Kerry O'Halloran

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Second edition

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The Politics of Adoption

International Perspectives on Law, Policy & Practice

Second edition

Springer

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To Molly

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[1] Professor and Director, Australian Centre of Philanthropy and Nonprofit Studies, Queensland University of Technology, Brisbane, Australia.

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Despite the best efforts of all the above, there will nevertheless be inaccuracies, gaps and inconsistencies. These, together with all views expressed are, sadly, inescapably attributable to the author who apologises unreservedly for lack of due diligence and for any confusion or offence inadvertently caused.

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Contents

Introduction

Adoption has always had a political dimension.

Its use to achieve political ends has been evident throughout history and in many different cultures. In Roman times, an emperor would adopt a successful general to continue his rule.[1] In Ireland, under the Brehon Laws, the reciprocal placements of children between clans was an accepted means of cementing mutual allegiances.[2] In Japan, the adoption of non-relatives was traditionally seen as a means of allying with the fortunes of the ruling family.[3] The willingness of governments to use adoption as a political strategy was apparent, for example, in Australia where it was used to further the assimilation of indigenous people.[4] It is now present in the phenomenon of intercountry adoption where the flow of children, particularly in the aftermath of war, is often politics by proxy.

Adoption can be profoundly affected by politics, as demonstrated by the decision of the Chinese government to advocate 'one-child families' which resulted in very many Chinese girls being relinquished for adoption abroad as their parents exercised a preference for a male child. Again, as in Korea in the recent past, currently in some South American countries and in those states of eastern Europe newly emerged from under the blanket of totalitarianism, governments can and do facilitate an outward flow of children for reasons of economic and political expediency.[5]

Adoption can also be the subject of political pressure, for not dissimilar reasons, in developed nations such as the U.S. and the U.K. In those countries political pressure has seen adoption used to free up the public child care systems. In fact direct political leadership, exercised first by President Clinton[6] and then by

[1] See, Gibbons, *The Decline and Fall of the Roman Empire*, Harrap, London, 1949 at p. 30.

[2] See, Gilligan, R., *Irish Child Care Services: Policy, Practice and Provision*, Institute of Public Administration, Dublin, 1991.

[3] See, Gibbons, *The Decline and Fall of the Roman Empire*, *op. cit*.

[4] See, Bird, C., *The Stolen Children; Their Stories*, Random House, Australia, 1998.

[5] See, further, Chap. 5.

[6] In December 1996, President Clinton issued his Executive Memorandum on adoption and in 1997 the Department responded with the *Adoption 2000* report.

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Prime Minister Blair,[7] introduced fundamental change to the accepted role of adoption in both countries. In other equally developed nations such as Sweden, political pressure is used to restrain such initiatives and give priority instead to protecting the legal integrity of birth families. The politics involved in the choice between providing government support for 'failing' families or for new adoptive families has become quite contentious.

Adoption, as a social service, is dependent upon political support if it is to flourish relative to other services, particularly abortion. How that balance is struck is a matter of politics and is evident in the existence or otherwise of welfare benefits, child care services, social housing and other forms of government provision for single parents. That equation is also clearly affected by the ease of access to assisted reproduction treatment, particularly IVF.

Adoption has an important social role that can be politically shaped. Whether it is so restricted that it primarily provides for the private needs of infertile married couples and legal wrapping for reconfigured family units, or is broadened to address public interest issues, are matters that are politically determined. In an adoption context, 'disability' is a political issue as is 'race', 'gender' and other indices of equity and equality. 'Poverty' is clearly a potent political issue, not only in the context of intercountry adoption, but as a factor at the heart of domestic adoption in some of the most developed nations in the world. By playing a pivotal role in balancing public and private interests – addressing issues such as those relating to homosexuality, disability, racial and gender equality, 'special needs' etc. – adoption contributes to and reflects the particular political ethos of each nation. The fact that in democratic societies all such social inclusion issues can be defined differently, and be politically ruled in or out as factors determining access to an adoption process, is recognized by the ECtHR in its 'margin of appreciation' rule which allows signatory States a degree of latitude in their dealings with such matters.

Adoption is a legal process but how the law is used to regulate that process is a political matter. The regulatory machinery gives effect to political aims by, for example, defining rights of access for all parties, establishing the terms upon which persons agencies and professionals may engage with the parties, allowing adoption orders to be compromised by 'openness' considerations, making available alternative forms of statutory orders and by authorizing possible post-adoption financial and professional support services. Whether or not government money finds its way into an adoption process and, should it do so, the basis for its distribution, is very politically revealing. As with any other regulated statutory system (e.g. taxation, banking and health services) the governing statutory provisions are susceptible to ongoing manipulation by the government of the day. This allows the adoption process to be adjusted or not in the light of contemporary social pressures (e.g. same sex relationships and freedom of information), depending on related political considerations.

[7] In July 2000, the Performance and Innovation Unit of the Cabinet Office, acting under the direction of the Prime Minister, assessed the need for change and published *The Prime Minister's Review: Adoption*.

Adoption law does not function in isolation. It plays a distinct role within the context of family law proceedings. In the developed common law nations adoption has moved from being a discrete self-contained private law proceeding to assume a much more central role. It now also functions as bridging mechanism between public and private law: an adjunct to both public child care and to marriage proceedings. In doing so it has become a platform that accommodates, with difficulty, the tensions between the governing principles in this body of law: the legal integrity and autonomy of the family unit; the paramount welfare interests of the child; parental rights and duties etc. This has elevated adoption proceedings, particularly as explored in the case law of the ECtHR, as the forum in which many of the more crucial issues for contemporary family law (e.g. same sex marriages) are now debated.

All the above points up the fact that adoption is essentially a social construct and as such is a product of the culture in which it functions. When the context is one of culture dominated by religion, such as in Ireland where until recently the Roman Catholic Church governed prevailing social values, or in Saudi Arabia where Islam predominates, then the social role and legal functions of adoption are very much as prescribed by that religion. When the culture is 'closed', but not by religion, as in the communities of Indigenous people in Australia, New Zealand and Canada,[8] then adoption simply imitates the open, sharing, communal nature of such societies. The civil law nations such as France and Sweden[9] share much the same approach to adoption, which is quite distinct from that of modern common law nations, but the latter are differentiated in some respects in ways that seem to reflect their respective cultural differences. Japan, an example of a modern developed nation but one with a particularly enclosed cultural heritage, is arguably a politically compromised entity and this is evident in the intriguing amalgam of social roles and legal functions that now constitutes adoption in that country.

In a number of common law countries, adoption reform is now giving rise to contentious political issues.[10] The change process underway in England & Wales offers an opportunity and a perspective to explore areas of commonality and difference in the adoption law, policy and practice of other nations. More basically, it also provides a window – albeit a Eurocentric one – through which to examine the presumption that within and between cultures there exists a common understanding of what is meant by adoption.

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[8] See, further, Chap. 14.

[9] Adoption in these countries is not endorsed by law, policy or practice as an option for addressing parental failure.

[10] Adoption law reform concluded in the U.S. with the Adoption and Safe Families Act 1997, in New South Wales, Australia with the Adoption Act 2000, in England & Wales with the Adoption and Children Act 2002 and in Scotland with the Adoption and Children (Scotland) Act 2007. Ongoing adoption law reviews were launched in Queensland, Australia in 2000, and in Ireland in 2003. In Northern Ireland, the Department of Health & Social Services and Public Safety published its report *Adopting the Future* in 2006 and new legislation is expected shortly. In New Zealand the Law Commission published its report *Adoption and Its Alternatives: A Different Approach and a New Framework* in 2000.

The Politics of Adoption takes an analytical look at adoption. It does so by:

- Tracing the evolution of adoption law, policy and practice across many centuries and societies to provide a record of the common pressures that have influenced the development of modern adoption in western nations
- Contrasting this with a consideration of adoption custom and practice as shaped by the social values of indigenous people and allowing adoption to acquire culture specific characteristics
- Analysing the content of adoption law and revealing its core constituent elements
- Identifying and evaluating the changing balance between public and private interests in adoption law to discern trends with wider policy implications
- Constructing and applying a template of its essential legal functions to permit analysis of adoption processes in England & Wales and other common law countries
- Conducting a comparative evaluation of the law, policy and practice of adoption in countries with different legal and cultural traditions
- Assessing the development of intercountry adoption and considering the modern characteristics of this phenomenon
- Examining recent international legislative and judicial developments to demonstrate the extent to which national adoption law, like the wider body of family law, is now becoming subject to certain key principles of international jurisprudence and
- Drawing some tentative conclusions about trends in the law, policy and practice of contemporary adoption, as culturally differentiated, and considering their implications for the future

This, the second edition, differs from the first in that it provides an update on developments in the common law nations that were then the subject of study. Primarily, however, the difference lies in the fact that this edition takes a much broader look at the cultural determinants of adoption. The 14 chapters of this edition divide into 6 parts throughout which attention is drawn to an inescapable political dimension in the role played by adoption within and between nations.

Part I 'Adoption, Society and the Law: the Common Law Context' consists of two chapters which examine the nature of adoption as it evolved in a common law cultural context. It looks to the experience of adoption in other societies, ancient and contemporary, for insight into the causes and likely outcome of current trends in adoption in western societies. Chapter 1 'Adoption: Concept, Principles and Social Construct' explores the concept of adoption, the underpinning principles and its history as a social construct, enquiring as to how its use has been variously conditioned by the prevailing pressures on the family. Chapter 2 'The Changing Face of Adoption in the United Kingdom' tracks changes to the role and function of adoption in the U.K. with a particular emphasis on the historical development of law, policy and practice in England & Wales.

Part II 'Developing International Benchmarks for Modern Adoption Law', consisting of three chapters, is central to the book in the sense that it provides material for

identifying and measuring the functions of the adoption process within a legal context. Chapter 3 'The Legal Functions of Adoption' constructs a template of the functions typical of the statutory adoption process in most modern western societies, particularly the common law jurisdictions, for use in Part III. Chapter 4 'Adoption, the Conventions and the Impact of the European Court of Human Rights' considers the provisions of international Conventions before examining the case law emerging from the ECtHR and assessing its significance for adoption practice. Chapter 5 'Intercountry Adoption and the Hague Convention' concentrates on the modern phenomenon of intercountry adoption and the steadily broadening regulating effect of the Hague Convention.

Part III 'Contemporary Law, Policy and Practice in a Common Law Context' applies the template of legal functions (as outlined in Chap. 3) to conduct an analysis and comparative evaluation of the adoption experience in major common law nations. Chapters 6, 7, 8 and 9 examine 'The Adoption Process' in England & Wales, Ireland, the U.S. and Australia respectively. These countries are leading representatives of the common law tradition but perform this function in a variable fashion. They have been chosen for comparative analysis because of their stature as common law jurisdictions and because recent or current engagement in adoption law reform reveals contrasting national approaches to much the same social pressures.

Part IV 'Contemporary Law, Policy and Practice in a European Civil Law Context' again applies the template of legal functions, this time to countries from the civil law tradition, with a view to contrasting their adoption experience with that of the common law nations. Chapters 10 and 11 examine the adoption process in Sweden and France respectively.

Part V 'Contemporary Law, Policy and Practice in Asia' continues the above approach but does so in relation to countries which offer further opportunities for appreciating the singular effects of culture on law, policy and practice. Chapter 12 considers adoption in an Islamic context, identifying and examining its hallmark characteristics as evidenced by the laws of different Islamic nations. Chapter 13 focuses on adoption in Japan and analyses the curious blend of functions it fulfills in that society.

Finally, Part VI 'Contemporary Law, Policy and Practice in an Indigenous Peoples Context' explores the relevance of the legal functions template when applied to adoption as experienced in 'closed' and less sophisticated communities. Chapter 14 'Intraculture Adoption' presents a study of the custom and rules governing adoption practice among the Indigenous people of Australia, the Maori of New Zealand and the Inuit of Canada. This chapter closes the book by offering a challenging perspective on adoption law, policy and practice as experienced for centuries within ancient cultures and an opportunity to reflect on the merits and deficits of the much more sophisticated and highly regulated approach developed in modern western nations.

White Park Bay Kerry O' Halloran
Summer 2008

Chapter 1
Adoption: Concept, Principles, and Social Construct

1.1 Introduction

Adoption is a complex social phenomenon, intimately knitted into its family law framework and shaped by the pressures affecting the family in its local social context. It is a mirror reflecting the changes in our family life and the efforts of family law to address those changes. This has caused it to be variously defined; in different societies, in the same society at different times and across a range of contemporary societies. It is currently being re-defined in the United Kingdom.

This chapter examines adoption from a developmental perspective drawing largely from law, policy and practice as experienced in England and Wales. It begins with a consideration of definitional matters, the concept and its culture specific determinants. An historical overview then provides some examples to illustrate the different social roles adoption has played in a variety of cultural contexts and to reveal the extent to which its development has been driven primarily by the changing pattern of adopters needs. This leads to a broad consideration of adoption in its English common law context and its gradual statutory transformation into statutory proceedings. The chapter concludes with an introduction to the main elements that emerged to structure statutory proceedings and continue to do so; the 'contract', the parties and the governing principles.

1.2 Definitional Matters and Related Concepts

It is not possible to frame a definitive statement that captures the meaning of adoption for all societies. The best that can be done is to settle for a legal definition of its core functions within a specific social context.

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1.2.1 Legal Definition

In legal terms, adoption has been defined as:[1]

> … a legal method of creating between the child and one who is not the natural parent of the child an artificial family relationship analogous to that of parent and child…

or, more bluntly:[2]

> … providing homes for children who need them is its primary purpose.

Adoption, however, existed long before it acquired its present form as a legal proceeding and such attempts to reduce it to a stand-alone legal function fail to do justice to its complexity. It can only be properly understood when viewed in the particular social context in which its legal functions are exercised. It must then also be considered against the background of its related legal framework, including, for example: the alternative options available; the consensual or coercive nature of proceedings; and the outcome for all parties involved.

In the U.K. adoption now exists only as a legal process, delineated and regulated by statute, culminating in proceedings that are judicially determined. Legislation addresses the rights and obligations of the parties concerned, defines the roles of those mediating bodies involved in the process, sets out the grounds for making an adoption order and states its effect. Statute law also provides the links between adoption and other legal processes; notably child care and matrimonial proceedings.

1.2.2 Concepts

Insofar as it is amenable to a conceptual interpretation, adoption addresses the act of the adopter. It is the voluntary acceptance of the responsibility to protect, nurture and promote the development of the child of another until adulthood that lies at the heart of adoption. It is an act which brings that child into the adopter's family with all the implications for sharing in the family name, home, assets and kinship relationships which are thereby entailed. As a corollary, that act also implies a severance by the adopter of those same links between the child and his or her family of origin. But it remains an artificial and fundamentally a legal relationship. It fails to wholly displace all incidences of the child's pre-adoption legal relationships and fails also to legally subsume him or her fully into the adopter's family. It has attracted some contentious conceptual interpretations.

- The 'gift' relationship.[3] Adoption cannot be properly viewed as the ultimate incidence of a gift relationship though the literature testifies to the attempts of some to do so (see, further, below).

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[1] See, Tomlin Committee report (Cmnd 2401), 1925.

[2] See, Houghton Committee, *Report of the Departmental Committee on the Adoption of Children* (Cmnd 5107), HMSO, London, 1972.

[3] See, for example, Lowe, N., 'The Changing Face of Adoption—The Gift/Donation Model Versus the Contract/Services Model', *Child and Family Law Quarterly*, 371, 1997.

- The 'blood link' relationship. This essentially grounds a presumption that care provided by a child's parent or relative is in the best interests of that child. It can be detected in the prohibited degrees of relationship rule, in the resistance to child care adoptions and in the passive acquiescence given to family adoptions. It underpins traditional rules of inheritance and is also evident in the inference of 'bad blood' that has so often been applied to unfairly discriminate against adopted persons.

The act of the adopter essentially puts in place an alternative legal relationship alongside birth relationships and leaves to time and providence the possibility that a bonding relationship will achieve the attachment between adopter and child necessary to fulfil the needs of both for a family.[4]

As a social construct 'adoption' acquired a common currency definition throughout most modern western societies. It had been shaped to have a specific meaning, imprinted with considerable consistency by the legislatures of common law nations on a range of different cultural traditions, in order to address much the same social problems. In acquiring its identity, adoption became differentiated from alternative child-care arrangements within such societies (e.g. long-term foster care, in *loco parentis* care etc.) and from comparable arrangements in other societies.

For example, 'simple' adoption is still common in many African nations and elsewhere while in Islamic countries, under *Shari'ah* law, adoption is prohibited but the practice of 'kafala', a form of long-term foster care, has long been used. Duncan explains the difference between adoption and kafala as follows:[5]

> … the latter does not have the effect of integrating the child into the new family. The child remains in name a member of the birth family and there are no inheritance rights in respect of the new family. However, kafala may if necessary involve delegation of guardianship in respect of the person and property of the child and in an intercountry situation it may result in a change in the child's nationality.

Initially, in the U.K. and similar western societies, the social construct of adoption broadly conformed to a single generic type. This was the third party adoption of a healthy white Caucasian baby by a married couple, unrelated and unknown to the birth mother, who were permanently and irrevocably vested with full parental rights and responsibilities in respect of her child. It involved three sets of needs: those of an unmarried mother wishing to voluntarily relinquish the child for whom she could not provide adequate care; the needs of her child for security of legal status and welfare; and the desire of a married childless couple for a child they could literally afford to call their own. It is unlikely that any society was ever able to quite satisfy the needs of all parties represented by such a providential equation and it is certain that they will be less able to do so in the foreseeable future. That single generic type faded as adoption evolved and permutated to meet certain needs.

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[4] See, for example, Bowlby, J., *Attachment*, Penguin, London, 1969.

[5] See, Duncan, W., 'Children's Rights, Cultural Diversity and Private International Law', in Douglas, G. and Sebba, L. (eds.), *Children's Rights and Traditional Values*, Aldershot, Ashgate, 1998 at p. 32.

These included providing for orphaned or abandoned children within the jurisdiction and internationally, responding to the plight of childless heterosexual and same gender couples, reducing the number of children being maintained in public child care facilities and enabling parents to secure the legal cohesion of their re-formed families. Consequently, all modern western societies are now in the process of re-adjusting their use of adoption.

1.3 Social Construct

The following brief historical overview of adoption as a social construct reveals that its usefulness, at various times and places, has rested in particular on a capacity to meet the needs of adopters and their range of quite different motives. Adoption, its social role and legal functions, has always been shaped primarily by the needs of adopters.

1.3.1 Adoption and the Inheritance Motive

Adoption has its legal origins in the law relating to the ownership and inheritance of property.[6] The concern of those with land but without children to legally acquire heirs and so consolidate and perpetuate their family's property rights for successive generations, is one which is common to all settled, organised and basically agricultural societies. In China, India and Africa adoption has long served this purpose,[7] but it was the tradition established over the several hundreds of years and throughout the extent of the Roman Empire which laid the European foundations for this social role. A Roman could adopt only if he did not have an heir, was aged at least 60 and the adopted was no longer a minor.[8] This tradition was revived in France by the Civil Code of 1902 which required that the adopter be at least 50 and without legal heirs, while the adopted must have reached his majority.[9] Heir adoption, therefore, owed its origins to an "inheritance" motive and all other factors being favourable found early acknowledgment in law.

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[6] See, for example, Benet, M.K., *The Character of Adoption*, Johnathan Cape, London, 1976.

[7] *Ibid*. at p. 22. Also, see Goody, E., *Contexts of Kinship*, Cambridge University Press, London, 1973.

[8] *Op. cit*. As Benet explains: "Full adoption, *adrogatio*, was only possible for a person who was himself *sui iuris*—that is, a member of no family but his own. A minor could not be *adrogated* because a minor *sui iuris* had *tutores* or guardians …The adopter "must be 60 or from some cause unlikely to have children" (p. 30).

[9] *Ibid*. at p. 77.

1.3.2 Adoption and the Kinship Motive

Closely linked to this property based social role is the practice of kinship adoption.[10] For some agricultural societies, such as those of India and China, these were synonymous as a relative was the preferred adoptee. All the ethnic groups peripheral to American society—Negroes, Indians, Eskimos and Polynesians—have long practiced kinship fostering and adoption as a means of strengthening the extended family, and their society as a whole, by weakening the exclusive bond between parents and children.[11] Though, curiously, the present form of kinship adoptions in the U.K., the so-called 'step-adoptions' are for quite the opposite reasons. Elsewhere this occurs as an open transaction between two sets of parents. To the Hindus of India adoption outside the caste is prohibited.[12] For the Polynesians the adoption of anyone other than a relative is an insult to the extended family.[13] Kinship adoptions seem to rest on an 'exchange' motive, whereby the donor nuclear family acquires a stronger affiliation with the wider social group, in exchange for relinquishing parental rights.

1.3.3 Adoption and the Allegiance Motive

The purpose of such adoptions is sometimes to secure social advancement for the adopted.[14] This is not unlike the Roman practice of non-kinship adoption for the purpose of allying the fortunes of two families. A Roman patrician, or even an emperor, would adopt, for example, a successful general as his successor.[15] In Japan, also, the adoption of non-relatives was traditionally seen as a means of allying with the fortunes of the ruling family.[16] In Ireland under the Brehon Laws much the same ends were achieved by reciprocal placements of children between clans as a demonstration of mutual allegiance.[17] This bears a strong resemblance to the feudal practice of paying fealty and showing allegiance to a lord by placing a child for court service. Again, in 16th and 17th century England, it was quite common for the more wealthy households to take in the sons and daughters of poorer parents on service contracts,

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[10] *Ibid*. at p. 14.

[11] *Ibid*. at p. 17.

[12] *Ibid*. at p. 35.

[13] *Ibid*. at pp. 35 and 48–50.

[14] As Gibbons explains, at the time of the Roman Empire a returning successful adventurer might seek to ingratiate himself "by the custom of adopting the name of their patron" and thereby hope to secure his position in society. See, *The Decline and Fall of the Roman Empire*, Harrap, London, 1949 at p. 131.

[15] *Ibid*. at p. 30. Marcus Aurelius being a good example.

[16] *Ibid*.

[17] See, Gilligan, R., *Irish Child Care Services: Policy, Practice and Provision*, Institute of Public Administration, Dublin, 1991.

for example as pages or servants.[18] Non-kinship adoption, in this form, would seem to be based on an 'allegiance' or 'service' motive.

1.3.4 Adoption and the 'Extra Pair of Hands' Motive

At a very basic level, adoption has clearly often been valued as a means whereby those with more work than they can manage could enlarge their family and thereby strengthen their coping capacity. This was very evident in the practice of transporting children from the United Kingdom to the British colonies throughout the latter half of the 19th and the first half of the 20th centuries. During that period many thousands, perhaps hundreds of thousands, of children were exported by philanthropic societies from the U.K. and Ireland to the United States, Australia and Canada[19] and elsewhere. There, it was felt, they would have opportunities to lead useful lives;[20] it was also candidly admitted that this would ease the burden on English ratepayers. Reputable English child care organizations such as Barnardos, were involved in arranging the safe passage of children who were orphaned, homeless or otherwise uncared for to overseas adopters only too happy to welcome into their family an extra pair of hands to share the work on farms etc. This form of adoption was not unlike the practice of being indentured into a trade.

1.3.5 Adoption and the Welfare Motive

Distinctly different from such historical forms of adoption is the relatively modern practice of non-kinship adoption of abandoned or neglected children for philanthropic motives. In societies where the functioning of the whole system was accepted as being of greater importance than that of each individual family unit, then the modern problem of unwanted children did not seem to arise. An extra pair of hands was always useful in societies tied to the land. But when the economy of a society changed from being land based to industrial, wage earning and mobile, then the nuclear family unit became more independent and children often simply represented more mouths to feed. By the mid-19th century, abandoning their children to the rudimentary state care provided by the workhouse authorities was the only option available to the many poverty stricken parents who had not benefited from the industrial revolution.

By the end of the 19th century, following effective campaigning by voluntary organisations concerned for the welfare of children, there had been a general change in the attitude towards workhouses as suitable environments for children. The better survival rates of children who were boarded-out compared to those

[18] See, Middleton, N., *When Family Failed*, Victor Gollancz, London, 1971.

[19] See, Bean and Melville, *Lost Children of the Empire*, Unwin Hyman, London, 1989.

[20] See, for example, Tizard, B., *Adoption: A Second Chance*, Open Books, London, 1977.

consigned to the workhouse and the consequent saving in public expenditure provided convincing evidence that the welfare of children was best assured by transferring responsibility to those who wanted to adopt a child to complete their family life. As Cretney has pointed out:[21]

> Adoption first appeared in the statute book in the context of the Poor Law: the Poor Law Act 1899 provided that the Guardians could in certain circumstances assume by resolution all the parents rights and powers until the child reached the age of eighteen; and the Guardians were then empowered to arrange for the child to be adopted.

The legacy of non-kinship adoption from the Poor Law period established the principle that the state as ultimate guardian should assume responsibility for those children whose parents are unavailable, unable, or unwilling to care for them and then could legally arrange for that responsibility to be vested in approved adopters (see, further, below).

However, the fact that children with welfare needs were available never provided any guarantee of their adoption.

1.3.6 Adoption and the Childless Couple Motive

Finally, adoption has probably always been seen as a provident answer to the reciprocal needs of a society, burdened with the costs of maintaining children for whom the adequate care of a birth parent was unavailable, and those of settled, married but childless couples able and willing to provide care for such a child. But it is unlikely that any society has ever produced an even numerical match to fully sustain this equation. The probability of this occurring in the future has been dramatically affected by the introduction of readily available means of birth control. As the traditional source for the supply of unwanted babies dries up, so the childless couples of western societies are being induced to 'widen the market' by looking towards the underdeveloped countries of Asia, South America and Eastern Europe for alternative sources of supply. At the same time public authorities in many western societies are redressing the imbalance in this equation by introducing legislative measures which divert the interest of potential adopters from the few non-marital babies to the needs of the many disadvantaged older, disabled, or children in pubic care in respect of whom full parental rights have been obtained.

1.4 Adoption in England: Historical Context

Adoption in England and Wales has a much longer history as a common law than as a statutory process. That history is one inextricably bound up with the status of the married father and the class system in English society. To fully understand why adoption

[21] See, Cretney, S., 'Adoption—Contract to Status?' in *Law, Law Reform and the Family*, Clarendon Press, Oxford, 1998 at p. 186.

in this jurisdiction developed the characteristics it did, why it developed some more quickly than others, and why the whole process of its transmutation into statutory proceedings took as long as it did, it is necessary to remember that at the turn of the 19th century England was still a very hierarchically structured and patriarchal society. In this context, these Victorian characteristics were considerably magnified by the gender specific nature of legislators and judiciary; ironically, the female contribution to defining the legal parameters of the adoption process was at best marginal.

1.4.1 The Common Law: Parental Rights and Duties

The common law respect for paternal authority was itself a legacy from Roman times founded on the doctrine of *patria potestas*. The Emperor Justinian in AD 560 had abolished the doctrine and the legal concept of an autonomous patriarchal family unit, but in Britain its hallmarks lived on to underpin feudal society and to become absorbed into the common law. Some of the more characteristic features of this doctrine included: the private autonomous household ruled by the father, the actual or virtual ownership of children, the blood tie, filial piety, the power and limits of corporal punishment, the expectation of maintenance and the diminished relationship between child and state. Parents were guardians of their children as of right, a right which included a custodial authority based on ownership of the child.

The common law, like that of ancient Rome, was essentially grounded on the rights and duties of the individual. It recognised and placed great importance upon legal status. In the context of the family, this meant a focus on the rights of the father and then to a lesser extent on the legal status of any others involved. The recognition given to the father with marital status was all important. Any actionable rights, in relation to the members of his autonomous marital family unit, belonged to the father. Thus, for example, for centuries he had the right to sue a third party for the loss of services to which he was entitled as father or spouse (e.g., he could claim damages against an adulterer for depriving him of his marital rights).

1.4.1.1 Paternal Rights

By the middle of the 19th century the doctrine of paternal rights was firmly established. The prevailing attitude towards paternal authority and the autonomous marital family unit was reflected in the opinion of a contemporary writer who stated:[22]

[22] See, *Transactions of the National Association for the Promotion of Social Sciences* (1874), quoted by Pinchbeck, I. and Hewitt, M. in *Children in English Society* (1973), p. 359. Also, see, Fox Harding *Perspectives in Child Care Policy*, Longman (1997) at p. 35 where he suggests that there was considerable opposition to laws restricting child labour and introducing compulsory education because these were seen as constituting an unwarranted state interference with parental authority.

> I would far rather see even a higher rate of infant mortality than has ever yet been proved against the factory district or elsewhere… than intrude one iota further on the sanctity of the domestic hearth and the decent seclusion of private life…

The *prima facie* right of a father to the control and custody of the children of his marriage, subject to an absence of abuse,[23] was virtually impregnable. It was absolute as against the mother.[24] The approach of the common law was reflected clearly in the judgment delivered by James L J in *Re Agar—Ellis*[25] when, on giving the decision of the Court of Appeal, he added:

> The right of the father to the custody and control of his children is one of the most sacred rights.

In this judgment, which treated paternal authority as almost absolute in the absence of any misconduct, the high water mark was reached for paternal rights. Its principal characteristics concerned the right to custody of a child, the accompanying rights to determine religious upbringing and education and the final right to ensure the continuance of the family estate by bequeathing property to his natural offspring.

The strength of the paternal right to custody[26] applied only to marital children. Until 1839 the custody of a legitimate child vested automatically and exclusively in the father. As head of the family he had the right to administer reasonable chastisement to his child.[27] His status was also the basis of the action for enticement.[28] Kidnapping a child was viewed essentially as an infringement of the paternal right to custody.[29] Such was the stringent judicial approach to the legal standing of the father that the courts would not permit a father to avoid his parental responsibilities by voluntarily giving up his right to custody and control.[30] The common law prohibited any attempt by a parent to irrevocably transfer all rights and duties in respect of a child to another. As was stated in *Re O'Hara*:

> … English law does not permit a parent to relieve himself of the responsibility or to deprive himself of the comfort of his position[31]

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[23] See *Re Thomasset* [1894] 300.

[24] See, *Ex parte Skinner*, 9 Moo 278; Simpson on Infants (2nd ed.), 1908, p. 115.

[25] (1883) 23 Ch D 317, pp. 71–72.

[26] See, *De Mannerville v. De Mannerville, op. cit*.

[27] See, *Gardner v. Bygrave* [1889] 6 TLR 23 DC, *Mansell v Griffin* [1908] 1 KB, 160, *obiter*, *R v. Hopley* [1860] 2F and F 160.

[28] See, *Lough v. Ward* [1954] 2 All ER 338; this remained the case until abolished by section 5 of the Law Reform (Miscl Prov) Act 1970.

[29] See, for example, *R v. Hale* [1974] 1 All ER 1107 it was alleged that the accused had "unlawfully secreted… a girl aged 13 years, against the life of her parents and lawful guardians."

[30] See, *St John v. St John* (1805) 11 Vessey 530 and *Vansittart v. Vansittart* (1858) 2 De Gex & Jones 249 at p. 256; *Hamilton v. Hector* (1872) LR 13 Equity 511.

[31] See, *In re O'Hara* [1900] 2 IR 232, *per* Holmes LJ at p. 253; (1899) 34 ILTR 17 CA. Also, see, *Humphrys v. Polak* [1901] 2 KB 385, CA and *Brooks v. Brooks* [1923] 1 KB 257.

and

> … English law does not recognise the power of blindingly abdicating either parental right or parental duty.[32]

Parental rights were regarded as inalienable. Parental culpability alone set the threshold for state intervention on behalf of child welfare. No separation agreement—purporting to regulate the future care, custody, education and maintenance of his children—would be enforced by the court against a father as this was viewed as an attempt "to fetter and abandon his parental power" and "repugnant entirely to his parental duty".[33]

1.4.1.2 Parental Duties

The common law recognised a specific duty particular to the parental relationship: the duty to provide for and adequately maintain a child throughout childhood. As Sir W Blackstone stated:[34]

> The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, … laid on them not only by nature herself, but by their own proper act, in bringing them into the world …

This duty was underpinned by the criminal law. The common law evolved a number of criminal offences particular to children and their parents. They were focussed not on the welfare of a child but on the abuse of a parental right; welfare was legally recognised only in an obverse relationship to parental right. A conviction would ensure court removal not just of custody but of all parental rights in respect of the child. The common law was never prepared to concede that a positive welfare advantage to the child would in itself provide grounds for displacing the parental right.

1.4.1.3 The Sanction of 'Illegitimacy'

The status of the patriarchal marital family in Victorian England was policed by the common law approach to 'illegitimacy'. This term served both to reinforce the 'legitimate' family while simultaneously disenfranchising the non-marital child and father and singling out the child's mother (though not the father) for social opprobrium. All three were firmly and publicly placed outside the law as it then related to the family. The consequences for those tainted by 'illegitimacy' involved serious status constraints not least in regards to rights of inheritance.

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[32] *Ibid*., per Fitzgibbon L J.

[33] See, *Van v. Van*, p. 259, per Turner L J.

[34] See, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1765.

1.4.2 The Poor Laws

From at least the time of the Poor Law 1601, a distinction had been drawn between public and private responsibilities in relation to children. Where family care was not possible—in circumstances of parental death, absence or criminal abuse—then Parliament used the Poor Laws to place responsibility on public authorities for the provision of residential child-care facilities. The Poor Laws significantly extended state interest in parenting standards by making the fact of child need itself, rather than its cause, a sufficient threshold for voluntary state intervention. Parental culpability was no longer a necessary prerequisite for the transfer of a child from private to public responsibility. Parents unable or unwilling to continue caring could voluntarily place their children with the Poor Law guardians. Once in care, parental rights could be assumed by the guardians under section 1(1) of the Poor Law Act 1889,[35] subject to subsequent judicial confirmation, and the guardians could under section 3 be empowered to place the child for adoption.

Poverty was most often the root cause of parental failure necessitating coercive state intervention, by Poor Law guardians, to remove children from parental care and commit them to the care of the state.

1.4.2.1 Public Child Care

The Poor Laws era introduced the formal role of the state as public guardian of child welfare. This role was evidenced by the beginnings of statutory criteria for the state to formally acquire care responsibility for children, schemes for boarding-out orphans and the children of destitute mothers and the provision of residential homes for children permanently separated from their parents.

The influence of various philanthropic societies during the period governed by the Poor Laws was also important. By the end of the 19th century child welfare voluntary organisations such as Dr. Barnardo's and the NSPCC began their current specialist services for children by developing a 'child rescue' approach to those abandoned, impoverished or ill-treated in the era of the Poor Laws. However, charitable organisations providing care were often faced with parental demands for the return of their children once they were old enough to be useful and earn a wage. The Custody of Children Act 1891 was introduced to provide a civil remedy for third party carers whose provision for destitute children was opposed by fathers demanding restitution of their custody rights. The rationale for the 1891 Act was explained in the course of the preceding House of Commons debates:

[35] Continued by section 52 of the Poor Law Act 1930 and subsequently by section 2 of the Children Act 1948. This power was regarded by the Curtis Committee as a "very important provision" (para 19) and in 1945 about 16% of children in the care of poor law authorities had been the subject of a section 52 resolution (*ibid*., para 29). This was later echoed by the Houghton Committee (para 153).

> … the Bill is intended to deal with… children who have been thrown helpless on the streets, and wickedly deserted by their parents, and who are taken by the hand by benevolent persons or by charitable institutions…

Its purpose was to provide a civil remedy to protect abandoned children from their neglectful parents by not enforcing parental rights. As such it was the first piece of legislation to offer protection for children from their parents and to others acting in *loco parentis*.

1.4.2.2 The Non-marital Child

Under the common law a non-marital or 'illegitimate' child was designated *sui juris* (outside the law) or the child of no-one and received no recognition in law. Parental responsibilities in respect of such a child could, therefore, be transferred. The adoption option in respect of such children admitted to the care of the Poor Law authorities or that of charitable organisations was readily available. This, in effect, confined the practice of adoption as a common law process to the relinquishment of illegitimate children by their unmarried mothers who, given the weight of public approbation and lack of any legal means of securing financial support, were left with little option. The courts took the pragmatic view that, in the circumstances, the decision to terminate parenting was itself a responsible parental act. This sympathetic judicial approach was evident in the ruling of Fitz-Gibbon LJ in *In re O'Hara*[36] when he commented that:

> … the surrender of a child to an adopted parent, as an act of prudence or of necessity, under the pressure of present inability to maintain it, being an act done in the interests of the child, cannot be regarded as abandonment or desertion, or even as unmindfullness of parental duty within the meaning of the Act.

Where the responsibility for an illegitimate, abandoned or orphaned child could be assumed within the care arrangements of a private family, instead of becoming an additional burden on public rates, then the courts did not interfere.

1.4.3 Pressures for Change; End of the 19th Century

In England, at the turn of the 19th century, the prospect of adoption legislation was a contentious matter. Although different reasons have been put forward for this, arguably in the main the resistance to adoption had its roots in the values and ethos that permeated Victorian society at that time.

To those who then constituted the upper echelons of the embedded class structure, matters such as 'blood lines' were important. Maintaining established family lines, and the estates that had survived intact for generations, was viewed as dependant to some degree upon protecting the status quo and with it the ability for families to continue

[36] [1900] 2 IR 233 at p. 244.

discretely managing opportunities for marriage and eventual succession rights. There were many who considered that adoption would introduce an unknown element into the rules governing inheritance and succession with potential to undermine established rights and thereby threaten the orderly devolution of family property. Victorian England was also a strictly patriarchal society where the male heads of families, whether rich or poor, shared a common law understanding of their rights and duties in relation to children. A view reinforced by the male heads of institutions such as the Church, parliament and the judiciary. Many of those who opposed the introduction of adoption did so in the belief that facilitating it would serve only to condone the actions of feckless parents seeking to avoid their legal, moral and economic duties to provide for the upbringing of their children. At a time when family law was governed by paternal rights and duties, rather than child welfare considerations, adoption was viewed by some with skepticism as a potential licence for continued permissiveness.

Both camps were very alert to matters of status and again, to some, adoption seemed to undermine certain carefully established legal and social distinctions. So, for example, the age old legal distinction between 'legitimate' and 'illegitimate' children and between the social standing of their respective sets of parents had a value for many. Status considerations extended to include matters such as family name, property, religion, residence, domicile etc.

However, there were a number of specific public concerns which steadily added to the pressure for change:

- **Baby-farming**

The practice of 'baby farming', or 'trafficking' in children, whereby unmarried mothers would entrust the care of their children to child minders who would then often neglect, abuse, murder or arrange for the informal adoption of their children, caused growing public disquiet.[37] The Infant Life Protection Act 1872 had sought to extend legal protection not only to the vulnerable young residents of workhouses but also to all those whose care was entrusted by their unmarried mothers to such child minders. This was a period when charitable organisations were very active in rescuing children from such abuse situations.[38]

- ***De facto* adoptions**

Those who undertook responsibility for children, abandoned by parents when they were young and needing care and maintenance, were often faced with parental demands for the return of their children when the latter were old enough to be useful and earn a wage. In an era when the courts were steadfastly defending the principle that parental rights were inalienable, such demands were difficult to lawfully resist. Consequently, by the latter half of the 19th century Parliament was

[37] See, the report by the Select Committee on the Protection of Infant Life. This 'baby-farming' scandal resonated with a similar experience in Australia (see, further, Chap. 8).

[38] The Thomas Coram Hospital for Foundling Children, for example, and the Infant Life Protection Society were very active at this time.

under growing pressure to provide legal protection for persons who cared for the children of others. As explained by Lowe:[39]

> Attempts to introduce adoption legislation were made in both 1889 and 1890. The object of each Bill[40] was to protect both children and adults involved in so-called 'de facto adoptions' (that is, where children were looked after by relatives or strangers either with the parent's consent or following the latter's abandonment of their children) by preventing parents or guardians from removing their children after they had consented to the 'adoption' unless they could persuade the court that such recovery was for the child's benefit.

- **War orphans**

In the aftermath of the First World War, adoption became a matter of general public concern as families informally undertook the care of very many orphaned children but without any guarantee of legal security for their voluntarily assumed care arrangements. Some of these caring families, like the children concerned, were from influential social backgrounds and were not prepared to passively accept the legal insecurity that accompanied informal adoption arrangements.

It should also be remembered that this was a period when adoption law had already been successfully introduced in some former British colonies[41] to which there was an established practice of sending children for the purposes of their adoption.[42] The issue as to why England should continue to resist introducing legislation to regulate a practice that was good enough for her former colonies and good enough for her to send her children to would not go away.[43]

1.5 Adoption Legislation: Evolving Principles and Policy

Eventually the government established the Hopkinson Committee to examine the case for introducing adoption legislation. In its report[44] the Committee recommended that existing care arrangements be retrospectively secured by legislation but despite several attempts the government failed to do so.[45] Interestingly, as noted

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[39] See, Lowe, N., 'English Adoption Law: Past, Present and Future' in Katz, S., Eekelaar, J. and Maclean, M. (eds.), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2000.

[40] *Ibid*. See, respectively, the Adoption of Children Bill (No. 101), 1889 and the Adoption of Children Bill (No. 56), 1890.

[41] For example: in Massachusetts, USA in 1873; in New Brunswick, Canada in 1881; in New Zealand in 1881; and in Western Australia in 1896.

[42] See, Bean, P. and Melville, J., *Lost Children of the Empire*, Unwin Hyman, London, 1989.

[43] See, for example, the report of the Royal Commission on the Poor Law (Cmnd 4499), 1909.

[44] See, *The Report of the Committee on Child Adoption* (Cmnd 1254), 1921.

[45] See, Lowe, N., 'English Adoption Law: Past, Present and Future' in Katz, S., Eekelaar, J., and McLean, M. (eds.), *Cross Currents*, Oxford University Press, Oxford, 2000 at pp. 308–310.

by Lowe,[46] the Committee recommended that the courts should have the power to dispense with parental consent not just in cases of parental neglect or persistent cruelty but also 'where the child is being brought up in such circumstances as are likely to result in serious detriment to [the child's] moral or physical welfare'.[47] Instead the government resorted to setting up the Tomlin Committee which did not view adoption as the answer to the problem of unwanted children—"the people wishing to get rid of children are far more numerous than those wishing to receive them".[48] Although not sharing the conviction of its predecessor that adoption legislation was necessary to encourage adopters, the Committee was convinced of the need to do so to protect those who had made care commitments to children in *de facto* adoptions. This Committee differed from its predecessor in relation to the proposed power to dispense with parental consent[49] preferring to restrict it to cases of parental abandonment or desertion, where the parent cannot be found or is incapable of giving consent or 'being a person unable to contribute to the support of the minor has persistently neglected or refused to contribute to such support'.[50] It also argued against adoption being a secretive process in which the parties would not be known to each other.

1.5.1 The Adoption Act 1926

Following publication of the Tomlin Report[51] and further failed Bills,[52] the government introduced the 1926 Act permitting, for the first time in these islands, a formal legal procedure for the adoption of children. This legislation avoided dealing with the thorny issues of inheritance and succession, dispensing with parental consent and the possible rights of an older child to give or withhold consent to his or her adoption[53] and to maintain contact with a birth parent, but it did embody three basic principles:

- All parental responsibilities would irrevocably and exclusively vest in the adopter/s
- The welfare interests of the child would be independently assessed and
- The informed consent of the natural parent/s was required unless they were dead, or had abandoned the child, or their whereabouts were unknown or they were incapacitated

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[46] *Ibid*. at p. 311.

[47] *Op. cit*. at para 34.

[48] See, McWhinnie, A., *Adopted Children: How They Grew Up*, Routledge & Keagan Paul, London, 1967.

[49] See, Lowe, N., 'English Adoption Law: Past, Present and Future' *op. cit*. at p. 311.

[50] See, Clause 2(3) of the draft Bill prepared by the Tomlin Committee.

[51] See, *Report of the Child Adoption Committee* 1924–1925 (Cmnd 2401).

[52] A total of six adoption Bills were introduced during 1924–1925.

[53] In Scotland this right has been available to children aged 12 or older from the introduction of the first adoption legislation (the Adoption of Children (Scotland) Act 1930, section 2(3)).

1.5.2 The Adoption of Children (Regulation) Act 1939

The recommendations of the Horsburgh Committee,[54] set up in 1936 to 'inquire into the methods pursued by adoption societies and other agencies', were incorporated into the 1939 Act. This required the registration of such societies or agencies and prohibited the making of adoption arrangements by any other body. As Lowe notes this legislation established the rudiments of today's adoption service, or outlined the remit of the modern Adoption Panel, by empowering the Secretary of State to make regulations to:[55]

(a) "Ensure that parents wishing to place their children for adoption were given a written explanation of their legal position
(b) Prescribe the inquiries to be made and reports to be obtained to ensure the suitability of the child and adopter and
(c) Secure that no child would be delivered to an adopter until the adopter had been interviewed by a case committee."

1.5.3 The Adoption Act 1949

This legislation rectified one omission in the 1926 Act by establishing the principle that adoption changed the child's status and vested him or her with certain succession rights in relation to their adopter's estate,[56] though not to any title, while also empowering local authorities to make and participate in adoption arrangements. Subsequently, both the Hurst Committee[57] and the Houghton Committee[58] recommended strengthening the role ascribed to local authorities and eventually in 1988 a provision was inserted into the 1976 Act making it mandatory for all local authorities to ensure the provision of an adoption service in their areas.

In 1954 the Hurst Committee[59] suggested that the 'primary object … in the arrangement of adoptions is the welfare of the child' and the Houghton Committee in 1972[60] recommended that 'the long-term welfare of the child should be the first and paramount consideration'.

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[54] See, *Report of the Departmental Committee on the Adoption of Children* (Cmnd 9248), HMSO, London, 1954.

[55] See Lowe, N., 'English Adoption Law: Past, Present and Future', *op. cit*. at p. 322.

[56] Such succession rights were further extended in the Children Act 1975.

[57] See, *Report of the Departmental Committee on the Adoption of Children*, *op. cit*., para 24.

[58] See, *Report of the Departmental Committee on the Adoption of Children*, HMSO, London, 1972 (Cmnd 5107), paras 33 and 34 and recommendation 2.

[59] See, *Report of the Departmental Committee on Adoption Societies and Agencies*, HMSO, London, 1937 (Cmnd 5499), p. 4.

[60] See, *Report of the Departmental Committee on the Adoption of Children*, *op. cit*., para 17.

1.5.4 The Children Act 1975

The 1975 Act introduced a new part for welfare to play in the adoption process. Section 3 stated:

> In reaching any decision relating to the adoption of a child, a court or adoption agency shall have regard to all the circumstances, first considerations being given to the need to safeguard and promote the welfare of the child through his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

This indicated that the public interest in adoption was to be represented by the welfare principle which was to be applied in all decisions, not just in the decision to make an adoption order. The 1975 Act, following recommendations made in the Houghton Report, also introduced custodianship orders[61] which were intended to provide an alternative to adoption for applicants whose circumstances did not merit the absolute and exclusive effects of adoption. Custodianship failed to win any support in the courts and this legal proceeding terminated with the introduction of the Children Act 1989.

1.5.5 The Adoption Act 1976

This legislation, which came into effect in 1988, gave effect to most of the recommendations made by the Houghton Committee and incorporated section 3 of the 1975 Act. Protracted delay in implementing the 1976 Act meant that practice developments had outpaced legislative reform by the late 1980s. As Bridge and Swindells comment:[62]

> The legislation had a sense of the past about it almost before it was fully in force and the 1976 Act came to be perceived as meeting the demands of an earlier age while failing to accommodate the changing use to which adoption had been put.

However, the new provisions did provide an improved framework for the judiciary to meet contemporary practice demands. The freeing procedures, for example, together with case law principles which stressed the weighting to be given to child welfare concerns relative to parental unreasonableness, facilitated an increase in non-consensual child care adoptions. The scope provided by section 12(6) for the court to attach such conditions as it sought fit, allowed the judiciary to moderate the more extreme effects of adoption by granting orders subject to access conditions that maintained an adopted child's continued relationship with members of their family of origin. Also, the introduction in section 51 of an adopted person's right to obtain a copy of their original birth certificate marked an important break with the traditional veil of secrecy and prepared the ground for more openness in

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[61] *Ibid*. at para 121. Custodianship became available in 1985.

[62] See, Bridge, C. and Swindells, H., *Adoption—The Modern Law*, Family Law, Bristol, 2003 at p. 12.

adoption. However, the summary comment made recently by the Commission for Social Care Inspection, seems fair:[63]

> The 1976 Act brought together arrangements for adoption and the care and protection of children waiting to be adopted. It focused on the needs of children likely to be adopted at that time. There was no specific provision for the needs of older children, the lifelong impact of adoption or the welfare of children adopted from abroad.

1.5.6 The Children Act 1989

The 1989 Act affected adoption law and practice in a number of ways. It made available a menu of family proceedings orders some of which like residence orders and parental responsibility orders reduced the need for adoption while others such as contact orders could be used in conjunction with adoption. By stating the matters held to constitute a checklist of welfare interests it enabled a new, more uniform and objective application of this inherently subjective concept. By introducing the concept of parental responsibility and requirements on local councils to provide services for children in need it placed a new emphasis on measures to prevent children entering the public care system. It accelerated the general movement towards accommodating more openness in adoption. It also introduced the paramountcy principle to govern judicial decision-making and by doing so sparked off a long period of debate as to why the principle should not be extended to adoption proceedings. More broadly, the flexibility provided by the 1989 Act revealed the absence of this approach in the 1976 Act.

1.5.7 Adoption (Intercountry Aspects) Act 1999

This Act amended the Adoption Act 1976 in respect of intercountry adoption and enabled the UK to ratify the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

1.5.8 The Adoption and Children Act 2002

The roots of the 2002 Act lie in the 1992 review of adoption law conducted jointly by the Department of Health and the Law Commission.[64] This resulted in the

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[63] See, the Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies*, London, 2006, para 4.2.

[64] The working party, drawn from the two agencies, was established in 1989. Constituted as the Inter-departmental Review of Adoption Law, it published four preliminary discussion papers: *The Nature and Effect of Adoption* (1990), *Agreement and Freeing*, *The Adoption Process*, and *Intercountry Adoption*; and three background papers: *International Perspectives* (1990), *Review of Research Relating to Adoption*, 1990, followed by *Intercountry Adoption* (1991–1992).

Consultation Document[65] which led in turn to the publication of the government's White Paper *Adoption—the Future*[66] and its sequel the Bill *Adoption—A Service for Children*.[67] However, despite a gestation period of 13 years, it was not until the pressure generated by child care scandals became acute that the government was finally prompted to prepare new legislation.[68]

At the heart of this policy review lay the fundamental question—What was to be the function of adoption in the 21st century? Practice had transformed the use of adoption since implementation of the 1976 Act, while the principles governing child care and adoption had become increasingly conflicted since the introduction of the 1989 Act.

Following the review of adoption services,[69] the local authority circular *Adoption—Achieving the Right Balance*[70] presented an important reformulation of the policy governing child care adoptions. It firmly stated that henceforth the governing aim was to "bring adoption back into the mainstream of children's services". It contained detailed sections dealing with issues such as race, culture, religion, language and avoiding delay and stated that where:

> … children cannot live with their families, for whatever reason, society has a duty to provide them with a fresh start and where appropriate a permanent alternative home. Adoption is the means of giving children an opportunity to start again; for many children, adoption may be their only chance of experiencing family life.

This circular has to be viewed in conjunction with the research findings published at much the same time in *Adoption Now*.[71] The message from research was that the fall in child care adoptions during the period 1992–1998 was largely attributable to the local authority emphasis on attempting to rehabilitate looked after children with their families of origin. This was due to social workers earnestly struggling to give effect to the principles of 'partnership with parents' and 'family care is best care' that underpinned the 1989 Act. In so doing, it was argued, local authorities were undervaluing the adoption option.

As Lowe points out, the approach in *Adoption Now* was subsequently endorsed by the *Quality Protects* programme which aimed to "maximise the contribution that adoption can make to provide permanent families for children in appropriate

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[65] See, the Department of Health, *Adoption Law Review: Consultation Document*, 1992.

[66] (Cmnd 2288), 1993.

[67] See, *Adoption—A Service for Children*, HMSO, London, 1996. Also, note the consultation process in relation to the Children Bill particularly the Green Paper *Every Child Matters*, 2003 and *Every Child Matters: Next Steps* published by the Dept. of Skills and Education, 2004.

[68] See, in particular, the Waterhouse Inquiry, *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the former County Council Areas of Gwynedd and Clwyd since 1974*, The Stationery Office, London, 2000.

[69] See, the Department of Health, *For Children's Sake: An SSI Inspection of Local Authority Adoption Services*, 1996 and *For Children's Sake—Part II: An SSI Inspection of Local Authority Adoption Services*, 1997.

[70] Local Authority Circular (20) 1998.

[71] See, the Department of Health, *Adoption Now: Messages from Research*, 1999.

cases". It also required local authorities "to reduce the period children remained looked after before they are placed for adoption".[72]

A fresh policy initiative, under the Prime Minister's personal leadership, firmly placed child care adoption on the political agenda. Too few children were being adopted from public care and those that were had to wait too long; adrift in care was not an acceptable option. It unequivocally asserted the need to make available the best form of permanent care to children failed by parental care and destined to experience a transitory sequence of residential and/or foster placements. There was considerable evidence that such children suffered poor educational attainment and a greater likelihood of eventual exposure to unemployment, homelessness and prison.

Preparations for new legislation began with the White Paper, *Adoption: A New Approach* in December 2000, followed in March 2001 by the Adoption and Children Bill being introduced in Parliament and concluded in November 2002 when the Bill received the Royal Assent. The Adoption and Children Act 2002, which came fully into effect in December 2005, now states the law in England and Wales.[73] This statute, as the Commission for Social Care Inspection explains:[74]

- Puts the needs of the child at the centre of the adoption process by: – aligning adoption law with the Children Act 1989 to make the child's welfare the paramount consideration in all decisions to do with adoption; – requiring the court or the adoption agency to have regard to a 'welfare checklist'
- Sets a clear duty on local authorities to provide an adoption support service and a new right for people affected by adoption to request and receive an assessment of their needs for adoption support services and
- Enables unmarried couples to apply to adopt jointly, thereby widening the pool of potential adoptive parents

The 2002 Act, accompanied by the introduction of National Standards and followed by the Children Act 2004 and the Children and Adoption Act 2006, together constitute the contemporary legislative framework for adoption in England & Wales (see, further, Chap. 6).

1.6 Legal Context: Evolution of a Modern Statutory Process

The Adoption of Children Act 1926 was introduced not to facilitate natural parents nor, particularly, to advance the welfare interests of children but primarily it was intended to provide protection for those third parties who had assumed care responsibility

[72] See, the Department of Health, *The Government's Objectives for Children's Social Services*, 1999 at para 1.3.

[73] The Adoption and Children (Scotland) Act 2007 does so for Scotland while the outcome of the ongoing adoption law review in Northern Ireland will complete the modernising of the legal framework for adoption practice in the U.K.

[74] See, The Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies*, London, 2006, para 4.8.

for children. In the aftermath of world war, when very many orphans were receiving such care, this legislative initiative was welcomed. Since then, the volume of annual orders has fluctuated in keeping with changing patterns of need but adoption as a legal process (unlike some other family proceedings e.g., custodianship) has proved its durability. It was conceived and remained as a contractual process that dealt separately with the legal interests of each of the parties.

1.6.1 The 'Contract'

Adoption is a process which, at its most basic, re-distributes the legal interests of the three main participants and, unlike any other orders relating to children, does so on a permanent, irrevocable and usually on an unqualified basis. Some of these traditional hallmarks have been steadily eroded as the process has adapted to fit the contemporary needs of the parties. Like all contracts, the commitments entered into by the parties must be evidenced by their informed consent; though in the U.K. this requirement has, in relation to older children, been given statutory recognition only in Scotland. The courts have also stressed the importance of ensuring the propriety of the contract by, for example, prohibiting any element of financial reward for the parties involved and any improper practice such as the unauthorised removal of a child from their jurisdiction of origin.[75] In recent years, the contractual standing of the parties to an adoption has been affected not only by a transformation in the legal weighting ascribed to the role of the natural mother and that of an unmarried father; more recently the legal interests of the child concerned have also undergone a radical change. From being confined to a legal role as merely the object of adoption proceedings, the child has now become fully the subject of such. In England and Wales, the incorporation of the paramountcy principle in the 2002 Act has again altered the balance struck between the parties to an adoption contract (see, further, Chap. 6).

1.6.1.1 Private and Confidential

From the outset, the statutory process of adoption was viewed and treated as essentially a matter of private family law; in fact, the most private of all family proceedings. The contractual arrangements reflected this in the guarantees of anonymity given to adopters and the natural parent/s, in the court use of serial numbers to identify children, the lack of access to agency files etc. This cloak of secrecy has been steadily lifted in recent years particularly as regards facilitating adopters' rights of access to personal identity information.

[75] Both practices, associated with the traditional abhorrence of 'trafficking' in children, were criminal offences under sections 57 and 11, respectively, of the 1976 Act.

1.6.1.2 Permanent and Irrevocable

The absolute nature of adoption, relative to other family orders, was apparent from the fact that once made, it retained its binding effect on all parties at least until the child concerned reached maturity. A valid order was not open to challenge by any of the parties, nor by anyone else. In particular, it could not be refuted by the adopters. This characteristic has remained immutable.

1.6.1.3 Exclusive

In keeping with Victorian values, an adoption order was intended to extinguish all parental rights and duties of the birth parents and vest as full a complement of parental responsibilities in named adopters as possible. A quick, clean and absolute break between the child and birth family was the legislative intent; no other form of ongoing intrusion in the new family was envisaged. For most of its history, adoption very largely met this expectation. However, with increasing awareness of 'attachment theory' has come a willingness to allow adoption orders to be made subject to conditions permitting contact between a child and members of their family of origin with whom a significant relationship has been established. Moreover, as child care adoption increased so too did the frequency of public service commitments to sustaining adoptions through the provision of ongoing professional and other resources. The adoption process has become much more 'open' than could have been initially foreseen.

1.6.2 The Parties

The legal process of adoption rests on a triangular relationship. In western society this has traditionally been typically represented by the unmarried birth parent/s, their lovingly relinquished healthy baby and the unrelated, married but childless heterosexual couple.

Full party status is usually confined to two of these participants. The relinquishing birth parent/parents or guardian and the person or couple wishing to undertake responsibility have always been parties in any adoption proceeding. The child, the subject of the proceedings, has not usually been awarded party status. Others may mediate, such as statutory and voluntary agencies, in arranging or supervising care arrangements. A range of carers and professionals from foster parents to judiciary will also be involved. An extensive network of family relationships will always be affected. But the legal framework is concerned exclusively with the re-distribution of legal responsibilities within this triangle of relationships. For convenience, these three may be referred to as the parties in an adoption process.

1.6.2.1 The Child

Children—their needs, availability and ultimately their acquisition—are of course central to adoption. When children were orphaned or abandoned, when their 'illegitimate' status could be transformed to 'legitimate', where parental consent was available or not withheld and where it was judged to be compatible with the child's welfare interests, then adoption was judicially viewed as wholly appropriate. However, when complications arose, for example in relation to the child in care whose married parents refused consent, then the courts were a great deal more circumspect. In the U.K. there would seem to have always been an imbalance in the number of children available relative to prospective adopters. For the earliest and longest part of its history as a statutory process that imbalance was evident in an excess of children; resulting in their adoption overseas. In recent decades this imbalance has been reversed; an excess of adopters has resulted in some thousands of children being brought from countries such as Romania for adoption in the U.K. While the courts have always required an independent assessment of a child's welfare interests, only in recent years have they been prepared to grant party full party status and rights of representation to older children in adoption proceedings.

1.6.2.2 The Birth Parent/s

The birth parent and/or legal guardian of the child, vested with parental responsibility, have always had full party status in any proceedings for the adoption of that child: the birth mother being inherently vested with such responsibility; the birth father having to legally acquire it. For the purposes of the statutory law of adoption in the U.K., the terms 'natural parent' or 'birth parent' have traditionally been interpreted as referring to the mother of a non-marital child whose involvement with the adoption process was solely for the purpose of voluntarily relinquishing all responsibility for that child. In recent years the *locus standi* of an unmarried father has also acquired some salience.

- **Birth mother**

The forced option of adoption was often unavoidable for an unmarried mother facing social censure, financial hardship and without the means to seek recourse to the courts. Of the three parties, only she held a legal right in relation to adoption; the right to relinquish all future rights. Whether married or not she could consent to the adoption of her child and, until the Adoption Act 1976, could directly place her child for adoption with whomsoever she chose. She thereafter retained, and continues to retain, the right to directly place her child for that purpose with a relative.[76] However, the introduction of the parental responsibility order under the Children

[76] Section 11 of the 1976 Act, following the recommendation in the Houghton Report (*op. cit*., para 81), prohibited direct placements by a birth parent with anyone other than a relative of that parent. Exemptions to the application of section 92 of the 2002 Act continue this residual parental right.

Act 1989, together with increased use of adoption by re-married parents in respect of legitimate children, transformed the traditional role of the birth parent in the adoption process. The contemporary law of adoption in the U.K. has broadened that role to include unmarried fathers and marital parents of either gender.

Arguably, in the U.K. as elsewhere in the western world, the needs of the birth mother had by the final decades of the 20th century become the principal bargaining position around which the needs of the child and those of the adopters had to be fitted. The dominance of the patriarchal model of the autonomous marital family unit had long gone. The legislative and judicial hesitancy to accommodate the paramountcy principle in adoption law had constrained opportunities to give priority to the needs of the child. The needs of adopters, as always the driving force in this dynamic, remained totally dependent upon children being available and all traditional sources were rapidly drying up. But the weighting given to the legal interests of birth mothers had grown to have a powerful impact upon adoption.

A constellation of different factors from financial and housing benefits for unmarried mothers—including a range of birth control methods, increased opportunities for employment, and ease of access to divorce proceedings—to social acceptance of non-marital and serial cohabitation arrangements combined to transform the *locus standi* of a birth mother. Not only could she now choose to avoid what had previously been the forced option of adoption but, should she decide to opt for her traditional role in that process, she could still claim the protection of confidentiality and anonymity that accompanied it.[77] Moreover, the modern use of adoption, as a variant of the long defunct custody order, to secure the boundaries of the increasingly impermanent nuclear family unit, emerged as a significant feature of this change process. The corollary, that it had become the recourse of birth parents for reasons exactly the opposite of those initially intended—to re-assert rather than relinquish their legal responsibilities—is indicative of the fundamental nature of the changes then affecting adoption. Despite a relatively acquiescent judicial practice there had been a long-standing unresolved debate as to the nature and extent of a public interest in this use of the law to accommodate the interests of a birth parent applying to adopt his or her own child.[78]

- **Unmarried father**

The traditional and rather dismissive approach towards unmarried fathers without parental responsibility has gradually given way to a more accommodating attitude; as reflected in the Adoption Agency Regulations 1983.[79] In *Re C*,[80] for example, the

[77] See, for example, *Z County Council v. R* [2001] 1 FLR 365 where Holman J upheld the right of a relinquishing birth mother to insist that her siblings were neither informed of her decision nor approached to assess whether they would be in a position to undertake care responsibility.

[78] See, the concern expressed by the Houghton Committee in *Adoption of Children*, HMSO, 1970, at para 98.

[79] See, Reg 7(3).

[80] [1991] FCR 1052.

court at first instance and the Court of Appeal were strongly critical of a local authority that had treated a birthfather in a cavalier fashion and failed to inform prospective adopters of his involvement and his wish to maintain contact with the child placed with them.

Undoubtedly this change in judicial attitude has been influenced by the European Convention on Fundamental Freedoms and Human Rights. In *Keagan v. Ireland*,[81] for example, the European Court of Human Rights established the principle that where an unmarried father had previously enjoyed a settled cohabiting relationship with a mother who had decided to place their child for adoption then that father should be informed and consulted because the protection given to 'family life' provided by Article 8 extended to include such a relationship (see, further, Chap. 4). This principle was upheld in *Re B (Adoption Order)*[82] where a birth father successfully challenged the right of foster parents to adopt his child with whom he had established a strong and consistent relationship. In *Re R (Adoption: Father's Involvement)*[83] the birth father had neither parental responsibility for nor a consistent relationship with the child relinquished for adoption by the mother with whom he had had an erratic and at times violent relationship. Nonetheless, the Court of Appeal ruled that he should at least be served with notice of the proceedings. *Re H; Re G (Adoption: Consultation of Unmarried Fathers)*,[84] on the other hand, concerned two unmarried fathers neither of whom were to be advised by their respective partners of her decision to relinquish their child for adoption. One had cohabited with the mother and they had an older child in addition to the one she proposed to relinquish. The other had never cohabited. The court ruled that the former but not the latter should be identified and consulted.

The traditional veto, held by a birth mother in relation to disclosure of the identity and the resulting involvement of the child's father in the adoption process, will no longer automatically prevail and will certainly be challenged in the courts if there is evidence of his prior cohabitation with the mother.

1.6.2.3 The Adopters

Thirdly and finally, the changes affecting adoption in the U.K. can be seen most clearly in the role of the adopters. It is not just that the number of adopters has fallen dramatically, it is also increasingly apparent that the legal functions of adoption are now being driven mostly by their needs. Some indication of the extent of that change can be seen in the range of applicants, and the broader span of needs they now represent, when compared with the third party childless marital couple who previously typified adoption applicants.

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[81] (1994) 18 EHRR 342.

[82] [2001] EWCA Civ 347, [2001] 2 FLR 26.

[83] [2001] 1 FLR 302.

[84] [2001] 1 FLR 646.

Birth parents have come to constitute the largest group of annual adoption applicants in the U.K.: in England and Wales such applications rose from approximately one-third in 1975 to one-half in 2002 though are currently declining somewhat. Adoption by a birth parent, acting jointly with their new spouse to adopt the former's child, marital or non-marital, had emerged as the most pronounced characteristic in the modern use of adoption. In *Re B (Adoption: Natural Parent)*[85] the House of Lords restored the adoption order in favour of the father to the exclusion of the mother, on the grounds of the child's welfare interests, thereby acknowledging that the standard model of family adoption was to continue to form part of modern adoption practice. A trend, originating in a tendency for spouses to jointly adopt the mother's child from a different and non-marital relationship in order to 'legitimate' that child, had extended to become almost routinely applied to children from previous marital relationships (though this changed after December 2005 when the provisions of the Adoption and Children Act 2002 came into effect; see, further, Chap. 6).

Kinship adoptions, whereby a child is adopted by a relative such as an uncle, aunt or grandparent, though of little numerical significance are also increasing as a proportion of total annual applications and so also are adoptions by foster carers.

The law has always paid particular attention to the 'worthiness' of third party adopters. Such was the legacy of 19th century 'baby farming' scandals that the legislative intent from the outset was directed towards putting in place the legal functions necessary to test the *bona fides* of would be third party adopters. Ultimately, this led to third party placements made by a birth mother or some person acting at her direction, being prohibited (unless made directly with a relative) because this test was judged more likely to be applied objectively if entrusted exclusively to professionals. The law was concerned to replicate for the child the type of family unit conforming most closely to the approved model prevailing in society at that time. Traditionally, that model was the archetypal childless marital couple of sound health and morals, in secure material circumstances and resident within the jurisdiction. As society became less homogenous, marriage less popular and less permanent, while the population of working age became more accustomed to transient home, employment and relationship ties, so the profile of third party adopters changed. From a position whereby they initially comprised the vast majority of adopters, they are now steadily declining both numerically and as a proportion of total annual applicants. It is probable that the proportion of potential third party adopters in the general population remains at least as high as it has ever been. The fall in the number of children available, however, coupled with changes in the 'type' of child waiting to be adopted, have greatly affected the corresponding pool of potential applicants and considerably reduced the chances of third party applicants successfully adopting a child born within the jurisdiction.

[85] [2001] UKHL 70, [2002] 1 FLR 196.

1.6.3 The Principles

From at least the initiation of adoption as a statutory process the courts were clear that three principles governed the decision to grant an adoption order. Firstly, the court must be satisfied that adoption is in the welfare interests of the child concerned. Secondly, the informed consent of the birth parent/s must be freely given or the need for it dispensed with. Finally, the adopters must be fully vested with the parental responsibilities necessary to safeguard the welfare of the child until he or she reaches maturity.

1.6.3.1 The Welfare of the Child

The principle that the welfare interests of a child should be of central importance in any decision taken affecting the upbringing of that child has long permeated all law relating to children. Adoption legislation, like all other family law proceedings, has always required that every application be subject to the 'welfare test', meaning that any decision must be taken only after consideration has been given to ensure its compatibility with the welfare interests of the child concerned. The part to be played by this imprecise term in adoption proceedings has for many years generated much controversy.

Three aspects of 'welfare interests' are relevant in the context of adoption proceedings:

- How is the term's content or meaning defined in statute and case law?
- What role does the law assign to the welfare test i.e. when is it to be applied and over what period?
- And crucially, what weighting is to be attached to the welfare component relative to the withholding of parental consent at time of determination?

While statute law traditionally made many references to 'welfare interests' it made no attempt to define or indicate the meaning to be attached to this term. Not until the 'welfare checklist' was introduced with the Children Act 1989 did legislative intent become specified. Being left with a free hand to develop their own interpretation, the courts have assembled a considerable body of case law illustrating the matters variously construed as constituting 'welfare interests'. They have always needed to be satisfied that the order if made would be at least compatible with the child's welfare interests which could comprise "material and financial prospects, education, general surroundings, happiness, stability of home and the like".[86] Traditionally, the comparative material advantage[87] available in the home of adopting parents would have been judged insufficient justification in itself for

[86] See, *Re B* [1971] 1 QB 437, per Davies L J at p. 443.

[87] See, *Re D (No. 2)* [1959] 1 QB 229.

severing a child's links with his or her birth parents. So, also, reasons such as 'legitimation',[88] immigration,[89] or simply to change a child's name,[90] have similarly been held to be insufficient. In more recent years the courts have tended to interpret the term in relation to the particular circumstances of the child concerned.

There has always been an issue as to the relationship between the adoption process and the welfare test. The fact that the welfare of children would undoubtedly be improved by their adoption has, historically, never been sufficient justification for their admission to the process. For example, before the First World War at any one time there were some 80,000 children in care under the Poor Laws. Afterwards, adoption was a selective service for the benefit of adopters rather than adoptees, as may be seen in the fact that in 1929–1930 the National Children Adoption Association arranged 225 adoptions but rejected 550 children. These were also years which saw many thousands of children 'exported' by philanthropic societies from the UK, where they were unwanted, to countries such as Australia and Canada up until the mid 1960s.[91] Subsequently, despite legislative synchronisation of grounds for care orders and grounds for dispensing with parental consent so as to permit adoption, judicial resistance to the welfare test as a bridge between child care and adoption succeeded for many decades in preventing ready access to the process for children in care. In the U.K., as graphically highlighted by Rowe and Lambert in *Children Who Wait*,[92] the availability of children needing substitute parental care never provided any guarantee of entry to the adoption process. Only at point of case disposal did the welfare interests of the child have a critical bearing on whether or not an adoption order could be made.

Statute law and case law have always been consistently clear that the welfare test is to be applied not just in the light of the child's current circumstances but also prospectively so as to take into account their welfare interests until he or she attains the age of majority. This approach was extended to suggest that the test be applied with a view to seeking assurance that it can be satisfied into the adulthood of the subject concerned. So, for example, where the Court of Appeal upheld[93] an adoption order granted six days before the subject with a learning disability attained his 18th birthday, it was held that in such circumstances the welfare consideration should extend beyond childhood.

For most of the lifetime of the adoption process, legislators and/or the judiciary have ensured that a measured rather than an overriding weighting was given to welfare interests relative to all other considerations when determining adoption applications. This stand was based on the belief that welfare interests should not

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[88] See, for example, *CD Petitioners* [1963] SLT (Sh Crt) 7.

[89] See, for example, *In re A (An Infant)* [1963] 1 WLR 34. Also, see, *In re H (A Minor: Non-Patrial)* [1982] Fam Law 121 where an adoption order was granted in respect of an immigrant child despite contrary advice from the Secretary of State.

[90] See, for example, *In re D (Minors)* [1973] Fam 209.

[91] As documented by Bean and Melville in *Lost Children of the Empire*, Unwin Hyman, 1989.

[92] See, Rowe, J. and Lambert, L., *Children Who Wait*, London, 1973.

[93] See, *In Re D (A Minor)(Adoption Order: Validity)* [1991] 2 FLR 66.

have automatic superiority, particularly in relation to the consent of birth parents. As explained by Lord Simon:[94]

> In adoption proceedings the welfare of the child is not the paramount consideration (i.e. outweighing all others) as with custody or guardianship; but it is the first consideration (i.e. outweighing any other).

As Lord Hailsham had earlier argued, in the debates on the Children Bill in 1975, while the paramountcy principle applied to "care and control, custody and guardianship, it cannot be equally true of adoption". It was strongly felt by many in the judiciary, that to abandon this final parental right—the right to refuse to surrender all parental rights—would be to open the door to 'social engineering'.[95] Finally, however, the principle that welfare interests must be the matter of paramount consideration—which had long governed decisions taken in wardship, child care and other proceedings—was extended to adoption with the introduction of the 2002 Act (see, further, Chap. 6).

1.6.3.2 Consent

The principle that adoption should rest on the full, free and informed consent of the birth parent/s, or the absence of dissent, was the starting point for statutorily regulating the process in the U.K. For most of its history, it has in the main been a consensual process resting on the freely given consent of the birth parent/s or on the absence of any need for it due to the child being orphaned or abandoned. While the consent principle has always protected the legal interests of a birth mother and those of a marital couple, in more recent years the law has extended the principle to afford some degree of recognition for the interests of the birth father, particularly if he has acquired parental responsibilities. When dominated initially by third party applicants and latterly by birth parents, adoption was largely consensual. Both forms were facilitated by the legislative intent that the process should enable voluntarily relinquishing birth parent/s to surrender all rights. In consensual adoptions, the law has remained focussed on the evidence necessary to establish the existence of a free and fully informed consent; the fact, its form and the circumstances. In all others the focus has

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[94] See, *Re D (An Infant)(Adoption: Parent's Consent)* [1977] AC 602 at p. 638.

[95] See, for example, the leading Northern Ireland case of *In re E.B. and Others (Minors)* [1985] 5 NIJB 1 where the dangers of straying into the realm of eugenic engineering were explained by Hutton LJ:

> "If the only test was the welfare of the child and the wishes of the natural parents could be disregarded, then there would be some cases where a child, taken into care for a short time because of the illness of his parents or some other family emergency, could be taken away permanently from humble and poor parents of low intelligence, and perhaps with a criminal record, and placed with adoptive parents in much better economic circumstances who could provide the child with greater material care and intellectual stimulation, a more stable background and a brighter future."

been on whether or not the grounds for dispensing with the need for consent can be satisfied.

As the non-consensual proportion of annual applications has slowly grown, mainly due to an increase in child care adoptions, so too has contention as to the proper balance to be struck between the grounds on which a birth parent may withhold consent and the welfare interests of their child. When should welfare interests prevail over the wishes of a non-consenting parent? What, if any, rights could a non-consenting or indeed a consenting parent retain?

In the U.K., the grounds on which a birth parent could rightfully withhold consent to the adoption of their child had been steadily reduced in the last half of the 20th century. The inevitability of the legal balance being struck in favour of welfare as against parental rights had first been signalled with the wardship ruling in *J v. C*[96] followed by the inclusion of 'paramountcy' in section 1 of the Guardianship of Minors Act 1971. In the Adoption Act 1976 the legislative intent to extend this principle had been evident from the fact that in section 16, the final two grounds for dispensing with parental consent were explicitly child care in nature; i.e. serious parental ill-treatment of their child would justify this measure. In the Children Act 1989, Parliament firmly directed the judiciary to apply the paramountcy principle to determine all decisions affecting the upbringing of a child in family proceedings. This, together with the explicit child care grounds for freeing orders, should have expedited the flow of children from child care into the adoption process and substantially increased the number of non-consensual adoptions.

Instead of taking the legislative lead, the judiciary steadfastly held to established precedents[97] as the sole justification for dispensing with parental consent; for the last three decades of the 20th century parental 'unreasonableness' was by far the most common ground for dispensing with consent. Simply put, the 'unreasonableness' test required the court to consider whether a reasonable person, in the parent's position, being mindful of the child's welfare interests, would be justified in withholding agreement. It was applied ubiquitously until displaced by the provisions of the 2002 Act.

Such limited rights as were reserved to a birth parent, such as the right to directly place their child with a person for the purposes of adoption, were eventually statutorily removed; except where the placement is with a relative. Whether entering the adoption process on a consensual or non-consensual basis, the only right legislatively left to a birth parent was the right to surrender all parental rights. The statutory power of the courts to attach a condition to an adoption order could be exercised only to further the welfare interests of the child and not to vest rights in the birth parent, whether consenting or otherwise.

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[96] [1970] AC 668.

[97] See, specifically, *Re W (An Infant)* [1971] 2 All ER 49 where Hailsham LJ emphasised that:

> "The test is reasonableness and nothing else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the totality of the circumstances".

1.6.3.3 Parental Responsibilities

Finally, the law sought to give effect to the principle that adopters should be vested with the rights and duties necessary for them to step into the shoes of the birth parents and thereafter provide for the child as though he or she had been born to them and of their marriage. The legislative intent was that an adoption order would create new and permanent legal ties between the child and his or her adopters so that, as expressed by Vaisey J in *Re DX (an infant)*:[98]

> The child looks henceforth to the adopters as its parents, and the natural parents, relinquishing all their parental rights step, as it were, for ever out of the picture of the child's life.

As initially understood, granting an adoption order vested certain common law rights and duties in the adopters. They acquired the right of custody which has been defined as a 'bundle of powers' including not merely physical control but also control of education and choice of religion and the powers to withhold consent to marriage and the right to administer the child's property.[99] Included were such other rights as to determine place of residence, choice of health services, travel and the right to withhold consent to a subsequent adoption. They also acquired the duties of guardianship which included the duties of maintenance, protection, control and provision of appropriate medical care. Excluded to a large extent were rights of inheritance; the common law resolutely protected the traditional rules of inheritance governing the devolution of property from birth parent to child. Since the introduction of the Children Act 1989 and the displacement of the concept of parental rights and duties by that of 'parental responsibilities', the authority vested in the adopters is best understood within the meaning statutorily ascribed to the latter term.

From the outset the courts had some difficulty in accommodating the piece of legal fiction that purported to place a child in exactly the same relationship to 'strangers' as he or she would otherwise have stood in relation to their birth parents. The judicial resistance towards accepting the legislative intent was evident in relation to matters such as inheritance and succession rights while legislation continued the exemption extended to an adopted brother and sister from the laws relating to incest. In more modern times it is evident in the practice of attaching conditions to adoption orders.

Initially, there was a presumption that a clean and absolute break between the child and the birth parent/s was a natural and essential part of U.K. adoption practice. A meaningful parent/child relationship being judicially viewed as vitiating the welfare ground for an adoption order: adoption and continued contact being seen as mutually exclusive. Since the introduction of the 1976 Act, however, the U.K. courts[100] have been able to attach such conditions as they think fit to an adoption

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[98] [1949] CH 320.

[99] See, Eekelaar, J., 'What are Parental Rights?' [1975] 89 LQR 210 and Hall, 'The Waning of Parental Rights' [1972] CLJ 248.

[100] See, in England and Wales, section 12(6) of the 1976 Act and in Northern Ireland, Article 12(6) of the 1987 Order. Note that in Northern Ireland a birth parent also had the right to add a condition of their own volition; the right to determine their child's the religion in which their child was to be brought up (Article 16(1)(b)(i)).

order. Most usually this occurs where a pre-adoption relationship exists between the child and a birth parent or sibling, constituting a psychological bond the continuance of which would have a meaningful significance for promoting the post-adoption welfare of that child. This is very often the case in family and child care adoptions where the child concerned is likely to be older and thus to have had the opportunity to form such relationships. In such circumstances, when satisfied that to do so would further the welfare of the child and would be enforceable, the courts are now more willing to attach a contact condition though in fact only rarely do so.[101] The flexibility permitted by the introduction of contact orders under the Children Act 1989, together with the practice of facilitating more 'open' adoptions and the concern expressed about step-adoptions, has led to the present position whereby perhaps a majority of adoptions now accommodate some level of ongoing contact between the child and a member of their family of birth. This development is set to accelerate further under the Adoption and Children Act 2002 (see, further, Chap. 6).

1.6.4 Contract or Gift Relationship

As Hollinger has noted:[102]

> A key element in debates about how adoptive families are constituted is the claim that the transfer of a child to an adoptive parent is a 'gift', a gratuitous transfer, analogous to a testamentary bequest or the donative deeding over of real property. Birth parents are said to "bestow" their child directly upon the adoptive parents, or to "surrender" them to child-placing agencies.

This is supported by pointing to the traditional prohibition, ingrained in adoption law, against any activity that could be construed as 'trafficking': the 'solicitation' of children is deplored; no money or other valuable consideration is to be paid in exchange for a child or for the consent of a birth parent; no intermediary or agency is permitted to 'sell' a child or make undue profits from facilitating placements. While this presents a good case in support of the relationship being based on 'gift' rather than contract, she rightly adds that in practice "the notion that adoption is not contractual is so powerful that it obscures the extent to which bargaining is intrinsic" to the relationship. Agency payment for all antenatal care costs, for example, has become a fairly standard element in the agreement between it and relinquishing unmarried mothers, stepparents will often agree to forgive the child support arrears of a non-custodial parent in exchange for that parent's consent to the adoption, while adoptive parents may pay, and agencies and private intermediaries may charge, for adoption-related expenses, including legal and counseling fees. She poses the question—To what extent should bargaining about financial and other aspects of an adoption be allowed to tarnish the notion that adoption is a gratuitous transaction?

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[101] See, *Re C (A Minor)* [1988]1 AER 712h.

[102] See, Hollinger, J.H., *Adoption Law and Practice* (vol. 1), Matthew Bender/Lexis-Nexis, New York, 1988–2005.

1.6.4.1 Public Services

Arguably, the current intensive involvement of expensive professionals—primarily social workers and lawyers—in the adoption process has served to emphasise its essentially contractual nature. Moreover, as the proportion of child care adoptions grows, so does the public service dimension. While this is most obvious in respect of the financial and other forms of state support provided for the adoption of children with 'special needs' there is a growing acceptance of the need for post-adoption, ongoing, professional support to be available to all parties involved in any adoption.

1.7 Conclusion

Adoption is the most radical of all family law orders. No other order so fundamentally changes the legal status of its subject on a lifetime basis. Its effect is to re-write the relationships between three sets of legal interests with implications for the wider family circles of those involved, the consequences of which will be felt by subsequent generations. Many different societies and the same society at different times, led by the changing motivations of adopters, have shaped adoption to fit the needs of its particular cultural context.

In the U.K., adoption is now a creature of statute. This was not always the case. The common law legacy, with its concern to uphold the legal autonomy and privacy of the marital family unit, defend traditional patriarchal social values, and its attention to matters of status, left its mark on the evolving statutory process. Many years later the basic constituent parts of the adoption process remain, to a large extent, as introduced by the first statute. Those recognised as parties, the main governing principles, the elements of their contractual relationship and the effect of an adoption order on their status are all essentially as initially defined. However, the balance then struck between the public and private interests is now undergoing significant change. The key component in this re-balancing has been the welfare interests of the child.

Traditionally, in this jurisdiction, the welfare factor has not played a particularly prominent role in adoption; a point most poignantly demonstrated by the circumstances depicted in *The Lost Children of the Empire*.[103] Adoption has never quite shed the political ambivalence that accompanied its eventual arrival onto English statute books, long after the introduction of equivalent legislation elsewhere, because of a reluctance to allow the welfare interests of a child to override all other concerns. This may have been due in part to residual considerations relating to status as evidenced by the continuing attention given in law to matters such as rights of inheritance, implications for rules governing immigration and the *locus standi* of an unmarried father. Until very recently, welfare in law has tended to be treated negatively; the court confining its considerations to ensuring

[103] See, Bean and Melville, *op. cit*.

that no consequences adverse to the child's welfare were likely to ensue as a result of it making an adoption order. For several decades[104] the judiciary tenaciously resisted suggestions that the paramountcy principle should have any bearing on the outcome of the adoption process. Overall, this approach was not inappropriate when adoption was almost exclusively a private family law proceeding in which, typically, the care of a voluntarily relinquished child had been assumed by unrelated, agency approved and supervised, adoption applicants. Then, the three sets of needs and legal interests neatly dovetailed and the social construct of adoption fitted well with contemporary circumstances.

However, in recent years the triangular relationship of legal interests had become very lopsided. The number of children compulsorily removed had not only vigorously outgrown the number voluntarily relinquished from parental care but were accompanied by a parental veto preventing adoption. The number of prospective adopters unable to satisfy their needs with an indigenous child had also grown. In a social context where birth control, serial parenting and transient family relationships had radically altered the previously prevailing marital, monogamous and nuclear family unit, adoption practice was in danger of being redefined largely as an expedient adjunct to marriage or remarriage. In particular, the part played by maternal choice was steadily narrowing the role of adoption in the U.K. Having emerged from under the patriarchal shadow the legal functions of adoption continued to be susceptible to manipulation to meet the needs of adults.

By the turn of the 21st century, the U.K. government was faced with the needs of large numbers of children failed by parental care, a judiciary concerned to protect established precedents in the law of adoption from being undermined by the paramountcy principle and practice developments that threatened to entirely privatise the future use of adoption. A new policy was required to redefine the social construct of adoption so that it better addressed the imbalance in the triangular relationship of legal interests between child, birth parent/s and adopters.

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[104] See, for example *Re D (An Infant)(Adoption: Parent's Consent)* [1995] 1 FLR 895 where Wall J remarked that it is "… logical that a different test needs to be applied to the making of an order which extinguishes parental rights as opposed to one which regulates their operation" at p. 898. A view endorsed by the DoH in its *Review of Adoption Law* 1992 at para 7.1. Note also *Re W (An Infant)*[1971] AC 682 where Hailsham LJ remarked that "welfare per se is not the test" endorsed by MacDermott LJ in the same case "…the mere fact that an adoption order will be for the welfare of the child does not itself necessarily show that a parent's refusal to consent to that adoption is unreasonable" at p. 706. More recently, however, perhaps in response to decisions of the ECtHR, the judiciary in this jurisdiction had begun to demonstrate a willingness to recognise that the paramountcy principle could have a bearing on consent issues.

Chapter 2
The Changing Face of Adoption in the United Kingdom

2.1 Introduction

The role of adoption in contemporary western society is quite different from any of its historical manifestations as outlined in the previous chapter. This reflects the nature of changes in the related cultural context. From its historical role in fairly closed societies with their well defined boundaries, structured roles and ordered social relationships, adoption has now adapted its functions in relation to the needs of nuclear impermanent family units within a more fluid cosmopolitan society. Modern forms of adoption very much reflect the characteristic pressures on contemporary family life in western society.

This chapter considers the role and functions of adoption against the context of unfolding social change in the United Kingdom, with a particular emphasis on recent developments in England and Wales. It begins with a broad review of modern adjustments to the traditional form of adoption. This includes a focus on the nature of change to the process as it becomes more 'open', accommodates a greater variety of children than formerly and responds to pressure from changes in the needs of adopters. It examines the causes of such adjustments and their consequences for the adoption process and for the roles of each of the parties.

The chapter then deals with each of the three main types of modern adoption: family adoptions, agency adoptions and intercountry adoptions. It identifies the different permutations that constitute each type, provides statistical data to reveal the nature and extent of trends in their use and assesses the capacity of each to promote the welfare interests of the children involved. In particular, it considers child care adoption. Because adoption must also be viewed in the context of other options for securing the welfare interests of children it is necessary to trace the modern policy development that now results in increased numbers of children subject to care orders being placed for adoption. This chapter concludes with a brief overview of contemporary models of adoption so as to contrast contemporary U.K. experience with that of other nations.

K. O'Halloran (ed.) *The Politics of Adoption,*

2.2 Modern Adoption Trends in the United Kingdom

A sense of perspective is needed in relation to adoption. Far fewer adoption orders are now made than at any time in the history of this statutory process. While all other family law proceedings continue to generate ever more litigation, adoption continues its steady decline. Adoption has greatly changed since the Adoption Act 1926 first placed this process on the statute books of the United Kingdom. This has not been due to government policy; despite the best endeavours of Houghton and others.[1] In the post-world war period through to the end of the 20th century, while U.K. society underwent fundamental economic, cultural and other changes, there were virtually no policy led or formative legislative initiatives to adjust the functions of adoption. The considerable changes that have occurred are largely the result of practice developments in response to pressures on the family. These changes have gradually distorted the original functions of adoption.

2.2.1 From Traditional Model to Modern Variants

The traditional form of adoption in the U.K. is dying out. Third party adoptions of healthy babies, voluntarily relinquished by natural parents resident and domiciled within the jurisdiction, most probably have no future. This form accounted for the majority of the 875,000 children adopted in England and Wales since 1926. Following a steady rise in annual adoptions between 1927 and 1968, when they peaked at 24,831, they have declined consistently every year since and reached 4,387 in 1998.[2]

The hallmarks of this type, which have endured for most of the statutory lifetime of the process and now colour our expectations of how adoption should be defined, are also fading. It was very much a private family law and 'closed' process, almost always consensual, involving a healthy baby with cultural affinity to the adopters, conducted confidentially usually by voluntary adoption societies and with guarantees of post-adoption secrecy. The underpinning legislative intent was to facilitate a neatly matching set of needs: relieve birth parents of responsibilities they did not want; provide a means for children to be 'legitimated'; and enable a marital couple to make arrangements for the inheritance of family property. Reflecting the patriarchal values and status considerations of the late Victorian era, the traditional form of adoption primarily served to reinforce conformity to socially acceptable standards represented by the marital family unit. This has now given way to new forms of adoption which have brought with them possibilities for re-interpreting the process and clarifying its functions.

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[1] See, the Houghton Committee, *Report of the Departmental Committee on the Adoption of Children* (Cmnd 5107), 1972 which followed on from the report of the Departmental Committee on the Adoption of Children *Working Paper* (HMSO), 1970.

[2] See, the Department of Health annual statistics.

2.2.1.1 Open Adoption

The assumption that the traditional 'closed' model of adoption is wholly compatible with the welfare interests of the child has faded in recent years. That approach was rooted in theories of child development that maintained the importance of allowing a child to form attachments within a clear and consistent set of relationships free from any ambiguity. Any proposed ongoing involvement of members of the child's family of origin was viewed as introducing complicating and confusing factors that might threaten the new and vulnerable family unit. It was also considered likely to impose unnecessary stress on birth parent/s, who needed to come to terms with their loss, and on the adopters who very often wanted to close the door on the facts and relationships associated with the birth history of 'their' child. A clean break and a new start were seen as being in the best interests of all parties.

In recent years, however, research has indicated that adoption arrangements which accommodate a degree of ongoing involvement from members of the child's birth family have been viewed as successful by the parties concerned. In particular, it has been demonstrated that an adopted child has the capacity to make sense of such a relationship framework and form the attachments necessary to ensure healthy emotional development. Increasingly, an adoption that allows for such degree of 'openness' as is compatible with the comfort levels of all parties is now viewed as being in the long-term perhaps healthier and more honest than the traditional closed approach; given the prevailing transparency of the current social context. That arrangements between the parties should be made and maintained in secrecy and information disclosure relating to identity kept to a minimum now contravenes principles well established in international Conventions and case law. The practice of openness[3] is usually associated with family adoptions, where access to information relating to origins and identity is most likely to be readily facilitated. In child care adoptions, however, which often involve older children, it has been embraced as an unavoidable necessity unless there is good reason for secrecy such as a background of child abuse or domestic violence.[4] As has been observed, adoption practice reflects social, political, economic and moral changes and the move towards openness in adoption reflects a general trend towards more openness in society.[5] Open adoption is an elastic concept that has been defined by Brodzinsky and Schlechter as follows:[6]

> The practice of open adoption begins with the first contact of both the prospective adoptive parents and the birth parents. It is discussed as an integral part of agency procedure in the adoption of all children. Open adoption is a process in which the birth parents and adoptive parents meet and exchange identifying information. The birth parents relinquish legal and basic child rearing rights to the adoptive parents. Both sets of parents retain the right to

[3] See, for example, Triseliotis, J., *Open Adoption: The Philosophy and the Practice*, 1970.

[4] See, for example, *Gunn—Russo v. Nugent Care Society and Secretary of State for Health* [2001] EWHC Admin 566, [2002] 1 FLR 1 [2001] UKHRR 1320, [2002] Fam Law 92, QBD.

[5] See, Grotevant, H. and McRoy, R., *Openness in Adoption*, Sage, Thousand Oaks, CA, 1998 at p. 196.

[6] See, Brodzinsky, D. and Schechter, M., *The Psychology of Adoption*, Oxford University Press, Cary, NC, 1990 at p. 318.

> continuing contact and access to knowledge on behalf of the child. Within this definition, there is room for greater and lesser degrees of contact between the parties. The frequency and meaning of the communication will vary during different times in the lives of the individuals involved, depending on their needs and desires and the quality of the established relationship.

The concept, and increasingly the practice, of openness brings with it the challenge that if the content of adoption is to be so radically transformed then perhaps the legal form that has housed the traditional interpretation of adoption should also be similarly transformed? Is the complete and permanent severing of the birth parent/s rights and duties in relation to their child, coupled with the equally exclusive vesting of such responsibilities in the adopters, now strictly necessary?

2.2.1.2 Step-Parent Adoption[7]

The attraction of a means whereby a second partner, who has all the day to day care responsibilities but none of the rights in respect of their spouse's child from a previous relationship, may acquire with the latter exclusive parental rights, is an increasingly frequent motive for adoption. A wish to ensure inheritance rights can also be a factor. This use of adoption had not been within the contemplation of initial legislators.

As marriage becomes less popular and less durable and parenting arrangements more fluid so an adoption order has come to be regarded as a useful authority for bolting the door behind a re-formed family unit to the exclusion of previous and now inconvenient relationships.[8] It may also, of course, signify to the child concerned that both birth parent and spouse are wholly committed to making him or her as much a part of the new family unit as is legally possible.

2.2.1.3 Adoption of Children with Complex or Special Needs

The term 'special needs' is used inconsistently. In the U.K. it has been most usually used in reference to children and others with learning difficulties. In the U.S. it refers to all children for whom, for whatever reason (e.g. older, with behaviour problems, with health care needs or members of sibling groups), it may be difficult to identify an adoption placement (see, further, Chap. 8). Practice in the U.K., particularly in the context of Adoption Panel determination of eligibility for adoption allowances, is now moving towards acceptance of the U.S. definition.

Again, in all western societies, the reduction in the number of indigenous healthy babies available for adoption has led to adopters broadening their outlook. This has been matched by a commensurate change in the factors governing the

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[7] In the last years of the 1976 Act, some 50% of adoption applications were from step-parents. Under the 2002 Act, such applicants will be directed towards a parental responsibility order/agreement as an alternative to adoption.

[8] See, Utting (1995) who noted that 40% of marriages end in divorce, 20% of families are headed by a lone parent and 8% of dependent children live in step-families.

availability of children, particularly babies. Previously, the few children with complex health care or special needs, unwanted or inadequately cared for by their birth parents, would have been consigned to long-term institutional care. Due to the advances made in medical sciences, many more vulnerable children are surviving and some need an intensity of care well beyond the abilities of 'average' parents. Some such children are now often successfully placed for adoption; though this may necessitate ongoing professional support.

2.2.1.4 Adoption of Children Born as a Result of Assisted Conception

The introduction of techniques of artificial insemination and the practice of surrogate motherhood have resulted in many children becoming available for adoption by private arrangement. This new form of 'adoption to order' is not without its problems and many court cases have been generated by the withdrawal of consents freely given before birth of the children concerned.[9] It also gives rise to concern for the child's long-term sense of identity and rights of access to information.

2.2.1.5 Intercountry and Transracial Adoptions

The acquisition of a child in a foreign country by citizens, resident and domiciled within another jurisdiction, who either adopt the child in his or her country or return with the child and initiate adoption proceedings, is neither a recent nor an unusual phenomenon. For perhaps the last 40 years there has been a flow of children from third world countries into the homes of adoptive couples in western Europe; particularly, from the Philippines and South America towards Scandinavia.[10] However, this is no longer an occasional occurrence. The inward flow of children from foreign countries to adopters in the U.K. has gradually become a more prominent characteristic of the modern adoption process; although the numbers have only increased slightly (currently approximately 300 annually) in the context of overall declining trends it is now proportionately more significant. There is a clear correlation between intercountry adoption and child care adoption: nations with a high rate of dependency on the former will also have low rates of availability through the latter; while social class (intercountry adoption is expensive), racial bias (white Caucasian prospective adopters tend to look towards Russia, Romania and eastern Europe rather than to Africa for children) and a preference for babies also play their part (see, further, Part III).

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[9] See, *Re MW (Adoption: Surrogacy)* [1995] 2 FLR 789 where the court dismissed a surrogate mother's opposition to an adoption application by commissioning parents in respect of a child who by then had been in the applicants care for two-and-a-half years. See, also, *Mikulic v. Croatia* Hudoc, 7 Feb 2002 and *Rose and E M (A Child Represented by her mother as litigation friend) v. Secretary of State for Health Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin).

[10] See, for example, the account of 20 years of such experience in Dalen, M. and Saetersdal, B., 'Transracial Adoption in Norway', *Adoption & Fostering*, vol. 2, no. 4, 1987. Also Ngabonziza, D., 'Inter-country Adoption in Whose Best Interests', *Adoption & Fostering*, vol. 2, no. 1, 1988.

This international phenomenon is impacting upon very many countries, involving the annual movement of many thousands of children and is regulated by a Convention drawn up at the Hague Conference on Private International Law in 1993. This Hague Convention has been given effect in the U.K. by the Adoption (Intercountry Aspects) Act 1999 and has been largely incorporated into the Adoption and Children Act 2002 (see further, Chaps. 5 and 6).

Intercountry adoptions are often transracial, some of the rationale and many of the same tensions prevail in both,[11] and can give rise to identity issues for children removed from contexts of family, kinship, language and culture to be reared in a foreign ethnic environment. In England and Wales, the wisdom of having any formal policy on transracial adoptions—whether to promote or discourage—has been questioned.[12] The local authority circular *Adoption—Achieving the Right Balance*, although not dealing with intercountry adoption, addressed this controversy and concluded with the advice that whereas good practice should always seek to achieve sensitive racial and cultural matching this must remain conditional upon any such match being wholly in the best interests of the child concerned.[13]

2.2.1.6 Same Sex Adopters

The 1976 Act was silent on the prospect of adoption by a same sex couple; it simply was not within the ambit of legislative intent. Indeed, not until very recently would a household consisting of a same sex couple be construed as coming within the legal definition of 'family'.[14] The possibility of adoption by a single person, however, was and is provided for; the earlier statutory prohibition on adoption of a female child by a single adult male having been removed. An adoption application by a single homosexual male or lesbian, where the applicant is living with a partner of the same gender, has therefore for some time been legally possible[15] but not until recently has it become professionally and socially acceptable. The most comprehensive recent review of the literature by Stacey and Biblarz concluded:[16]

> Because every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children's mental

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[11] See, Murphy, J., 'Child Welfare in Transracial Adoptions: Colour-Blind Children and Colour-Blind Law', in Murphy, J. (ed.), *Ethnic Minorities—Their Families and the Law*, Hart Publishing, Oxford, 2000.

[12] See, for example, Tizard and Phoenix (1989) who found that transracial placements are not necessarily damaging experiences for the children concerned.

[13] See, Department of Health, LAC 20, 1998.

[14] See, *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 11 FLR 271 where the House of Lords ruled that a settled homosexual relationship did constitute a 'family' for the purposes of the law relating to landlord and tenant.

[15] See, for example, *Re E (Adoption: Freeing Order)* [1995] 1 FLR 382 where the Court of Appeal, albeit reluctantly, approved the placement of a girl with a single lesbian adopter.

[16] See, Stacey, J. and Biblarz, T., 'Does the Sexual Orientation of Parents Matter?', *66 American Sociological Review*, 159, 176, April 2001.

> health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's "best interests." In fact, given that children with [lesbian or gay] parents probably contend with a degree of social stigma, these similarities in child outcomes suggest the presence of compensatory processes in [these] families.

Judicial notice has been taken of research findings indicating that child rearing by same sex couples has not disadvantaged the children concerned.[17] This has led to the current position where judgments emphasise that providing such applicants satisfy the welfare test then their sexual orientation is of little relevance. So, for example, in *AMT (Known as AC) (Petitioners for authority to adopt SR)*,[18] where the subject was a three year old boy and the applicant a male homosexual living with a long-term male partner, the court granted an adoption order. Again, in *Re W (Adoption: Homosexual Adopter)*,[19] an application for a freeing order was unsuccessfully opposed by the birth mother, objecting to a local authority placement of her child with two lesbian women, who intended to adopt. These judgments, which brought adoption practice more into line with the realities of modern family life, prepared the ground for legislative change (see, further, Chap. 6).

2.2.2 Causes of Change

The structured homogeneity of late Victorian England has given way to a more fluid, multi-cultural society with permeable boundaries. Family life is now much less likely to be based on marriage, is more impermanent with serial parenting and shared care arrangements not uncommon. It is likely to take the form of a self-reliant fairly mobile nuclear unit, unlikely to be reinforced by an extended kinship network nor by community links and probably transient in nature as families relocate in pursuit of employment opportunities. Against this background the welfare interests and indeed the rights of the child have steadily acquired a more defined salience. This has been partly a consequence of increased knowledge of child development, particularly in relation to theories of attachment and bonding as attested to by a considerable body of research on outcomes for looked after children. It is also attributable to the general withdrawal throughout family law from a defence of the status determined obligations of adults (e.g., marriage) to upholding the principle that the welfare interests of children must prevail in any set of circumstances.

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[17] See, for example: Golombok, S., 'Lesbian Mother Families', in Bainham, A., Day Sclater, S. and Richards, M. (eds.), *What Is a Parent?*, Hart Publishing, Oxford, 2000; Patterson, C.J., *Children of Lesbian and Gay Parents*, 1991; and Polikoff, *This Child Does Have Two Mothers*, 78 Geo. L. J. 459, 1990.

[18] [1997] Fam Law 8 and 225.

[19] [1997] 2 FLR 406. See, also, *Re E (Adoption: Freeing Order)* [1995] 1 FLR 382.

2.2.2.1 Advances in Medical Science

Advances in medical science have allowed parenting to become more a matter of choice, mostly to be exercised by women. Birth control and abortion services have clearly affected the number of unwanted births and therefore the number of birth parent/s wishing to voluntarily relinquish their babies. Improved techniques for assisting conception (AID, GIFT etc.) and for facilitating surrogacy arrangements have had implications for the adoption process. As mentioned above, medical science has also greatly improved the survival rate for babies born with complex health and social care needs resulting in more such children becoming available for adoption.

2.2.2.2 Welfare Benefits

Birth parents who choose to provide ongoing care for their child, unlike their predecessors in the more traditional form of adoption, now have access to the range of welfare benefits and public services necessary to undertake and sustain that parental role. This—together with the fading of the social stigma previously associated with that role, access to contraceptives and the growth in equality of employment opportunities—has transformed the relationship between unmarried mothers and the adoption process.

2.2.2.3 Failed Parenting

Failed family life is becoming more evident as the child care population increases and media reportage of child abuse becomes commonplace. The ever-growing number of child abuse inquiries and paedophilia scandals have generated a level of public concern that is causing the government to formulate new policy initiatives. The failure of community care programmes to provide adequate support for the mentally ill, for those suffering from learning disability, for drug abusers and for refugees has exposed many children to situations of neglect and abuse (see, further, Part III). There is now a recognition that new measures need to be taken to provide both a better level of child protection[20] and also safe and permanent alternative care arrangements for children failed by parental care.

2.2.2.4 Child Development Knowledge

Contemporary knowledge of child development—of what promotes or obstructs healthy physical and emotional growth and of what constitutes the welfare interests

[20] See, The Department of Health, *The Victoria Climbie Inquiry* ('the Laming Report'), The Stationary Office, London, 2003.

of a child—is at a much more advanced stage than in the era of traditional adoption. The importance of 'nurture', physical and emotional, of 'bonding' between child and a significant carer, in contributing towards a child's well balanced psycho-social development have been extensively researched and are now accepted as key concepts in child rearing practice.[21] However, it was 'attachment theory'[22] more than any other aspect of modern child development knowledge, impacting upon child care policy and practice that in turn caused a strategic change in professional attitudes towards the adoption process. Attachment theory suggests that the future psychological wellbeing of every child is dependent upon their experiencing an intimate one-to-one relationship with a caring adult for a crucial period during their formative early years.

2.2.2.5 Failed State Care

The years immediately prior to and following the introduction of the Children Act 1989, which brought with it the 'partnership with parents' principle' was a period of professional emphasis on family reunification in which foster care rather than adoption was the preferred option for children neglected or abused by their families. This, however, was also a period when the failings of state care became obvious; the failure of some public child care agencies to satisfactorily provide for the welfare of some children made the subjects of care orders has been well documented.[23] The effect of public care scandals, combined with the expense of state care and influence of the principle that family care is best, led to a period of intense research focused on evidence based practice to clarify what works best. The outcomes research[24] for

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[21] See, for example, Goldstein, J., Freud, A. and Solnit, A.J., *Beyond the Best Interests of the Child*, 1973 which promoted the 'psychological parenting' concept and where the point (contributing significantly to the rationale for permanency planning) is made that "Continuity of relationships, surroundings, and environmental influences are essential for a child's normal development" (pp. 31–32).

[22] See, for example, Bowlby, J., *Attachment and Loss*, Hogarth Press, London, 1969 and Howe, D. et al., *Attachment Theory: Social, Developmental and Clinical Perspectives*, Analytical Press, Hillsdale, NJ, 1999. Also, see, Harris, G., 'The Human Life Cycle: Infancy', in Davies, M. (ed.), *The Blackwell Companion to Social Work* (2nd ed.), Blackwell, Oxford, 2003 at pp. 342–347 where Harris states that 'in extended families, infants might form an attachment to family members other than the main care provider' (p. 343). It is now accepted that an infant child is equally capable of forming an attachment to a male or female carer.

[23] A number of official inquiries reported on the capacity of the care system itself to permit and sustain a culture of child abuse. See, for example, Waterhouse, *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd Since 1974*, The Stationery Office, London, 2000.

[24] The 'outcomes research', analysing and evaluating the care careers of looked after children, is comprised of many different reports compiled in the main from within the social work and allied professions. These include: Triseliotis, J. and Hill, M., *Hard to Place—The Outcome of Adoption and Residential Care*, Gower, London, 1984; Thoburn, J., *Captive Clients*, 1980; Milllham, S. et al., *Lost in Care*, 1986; Rowe, J., Hundleby, M. and Garnett, L., *Child Care Now—A Survey of Placement Patterns*, 1989; Farmer, E. and Parker, R., *Trials and Tribulations*, 1991; Parker, R.,

looked after children, together with attachment theory, suggested that once rehabilitation had been found to be impracticable then a local authority should institute permanency planning and that adoption rather than foster care was more likely to produce long-term beneficial outcomes for the children concerned.

By the end of the 20th century, the 'permanency planning' policy had become of central importance to local authority child care managers. This requires a plan to be drawn up for every child accommodated by a local authority showing how a safe sustainable placement is to be secured that will enable the child to form the attachment so necessary for his or her welfare (see, further, below).

2.2.2.6 Children's Rights

An important modern development in the law relating to children has been the relatively recent paradigm shift from a central concern for the protection of welfare interests to one of asserting their rights. This is largely due to the weight of case law precedents established under Convention provisions (see, further, Chap. 4). One effect of this development is that in certain issues, such as disputes regarding contact or parental responsibility, judicial determination will proceed from the premise that the child has a right to whatever arrangement is most conducive to securing and promoting their welfare. A more general effect has been to centre stage children's interests in all family proceedings; the law is now much more for children than about them.

2.2.3 Consequences for the Adoption Process

Radical change in the use of adoption has necessarily impacted upon the process itself. There are now far fewer voluntary adoption agencies involved and many more professional checks and balances[25] (see, further, Chap. 3). In addition to such administrative changes, the content of the process has also undergone a considerable transformation.

2.2.3.1 The Process

Provision for post-adoption support, information rights and reunification services has led to adoption becoming more 'open', less absolute, anonymous, taboo tainted

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Ward, H. and Jackson, S., et al. (eds.) *Looking After Children: Assessing Outcomes in Child Care*, HMSO, London, 1991; Bullock, R. et al., *Going Home*, 1993; Department of Health, *Caring for Children Away from Home: Messages from Research*, 1998; *Adoption as a Placement Choice: Argument and Evidence*, The Maudsley (1999); and Broad, R. et al., *Kith and Kin: Kinship Care for Vulnerable Young People*, 2001.

[25] The transformation of adoption practice from a patchwork of activities provided largely by voluntary societies to a comprehensive and professionalised adoption service provided in the main by local authorities dates from the recommendations of the Houghton Committee in *Report of the Departmental Committee on the Adoption of Children* (Cmnd 5107), 1972 at para 38.

and exclusive. It can no longer be viewed simply as a legal proceeding but must be seen as comprising a comprehensive package of adoption services, governed by statutory regulations and managed, administered and conducted by professionals.

Perhaps one of the more obvious manifestations of the compromises made to the traditional process lies in the fact that it now often accommodates ongoing contact arrangements which are sometimes incorporated as conditions in adoption orders.[26] Where, for example, a relationship already exists between the child and a birth parent or sibling, which may constitute a psychological bond and thus in itself be a determining factor of welfare, then the courts may well see fit to attach a contact condition when making an adoption order.[27] In the past the existence of such a meaningful bond would have been judicially viewed as vitiating the welfare ground for an adoption order: adoption and continued contact being seen as mutually exclusive. Now, the two factors that determine whether a contact condition (or any other condition) should be attached to an adoption order are the welfare of the child and enforceability.[28] Generally, the new flexibility permitted by the introduction of contact orders under the Children Act 1989, together with the tacit encouragement offered to the practice of facilitating more 'open' adoptions and the concern expressed about step-adoptions, has led to an increasing number of adoption orders being made jointly with contact orders. Most usually, however, contact arrangements are informally negotiated by the parties concerned and do not require a court order.

Another clear development is that the adoption process has come to accommodate a growing number of contested applications. A process, very largely consensual until the 1980s, has since become increasingly non-consensual as child care adoptions are contested and occasionally so also are family adoptions.

Moreover, the modern adoption process no longer necessarily begins with an application for, nor ends with the making of, an adoption order. Pre-adoption counselling services are now available to all parties. In addition, the 1976 Act introduced the requirement that local authorities ensure the provision of an adoption service including post-adoption support services.

Finally, following the introduction of adoption allowances in 1983, the process now allows for considerable state payments to be made to adopters; though these

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[26] Under section 12(6) of the Adoption Act 1976, the court was given the discretionary power to attach such conditions as it thinks fit to an adoption order.

[27] See, *Re J (A Minor)(Adoption Order: Conditions)* [1973] Fam 106, *per* Rees J where it was first held that continued contact was not inconsistent with adoption. Also, see, the decision of the House of Lords in *Re C (A Minor)(Adoption Order: Conditions)* [1989] AC 1, HL where it was re-affirmed that there was a power to attach a condition where this was in the welfare interests of the child concerned.

[28] See, *Re C (A Minor)* [1988] 1 AER 712h where both factors arose for consideration. However, also, see, *Re S (Contact: Application by Sibling)* [1998] 2 FLR where the court refused an adopted nine year old child leave to apply for a contact order enabling her to resume her relationship with a seven year old half brother with special needs who had been adopted into a different family. The application was resisted by the boy's adoptive parents on the grounds that it would disrupt his life. The court held that the making of an adoption order was intended to be permanent and final and issues such as contact should not be considered after that event; except in the most unusual circumstances.

still compare unfavourably with foster care allowances. Local authority Adoption Panels will now, more often than not, recommend the payment of adoption allowances when approving the adoption placements of looked after children. As a consequence the pool of prospective adopters has broadened as foster parents and other carers have opted for financially supported adoption as the preferred means of securing long-term care arrangements.

However, the policy of 'paying people to adopt children' was controversial.[29] It represented a significant shift in the approach of government to what had been regarded as a private area of family law where the motivation of adopters was expected to be altruistic, above reproach and untainted by considerations of personal benefit.

2.2.3.2 The Children

The profile of today's typical adopted child is very different from the one traditionally placed for adoption. Then the process largely catered for healthy, indigenous, 'illegitimate', white Caucasian babies.[30] Now there are far fewer babies[31] and of those many are likely to be from a different country and possibly from a different race than that of their adopters. The preponderance of family adoptions naturally raised the average age of children being adopted as did the increase in children adopted by their long-term foster carers; a trend that is now in reverse (see, further, Chap. 6). Child care adoptions—often accompanied by very necessary long-term financial, professional and other forms of support—have introduced many children to the adoption process with needs that would not have been within the contemplation of initial legislators. Most contemporary agency adoptions involve children that are the subject of care orders, have some degree of 'special needs', whether suffering from a physical or learning disability, from a behavioral disorder or from

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[29] See, British Association of Social Workers, *Analysis of the Children Bill*, 1975, which states:

> "It would be an intolerable situation if financial resources were made available to subsidise adoption when an allocation of similar resources to the natural parents may have prevented the break up of the family in the first place" at p. 22.
>
> Cited by Lowe, N., 'English Adoption Law: Past, Present and Future', *op. cit*. at p. 330.In support of this approach it has to be noted that child care adoption is virtually non-existent in Denmark where the state heavily invests in the family support services necessary to keep vulnerable children at home.

[30] In 1968, the peak year for adoptions in the U.K. and Ireland, one in five of all 'illegitimate' children were adopted in the former jurisdiction compared with four in every five in the latter. See, also, Bridge, C. and Swindells, H., *Adoption: The Modern Law*, Family Law, Bristol, 2003 where it is stated:

> "By 1951, baby adoptions comprised 52% of all adoptions. By 1968 this proportion was even greater—amounting to 76% of all adoptions—and in the same year, 91% of all adoptions were of illegitimate children. Adoption of illegitimate babies had become the primary focus of adoption law" at p. 6.

[31] In 1975, the proportion of children adopted aged 10 years or more was 19% whereas by 1987 it had grown to 27%. In 1998, babies constituted only 4% of total adoptions.

'foetal alcohol syndrome' and may be placed in sibling groups; none of which was envisaged by initial legislators.

The views of the child concerned, age and understanding permitting, will now be sought in relation to their proposed adoption. For example, the decision of a court[32] to dispense with parental agreement was significantly influenced by an 11 year old boy's views on adoption. This judicial approach has been endorsed by an official recommendation[33] that the court should not be allowed to make an adoption order in relation to a child aged 12 years or over unless that child's consent has either been obtained or has been dispensed with. In *Re I (Adoption Order: Nationality)*[34] the court attached considerable importance to the expressed consent of children aged 13 and 16 when approving their adoption despite opposition from the Home Secretary who submitted that the application was a sham intended to defeat immigration controls.

2.2.3.3 The Birth Parent/s

The single most radical consequence of modern changes for the adoption process is that adoption came to be used mainly for the opposite reasons for which it was initially legislatively intended. By the early years of the 21st century, more mothers were resorting to adoption, with their new partner, as a means of jointly acquiring rather than relinquishing absolute and irrevocable rights in respect of a natural child.[35] This curious legal anomaly continued until the introduction of the Adoption and Children Act 2002 (see, further, Chap. 6). Where the birth parent/s are otherwise involved in the adoption process, which unlike formerly can now include the unmarried father,[36] it is likely to be on a non-consensual basis to resist the forced adoption of their child. These fundamental changes called into question the continued relevance of legislation constructed on a contrary premise.

Another significant consequence of modern changes to the adoption process is that information rights now mean that the birth parent/s cannot step forever out of the life of their adopted child. The latter will always have access to the information necessary to identify, trace and possibly contact their birth mother if not both parents. In circumstances where a birth father had neither parental responsibility nor given his consent then his name will not appear on the original birth certificate and this will leave an adoptee dependant upon the information sought and recorded by the relevant adoption agency.

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[32] See, *Re B (Minor)(Adoption: Parental Agreement)* [1990] 2 FLR 383. See, also, *Re G (TJ)(An Infant)* [1963] 1 All ER 20 CA; *Re D (Minors)(Adoption by Step-Parent)* [1980] 2 FLR 103, and; *Re B (A Minor)(Adoption)* [1988] 18 Fam Law 172.

[33] See, Interdepartmental Group, DoH, *Review of Adoption Law*, para 3, 1992.

[34] [1998] 2 FLR. See, also, *Re D (Adoption Reports: Confidentiality)* [1995] 2 FLR 687.

[35] See, Bridge, C. and Swindells, H., *Adoption—The Modern Law*, Family Law, Bristol, 2003 at p. 217.

[36] See, *Re B (Adoption: Natural Parent)* [2002] 1 FLR 196 HL where the House of Lords endorsed an adoption order made by the High Court in favour of an unmarried father as sole applicant.

2.2.3.4 The Adopters

Aside from the above mentioned fact that many of today's adopters are the birth parents of the children concerned, some other changes to the role of adopters have also impacted upon the process. The profile of the typical adopter is now very different from the applicant who would have been involved in the traditional form of adoption. They now may well be older, not necessarily married and perhaps be financially assisted and professionally supported. Occasionally, they may be of the same gender. They may also be of a different nationality and perhaps different race to the child they propose to adopt.

Arguably, today's adopters may be seen in the main as comprising three distinct groups. Firstly, there are those who adopt children from a child care context. These are likely to be foster parents, or agency approved adopters with similar abilities, who will adopt older children or those with special needs and who may well rely upon and welcome ongoing and intrusive public service support. Secondly, there are those with the motivation, determination and resources to adopt babies from another country. These are more likely to be from a professional or upper middle class background and are unlikely to want any post-adoption public service intrusion. Finally, there are those who adopt children to whom they are related, usually as birth parent or as spouse of the latter. This group is again unlikely to want or welcome any post-adoption public service intrusion. Adoption in the first two groups will be as a result of agency placements involving assessments by an Adoption Panel. A majority of adopters are now likely to have ongoing contact, direct or indirect, with members of the adopted child's family of origin.

2.3 Family Adoption

This term usually refers to first party applicants where the adopter, or one of them in the case of a joint application, is in fact the birth parent of the child concerned. It also includes kinship applications made by other relatives most usually grandparents but occasionally by uncles and aunts who traditionally would have had no *locus standi* in adoption proceedings but under modern family law provisions may acquire legal standing by virtue of an enduring care relationship with the child. Lying at its heart is the concept of the 'blood-link' and the legal significance to be attached to this as a component of a child's welfare interests.

2.3.1 Trends in Annual Orders

Family adoptions, though accommodated with some ambivalence by the law in the U.K., have grown to the point where they now constitute the single largest category of applicant. Of these, step-parent adoptions, although not a new

phenomenon,[37] have developed to comprise a large proportion of all annual adoptions. Lowe offers the following explanation:[38]

> A key element in the increased number of adoption orders during the period 1951–68 was the rise of step-parent adoptions. Such adoptions are essentially of three types: so-called 'post-divorce' step-parent adoptions,[39] where the new family comprises a divorced parent, a child of the former marriage and a step-parent; 'post-death' step-parent adoptions, where the family comprises a widowed parent, a child of the former marriage and a step-parent; and 'illegitimate' step-parent adoptions, where the family comprises a formerly unmarried parent, an illegitimate child and a step-parent.

It is the post-divorce adoptions of 'legitimate' children that account for the rise in step-parent adoptions and in turn inflate family adoptions relative to all other types. In 1951 step-adoptions formed 32% of all adoptions and by 1968 this had risen to 34%. The post-divorce adoption of 'legitimate' children more than doubled in the period 1968–1974. As Lowe explains, following the disapproval expressed by Houghton[40] for this type of adoption and the resulting provision in the Children Act 1975 directing the courts to reject such applications where other options were more appropriate, the number of such adoptions fell sharply.[41] However, according to the Annual Judicial Statistics: in 1998, the proportion of all adoption orders made in favour of step-parents still constituted 50% of the total; though by 2005 this had fallen to 20% (see, further, Chap. 6).

2.3.2 Adoption by Birth Parent and Spouse

An unmarried mother may adopt her own child.[42] An unmarried father may also do so.[43] Initially, however, the typical such application was made by newly married parents in respect of their child conceived and born in the context of their pre-marital relationship; the purpose being to 'legitimate' that child. More recently it has come to be represented most typically by the re-married parent who applies

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[37] See, Masson, J., Norbury, D. and Chatterton, S., *Mine, Yours or Ours?*, HMSO, London, 1983 where it is noted that in 1951 a third of all adoptions involving 'legitimate' children and just under one-half of those who were 'illegitimate' were step-parent adoptions.

[38] See, Lowe, N., 'English Adoption Law: Past, Present, and Future', in Katz, S., Eekelaar, J. and Maclean, M. (eds.), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2000 at p. 317.

[39] See, Lowe, *ibid*., where as authority for this definition he cites Masson, J., Norbury, D. and Chatterton, S., *Mine, Yours or Ours?*, HMSO, London, 1983 at p. 9.

[40] See, the Departmental Committee on the Adoption of Children, *Working Paper*, HMSO, London, 1970, paras 92–94. Also, see, *Report of the Departmental Committee on the Adoption of Children* (Cmnd 5107), 1972.

[41] From 4,545 in1977 to 2,872 in 1983; Lowe cites as his source the Inter-Departmental Review of Adoption Law, Discussion Paper No. 3, *The Adoption Process* at p. 9.

[42] See, *Re D* (*An Infant*) [1959] 1 QB 229 [1958] 3 All ER 716.

[43] See, *F v. S* [1973] Fam 203 at 207, [1973] 1 All ER 722 at 725 CA. Also, see, *Re B (Adoption: Natural Parent)* [2002] 1 FLR 196 HL above at f/n 31.

jointly with their spouse to adopt the former's child from a previous relationship. This use of adoption, which increased considerably after the Divorce Act 1969 came into effect, to legally seal the boundaries of their new family units, has remained contentious.

The effect of an adoption order in such circumstances may be to marginalise not only the birth father but also his side of the family. The European Court of Human Rights in *Soderback v. Sweden*[44] accepted that such an adoption amounted to interference with the birth father's right to respect for family life as it totally and permanently deprived him of the opportunity to enjoy family life with his child (see, further, Chap. 4). But in the U.K. there has been little evidence of suitability criteria being applied by the judiciary to refer uncontested step-parent applications to marital proceedings. Practice has remained largely unchanged despite the warning in the Houghton Report that an adoption order in such circumstances might be more prejudicial than beneficial to the welfare of the child.[45] The misgivings of Houghton found expression in section 14(3) of the Adoption Act 1976 which required such a judicial referral to custody proceedings, though this was eventually repealed by the Children Act 1989. However the Court of Appeal in a ruling,[46] which was then against the normal trend, allowed the appeal of a birth father against an adoption order made in respect of his child and in favour of the child's mother and husband. This decision was based on the grounds that the father had demonstrated the appropriate attachment, commitment and motive to be eligible for a parental responsibility order. Increasingly, where a birth father can provide evidence of having sustained some degree of 'family life' as interpreted by the ECtHR, then the courts are prepared to challenge any use of adoption that would prevent him from continuing to do so (see, further, Chap. 4).

2.3.3 Adoption by Grandparent

The Houghton Report took the view that adoption by grandparents was not, as a rule, desirable.[47] This reservation rests on the significance of age differentials between adopter and adopted and echoes the warning given by Vaisey J. that they should be regarded as exceptional and made with great caution. Adoption by a grandparent has been treated with some caution by U.K. law but is now becoming fairly common.

2.3.4 Other Relative Adoptions

Being usually grounded on the rationale of extending de jure status to de facto long-term in loco parentis care arrangements, in respect of a consensual parental

[44] [1999] 1 FLR 250.

[45] At paras 97 and 103.

[46] See, *Re G (Adoption Order)* [1999] 1 FLR 400.

[47] Paras 111–114.

placement, this type of adoption is now increasingly used by relatives and is referred to as 'kinship adoption'. A characteristic of the modern law as it relates to children is the protection now given to long-term direct care arrangements provided by a person, usually but not necessarily a relative, who has undertaken full responsibility for a child with authority from the parent. Such an arrangement can find ultimate protection in adoption. Also, where a local authority has determined that adoption is in the best interests of a looked after child then, in accordance with the principle of giving first preference to arrangements that retain a child within his or her family of origin, it will always explore the possibility of kinship adoption.

2.3.5 The Welfare Principle, the Blood Link and Family Adoptions

In the U.K., prospective adoption applications from relatives of the child concerned are not subject to scrutiny by the local Adoption Panel. This, in effect, means that perhaps the most important quality control mechanism in the adoption process has no relevance for a very significant proportion of U.K. adoptions. They avoid this forum for professional assessment on the grounds that this is viewed as a matter of private family law and because there is very seldom a 'placement' consideration as regardless of the outcome the child will almost certainly continue to be retained in the care of the applicants. Although inquiries regarding their suitability will be made by local authority social workers, following the required serving of notice of their intention to apply to adopt, the applicants can choose when to apply and may not do so until several years after making the placement arrangement.

2.3.5.1 The 'Blood-Link' Factor

In common law jurisdictions the 'blood-link' or *jus sanguinis* has long been accepted as signifying an entitlement to rights by virtue of the circumstances of birth. Most often the concept is relied upon to ground an application for citizenship but it also applies in a family law context to similarly indicate a sense of 'belonging'. Particularly in Indigenous communities, but increasingly also in modern western nations, the understanding that the welfare of a child may be best pursued through exploring the care potential offered within his or her extended family has considerable credence.

The House of Lords, in *Re G (Children)*,[48] can be seen as establishing something of a milestone in U.K. jurisprudence dealing with welfare interests in the context of a parent-child relationship. On the face of it the case concerned a disputed shared residence order made in favour of two women, whose lesbian partnership had broken down, in relation to two children born by artificial insemination to the one

[48] [2006] UKHL 43 [2006] FLR 629.

who now had primary care responsibility. However, it in fact led the court into an examination of 'what is a parent?' and 'how much does the blood tie matter?'. Overturning the decisions of the court at first instance and the Court of Appeal, the House of Lords ruled that insufficient weight had been given to the "important and significant factor"[49] of the biological link between the birth parent and children. In a judgment that claimed to be "raising no presumption in her favour"[50] the birth mother, argued Baroness Hale, could not be viewed as being on the same footing in relation to the two children as the other 'parent' because she was "both their biological and their psychological parent … in the overall welfare judgment that must count for something in the vast majority of cases."

This important ruling would seem to establish the blood-link as a factor of some legal weight in differentiating between the claims of parents, whether in a same sex context or otherwise. Arguably, it is not without ambiguity. The decision is open to interpretation as raising the importance attached to the blood-link as a component of a child's welfare interests (integral to developing an authentic identity, with lineage and inheritance connotations etc.). It also resonates with a more traditional approach that recognizes the inherent stronger legal position of a natural parent (carrying a presumption of care rights and responsibilities) and thereby perhaps devalues the modern emphasis placed on attachment and psychological bonding.

2.3.5.2 Kinship Adoptions

Kinship adoptions (whether by uncles and aunts, grandparents or other relatives), and adoptions by birth parent and step-parent, foster-parents and all other carers with an established legal relationship with the child concerned, are contentious.

On the one hand a kinship adoption is regarded as problematic because:

- A new and lesser legal status is being substituted for an existing legal and actual relationship
- Purpose and motive can be open to question
- Kinship adopters are usually older than others
- It can obscure the nature of the actual relationship between child and adopter and be confusing for other children in the family; and
- It can have a divisive effect by alienating other relatives

On the other hand a kinship adoption is viewed positively because:[51]

- It often retains the child in their home and social environment

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[49] *Ibid*. at para 44. See, also, the Australian case *Hodak, Newman and Hodak* (1993) FLC 92-421 for a similar ruling (further at Chap. 9).

[50] *Op. cit*. at para 44.

[51] For further arguments in support of kinship care see, for example, Broad, B. (ed.), *Kinship Care: The Placement Choice for Children and Young People*, Russell House, Lyme Regis, 2001; Greef, R. (ed.), *Fostering Kinship: An International Perspective on Kinship Foster Care*, Arena, Aldershot, 1999 and Hegar, R.L. and Scannapieco, M., *Kinship Foster Care: Policy, Practice and Research*, Oxford University Press, New York, 1999.

- It always maintains the child within their actual network of relationships (though in some circumstances this can be problematic)
- It facilitates an honest sharing of information between all parties; and
- By retaining the child within their culture of origin it minimizes the possibility of long-term identity problems

2.4 Agency Adoption

Third party or 'stranger' adoptions, where the adopters are unrelated in every respect to the child voluntarily relinquished or otherwise consensually available, is the model that has consistently been the subject of legislative intent in the U.K. It has also been consistently in decline since the 1970s. In 1982, following the recommendation of the Houghton Committee,[52] such adoptions became the responsibility of adoption agencies as private placements by non-relatives were thereafter prohibited by section 28 of the Children Act 1975. These are now more commonly referred to as 'agency adoptions' because, unlike family adoptions, the critical placement decisions are made by the professional staff of an adoption agency.

2.4.1 Trends in Annual Orders

Agency adoptions include consensual placements whether made by registered voluntary adoption societies or local authority agencies and non-consensual placements made by the latter in respect of children subject to care orders (child care adoptions) including placements made with members of the child's family of origin (kinship adoptions). This composite group, though most representative of legislative intent and constituting by far the majority of all orders made, has steadily declined over recent years in the U.K. The child care component, however, has remained at a fairly consistent and significant level as a proportion of all adoptions but at a low level relative to the child care population. At the end of the 1980s, only a very small proportion of children in care were subsequently adopted[53] but, as Lowe points out, "whereas in 1968 they accounted for 8.7% of all adoptions, for most of the 1990s they accounted for a third or more of all adoptions."[54]

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[52] See, *Report of the Departmental Committee on the Adoption of Children*, HMSO, London, 1972 (Cmnd 5107), paras 84–90 and recommendation 13.

[53] A survey of six local authorities in England revealed that only 0.8% were eventually placed for adoption (see, Rowe et al., 1989). See, also, review of research into adoption by the DoH, 1999a)

[54] See, Lowe, N., 'English Adoption Law: Past, Present and Future', *op. cit*. at pp. 321–322, where he cites the 'Looked After' statistics for England as showing the following child care adoptions: 2,400 in 1997; 2,500 in 1998; and 2,900 in 1999. The Dept of Health annual statistics reveal that in England during the year ending 31 March 2002, a total of 3,400 looked after children were adopted.

This inverse correlation between child care adoptions as a proportion of all adoptions and between child care adoptions as a proportion of the child care population is explained by the fact that during this period the number of child care adoptions remained fairly constant while annual adoptions steadily fell and the child care population continued to increase.

2.4.2 Voluntary Society Adoptions

The archetypal triangulation of need—featuring the relinquishing birth parent/s; the child orphaned, abandoned, unwanted or inadequately cared for; and the childless couple selected by intermediaries on the basis of eligibility/suitability criteria—provided the template for adoption law in the U.K. It was pioneered and administered for most of the history of adoption as a statutory process, until the 1970s, largely by voluntary adoption societies.[55] Consent for adoption was envisaged and almost always was available, placements were chosen and made by voluntary societies in a confidential manner so as to ensure that all identifying information was held by the society and not shared between the birth parent/s, child and adopters. Record keeping by such societies was a matter for their discretion; many were destroyed in the belief that this was in keeping with the confidential relationship between the society and the three parties. The consequences of this process were legislatively intended to be essentially private, absolute and irrevocable.

The involvement of voluntary societies in adoption has faded as the process became dominated by family applicants, for whom there is no need to provide a placement service, and by child care placements which are usually non-consensual and require to be authorized and managed by local authorities.

2.4.3 Child Care Adoptions

The flow of children from the public child care sector into the private law adoption process has been a relatively recent development. For many generations, when care in the family of origin failed, whether due to criminal abuse perpetrated by a culpable parent or neglect by a well meaning but inadequate parent, children have entered the public care system. This seldom resulted in their becoming available for adoption.[56] Indeed, in 1952 of all children adopted only 3.2% were from public

[55] In 1966, for example, of all agency adoptions, 73% were arranged by voluntary societies; by 1971 this had fallen to 60%.

[56] Despite recommendations in the Curtis Report, *The Care of Children* (Cmnd 6922), 1946 where adoption was advocated for older children in care and subsequently those of the Houghton Committee, *Report of the Departmental Committee on the Adoption of Children* (Cmnd 5107), 1972 which pressed for adoption to be made available to children in public care where this was in the best interests of a particular child.

care,[57] rising to 8.7% in 1968, while a survey by Rowe in 1989 of placement patterns in six local authorities discovered that only 0.8% of children in care were eventually adopted.[58] However, the traditional alternatives gradually became less viable. Long-term residential care in children's homes proved damaging to the welfare interests of thousands of children placed in the care of local authorities by court orders, while the recruitment and retention of sufficient foster carers, became increasingly problematic. A body of research (see, above at f/n 22) convincingly demonstrated that the life chances of a child who had grown up in the public care system compared very badly, across a number of indicators (including employment, mental health, relationships etc.), with one who had matured in a safe family environment. Consequently grounds for freeing such children for adoption were eventually legislatively introduced.[59]

The Children Act 1989, however, rested on principles such as that the welfare interests of a child were best served by care in their family of origin and local authorities should work in partnership with parents. The introduction of this legislation saw a change in the trend of child care adoptions. Instead of continuing their steady increase child care adoptions began to decrease from the mid-1990s.

By the beginning of the 21st century, the imbalance between type/volume of child care resources and the needs of children requiring alternative long-term care arrangements had become a matter of acute concern to all local authorities. Residential accommodation for children subject to care orders, where desirable, was difficult to secure. Foster parents were a scarce resource and serial placements for a child in care was the norm. These problems were unfolding in the context of a dramatic decline in the availability of freely relinquished healthy babies and a continued increase in the number of childless couples wishing to adopt. Moreover, the pressure emanating from research findings on the outcomes for looked after children together with the results of evidence based practice utilising attachment theory and implementing the permanency planning policy indicated that traditional approaches to securing care arrangements for looked after children were unsustainable. It seemed that an assertive policy to expedite non-consensual adoption for older and often abused or impaired children might be timely.

2.4.3.1 Rehabilitation

The fact that by far the majority of looked after children return to their families, and the vast majority of those that do not remain in foster care, should not be overlooked in any discussion about child care adoption. Whether the welfare interests of a child committed to long-term local authority care would be best furthered by a

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[57] See, Lowe, N., 'English Adoption Law: Past, Present and Future', in Katz, S., Eekelaar, J. and Maclean, M., *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2000 at p. 315.

[58] See, Rowe et al. (1989).

[59] The concept of 'freeing orders' was first suggested by Houghton, see, *Report of the Departmental Committee on the Adoption of Children*, HMSO, London, 1972 (Cmnd 5107), paras 173–186.

permanence plan that aims to rehabilitate him or her within their family of origin, or within the extended family, or by long-term foster care, or by adoption is clearly a matter that must turn on the particular circumstances of the child concerned. The principles and ethos of the 1989 Act, however, exerted an influence, not present in earlier legislation, towards a preference for the former option. It remains the case that where there are reasonable grounds for optimism, regarding a possible reunification of parent and child, then clearly the local authority must give first preference to pursuing that option. As Munby J remonstrated in *Re L (Care: assessment: fair trial):*[60]

> … it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to a parent—particularly, perhaps to a mother—that he or she is to lose their child forever.

In the light of the draconian effect of adoption on the future of such a parent/child relationship, the guidance from the ECtHR is apt—every effort should be made to explore rehabilitation if subsequent recourse to adoption is to be compliant with Article 8 of the European Convention. In particular, *Gorgulu v. Germany*[61] provides authority for the view that the child's welfare must be seen in a long-term context and this may even require terminating an adoption placement, however satisfactory, if local authority intervention is to meet the test of 'proportionality'. The significance of this principle was explained by Hale LJ in *Re C and B*[62] as follows:

> … one comes back to the principle of proportionality. The principle has to be that the local authority works to support, and eventually to reunite, the family, unless the risks are so high that the child's welfare requires alternative family care. I cannot except that this was a case for a care order with a care plan of adoption or nothing. There could have been other options. There could have been time taken to explore those other options.

In many cases the prospects for safe rehabilitation can be swiftly assessed as unrealisable on the basis of facts grounding the care order, the parent/s track record etc., or the number of years the child has been in care. In those circumstances, when the principle of partnership with parents and the 'care in the family of origin is best' ethos of the 1989 Act have had to give way, then a local authority applied the policy of permanency planning. Now, when parents seek leave to defend adoption proceedings, following care orders and the issue of placement orders under section 21 of the 2002 Act, a heavy onus rests on them to show a significant change in their circumstances and this will be judicially assessed by application of the paramountcy principle.[63]

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[60] [2002] 2 FLR 730.

[61] Application No 74969/01, ECtHR, 26.02.2004. Also, see, *P, C and S v. UK* (2002) 35 EHRR 31, *K and T v. Finland* [2001] 2 FLR 707 and *Johansen v. Norway* (1996*)* 23 EHRR 33; see, further, Chap. 4.

[62] [2001] 1 FLR 611 at para 31.

[63] ee, *P v. Serial No 52/2006 and Others* [2007] EWCA Civ 616.

2.4.3.2 Permanency Planning

A key policy to emerge in recent years in most western societies has been a recognition that public service agencies should strive to secure for every vulnerable child a stable, safe and nurturing environment in which he or she can grow up. Where rehabilitation in the family of origin or with relatives is not an option then local authorities must consider how best to secure a permanent placement for a looked after child. 'Permanence' is 'a framework of emotional, physical and legal conditions that gives a child a sense of security, continuity, commitment and identity'[64] while 'permanency planning' has been defined as:[65]

> …the systematic process of carrying out within a limited period a set of goal-directed activities designed to help children and youths live with families that offer continuity of relationships with nurturing parents or caretakers, and the opportunity to offer lifetime relationships.

The term has long played a role as a key concept in American child care legislation and now informs local authority policy in relation to looked after children for whom return to their families of origin is not feasible. The age of the child, the child's wishes and the quality of his or her relationship with their parents may well indicate adoption as the preferred means of securing permanency for that child whether or not parental consent is available. Local authorities will always apply permanency planning to identify the best option for a 'looked after' child, most often this will be either adoption or long-term fostering or by way of such private law measures as a residence order and in the future special guardianship.

A factor of growing significance for local authorities engaged in permanency planning is whether the cost in financial and other terms merits pursuing the adoption option for a looked after child. Purely in financial terms, justifying the investment of scare resources in lengthy contested proceedings often involving QCs, expert witnesses and vast amounts of social work and senior management time in respect of a child (who may in any event remain in the existing care arrangement) can be problematic. The cost in terms of time for the child concerned who needs a settled family environment to form attachments and the insecurity for prospective adopters must also be borne in mind. Then there is the cost to the self-esteem and morale of social workers, often young and inexperienced, exposed to intimidating cross-examination in the gruelling process of contested proceedings. It may be that, despite all the changes in law and policy to facilitate the adoption of looked after children, such practice driven considerations will ultimately weigh in the balance with local authority decision makers.

2.4.3.3 Concurrent Planning

In recent years the practice of concurrent planning has been instituted for children accommodated by local authorities in order to reduce the number of changes of

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[64] See, the Department of Education and Skills, *Draft Regulations and Guidance for Consultation (Care Planning, Special Guardianship)*, London, 2004 at p. 20.

[65] See, Maluccio, A. and Fein, E., 'Permanency Planning: A Redefinition', *Child Welfare*, 62(3), 1983, pp. 195–201.

placement endured by such children. This is a practice whereby a local authority will commit to a rehabilitation programme designed to return a child to safe parental care, while also putting in place a parallel permanent placement plan. It relies upon foster parents who are chosen for their capacity to engage directly with the birth parents and facilitate the rehabilitation plan but who, in the event of that plan failing, are also willing to adopt the children concerned. These two options will then be played out in tandem with emphasis given to rehabilitation but the fallback position of adoption is kept alive and preparations for utilising it are attended to constantly. In very many cases, where the rehabilitation option has demonstrably failed, children in care have then been successfully and relatively swiftly adopted. This approach avoids the traditional care career of serial placements and 'drift' in long-term foster care.

2.4.3.4 Long-Term Foster Care and Adoption

Given the virtual disappearance of residential care provided by voluntary organisations and the influence of the principle that family care is most conducive to promoting the welfare of a child, permanency planning in practice means a choice between two forms of placement, long-term foster care and adoption.

Generally speaking, long-term foster care is most often the placement of choice in circumstances where the probability of successful bonding, the crucial component in any attempt to replicate in adoption the dynamics of a "normal" nuclear family, is reduced by some added complication. This may be the case where the children concerned are older, have been repeatedly fostered, comprise a multiple sibling group, have complex health or special needs or are children from a minority culture background. Quite often the choice is made because a child has close relationships with his or her family of origin which the local authority want to maintain, and a placement with foster parents rather than adopters is more conducive to facilitating open-ended contact arrangements. In *Re B*,[66] where such a relationship existed but a local authority nevertheless chose adoption rather than long-term foster care, the courts challenged that choice. The court ruled that given the close and frequent contact between the looked after child and his birth father and paternal grandmother, all of whom lived locally, adoption was inappropriate as the child was in fact a secure member of both families.

Also, there are times when an intended short-term placement has been so successful that any change would threaten the welfare interests of the child concerned. For example, in *Re F (Adoption: Welfare of Child: Financial Considerations)*[67] the local authority sought freeing orders in respect of three siblings whom it proposed to remove from successful but expensive foster care and

[66] [2001] 2 FCR 89.

[67] [2003] EWHC 3448 (Fam). Note, also, *R (L and Others) v. Manchester City Council; R (R and Another) v. Manchester City Council* [2001] EWHC Admin 707, [2002] 1 FLR 43 where the court ruled that the local authority practice of paying less to kinship carers than to foster carers was unlawful.

place for adoption, though an adoption placement had yet to be identified. The foster carers were not in a position to adopt because of the financial loss they would incur on cessation of foster care allowances. The proposal was not supported by the guardian nor by any of the other professionals involved as it was seen as contrary to the children's welfare interests. The court refused the order and rebuked the local authority for not having a child-centred focus in its care plan.

The disadvantages of long-term foster care are that:

- There is intrusion.
- Drift can happen with the child moving from one place to another. It is more likely to lead to breakdown.
- It reinforces impermanence.
- Matters such as surname can be important. Self-image is important as children get older.
- The existence of other children in foster care can increase the insecurity as they come and go.
- Children frequently act out with the other foster children the abuse they have suffered.
- Placements in long-term foster care are more likely to fail than adoption placements.

The advantages of adoption, as stated in the DHSS circular *Departmental Guidance: Permanency Planning for Children: Adoption—Achieving the Right Balance*, are that:[68]

> The importance of family life to a child cannot be overstated. It is the fundamental right of every child to belong to a family and this principle underpins the United Nations Convention on the Rights of the Child which United Kingdom ratified in 1991. Where, for whatever reason, children cannot live with their families, society has a duty to provide them with a fresh start and, where appropriate, a permanent alternative home. Adoption is the means of giving children an opportunity to experience positive family relationships. Adoption continues to provide an important service for children, offering a positive and beneficial outcome. Research shows that adopted children generally make very good progress compared with similar children who are brought up by their parents. Adopted children do considerably better than children who have remained in the care system throughout most of their childhood. Adoption provides children with a unique opportunity to become permanent members of new families enjoying a sense of security and well-being previously denied to them.

The government has since firmed up on this approach with an unequivocal policy commitment to prioritising adoption in preference to long-term foster care (see, further, Chap. 6).

2.4.3.5 Private Law Orders

Permanency planning can also result in a looked after child leaving the public care system for private family care not through adoption but under the authority of a

[68] See, Local Authority Circular (20), 1998. See, also, the government's Green Paper, *Every Child Matters*, published in September 2003.

private law order. In the past this might have been achieved through use of a guardianship order or the ill-fated custodianship order. Since the introduction of the Children Act 1989, residence orders have been used to discharge a child from a care order and for vesting parental rights, shared with the birth parent/s, in the named holder of the new order. This option has not proved popular with foster-parents because its authority and status is seen as being unduly compromised by ongoing parental involvement. It is hoped that the more authoritative special guardianship order, now available under the Adoption and Children Act 2002, will be a more attractive option for foster parents and indeed for kinship carers.

2.4.4 The Welfare Principle and Agency Adoptions

All prospective agency adoptions are assessed by an Adoption Panel the brief of which is to make recommendations as to:

- Whether adoption is in the best interests of a particular child
- Whether a prospective adopter should be approved as an adoptive parent and
- Whether the home of a particular approved prospective adopter would provide a suitable placement for a particular child

The Panel acts as an independent quality assurance body that makes recommendations to its 'parent' adoption agency on matters concerning adoption as a means of securing the welfare interests of children referred to it (see, further, Chap. 6).

2.5 Intercountry Adoptions

For some decades the number of babies available for adoption has been declining in all modern Western societies. At the same time, circumstances of war and natural disaster have induced other countries to permit the adoption of orphaned or abandoned children by couples in western societies. The welfare interests of such children can usually only be improved by this modern 'child rescue' approach. However, for some children their availability is conditioned by the social economy of their country of origin and it may be that the dislocation to family and culture resulting from adoption may prove in the long-term not to be conducive to promoting their welfare interests. It may be that intercountry adoption will only satisfy the welfare test where neither rehabilitation in the family of origin nor adoption within the country of origin is possible.

2.5.1 Trends in Annual Orders

The adoption of children from other countries by persons unrelated to them and resident in the U.K. is slowly becoming a more significant aspect of modern adoption practice. Lowe has drawn attention to the relatively low numbers of such adoptions:[69]

> In the early 1990s, there were a number of adoptions of Romanian orphans. Indeed, in 1992 the *Adoption Law Review* commented that since March 1990 over 400 children from Romania alone had been brought to the U.K. for adoption. In 1998, however, the total number of intercountry adoptions through official procedures was 258, amounting to 6% of all adoptions for that year.

2.5.2 Transracial Adoptions

The media generated controversy surrounding transracial adoptions has tended to center on a practice by adoption agencies and local authorities to make and break placements on the basis of whether or not there was a racial match between child and prospective adopters. There have been a number of cases where the propriety of this practice has been examined.[70] The emerging consensus is that where possible placement arrangements should reflect a child's ethnic background and cultural identity insofar as such considerations are compatible with the welfare interests of that child which must always have priority. In particular, the courts have upheld the value of preserving established relationships as a key component of welfare interests in transracial as in all other kinds of placements; the duration of current care arrangements and age of the child being of crucial importance. In *Re N (A Minor) (Adoption)*[71] Bush J warned that:

> … the emphasis on colour rather than on cultural upbringing can be mischievous and highly dangerous when you are dealing in practical terms with the welfare of children.

The practice was addressed in the White Paper on adoption.[72] The view then expressed was to the effect that a child's ethnic background and cultural identity should always be factors to be considered by agency staff when making adoption placements but not necessarily to be given any greater consideration than other factors.

2.5.3 The Welfare Principle and Intercountry Adoptions

All prospective intercountry adoption applicants are professionally assessed and the resulting reports are reviewed by Adoption Panels.

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[69] See, Lowe, N., 'English Adoption Law: Past, Present and Future', *op. cit*. at p. 333.

[70] See, for example: *Re P (A Minor)(Adoption)* [1990] 1 FLR 96; *R v. Lancashire County Council, ex parte M* [1992] 1 FLR 109; and *Re JK (Adoption: Transracial Placement)* [1991] 2 FLR 340. Also, see, Caesar et al., 1993 and Tizard and Phoenix, 1989.

[71] [1990] 1 FLR 58 at p. 63. Also, see, *Re O (Transracial Adoption: Contact*) [1995] 2 FLR 597.

[72] See, *Adoption: The Future* (Cmnd 2288), HMSO, London, 1993, para 4.32.

Intercountry adoptions have given rise to eligibility issues. These most often occur in relation to the prohibition on unauthorised payments,[73] unauthorised placements and proof of consents. The first two represent the traditional legal abhorrence of 'trafficking' in children and are criminal offences under sections 57 and 11 respectively of the 1976 Act. Improper payments (e.g. direct or indirect payments to the child's mother) may, if proven, prevent the court from making an adoption order;[74] though much will depend on the circumstances and whether the child's welfare interests are otherwise impaired. Improper placements are viewed more seriously by the courts and are more likely to result in the refusal of an adoption order. The problems in relation to proof of consents refers to the difficulty in establishing, across geographical, cultural and language barriers, the legal status of parent and child and confirming that any consent given was done so freely and with full understanding of the consequences. Any one or combination of these issues may well complicate the court's ultimate application of the welfare test to a particular intercountry adoption application. However, as was illustrated in *Re C (Adoption: Legality)*,[75] the fact that there have been irregularities—in adopter approval, payments, matching and introduction of adopter and child—will be insufficient to outweigh the fact that once the placement is made the passing of time steadily dictates the making of an adoption order as the best option available to the court.

2.5.3.1 Cultural Links

Applying the welfare test to the child subjects of intercountry adoptions does of course give rise to some fundamental questions. It must be accepted that the circumstances of war and natural disaster governing the availability of many children are such that their welfare interests can only be improved by this modern 'child rescue' approach of adopters. This rationale, perhaps, lay behind the decision of the court in *Re K (Adoption and Wardship)*[76] which concerned a five year old orphan who as a wounded baby had been removed from Bosnia and then 'adopted' by her English rescuers. The court, when faced with a petition from the child's relatives, set aside the defective adoption order but rather than direct her return to her extended family and her country of origin it ruled that she should remain with the English couple who had become her 'psychological parents'. However, for some children their availability is conditioned by the social economics of their country of

[73] See, *Re An Adoption Application* [1992] 1 FLR 341, *Re AW (Adoption Application)* [1992] Fam Law 539 and *Re C (A Minor)(Adoption Application)* [1992] Fam Law 538.

[74] The court may, however, retrospectively authorise payments; see, for example, *Re WM (Adoption: Non-Patrial)* [1997] 1 FLR 132.

[75] [1999] 1 FLR 370.

[76] [1997] 2 FLR 230. See, also, *Re N* [1990] 1 FLR 58 where the adoption application by white foster parents in respect of a four year old Nigerian child, placed with them when three weeks old, was successfully challenged by the child's father who lived in the U.S. The court, attaching considerable weight to the father's assertion that adoption was unknown to Nigerian law and carried resonances of slavery, warded the child giving care and control to the foster parents.

origin and it may be that the dislocation to family and culture resulting from adoption may prove in the long-term not to be conducive to the promotion of their welfare interests. This line of reasoning was present in the decision of in the Court of Appeal in *Re M (Child's Upbringing)*.[77] In that case it was held that preserving the Zulu identity of a 10 year old boy, reared for 7 years by white foster parents, was sufficiently important to order his return to natural parents in South Africa despite his strong wishes to the contrary. While it is admittedly difficult to reconcile the judicial rationale of both cases, it may be that intercountry adoption will only satisfy the welfare test where, as with other adoptions, rehabilitation in the family of origin has become impossible. The consent or absence of dissent, of the child concerned, must also be a factor in meeting that test.

2.6 A Coherent Legal Model for Adoption Practice

It could be argued that adoption practice in the U.K. has now outgrown the uniform legal framework which governed its development since its legislative inception. Adoption no longer conforms to the single coherent model that traditionally fitted the social needs of late Victorian England. In fact it has not done so since at least the 1970s.

2.6.1 Classification of Adoption by Type

The adoption process in the U.K. now encompasses several different 'types', usually broadly classified as 'family adoption', 'third party adoption' also known as 'agency adoption' which contains a number of quite distinct groups and 'intercountry adoption' which is really a form of third party adoption.

2.6.1.1 Family Adoption

Most usually the applicants are a birth parent of the child concerned and the former's spouse motivated by a wish to legally secure exclusive parental rights and responsibilities. Pre-application professional assessment is not required and counselling is unlikely to be wanted. The child is unlikely to be a baby, their wishes, and their consent if old enough, are likely to be sought and the order may well be compromised by a contact condition in favour of the child's other parent. Post-adoption public support services are not provided.

[77] [1996] 2 FLR 441. See, also, *Re B (Adoption: Child's Welfare)* [1995] 1 FLR 895 which concerned an adoption application arising from the informal foster care arrangement made for a Gambian child. In refusing the application, Wall J placed considerable importance upon the child's cultural inheritance as an integral aspect of its welfare.

2.6.1.2 Agency Adoption

The traditional form of adoption, which continues albeit in greatly reduced form, is initiated by a married but childless couple, unrelated to the child and motivated by a need to become parents. They will have been professionally assessed and carefully matched to suit the needs of the child concerned. The child is likely to be a baby or toddler without health or social care difficulties and their views or consent will not be sought. The order is likely to be absolute and post-adoption public services are again most unlikely.

Child care adoption is a species of agency adoption. It is, however, initiated by a local authority seeking carer/s, married or not, with skills appropriate to the needs of the child concerned. The applicants may be motivated by their existing care relationship with the child (although only a minority of such applicants will be foster carers) and will have been professionally assessed, offered counselling and be carefully matched to suit the needs of that child. The subject is likely to be an older child with health or social care problems whose views or consent will be sought. The order may well be compromised by a contact condition in favour of member/s of the child's family of origin and post-adoption public support services will be provided.

2.6.1.3 Intercountry Adoption

The applicants are likely to be an older married couple motivated by a need to parent a healthy baby or toddler without health or social care problems and preferring to do so by looking overseas rather than undergo the waiting and uncertainties associated with agency adoption. They will have been professionally assessed and counselled, will be prepared to pay the considerable costs involved and will not want post-adoption public services. The order will be absolute.

They each conclude, if successful, in an order with a uniform effect on the parties concerned. However, intercountry adoption is different from the others in that it is now regulated by its own quite distinct body of legislation (see, further, Chaps. 5 and 6).

2.6.2 Social Role

The purposes pursued in each type of adoption are often fundamentally different. In particular, family adoption, child care adoption and intercountry adoption can be clearly differentiated from each other and from the traditional form of third party adoption. The children, their needs and the relative bearing of the welfare principle are also quite different in each context, as are the motives of adopters and the reasons governing the availability of children. The extent to which each type attracts professional and public service intervention differs considerably.

2.6.3 Legal Functions

Essentially, the above differentiation in adoption's contemporary social role reflects the balance respectively struck between public and private interests in each type. The public interest is most strongly represented in child care adoptions while family adoptions are in the main dominated by private interests. All types are also subject to the public interest in safeguarding the welfare of the child.

2.7 Conclusion

Adoption in the U.K. has greatly changed since the introduction of the first legislation. Most change has occurred in the past few years. The traditional form of adoption has largely been displaced by new variants some of which are wholly driven by private interests (e.g., family adoptions, surrogacy associated adoption) and others by the public interest (e.g., child care adoptions). Sustained adopter demand in the face of the shrinking consensual availability of healthy white babies has broadened the adoption 'market'. Intercountry and transracial adoptions, once rare occurrences, are becoming increasingly common, as is adoption by same sex couples, while many more children with 'special needs' are now being adopted than would ever have been thought possible. A closed, immutable and confidential process has become more open.

All this gave rise to legal complications regarding issues such as consent, application of the welfare principle and post-adoption contact, financial support and information rights. The 'one size fits all' composite legal framework could no longer adequately accommodate the new types of adoption with their associated distinctive problems. Adoption law as a whole in the U.K. was no longer reflecting a coherent policy nor was it equal to the sum of the parts of adoption practice.

Chapter 3
The Legal Functions of Adoption

3.1 Introduction

At each stage of the adoption process a distinct set of legal functions comes into play which are now readily recognised. They have clear roles in a statutorily defined process that, at least in contemporary western societies, is now well established and to a varying degree regulated throughout its sequence of quite different stages. Entry to the process is controlled through the application of threshold criteria to all parties. Placement of the child is subject to an authorised consent. Supervision of the child, after placement and until determination of proceedings, is usually a statutorily ascribed responsibility. The outcome of an adoption application is determined with regard to the rights of the parties but in accordance with the principle of the welfare of the child and may result in the issue of a conditional order or in an order other than the one sought. Finally, the effects of an adoption order, the possible availability of post-adoption support and of long-term services relating to information disclosure, tracing and possible re-unification and the responsibilities of the parties concerned are usually set by statute.

The central focus of this chapter is on identifying, from a U.K. perspective, the main legal functions of adoption as generally applicable in those contemporary modern western jurisdictions with a common law foundation. It does not consider the political context within which the regulatory framework for adoption is set. Instead the intention is to identify and examine the technical application of the primary legal functions. Attention is given to recent changes in emphasis and to the balance now generally struck between public and private legal interests. The chapter goes on to examine the related legislative intent and assesses the consequences of exercising the legal functions for the parties involved in the adoption process. In this way a tool kit is assembled for use in later chapters to assess and track trends in the main operational aspects of the adoption process in other contemporary jurisdictions. The chapter thereby also provides a template against which the legal functions in the adoption processes of other countries, whether or not they share a common law heritage, can be compared and evaluated. This, in turn, will enable conclusions to be drawn later in the book as to the significance of the differing political contexts in which the adoption process operates.

K. O'Halloran (ed.) *The Politics of Adoption,*

The chapter begins with an overview of the adoption process. In particular, it considers:

- The regulatory framework
- The roles of determining bodies
- The roles of other administrative agencies
- The sequential stages of the adoption process and the nature and the weighting of different legal functions at each stage
- The legal criteria governing entry to and exit from the process
- The legal effects of an adoption order and
- The outcomes of the process for the parties concerned

Finally, the chapter concludes with a review of the changing place of adoption within the larger framework of family law.

3.2 Regulating the Adoption Process

While adoption in the U.K. has been firmly established as a judicial process, closely regulated, successful completion of which is marked by the issue of a court order, this is not necessarily the case in other jurisdictions. In Ireland, for example, proceedings are determined by an administrative body rather than by a court. In the U.S. the process is much less regulated: direct placements with an unrelated third party and placements by private commercial agencies are permitted. Whether or not adoption proceedings are judicial, however, the role assigned to mediating bodies is now almost always professional, intrusive and extensive and the entire process operates within a statutory framework.

This framework provides an important opportunity for influencing the balance between public and private interests. If appropriate standards are to be maintained and good practice promoted then an agency must be positioned to hold an overview of the workings of the adoption process. In the U.K. jurisdictions, both the local authority and the court undertake this role while in Ireland it falls to an Adoption Board.

3.2.1 The Adoption Process

Until relatively recently in most western societies the adoption process has existed simply as an extreme form of private family law proceedings. It was a process characterised by private initiative, the anonymity of its participants, and by the fact that one or more parties sought to bind the others to permanent secrecy. It aimed to achieve an artificial re-configuration of legal relationships between the participants, sealed by an unconditional adoption order that would be absolute, exclusive and permanent. It was an adoption process wrapped in a distinct aura of taboo. This

traditional adoption process usually permitted only one of two possible outcomes: an adoption order was either granted or it was refused; there were no alternative options available to the court.

When being treated as primarily a matter of private law, the adoption process was conducted in a non-intrusive manner. All the important decisions were taken before the application was brought before the court or other determining body. The latter then addressed the public interest dimension by ensuring that the welfare threshold was satisfied. In recent years, instead of the traditional all or nothing, private or public resolution of adoption proceedings, the law in many jurisdictions has developed to provide a longer, broader and more balanced response to adoption applications. An adoption process will now most usually consist of the following stages:

- Pre-placement counselling
- Legal procedures regarding availability of child, status of parties, consents, identification of any residual post-adoption rights etc.
- Placement of child
- Pre-application supervision of placement
- Legal procedures relating to application
- The hearing and issue of order/s, with or without attached conditions
- Post-adoption support services and
- Information disclosure, tracing and possibly re-unification services

As can be seen, the process is now often lengthened at commencement by a statutory pre-placement counselling stage during which adoption agencies are required to provide a counselling service to all birth parents whose consent is available or will be sought for an adoption and to such others as may be necessary. In the context of family adoptions, professional scrutiny is now frequently required. The process has also been extended at the closing stage by procedures governing the disclosure of information, use of contact registers, possible conditions attached to adoption orders and the opportunities for adoption allowances and other forms of ongoing support from government bodies. Moreover, it now encompasses a wide range and uneven mix of participants including: increasing numbers of children from other jurisdictions; children who have special social and/or health care needs; a growing proportion of parental applications and foster parent applicants.

The sequence of stages constituting the adoption process have become more distinct and are now governed by a mix of some prescriptive rules and large areas of professional discretion but otherwise the continuum has not undergone any substantive change. What has changed most significantly in many jurisdictions is the nature of the process. This has developed from being almost exclusively consensual to becoming increasingly coercive as regards authorising the availability of children. Although the degree and pace of this change varies from one jurisdiction to another: in Ireland, for example, it affects only a very small minority of annual adoptions. In general, contention, if not outright adversarial opposition, is now a not uncommon feature of the adoption process. This has been accompanied by other changes that have impacted upon adoption's traditional

hallmarks of absoluteness, exclusiveness, secrecy and permanency. These have necessitated adjustments to the regulatory role statutorily assigned to the determining body or agency.

3.2.2 Role of the Judiciary or Other Determining Body

The consequences of adoption for the legal status of all concerned have always been viewed in the U.K. and in the U.S., unlike some other jurisdictions such as Ireland, as of such significance as to necessitate the exercise of judicial rather than administrative authority.[1] This is often also a matter of practical necessity; as the non-consensual proportion of adoption applications grows so too does the need to involve the court to adjudicate on contentious legal issues. The role of the court or other determining body is to:

- Ensure that criteria of eligibility/suitability and status are fulfilled by all parties
- Ascertain consent or adjudicate on consent issues where necessary
- Check adherence to law, procedures and propriety
- Ensure the welfare of the child and
- Then make such order as may be appropriate

This role is usually supplemented by the responsibilities of other officials, such as social workers and a court officer such as the CAFCASS officer. The former will usually provide reports detailing the circumstances of the adopters and the family background of the child while the latter will be required to carry out an exhaustive investigation into all the circumstances of the proposed adoption. The court officer will interview all applicants and respondents including, where feasible, the child and ensure that any factor having a bearing on the welfare of the child is brought to the attention of the court.

3.2.3 Role of Administrative Agencies

The extent to which the law licenses or constrains those in a pivotal position to influence the finalising of an adoption 'contract' provides a valuable insight into the legal balance struck between public and private interests.

Adoption legislation generally contains few objective criteria; control over the adoption process has effectively been delegated to adoption agencies. In recent years that process has, in most modern western jurisdictions, become greatly

[1] In Ireland this function is administrative; adoption hearings and the decision to grant or refuse the order sought are matters for the Adoption Board. The High Court only has a role where legal issues, such as consent disputes, require adjudication; in all cases the final decision in relation to an adoption application is taken by the Adoption Board not the court.

contracted in terms of the numbers of applicants and babies involved while also becoming increasingly professionalised. The fewer children now being adopted, many in the course of contested proceedings and bringing with them complicated legal problems, receive attention from an increasing range of bodies and officials; their bearing on the process differing according to whether an application is 'family', 'agency' or 'intercountry'.

An adoption society or agency is the key professional reference point in the adoption process; in many jurisdictions these are now required to register with a designated government body and such registration is dependent upon ability to satisfy prescriptive standards. The emergence of consortia, umbrella bodies that co-ordinate the work and resources of several adoption agencies, are also beginning to exercise a significant influence on shaping policy and practice. An important development in recent years in the U.K., unlike other jurisdictions, has been the extent to which the traditional involvement of voluntary agencies in the adoption process has been displaced by statutory agencies. This reflects three changes in entry to the process: a sharp decrease in the number of babies available for third-party placements; a steady increase in first party applicants adopting a child to whom they are related; and increased access to the process by public bodies placing older children or those with complicated health/social care needs. The key professional functions of an adoption agency are likely to include:

- Assessing prospective adopters
- Providing pre-placement counselling for birth parents and where appropriate, for the children concerned
- Providing information to adopters on health, social care and well-being of children to be placed
- Arranging adoption placements
- Assessing and where appropriate meeting any need for post-adoption support services and
- Providing post-adoption counselling, information disclosure and tracing services

The actual range of functions undertaken by an agency is a good indicator of whether the adoption process of any given jurisdiction is primarily a public or private process. In the U.K., these functions are now much more likely to be implemented by the staff of a local authority than by a voluntary agency. In the U.S. voluntary or commercial adoption agencies now play a more prominent role at this crucial stage in the adoption process than state agencies. In Ireland, though a number of voluntary adoption agencies continue to practice, some are in fact wholly run as subsidiaries or agents of the Health Service Executive.

The local authority in England, or the equivalent public body in other jurisdictions, plays an additional and important role in relation to the adoption process. The statutory powers available to it for the registration and supervision of adoption agencies are again indicative of the public dimension as is the extent to which it acts as a feeder channel to the adoption process. In some jurisdictions that body will manage the child care context for permanency planning on behalf of children in need of long-term foster care, but will otherwise be positioned alongside and carefully distanced from

the adoption process. In others such a body will ensure that the adoption process is firmly embedded and integrated within its child care context. The difference between the two reflects a corresponding difference in the contemporary political approach to adoption that turns on whether it is to continue to be treated, as it has been traditionally, as primarily an aspect of private family law or is it now just another area of law which offers opportunities for addressing the welfare needs of children and where the public interest in safeguarding and promoting their welfare overrides other considerations. This distinction, together with its entailed rationale, consequences and possible culture linkages, provides a theme to be explored in this book.

The Registrar General, or equivalent official in other jurisdictions, has duties with a bearing on the adoption process, though in effect these are tied to a post-adoption role. At a minimum, these will allow for the collection of information sufficient to identify child, adopters, the date and place in respect of every adoption order issued.

3.3 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

Access to the adoption process is clearly crucial—Who may be a party to adoption proceedings? Who may be prohibited from participation? The conditions under which this may happen—comprise the acid test of how the public/private balance is struck. The eligibility and suitability criteria as applied to natural parents, the child and to the adopters gives effect to this balance. In almost all western jurisdictions, access to the adoption process is now subject to mandatory professional scrutiny to ensure that all parties meet the threshold criteria and that the placement is at least compatible with the welfare interests of the child. In the U.K., this role is performed initially by adoption agency staff in relation to all applications including 'family' adoptions and then by Adoption Panels in respect of all third party adoptions whether child care, intercountry or arranged by a voluntary adoption agency.

3.3.1 The Child

The child is the starting point and in all jurisdictions the law sets certain prerequisites for his or her entry into the adoption process.

Firstly, the subject must satisfy certain status requirements; traditionally, this focused on his or her 'legitimacy'. Now it is the child's legal status and their welfare interests, rather than the marital status of his or her parents, that are usually the primary determinants of eligibility for adoption; though not, for example, in Ireland where parental marital status is often the key determinant. At its most basic level,

status requirements in virtually all modern western jurisdictions include the necessity that the subject of proceedings meets the legal definition of 'child': he or she must be born and be less than 18 years of age; it is not possible to adopt a foetus; nor is it possible to adopt an adult (though, in this as in other aspects of the adoption process, the experience in Japan offers an interesting contrast, see further, Chap. 13). Additionally, many jurisdictions stipulate that a young person must not have been previously married though a previous adoption is not necessarily an obstacle. Moreover, the necessity of obtaining a fully informed and free parental consent imposes a minimum age requirement as some time must elapse from birth before a mother can be considered capable of making such an important decision; most usually the child has to be at least one week old. Where the child is of sufficient age and understanding then there is usually a legal requirement to either seek their views or to obtain their consent in relation to the proposed adoption; in either case this should be preceded by provision of appropriate information and advice as to all relevant rights.

Secondly, the subject must satisfy availability criteria by being amenable to the courts of the jurisdiction in which he or she is resident. It is usually not possible to lodge an application in respect of a child who is resident elsewhere and thus remains subject to the courts of that jurisdiction.

Thirdly, for most of the history of the adoption process, children in this and other jurisdictions have to satisfy explicit suitability criteria before entering the adoption process. Traditionally, in the U.K., Ireland, Australia and in the U.S. a suitable child was one who conformed to an archetypal model by being healthy, white, Caucasian, 'illegitimate' and a baby. Now the suitability threshold is implicitly higher for a child in the context of 'family' adoptions and lower as regards 'agency' adoptions. The lower suitability threshold is also now apparent in many jurisdictions by the active targeting of special needs children and those with complex behavioural or health needs for adoption coupled with special post adoption allowances and other forms of support. Most jurisdictions now require matters relating to the child's age, gender, religion, ethnic or cultural background and any special health or social care needs to be specifically addressed by the adoption agency involved. In the U.K. the agency's Adoption Panel is additionally required to be satisfied, except in relation to 'family' adoptions, that all such matters will be appropriately resolved by the proposed adoption.

In summary, for a child to enter an adoption process most contemporary western jurisdictions require the following criteria to be satisfied:

- The child must be a 'person' known to the law i.e., he or she must have been born
- The availability of the child must be appropriately authorised
- The child must also usually satisfy minimum and maximum age limits
- Conditions relating to residence/domicile etc. must be satisfied
- A professional assessment must indicate that adoption would be at least compatible with the specific needs and welfare interests of the child; and
- The consent of the child, where he or she is of sufficient age and discernment, must be obtained

3.3.2 The Birth Parent/s

In most western jurisdictions the appearance of a birth parent in adoption proceedings will be as either donor parent or respondent. In both instances there is usually a statutory requirement that the parent/s be professionally assessed by a registered adoption agency and have access to a counselling service. In the U.K., except for 'family' adoptions, the circumstances of the birth parent/s will also be scrutinised by an Adoption Panel.

In the former case, certain threshold requirements must be met by the relinquishing birth parent/s or legal guardian of a child. Eligibility criteria, for example, as demonstrated by being amenable to the courts though not necessarily resident within the jurisdiction, must be satisfied. Also there must be no evidence of illegal practices; in some jurisdictions this means that the selling or smuggling of children for adoption purposes is specifically prohibited. Whether married or not, in most jurisdictions any parent with full parental responsibility is entitled to voluntarily relinquish a child for adoption; though the consent of the other parent must be obtained or the need for it dispensed with. In some jurisdictions, such as Ireland, this is not the case as it is not legally possible for a married parent to abandon all rights and responsibilities in respect of their child; though, in a few extreme circumstances, these may be removed by court order. An interesting permutation, reflecting the different balance struck between public and private interests in modern western jurisdictions, is the nature and extent of any rights which the birth parent/s may exercise or retain when their child enters the adoption process. In some jurisdictions, such as Northern Ireland, the birth parent/s may determine the religious upbringing of their child. In others, such as New Zealand they have the right to choose the adopters. In the U.K. jurisdictions and elsewhere, although not for example in Ireland, adoption orders may be made subject to a condition granting rights of ongoing contact in favour of the birth parent/s.

In general, the law imposes least requirements where a child is being voluntarily admitted to the adoption process by his or her unmarried mother. The informed consent of the latter is the only absolute necessity; increasingly in modern western jurisdictions the involvement if not the consent of the unmarried father is also sought. Where the adoption is in respect of an overseas child, then evidence of that consent must be available to the court. Where the need for parental consent is obviated by permanent absence, death or by judicial removal of parental rights the court will instead require the consent of the person or body legally charged with responsibility for the child. In some jurisdictions legislation provides for circumstances in which consent may be revoked.

Traditionally 'legitimate' children could not be adopted within the lifetime of either parent, as this was viewed as undermining the legal integrity of the marital family unit. Usually, however, the law no longer draws such an inference. Provided evidence of legal status and the necessary consents are available, then in most jurisdictions any parent or parents, whether married or not, may enter the adoption process on a consensual or coercive basis; Ireland being a notable exception. Where the birth parent is appearing as respondent, for example a divorced father objecting

to the adoption of his marital child, the court is usually unable to make the adoption order unless statutory grounds exist for dispensing with his consent.

In summary, the role of the birth parent/s at point of entry to the adoption process will, in most contemporary western jurisdictions, require the following criteria to be satisfied:

- Ascertaining legal status regarding marriage, domicile, residence, parental responsibilities etc.
- Post-counselling consent of birth mother
- Notice served upon or consent of birth father
- Consent for disclosure of health information on child and
- Ascertaining any pre-conditions for adoption

3.3.3 The Adopters

Adopters, in particular, must meet the full rigour of threshold requirements; though the onus falls unevenly on applicants according to whether they are first or third party adopters.

Generally, third party applicants, with in the eyes of the law no inherent reason to offer love care and protection to a child to whom they are unrelated, are required to satisfy both eligibility and suitability criteria. The law governing this varies considerably from jurisdiction to jurisdiction. So, for example, in the U.K. both sets of criteria have traditionally been applied quite prescriptively, in the U.S. they have always been liberally interpreted while in Ireland considerable importance has been attached to an obligation placed upon adopters to ensure the religious upbringing of a child conforms with that of the birth parent/s. In the UK, the responsibility for ensuring that both sets of criteria are satisfied falls in the first instance to the adoption agency involved and then, except for 'family' adoptions, to the relevant Adoption Panel.

Eligibility criteria usually require adopters to satisfy statutory conditions relating to:

- Marital status
- Residence/domicile
- Income or financial means
- No evidence of having procured child by illegal means
- Character, or lack of serious criminal convictions and
- Minimum age

Suitability criteria are additionally required by adoption agencies and although varying to some degree depending on according to whether they are being approved for a specific child or more generally, these will include matters such as:

- Maximum age
- Religious and racial compatibility

- State of good health
- Appropriate motivation
- Quality and duration of relationships and
- Cultural background and lifestyle

In recent years certain practice and policy developments have driven some significant changes to the law as in relates to third party adopters. Firstly, a growing volume of intercountry adoptions attracting less rigorous professional scrutiny than other third party applications led eventually to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 which introduced specific legislative provisions that now regulate adopters in this context (see, further, Chap. 5). Secondly, a policy to maximise the number and range of child care adoptions forced a change in agency perception of adopter eligibility and suitability criteria in application to the often complex health and social care needs of the children in public care. This saw a change in professional emphasis from an 'adopter led' to a 'child led' approach. Instead of responding to applications by identifying 'normal' adopters to be carefully matched—in accordance with characteristics such as race, religion, class and physiological features—to 'normal' children, adoption agencies began to sift, sometimes actively recruiting, adopters according to their skills and aptitudes to cope with children with 'special needs'. In many jurisdictions, this has led to a broadening practice interpretation of eligibility and suitability criteria which has come to accommodate adopters who differed from the traditional type by being perhaps older, single, mixed race or of gay or lesbian sexual orientation. Again, in many jurisdictions, the increased availability of post-adoption support services also eased access to the process.

First party applicants, however, have traditionally attracted a relaxed approach: eligibility criteria were viewed as unlikely to be contentious and suitability criteria as unlikely to be relevant as the child would, in any event, almost always remain in the care of the applicants—much the same approach is currently evident as regards applications by long-term foster carers. An increase in the rate of family breakdown and with it the rise in serial parenting arrangements has seen the adoption process in many jurisdictions being used more by birth parents to secure rather than relinquish rights to their children. In response, many such jurisdiction have in recent years been enacting laws requiring first party applicants to demonstrate that adoption, rather than any other order, is a better means of promoting the welfare of the child concerned.

3.4 Pre-placement Counselling

It is a requirement of the law in general that any consent must be informed and given freely with a full appreciation of the consequences. In the context of the adoption 'contract' this often requires a counselling service to be made available to all parties at least for that purpose but most usually also for the purpose of assessing any

needs, support or service requirements they may have as they prepare to enter the adoption process. The counselling is not always provided by the agency responsible for placing the child, indeed this would often be unwise, but that agency is usually the one responsible for ensuring its provision. Most jurisdictions now have legislative provisions requiring that pre-placement counselling services be offered to all parties.

3.4.1 The Birth Parent/s

Pre-placement counselling services are most usually arranged, if not provided, by adoption agencies and directed towards the birth parent/s of children the agency is considering placing for adoption; traditionally a service associated with the needs of unmarried mothers. In most jurisdictions the provision of this service is now a statutory requirement to be offered to both parents regardless of their marital status; although in relation to fathers, the duty is sometimes restricted to the provision of counselling services to those with legal parental responsibilities. At a minimum the service entails advising the parent/s as to the legal consequences of any adoption decision taken in respect of their child, providing the information necessary and ensuring that this has all been fully understood. It also entails exploring with them all feasible alternative options and, insofar as the law of the jurisdiction permits, establishing whether the parent/s wish to exercise any residual rights in relation to their child such as to maintain a level of contact or determine nature of religious upbringing. It may extend to offering a therapeutic relationship enabling the parent/s to work through their feelings and be reconciled to the decision taken. The duty to provide this service now falls mainly on public care agencies and is most often directed towards the birth parent/s whose child is to be the subject of a compulsory adoption placement by that agency. In such cases parental consent is not always an issue but in all other cases the onus rests on the service provider to satisfy themselves that a fully informed consent has been given and given free from any undue pressure.

3.4.2 The Child

Where the child concerned is of an appropriate age and level of understanding, then there is usually a statutory requirement that the adoption agency involved at least seeks their views and ensures that a counselling service is provided appropriate to that child's needs. Again, the service is directed as a minimum towards ensuring that appropriate information is made available, that all feasible options are explored and that the child has an understanding of the consequences that will follow from the making of an adoption order. The counselling will take into account any issues arising from the child's age, gender, religion, ethnic or cultural background and any special health or social care needs. In relation to a 'mature minor' the duty may be

to establish whether he or she fully consents to the proposed adoption in addition to the obligation to provide a counselling service. The latter may extend to exploring the child's attitude towards maintaining contact with members of his or her family of origin. It will involve advising the child regarding any rights the law of their jurisdiction may provide in relation to matters such as contact conditions and post-adoption access to information. Such work is often viewed as requiring a high level of skill and may necessitate the involvement of specialists.

3.4.3 The Adopters

Again, most jurisdictions impose a statutory obligation upon adoption agencies to provide such counselling as is necessary to ensure that prospective adopters fully understand and accept the legal consequences that will follow from the making of an adoption order. This duty will usually require the agency to satisfy itself that the prospective adopters appreciate the effects of an adoption order on their rights and responsibilities in relation to matters such as care and protection, inheritance and citizenship. It will entail ensuring that they understand and are willing to comply with any possible conditions that may represent the ongoing legal rights of others in relation to matters such as contact and religious upbringing. It will explore their knowledge of and entitlement to any available professional support services, adoption allowances etc. The counselling should also address issues of willingness to share information with the child as to his or her family and perhaps culture of origin and their acceptance of the child's eventual right to access information held in agency files. The prospective adopters will most usually have counselling opportunities available to them in the context of their relationship with the assessing and/or the placing adoption agency (where, as in intercountry adoptions, these are the functions of separate agencies).

3.5 Placement Rights and Responsibilities

In practice, a child enters the adoption process when he or she is placed with prospective adopters. This placement decision must be taken by a person or body with the requisite authority; an initial consent is a legal necessity.

3.5.1 Placement Decision

Traditionally this decision was a private one taken by birth parent/s or guardian, due more to a presumption that this was essentially a matter of private family law rather than that it offered the best way of serving the child's welfare interests. It was

sometimes implemented by a direct placement or by placement through the good offices of an intermediary. It was most often implemented in favour of a third party or stranger but not infrequently a relative such as an uncle or grandparent was the parental choice for placement. It necessitated a complete change in the child's living environment. In some jurisdictions, such as in New Zealand and certain states within the U.S., choice of placement may still be determined by the birth parent/s. In the U.K. jurisdictions and in most other modern western nations, this traditional right has been statutorily removed and replaced by a requirement that the placement decision is taken by a registered adoption agency.

Nowadays, in many jurisdictions, the majority of such decisions are still taken privately, by birth mothers supported by their spouses, but these are decisions to adopt rather than to relinquish the children concerned. Whereas most adoption decisions are still authorised by birth parents, they now do not necessarily entail a change of placement. This interesting dimension to the politics of adoption, perhaps a residual legacy from an era when this area of law was firmly designated 'private' and parental decisions were almost sacrosanct in law, is one which will provide a focus for discussion in this book.

In addition, in all jurisdictions a growing proportion of decisions are public policy driven. Most evident are those relating to children in public care. In the U.K., following policy developed in the U.S., specific statutory grounds for dispensing with parental consent and authorising an adoption placement despite parental opposition have been in place for some years (see, further, below). Decisions taken by the courts—subsequent to child care proceedings initiated by health authorities on the grounds of parental abuse, neglect or inadequacy—are now determining the placements of many children. Judicial decisions, however, are preceded by those of child care professionals which in some jurisdictions, such as those of the U.K., are in turn based upon the recommendations of an Adoption Panel. To this body falls the responsibility to assess and make recommendations regarding all child care and intercountry adoption placements. Again, as mentioned earlier, for the purposes of this book, state driven non-consensual adoptions provide an important theme differentiating the jurisdictions studied that requires analysis.

The policy initiatives of foreign jurisdictions have also played a significant role in fuelling the rise in numbers of intercountry placements. For example, in China the introduction of the government policy to strongly recommend limits to the number and gender of children born to marital couples and the policy of the Romanian government to make available the occupants of its state orphanages to foreign adopters have both directly led to many thousands of placements for children in home environments far removed from their kin and cultural context of birth.

3.5.2 Placement Supervision

In most jurisdictions there is a legal requirement to ensure that an adoption placement is safeguarded until such time as a court or other body determines whether or

not an adoption order is to be made in respect of the child concerned. The duties to safeguard the child's welfare interests rest most rigorously upon all placement agencies but apply also, though with less intrusiveness, to family adoptions from notification to hearing. Most usually, once made the placement cannot be terminated without prior approval of the placing agency or court.

3.6 The Hearing and Issue of Order/s

In most jurisdictions, although not in Ireland, the hearing of an adoption application is a judicial process. Whether judicial or administrative, satisfying the statutory grounds relating to eligibility, suitability and consent will itself be insufficient to allow the process to conclude with a granting of the order sought. Whereas any contested application will fail because the statutory grounds have not been met, no contested or uncontested application (even where the grounds have been met) will succeed unless the court is assured that the welfare test is also fully satisfied. Applying the test may result in the issue of an altogether different order or no order at all.

3.6.1 Where Consent Is Available

Adoption in the U.K. and elsewhere was traditionally a largely consensual process. Where the necessary consents were available or could be dispensed with and all statutory criteria were met, then no obstacle existed to prevent a court or similar body from concluding the adoption process by granting the order sought. Nowadays in most jurisdictions the informed consent of an older child, the subject of proceedings, will also be sought; though this is not always regarded as determinative. In many jurisdictions, the availability of all required consents will not necessarily prevent consideration of whether an order other than the one sought would not offer a more appropriate means of ensuring the welfare of the child concerned.

The issue of consents is, again, a revealing indicator of the public/private balance politically struck by a government when regulating the adoption process and as such will form a component in the comparative assessment of the jurisdictions studied.

3.6.2 Where Consent Is Not Available

In recent decades, non-consensual adoption applications have become a prominent feature of the law in many countries. Adoption law, in modern western jurisdictions, now often provides specific statutory grounds for dispensing with parental consent

on grounds of child neglect or abuse as well as on the traditional grounds of parental absence, incapacity or death. Allowance is also generally made for contested family adoptions.

3.6.2.1 Grounds in Child Care Adoption

In the context of third party adoptions, the specific synchronisation of some grounds for dispensing with parental consent with those of child care legislation is a very significant development in modern family law. The effect of introducing grounds of parental fault, closely aligned to those already established in public child care legislation, as justifying an application for freeing or for adoption has finally bridged the gap between the public and private sectors of this law. The rights of an abusing parent who falls foul of statutory care proceedings may now not only be qualified by the issue of a care order but may also be abrogated by an adoption order. From statutory origins based on serving the private parental interests of a closed nuclear family unit, the legal functions of adoption in most jurisdictions have now been strategically re-positioned to openly serve a public interest in rescuing a child from parental abuse and providing permanent alternative family care.

3.6.2.2 Grounds in Contested Family Adoption

In the context of first party adoptions, non-consensual applications also pose a fundamental dilemma for the policy, law and practice of modern western jurisdictions. As parenting becomes less marriage based and features looser ties with extended family networks, transient home and locality links and serial care arrangements, the circumstances in which it can be safely predicted that the permanence and exclusive nature of an adoption order will be an appropriate legal intervention in private family relationships are decreasing. The use of adoption as an extreme form of parental custody order is becoming a policy issue in many countries. Some jurisdictions, such as England & Wales under its new adoption legislation, now provide a statutory power for alternative orders to be made as indicated by the welfare interests of the child concerned, in either public or private family law, at judicial discretion.

3.6.3 The Orders Available

Adoption being traditionally regarded as a matter of private family law, it was often customary to legislatively provide the judiciary with the power to make an alternative private law order in the rare event of an adoption application not succeeding. Some jurisdictions provide such a power to be used in circumstances where the grounds for adoption have not been satisfied but those for an alternative order in private or public law can be met. Yet again, there are jurisdictions where the matter is left

totally to judicial discretion; the order to be made is the one which is most appropriate to the welfare interests of the particular child.

3.7 Thresholds for Exiting the Adoption Process

There is no general right to adopt or to be adopted.[2] In all modern western jurisdictions, the legal function applied by the court or similar body in concluding adoption proceedings is that of making a determination which is at least compatible with the best interests of the particular child. This 'welfare test' universally provides the single over-riding threshold criterion for exiting the adoption process.

3.7.1 The Welfare Interests of the Child

Whether an adoption order can be made is determined in accordance with the statutory criteria relating to eligibility, suitability and consent. Whether it will be made is determined by the welfare test. The welfare test in adoption proceedings has three functions:

- It identifies the 'substance' of welfare in relation to the child concerned
- It indicates the professionals required/permitted to bring welfare related matters before the court and
- It defines the weighting to be given to such matters, relative to others, in deciding whether or not to make an adoption order

Firstly, the making of an adoption order is conditional upon a finding that to do so would be at least compatible with the welfare interests of the child concerned; which entails a careful analysis of matters constituting the particular welfare interests of that child. The wishes of an older child regarding his or her proposed adoption have to be ascertained and taken into account. Expert witnesses may be called to give evidence and that evidence may have a determining weight. Whether contested or not, information on matters constituting welfare interests will invariably be required by the court or other such body before any decision is taken.

Secondly, in most jurisdictions the duty to bring welfare considerations before the court rests heavily on a range of specified agencies and/or on such court officers as a guardian *ad litem*. Usually this duty necessitates completion of comprehensive reports detailing the family background and needs of the child, his or her views—where appropriate—regarding the proposed adoption and a professional assessment of the probable outcome for the child if the order is made. In some jurisdictions there are legislative provisions requiring the legal representation of a child's rights

[2] See, the findings made by the ECtHR in this respect, for example in *X v. Belgium and The Netherlands* Application No. 6482/147 (1975) 7 DR 75 and *Pini and Others v. Romania* [2004] EHRR 275; also, see further, Chap. 4.

and welfare interests before determination of an adoption application can be made.

Thirdly, the weighting given to the welfare factor in adoption proceedings has always been a contentious matter reflecting the balance struck in any jurisdiction between public/private interests and parent/child rights in this area of family law. Traditionally in the U.K., both legislative intent and judicial practice have painstakingly differentiated between the paramount weighting given to welfare interests in child care proceedings and a lesser weighting ascribed to such interests in adoption proceedings. While in England this distinction has now been statutorily erased following a government policy initiative to expedite child care adoptions, it continues in Northern Ireland where the law has not yet been similarly amended and it has long prevailed in the Republic of Ireland. The weighting given to welfare interests will also usually differ to some degree in relation to the class of applicant. So, first party applicants may not be subject to the same level of pre-placement scrutiny as third party applicants while non-consensual applicants may find their adoption order qualified by a contact condition imposed to safeguard an aspect of a child's welfare.

3.8 The Outcome of the Adoption Process

In all modern western jurisdictions, legislative intent began by being almost exclusively concerned with regulating the consensual third party applications of indigenous, healthy and in all respects 'normal' non-marital babies. From that common starting point each jurisdiction has steadily adjusted its legislative provisions in response to the pressure from emerging areas of common social need which has inevitably led to a change in the balance struck between public and private interests. It is the nature and extent of the adjustment made that reveals the particular underlying political pressures and provides an important measure to differentiate between the jurisdictions studied.

3.8.1 Adoption Orders and Third Party Applicants

This, the type of order originally legislated for, has everywhere declined both in aggregate and as a proportion of total annual orders.

Unconditional, consensual, third party adoption orders now form a minority of the annual output. This is so despite the fact that orders in respect of children from overseas are of increasing numerical significance and those made in respect of children suffering from learning difficulties, physical disability or behavioural problems are becoming more common. Unconditional but contested adoption orders, where the opposition is from a culpable parent or parents, form a significant and growing proportion of annual orders made. The child concerned will often be the subject of a care order and may well be 'legitimate'.

Conditional adoptions, usually permitting contact with a member of the adopted child's family of origin but sometimes requiring a specified religious upbringing, now constitute a growing proportion of annual orders. In most jurisdictions, qualified orders are becoming a characteristic of the adoption process in that they represent an increasing public commitment to acknowledge and promote the independent interests of a child, over and above the interests of birth and adoptive parents, before and after the issue of an adoption order. This is also apparent in the statutory provision of post-adoption support services which again indicates a recognition that the long-term welfare interests of an adopted child may well require to be sustained by public resources.

3.8.2 Adoption Orders and First Party Applicants

In most modern western jurisdictions, unconditional consensual orders in favour of first party applicants have for some years constituted the main outcome of the adoption process. Except in Ireland, these orders are likely to be in respect of children who are 'legitimate'. They often concern older children and, because such applications are open to professional and judicial challenge on their merits, some are likely to be diverted to other proceedings. A characteristic of such adoptions in many jurisdictions is the fact that some orders will also be made subject to a contact condition.

3.8.3 Adoption Orders and Relatives

A feature of the adoption process in many contemporary modern jurisdictions is the growing minority of orders now made in favour of grandparents. These applications are susceptible to professional or judicial challenge.

3.8.4 Other Orders

The outcome of a small but growing proportion of adoption proceedings is now likely to be the issue of an order other than the one sought. In the U.K. and in Ireland, whether contested or not, an adoption application may at judicial discretion conclude in the issue of a different private law order.

3.9 The Effect of an Adoption Order

In most if not all jurisdictions, the traditional outcome of the adoption process for many generations was either no order or a full order with its characteristic permanent, exclusive and absolute legal effects on all parties. This has been

dramatically changed in all modern western jurisdictions by the statutory introduction of information rights, contact registers, schemes for payment and support and the possibility of conditions being attached to adoption orders or the issue of alternative orders. In particular, the traditional consequences of an order on the legal status of the parties involved have also changed.

3.9.1 Effect on the Child

Generally, the law in most jurisdictions states the primary effects of an adoption order to be that thereafter the child's legal status cannot be anything other than 'legitimate', he or she will bear the surname of the adopters and in all respects is to be treated in law as their child. Because the child's status is thereafter defined by that of the adopters so also for the duration of childhood, are all matters of residence, domicile and nationality. The succession rights of an adopted child are usually expressly addressed by legislation and provide that for most purposes there should be no distinction between the inheritance rights of a parent's natural and adopted children. Usually, also, such legislation provides that adoption does not affect the law relating to marriage and incest (i.e. an adopted person may not marry anyone he or she would have been prohibited from marrying if the adoption had not occurred). In short the legal effect of an adoption order on the status of the child concerned will most usually be:

- Prevention of 'illegitimacy'
- Assumption of the same name, residence, domicile and citizenship as the adopters
- Assumption of the same inheritance rights as an adopter's birth child and
- The acquisition of such rights as may be attached by condition to the order

These legal incidences of adoption invariably apply regardless of the type of adoption (e.g. 'open' or intercountry etc.) and will prevail throughout childhood.

3.9.2 Effect on the Birth Parent/s

Again, in most jurisdictions the law states the primary effects of adoption on the birth parent/s to be the abrupt, permanent and absolute termination of their rights and responsibilities in respect of the adopted child. It will also operate to extinguish any court order relating to the child and any agency directive requiring payments for the child's maintenance or upbringing. The law is not always as certain regarding the right of the child to inherit from the birth parent/s; in some jurisdictions the adopted child will retain the right to benefit from the estate of the birth parent/s unless specifically excluded. However, for most purposes the birth parent/s will be

treated in law as if the child had never been born to them. In summary, the main legal effects of adoption on the birth parent/s are to:

- Terminate all parental rights and responsibilities
- Extinguish any court order imposing any liability upon them in relation to the child
- Remove any obligation to provide for the child by will or testament and
- To grant such rights as may be attached by condition to the order

3.9.3 Effect on the Adopters

The law in most jurisdictions states the primary effect of an adoption order on the adopters to be the vesting in them of all parental rights and responsibilities in respect of the adopted child. There is usually a specific legislative provision declaring that in any will, testament or in the event of intestacy, in the absence of any statement to the contrary, the estate of the adopters will devolve to the adopted child as though the latter was their birth child. For most purposes the birth parent/s will be treated in law as if the child had been born to them, though in some jurisdictions exceptions are made to the rules relating to consanguinity so as to permit marriage within degrees of blood relationship that would otherwise be prohibited. The main legal effects of an adoption order on the adopters are to:

- Vest in them all parental rights and responsibilities, subject to such constraints as may be specified in any attached condition/s and
- Create a presumption of entitlement to inherit from their estate

3.10 Post-adoption Support Services

Traditionally, in keeping with the essentially private nature of adoption, once an order was made then the door was closed on the newly formed family unit, professional intrusion into its affairs ended and no further contact with public service agencies was anticipated. However, in recent years there has been a growing recognition that such families should be entitled to call upon the state for ongoing support services as required. As many jurisdictions began to accommodate and give effect to a policy of increased use of adoption as a resource for public care bodies, it has become customary for the latter to facilitate this by providing such short or long-term support services as are likely to sustain the child within that care arrangement. Currently, these support services are usually confined to third party rather than first party adopters and are only occasionally extended to benefit the birth parent/s.

3.10.1 Child Care Adoptions

In a child care context, the making of an adoption order marks a double change in the status of the child concerned. He or she is legally transplanted not only from one family to another but also from public to private care. In modern adoption practice and particularly in the context of child care adoption, this transfer is no longer between two necessarily mutually exclusive settings. The child adopted from a public care background is likely to differ from the subject of a traditional adoption by being older, have special health or social care needs and to have formed attachments necessary for promoting his or her post-adoption welfare interests. In all modern western jurisdictions there is now a much greater willingness on the part of adoption agencies, courts and the families concerned to facilitate a carry-over of those relationships, services and professional input deemed important for the welfare of the child in their post-adoption life.

Adoption allowances are the most common form of support service and have a particular significance for child care adoptions. In the main they are used to continue the support provided to carers under the foster care allowance scheme before they elected to adopt the child they previously fostered. Allowances are also important in securing and supporting adoption placements for those requiring particularly high levels of attention, such as disabled children, sibling groups or those with complex health care or special needs. In many jurisdictions counselling services are quite prevalent, particularly in the increasing number of cases where ongoing contact arrangements are in place to maintain relationships between the adopted child and members of their family of origin. The provision of other specialist services tends to vary in accordance with the particular needs of the children adopted but may include respite care, the services of psychologists and psychiatrists, occupational therapy, speech therapy and possibly nursing care. At a minimum, however, post-adoption support services will consist of:

- Adoption allowances and
- Counselling services

3.11 Information Disclosure, Tracing and Re-unification Services

The traditional guarantee of absolute and permanent confidentiality, given by an adoption agency to a mother voluntarily relinquishing her baby for adoption, has become steadily diluted in all modern jurisdictions in recent years. An adopted person now generally has the right to information about the fact and circumstances of their adoption, the means for accessing that information and an entitlement to related counselling services. The statutory introduction of information disclosure procedures, contact registers, tracing and re-unification services have transformed some of the more traditional characteristics of adoption.

3.11.1 Information Rights

In most jurisdictions information disclosure is associated with rights of the adopted person rather than with the needs of adopters or the natural parent/s. This right is generally restricted to the adopted adult. For an adopted child, that is where such a young person has not reached the age of 18, it would be most unusual for him or her to have a statutory right to access birth records.

Legislative provisions and procedures enabling an adopted person to acquire by right information relating to the circumstances of the adoption have now been introduced in many countries. So, an adopted person under the age of 18 and intending to be married may apply to the Registrar General, or other such body, for a declaration that the intended spouse is not within the prohibited degrees of relationship for the purposes of marriage law. An adopted person over that age usually has the right to make a similar application for a copy of their original birth certificate and has a right of access to information relating to the circumstances of their adoption. For an adult adopted person seeking to access information about his or her sperm donor father, however, where relevant legislation exists this can vary considerably among modern western jurisdictions.

Prospective adopters are generally entitled to full disclosure of information relating to any child placed with them, or approved for placement with them, for adoption purposes. The birth parent/s generally have no rights to access information relating to the adopters identity nor to the post-adoption circumstances and whereabouts of the child.

3.11.2 Information Disclosure Duties

In addition to the above statutory duties of the Registrar General, or similar government body, it is now also customary to have information disclosure obligations placed upon such other relevant bodies as the courts and public health care agencies. However, it is the adoption agencies that are central to the adoption process and serve as the primary repository for all adoption information.

By virtue of its initial critical role with at least the birth parent/s and child if not also the adopters, the adoption agency will later be the primary source of information relating to the personal history and circumstances of those parties. For the adopted adult seeking access to information and perhaps to relatives associated with his or her birth family, through the statutory procedures available, all avenues will lead back to the relevant adoption agency. The usefulness of the disclosure procedures will be wholly dependent upon the amount and quality of information recorded and held on file by the agency. In most jurisdictions there are now legislative provisions requiring adoption agencies to maintain their records for a specified minimum period; usually not less than 50 years (see, further, Part III).

3.11.3 Tracing and Re-unification Services

For some adopted persons access to information is not enough and contact is sought with a relative, most usually a birth parent, who may well have reciprocal needs. Many jurisdictions have introduced 'contact registers' as a means of facilitating the mutually compatible needs of these parties. The purpose of such a register is to hold and co-ordinate information relating to desired contact between adopted persons and members of their family of origin. Right of access to the register is invariably restricted to adopted persons of not less than 18 years of age: any public inspection and search of the registers, books and records are prohibited. The usefulness of this service is restricted to situations where there is matching information in the contact register; many birth parents choose not to be contacted and do not file information.

The next step for many adopted persons is to attempt to meet with their birth parent/s; though the latter may also initiate this process. Most jurisdictions now have a statutory or voluntary procedure whereby the relevant adoption agency will undertake to trace and contact the relative and relay the request for a meeting. Where both parties agree, it is probable that the agency will effect introductions and mediate at least in the initial encounters.

3.12 Adoption Within Family Law

In modern western societies, being a parent is now largely a matter of private individual choice. Serial parenting arrangements, together with the medical developments which allow adults to choose or reject the option of parenthood, have undone the centrifugal significance that the nuclear marital family once had within the body of private family law. In public family law, an increase in the incidence or detection of child abuse and neglect has led to the development of ever more pervasive interventionist strategies by public child care agencies in relation to families. On both the private and public fronts there has been a retreat from the traditional presumption that the legal integrity of the family should be upheld and a falling back to the safer ground that however families constitute or re-constitute themselves they must ensure the welfare interests of any child involved.

Adoption is intimately linked to the different public and private proceedings that constitute family law. While it has traditionally reflected the principles of private law, in many modern contemporary western societies it now embodies and is being shaped by the more pervasive principles and pressures influencing practice within the broad body of family law. Adoption has come to incorporate principles drawn from the public and private sectors and this enables it to bridge them both and to perhaps play a key role in bringing a new coherence to law, policy and practice in this area.

3.12.1 Adoption in Its Traditional Family Law Context

Traditionally, adoption was the ultimate private family law proceeding; no other order in public or private family law had such an extreme effect. It was wholly a creature of private law: initiated by private applicants; allowing for minimum professional intrusion; and concluding in an order that resolutely sealed the private boundaries of the new family unit. Arguably, this was strongly associated with the dominant patriarchal model of the family unit as upheld by Victorian society, entrenched in legislation and vigorously defended in the courts. A legacy that thereafter endured in the legal importance attached to status, to the integrity and autonomy of the family and in the significance of rights of inheritance, perpetuation of the family name etc. The role of adoption and the functions it was initially legislatively established to serve in western society may be viewed as intimately tied to the Victorian legacy of the patriarchal family unit.

In recent years, status in family law has become a much more elastic concept. Illegitimacy, marriage, divorce, residence, 'child of the family' etc. are among many examples of designations which have now largely lost their clear and almost immutable capacity to define the status of parties which they held for generations in the family law proceedings of many jurisdictions.

Initially, the law was concerned to recognise and protect the marital family unit as the necessary foundation for society and the essential prerequisite for a body of family law. The private sanctity of this unit was afforded special protection. The law regarded status as emblematic of certain specific sets of rights and duties thereby vested in adults and defining their personal and private legal capacities. Private family law and the statutory processes for conferring or extinguishing status were limited in number, clearly defined, absolute and permanent in their effects and rigorously policed by the courts. Public family law was non-interventionist and largely directed towards policing parental behaviour that threatened or did not conform to the norms represented by the marital family unit.

As times changed in modern western societies the emphasis moved away from protecting the special position of the marital family unit, and the concomitant status of the parties concerned, towards protecting instead the welfare interests of children. Family law in those societies is now primarily concerned with giving effect to the public interest in safeguarding the welfare of any child who may be affected by the outcome of status related proceedings whether these are public or private. This provides an interesting point of contrast with other societies, particularly those of the more conservative Islamic world, which will be explored in this book.

3.12.2 Adoption in the Context of Modern Public Law Proceedings

In most western jurisdictions, the state as 'guardian of last resort' continues to undertake its traditional duty to provide for the public care of children in circumstances where private care is impossible: usually where parents are dead, missing,

cannot exercise proper control; or have been convicted of abuse, neglect or of otherwise failing to exercise adequate care and protection in respect of their children. More recently, in keeping with the ethos of 'partnership' between child care agencies and parents, such care may also be provided with parental consent; usually for reasons of parental respite, training or illness. In either case the law has usually been at pains to ensure that the limited and specific duties of public child care agencies should not be convertible into a power to make a compulsory adoption placement. Parental consent has been upheld as the essential legal passport for a child to pass from public care to private family via adoption.

In many contemporary societies this is no longer the case. Equating the grounds for entry to public care with those of non-consensual third party adoption has been a most significant development for family law as a discipline. This policy is one that now clearly differentiates the family law of modern western jurisdictions.

3.12.3 Adoption in the Context of Modern Private Law Proceedings

In most jurisdictions, the legal functions of adoption were legislatively defined and carefully separated from those of such other private law proceedings as guardianship, wardship and matrimonial proceedings; each occupied its own separate well-defined and discrete space within the body of private family law. The legal functions of each were tightly contained, exercised on a once-off basis to achieve permanency in the status awarded by their respective orders. The emphasis was on clarifying the rights and duties of spouses and parents in proceedings initiated by them and in which professional or other agency intrusion was minimal. The legal functions, where they concerned the interests of children, were more about them than for them.

This has greatly changed in most modern western jurisdictions. Adoption is now closely aligned to matrimonial proceedings: the legal functions of the former most often being used as an adjunct to the latter; to assimilate the legal status of either a pre-marital child or one from a previous marital relationship. Other proceedings for broad grants of authority, such as in guardianship and wardship, have largely been displaced by a narrower range of more specific orders that now offer a variety of options dealing with matters such as where and with whom a child is to live, contact arrangements, prohibited conduct etc. Further, the *locus standi* of parents, traditionally central to those proceedings, is being challenged by a new recognition accorded to those who bear direct and continuous care responsibility, whether or not they are related to the child concerned.

Although an adoption order continues to alter the status of the three parties involved, the order itself has changed. Its previous draconian effects have been ameliorated by the statutory introduction of possible qualifications. Instead of vesting/divesting wholly and permanently all incidents of status, an adoption order may now provide for an arrangement which permits a sharing of status attributes. This

is indicative of a more generalised and international movement to the same effect in family law as a discipline.

3.12.4 Adoption and Contemporary Family Law Principles

The contemporary concept of 'family' in modern western society has changed considerably from the Victorian patriarchal model, resting on monogamous marital union for life, on which the family law of such a society was constructed. The U.N. now defines 'family' as:

> Any combination of two or more persons who are bound together by ties of mutual consent, birth and/or adoption or placement and who, together, assume responsibility for, *inter alia*, the care and maintenance of group members through procreation or adoption, the socialisation of children and the social control of members.

The legal functions of adoption are indicative of those occurring elsewhere in family law as the entire body of law becomes slowly more integrated around certain key principles.

3.12.4.1 Welfare of the Child

In all modern western jurisdictions, there is now an unmistakable emphasis on ensuring that family law proceedings satisfy a general public interest requirement that all arrangements for the future upbringing of children are subject to much the same controls and supports and are tested against other options before they are legally sanctioned by court order. Mostly, this is evident in the use of the welfare principle to ensure that private and public proceedings are subject to the test that the outcome secures and promotes the welfare interests of the child. This may entail compromises to the order issued by the court that would not have been previously countenanced in neither private nor public family law. From a position where the welfare principle was accorded a paramount weighting in a restricted number of proceedings and in relation to specified matters, it is now gradually permeating all family law in most jurisdictions.

3.12.4.2 Rights of the Child

The powerful influence of Convention rights and case law has in recent years made this principle of central importance to the family proceedings of all modern western jurisdictions.

The step from welfare interests to rights is one which has been made in order to equip children to take their place in an adversarial court system where the numbers of adult litigants, the costs and the shortage of court time might otherwise cause their interests to be treated in a cursory, subservient and paternalistic fashion.

The fact of party status, entitlement to legal aid, access to a range of professional support and representation and full exposure to the dynamics of adversarial family law proceedings are among the more prominent accompaniments of a rights approach. The balance to be struck between a child's welfare interests and their rights is a contentious issue, indicative of significant differences in cultural values, for many jurisdictions.

3.12.4.3 Parental Responsibility

The increased salience given to the interests and rights of children in the family law of modern western jurisdictions has been accompanied by a corresponding decline in the traditional central importance attached to parental rights. The displacement of rights by the principle of parental responsibility has marked a shift in emphasis in family law from structure to content, from status to protection; parents are legally empowered to re-configure their adult-to-adult relationships but have the duty to do so in ways that enable them to continue being responsible for their children. The new priority given to protecting the welfare interests of children has led to a hardening of the onus on those in a position to afford that protection. Certain concepts such as 'fault' have lost their traditional currency; spouses and parents will in law be held accountable for the consequences, whether intended or not, of their actions or inactions. Other concepts such as 'unreasonableness' now pervade family law as indicators of failure to uphold the responsibilities of spouse or parent and justifying removal of their rights as such.

3.13 Conclusion

Adoption—law, policy and practice—represents in a particularly intimate and fundamental way the essential characteristics of a society and its cultural context at a specific time and developmental stage. The social functions of adoption reflect the society of which it is a part and are adjusted by it in response to emerging pressures. The legal functions of adoption, being internally referenced and remaining relatively fixed, retain their basic characteristics. This chapter has identified the sequence of stages that constitute the modern adoption process and the range of essential and possible legal functions that are available to give effect to the legislatively determined purposes of each stage. In so doing it has outlined a template to be applied in later chapters to identify and explore the permutations that constitute the legal functions of adoption in other jurisdictions and so permit a comparative evaluation of its social role.

While this template is one constructed from a U.K. perspective for application to essentially common law jurisdictions, it is suggested that it nonetheless provides a useful tool for exploring the makeup of adoption processes in other quite different societies. The checklist of components constituting the U.K. regulatory system are

used to identify points of similarity and difference between that system and those of the other countries studied in Parts III–V of this book. This exercise generates the material for a subsequent comparative evaluation of jurisdictional differences and their political significance.

Chapter 4
Adoption, the Conventions and the Impact of the European Court of Human Rights

4.1 Introduction

National adoption proceedings take place within an overall context of rights, duties and principles set by provisions of international law. In England & Wales for example, when applying the provisions of adoption legislation to the circumstances of any particular case, it will now often be necessary to also have regard not only to relevant domestic legislation, such as the Children Act 1989 and the Adoption and Children Act 2002, but also to international treaty law and principles and to a rapidly expanding body of international case law. The international legal context must be taken into account when examining all the jurisdictions studied but the Conventions have a particular bearing on the domestic adoption law of Sweden, France and Ireland.

'Convention law' is usually taken as a reference to either the United Nations Convention on the Rights of the Child 1989 or the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[1] or to both. In fact the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 together with the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986 and, most recently, the European Convention on the Adoption of Children 2008, are also very relevant, though of different weight, as they provide the framework for regulating intercountry adoption (see, further, Chap. 5). All these Convention instruments contribute to the building of an international rights context for the adoption of children. They also further the growing international harmonisation of principles and processes in family law.

This chapter is primarily concerned with examining how the modern development of the policy, law and practice of adoption has been influenced by the European Convention of 1950 and the decisions of the European Court of Human Rights. It also considers, though to a lesser extent, the United Nations Convention of

[1] See, further, http://www.unicef.org/crc/ and <http://www.echr.coe.int> respectively. Also, note that the Council of Europe, on 03.05.02, adopted the Convention on Contact concerning Children; see, <http://convention.coe.int>.

K. O'Halloran (ed.) *The Politics of Adoption,*

1989. As the unfolding of various Conventions form part of the context for constructing an international framework for safeguarding children they are first outlined to provide necessary historical background. Although the effects of these international mechanisms are considered in relation to the U.K., with particular reference to the Adoption and Children Act 2002, the generic nature of the principles and the remit of the Conventions ensure their equal applicability to other jurisdictions.

4.2 The European Convention on the Adoption of Children 1967

This Convention, sought to identify some common principles and standards of practice to serve as international benchmarks for the parties involved in adoption. For example, it established the principle that adoption should be in the interests of the child (Article 8, para 1) and should provide the child with a stable and harmonious home (Article 8, para 2). It gave protection to adopter's rights by emphasising the need for anonymity (Article 20) and to birth parent's rights by establishing that any consent given by a mother to the adoption of her child is invalid if given within six weeks of that child's birth (Article 52, para 3); she can, however, give a valid consent to placement within that period. Some principles, however, proved contentious. One such was the requirement stated in Article 6(1) that national adoption laws "shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person".[2]

A Working Party on Adoption, composed of experts from member States (the 'Committee of Experts in Family Law'), was established to revise the 1967 European Convention.

4.2.1 The European Convention on the Adoption of Children 2008

On 7 May 2008, the Committee of Ministers of the Council of Europe adopted the European Convention on the Adoption of Children which opened for signature in November 2008, in Strasbourg. The new provisions introduced by the Convention include:

- A requirement that the father's consent be obtained in all cases, even when the child is born out of wedlock
- A requirement that the child's consent be obtained if the child has sufficient understanding to give it
- A requirement that adoption be available to heterosexual unmarried couples who have entered into a registered partnership in States which recognise that institution, and to single applicants

[2] In July 2002 Sweden withdrew from the Convention following changes in its national adoption laws allowing for adoption by homosexual couples in a registered partnership, as it determined that this aspect of its new national adoption laws conflicted with Article 6(1).

- It also leaves States free to extend adoptions to homosexual couples and same sex-couples living together in a stable relationship
- A requirement that a better balance be struck between adopted children's right to know their identity and the right of the biological parents to remain anonymous
- A requirement that the minimum age of an adopter must be between 18 and 30, and the age difference between adopter and child should preferably be at least 16 years

4.2.2 The Council of Europe

The Council of Europe is active in promoting consistency in the various domestic adoption laws of its member States. The Council of Europe is known primarily for its 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. This does not contain any specific reference to adoption, but Article 8 safeguards respect for private and family life and Article 12 guarantees the right to marry and found a family (see, further, below).

4.3 The United Nations Convention on the Rights of the Child 1989

The U.N. Convention on the Rights of the Child (UNCRC, CRC or UNCROC), signed by nearly 200 countries, was ratified by the U.K. on December 16, 1991. It has now been ratified by all U.N. member States except for Somalia and the United States.[3] It lists 42 substantive rights that comprehensively address the needs of children—including Articles 18, 20, 21, and 35 with direct relevance to adoption—and requires the courts in the U.K. to ensure that decisions broadly comply with the general and specific obligations set out in the Convention. While the Convention has no specifically designated means of enforcement, the U.N. Committee on the Rights of the Child does make recommendations to states, on the basis of reports filed with it under Article 44, for improvements in national law and practice.[4] This audit mechanism provides a useful tool for promoting transparency and accountability and for benchmarking developments in national law while also facilitating international comparative assessments. In relation to the U.K., for example, concerns raised by the Committee in response to the former's 1995 report included the growth in child poverty and inequality, the extent of violence towards children, the use of custody for young offenders, the low age of criminal responsibility,

[3] The U.S. has signed the Convention but has not yet ratified it. See, Day O'Connor 'Children's Rights and Youth Justice in the USA', *International Family Law Journal*, 2006 at p. 183.

[4] The UK Government made its first report to the Committee on the Rights of the Child in January 1995 and submitted its consolidated third and fourth report on 15 July 2007. The U.K. entered reservations when it ratified the Convention and has not ratified the optional protocol on the sale of children, child prostitution and child pornography.

and the lack of opportunities for children and young people to express views. The 2002 response of the Committee expressed similar concerns, including the welfare of children in custody, unequal treatment of asylum seekers, and the negative impact of poverty on children's rights. There was also much attention given by the media to the Committee's criticism of U.K. parents right to hit their children as "a serious violation of the dignity of the child".

The following are some of the more significant provisions of the U.N. Convention with relevance for adoption law and practice.

4.3.1 Article 2—The Non-discrimination Principle

Article 2 directs that all Convention rights are to apply to children without exception and without discrimination of any kind. This applies irrespective of the child's—or his or her parent's or guardian's—race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In the latter respect, it therefore prohibits discrimination on the basis of parental marital status. So, for example, in Ireland an effect of the 1988 Act is to facilitate the child care adoptions of children of non-marital parents but to obstruct similar entry by children of marital parents. This would seem to be in breach of Article 2. All appropriate measures must be taken to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members. This resonates strongly with the requirement in section 1(5) of the Adoption and Children Act 2002 in England & Wales that adoption agencies give 'due consideration to the child's religious persuasion, racial origin and cultural and linguistic background'.

4.3.2 Article 3—The Best Interests of the Child Is a Primary Consideration

Article 3 states the most important principle in the Convention. This Article requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

4.3.3 Article 7—The Right of the Child to Know Their Identity

Article 7 recognises the right of a child to know the identity of his or her parents. This is a powerful legal acknowledgement that an adopted person has a

right of access to information, in the form of agency records etc., that could potentially contribute to their sense of identity. Arguably, this confers on an adopted child the right to have their parents' identity recorded on his or her birth certificate.

4.3.4 Article 12—The Right of the Child to Express an Opinion in Administrative and Judicial Proceedings

Article 12 states that the child has the right to express his or her opinion freely and the right to have that opinion taken into account in any matter or procedure affecting the child. This is subject to the caveat that the child concerned must be capable of forming his or her own views. Due weight, in accordance with the age and maturity of the child, must be given to those views. In particular the child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In England & Wales, the Adoption and Children Act 2002, while not inconsistent with the requirements of this Article, does not take any further forward the established legislative position regarding the child's right to be heard on matters affecting him or her in family proceedings. In particular, while it would always be the case that where a child had views in relation thier proposed adoption these would be sought and brought before the court by the CAFCASS officer, the child would seldom have the opportunity to express these views either personally and directly or through a solicitor. Moreover, in Scotland,[5] unlike other U.K. jurisdictions, there is a specific legislative requirement that the child's consent be obtained as well as their views (see, further, Chap. 6).

4.3.5 Articles 13 and 14—The Right of the Child to Self-determination, Dignity, Respect, Non-interference and the Right to Make Informed Decisions

Articles 13 and 14 require the state to ensure that the child has the right to freedom of expression and the right to express his or her own views. Again, rights require a mechanism for their enforcement and it is to be noted that in England & Wales the 2002 Act continues the practice of not making provision for automatic representation by a solicitor in private family law proceedings.

[5] See, Adoption and Children (Scotland) Act 2007, section 32.

4.3.6 Article 18—The Primary Responsibility for the Upbringing of a Child Rests with the Parent/s

Article 18 requires the state to render appropriate assistance to parents and legal guardians to facilitate the upbringing and development of their children. It requires the state to ensure that children of working parents have the right to benefit from those child care services and facilities for which they are eligible. Accordingly, in England & Wales, the 2002 Act has to be viewed in the context of the family support provisions in the 1989 Act. Preventing children identified as 'in need' from becoming children at risk of 'significant harm' is a central plank in the policy of the latter. However, its frequent failure to achieve this in practice is evidenced by the increase in children coming into public care. In part, the rationale for the 2002 Act is to address the consequences of failure in the preventative intervention mandated by the 1989 Act. Arguably, the need for a new adoption law to expedite the transfer from public care to private care, of those children requiring a permanent home following failed parenting, would not have been so pressing if a greater investment had been made in family support services; an argument that has parallels with the intercountry adoption dynamic.

4.3.7 Article 20—State Duty to Protect Child Without Family

Article 20.3 suggests that:

> Such care could include, *inter alia*, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 20 requires the state to provide care for a child deprived of a family environment and in doing so must have due regard to the child's cultural background. The local authority interventionist approach to vulnerable families ensures the provision of state care in the circumstances outlined in this Article. However, the quality and permanence of such care arrangements are often jeopardised by forced reliance upon serial foster care placements while the protection afforded to the children concerned cannot be guaranteed as the Waterhouse report[6] and others have convincingly demonstrated. Following extensive debate among the professionals and agencies concerned, there is no doubt that state care is now provided on a culturally sensitive basis and that transracial adoption placements are arranged only after due consideration has been given to the issues involved. However, it could be argued that intercountry adoption in practice is very often undertaken on a culture-blind basis with little concrete allowance made for measures to bridge the usually very significant gap between the cultures of adopters and adopted. Although section

[6] See, Waterhouse, *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd Since 1974*, the Stationery Office, London, 2000.

1(5) of the 2002 Act does require that attention be given to such matters it provides no indication of how this is to be done.

4.3.8 Article 21—Adoption Shall Ensure That the Best Interests of the Child Shall Be the Paramount Consideration

Article 21 is of particular significance for adoption as it requires those State Parties that recognise and/or permit adoption to give paramount consideration to the welfare interests of the children concerned when doing so. It requires State Parties to:

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.
(b) Recognise that intercountry adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.
(c) Ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.
(d) Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it.
(e) Promote, where appropriate, the objectives of this article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 21(d), in conjunction with Articles 8 and 32 of the Hague Convention, requires a State Party to take all appropriate measures to ensure that adoption placements do not result in any improper financial gain for any of the parties involved.

Section 1(1) and (2) of the 2002 Act now ensure that the best interests of the child are treated as the paramount consideration by both court and adoption agency.

4.3.9 Article 25—Adoption Placements Must Be Subject to Periodic Review

Article 25 requires periodic review of placements of all types, including foster care and residential units, to ensure that no child in state care is overlooked.

Section 118 of the 2002 Act amends the 1989 Act to provide a system of independent review and thereby safeguard children in local authority placements from being allowed to 'drift in care'.

4.3.10 Article 27—Every Child Is Entitled to a Reasonable Standard of Living

Article 27 requires the state to recognise the right of every child to a standard of living adequate for that child's physical, mental, spiritual, moral and social development. There is now a considerable body of research available to testify to both the enduring level of poverty in the U.K. and the strength of the correlation between poverty and family failure.[7] There can be little doubt that there would be fewer children coming into public care and on into adoption if the coping capacity of vulnerable families was reinforced by adequate resources.

4.3.11 Article 35—Prevention of Trafficking in Children

Article 35 requires State Parties to:

> take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form.

The U.K. courts are increasingly referring to this provision in the context of intercountry adoption applications when issues arise regarding improper payments and uncertainty as to consents.

4.3.12 Articles 44 and 45—Every State Is Required to Audit, Progress and Publish a Report

Articles 44 and 45 require a State Party to report on the measures it has adopted which give effect to the rights recognised in the Convention and on the progress made on enjoyment of those rights. The United Kingdom compiles and submits such a report every five years.[8]

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[7] See, for example, the recent HBAI (Households Below Average Income) report which concludes that 3.8 million children—one in three—are currently living in poverty in the UK, one of the highest rates in the industrialised world (10.06.08).

[8] See, *e.g. The United Kingdom's First Report to the UN Committee on the Rights of the Child*, HMSO, 1994. The second report was published in September 1999 and the consolidated third and fourth reports were submitted on 15 July 2007. See, further, at www.everychildmatters.gov.uk/strategy/uncrc/ukreport

4.4 The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993

This Convention has the distinction of being the first truly international piece of regulatory legislation due to the near global reach of its provisions[9] (see, further, Chap. 5).

4.5 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

In the U.K., the Human Rights Act 1998, incorporating the Convention, came into force on October 2, 2000. All public bodies including courts and local authorities have, from that date, been required to ensure that their processes and decisions are compliant with Convention rights. All case law resulting from decisions of the European Court of Human Rights ('ECtHR')[10] has since had a direct relevance for the courts in the United Kingdom. However, most breaches never reach the ECtHR; they are the subject of proceedings in domestic courts and the related judgments serve to reshape practice and forestall the likelihood of future similar breaches.

The common law tradition of the U.K. in relation to the family, evolved with a formal emphasis on parental rights, duties and status accompanied by mandatory court proceedings for sanctioning any permanent changes to the legal relationships between the parties involved (see, further, Chap. 2). This was quite different from the more flexible approach developed elsewhere. Consequently, while there are considerable differences in the law, policy and practice of adoption across the countries of mainland Europe the differences between the latter and the U.K. are of a more fundamental nature. This has led to certain tensions as the ECtHR lays down benchmarks for standards to be upheld by all signatory nations.

The difficulty in setting common benchmarks for human rights is apparent from even the most cursory analysis (which is all that may be ventured in the present context) of contemporary differences between the UK and continental Europe in their approach to adoption. In the Scandinavian countries, for example, the steady decline in consensual domestic adoption and the unavailability of children from public child care has meant that the adoption of babies is now an almost totally intercountry phenomenon (see, further, Chap. 5). In France and more generally in

[9] Since it was concluded at The Hague on March 29 1993, some 75 countries have become Contracting States: only Russia and Ireland have signed but failed to ratify the Convention. The U.K. signed in 1994 and completed ratification on 27.02.03. See, http://www.hcch.net/e/status/adoshte.html

[10] The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a Commission and Court. For judgments of the ECtHR, see http://www.echr.coe.int

Europe, the absence of statutory powers to remove all parental rights and totally dispense with the need for parental consent means that the adoption experience is virtually entirely a consensual process. The corollary of course is that public child care institutions in those countries have a high investment in family support and long-term foster care services.

In the U.K., by way of contrast, the non-consensual use of adoption in relation to children in the public care system has brought with it significant features that are becoming distinguishing characteristics of that nation's adoption experience. For example, the children involved are often: old enough to have their views taken into consideration, for their consent to be relevant and to have a sense of personal and cultural identity; adopted in sibling groups; suffering from significant health and/or social care problems; committed to ongoing post adoption contact with their birth parents/siblings; and may be adopted by persons qualifying for ongoing financial assistance.

This somewhat disparate national experience of adoption, particularly between the U.K. and the rest of continental Europe, has not yet been the subject of international research to identify the difference in outcomes for children failed by parental care but adopted (as in the U.K.) instead of being retained within alternative public service care arrangements (as in, for example, Sweden). It has, on the other hand, given rise to a range of legal issues with which the ECtHR copes by applying the doctrine of a 'margin of appreciation'. This doctrine declares that individual states are entitled to act with a level of discretion in accordance with their particular legal tradition. However, as is illustrated in the case law below, the exercise of discretion is only permissible within the judicial parameters established by principles such as 'necessity' and 'proportionality'.

All the following provisions have a general relevance for family proceedings, and therefore also for adoption, but some have been applied specifically to adoption cases. They are important and have a potentially direct bearing on the circumstances of those appearing before the court. Accordingly members of the judiciary have cautioned against any inclination to simply refer to them in passing in a routine or ritualistic fashion.[11] In fact, contemporary case law contains constant references to such rights which are treated as essential benchmarks of good practice.

4.5.1 Article 6—Everyone Is Entitled to a Fair and Public Hearing Within a Reasonable Time by an Independent and Impartial Tribunal Established by Law

A majority of applications to the ECtHR have been generated by alleged breaches of Article 6, though it is of lesser direct importance to adoption than Article 8.

[11] See, *Daniels v. Walker (Practice Note)* [2000] 1 WLR 1382 at p. 1387.

4.5.1.1 Delay

Delay in the processes of court or local authority can be harmful to the welfare interests of the children concerned. According to the European Court of Human Rights the following factors should be taken into account when considering whether there has been undue delay in determining a case:

- The complexity of the case[12]
- The conduct of the applicant and the other parties[13]
- The conduct of the relevant authorities[14] and
- What is at stake for the applicant in the litigation[15]

In *H v. United Kingdom*[16] the parent complained of the "deplorable delay" of almost two years in court proceedings concerning her contact application in relation to her child in local authority care. By the time the matter was brought before the court almost three and a half years had elapsed since she had last seen her child who was by then well settled with prospective adopters. The court stressed that:

> In cases of this kind the authorities are under a duty to exercise exceptional diligence since… there is always the danger that any procedural delay will result in the *de facto* determination of the issue submitted to the court before it has held the hearing.

The court held that the time it had taken the parent to pursue a claim for contact with her daughter—from the first application in wardship/adoption proceedings to the rejection of her leave to appeal to the House of Lords—constituted "excessive delay" and thus breached Article 6(1). This ruling establishes the important duty to expedite proceedings which is not always reflected in national law.

Section 1(3) of the 2002 Act, it should be noted, specifically directs that 'the court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare'.

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[12] See *Glasser v. United Kingdom* [2001] 1 FLR 153 where the court recognised that the complexities arising from the case being transferred between jurisdictions required additional reports to ensure that the eventual decision affecting the welfare interests of the child was based on a thorough investigation.

[13] See *Glasser* (*ibid*.), and *Hokkanen v. Finland* [1944] 19 EHRR 139 [1996] 1 FLR 289, where, in both cases, the delay was attributable to the party awarded custody refusing to comply with the terms of contact orders. More recently, in *Pini and Others v. Romania* [2004] EHRR 275, the ECtHR found that the Romanian authorities, by failing for more than three years to take effective measures to comply with final and enforceable judicial decisions, had rendered nugatory the provisions of Article 6.

[14] See *Bock v. Germany* [1990] 12 EHRR 247, where the court held that there had been a breach of Article 6 by the delay resulting from domestic courts seeking an unnecessary number of reports.

[15] See *H v. United Kingdom* [1988] 10 EHRR 95, where the court noted that the irreversibility of adoption proceedings was a factor in the adopters' failure to apply promptly. Also, see, *Mikulic v. Croatia*, Application No. 53176/99, ECtHR, 07.02.02 where the court ruled that, given what was at stake for the applicant, the four year delay before hearing did not satisfy the obligation to act with particular diligence to progress the proceedings.

[16] *Ibid*. See, also, *Paulsen-Medalen and Svenson v. Sweden* (1998) 26 EHRR 260 and *Z.M. and K.P. v. Slovakia*, Application No. 50232/99, 11.05.2005.

4.5.1.2 Legal Representation

An essential element of a 'fair hearing' is the provision of appropriate legal representation. The court, in *Airey v. Ireland*,[17] held that the Irish State had breached Article 6 when it failed to either make proceedings accessible, to simplify them or to provide legal aid for the applicant who had been left to represent herself. In *P, C and S v. UK*[18] the court was clear that the failure to provide parents with legal representation was in breach of their rights under Article 6 because:

> … the complexity of the case, along with the importance of what was at stake and the highly emotive nature of the subject matter, lead this Court to conclude that the principles of effective access to court and fairness required that P receive the assistance of a lawyer.

The parents had a right to legal representation in adoption proceedings, including at the administrative stage.

4.5.1.3 Involvement of Parent in Decision-Making Process

The ECtHR has assiduously established the principle that those whose interests are at stake in any decision-making process must be afforded every opportunity to fully engage in that process. For example, in the English decision of *Re C* (*Care Proceedings: Disclosure of Local Authority's Decision Making Process*)[19] a mother challenged the local authority for failing to involve her in its decision-making process claiming that she had never been informed that she was required to acknowledge responsibility for the death of her first child as a step towards possible rehabilitation with the second. The court found that by not informing the mother of the contents of the report, in which an expert witness had raised the responsibility issue, the local authority may have failed to respect her "right to a fair trial" and thereby been in breach of Article 6. The court held that under Article 6 the mother should have had an opportunity to examine and comment on the documents being considered by the expert and to cross-examine witnesses interviewed by the expert on whose evidence the report was based. This is an aspect of the "equality of arms" principle whereby both parties to proceedings must be placed in a position where they have equal knowledge of and be permitted to comment on evidence held by the other.[20]

This issue of the "fairness" of a local authority's process was also raised in *Re C* (*Care Assessment: Fair Trial*)[21] where again the court stressed that Article 6 rights were not confined to judicial proceedings. The mother had not been properly engaged in the decision-making process, had been excluded from meetings and had not been informed of the contents of certain critical reports. The court ruled that the guarantee of procedural fairness provided by Article 6 was unqualified and could

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[17] (1979) 2 EHRR 305.

[18] (2002) 35 EHRR 31; [2002] 2 FLR 631.

[19] [2002] 2 FCR 673.

[20] See *P, C and S v. United Kingdom*, *op. cit*.

[21] [2002] EWHC 1379, [2002] 2 FLR 730.

not be compromised (unlike Article 8 rights). Again in *Re M (Care: Challenging Decisions by Local Authority)*[22] parents successfully appealed from a local authority decision that they could not provide care for their child. The appeal was grounded on a failure by the local authority to involve them in the decision-making process which thereby breached their rights under Article 6 and may have done so also under Article 8.

This right is also relevant to the issues of disclosure of documents and other evidence to the court and may have a relevance for the availability or otherwise of legal aid. Alleged breaches of a parent's right of access to their child in care have also been heard under Article 6.[23]

4.5.2 Article 8—The Right to Respect for Private and Family Life

This Article requires respect for a person's private and family life, their home and correspondence. According to the ECtHR, it necessitates parental involvement in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests.[24] If they are not so involved, there will have been a failure to respect their family life. Parents are entitled to be involved in the decision-making process relating to the religious education of their children. Essentially this right aims to provide protection for an individual against arbitrary action by public authorities, for example a local authority.[25] It places an obligation on the court to ensure that the rights of an individual are properly secured and are protected against infringements by other individuals.[26] It also inherently requires procedural fairness. However, the prohibition on public authority interference is made subject to the exception that where to do so is: (a) in accordance with the law; and (b) is necessary in a democratic society[27] (i) in the interests of national security, public safety or the economic well-being of the country, (ii) for the prevention of crime and disorder, (iii) for the protection of health or morals or (iv) for the protection of the rights and freedom of others.

4.5.2.1 Restrictions on Private Life

There are limits on an applicant's right to private life under Article 8 of the European Convention; it does not confer upon a litigant an unfettered choice of

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[22] [2001] 2 FLR 1300.

[23] See *O v. United Kingdom, B v. United Kingdom, H v. United Kingdom, R v. United Kingdom and W v. United Kingdom* (1987) 10 EHRR 29.

[24] See, *W v. United Kingdom* (1987) 10 EHRR 29.

[25] See, for example, *Re M (Care: Challenging Decisions by Local Authority)* [2001] 2 FLR 1300 and *C v. Bury Metropolitan Borough Council* [2002] 2 FLR 868.

[26] See *Airey v. Ireland* (1979) Series A No. 32, 2 EHRR 305.

[27] See, *Olson v. Sweden (No. 1)* (1988) 11 EHRR 299 where it is explained that to be justifiable such interference must be "relevant and sufficient; it must meet a pressing social need; and it must be proportionate to the need".

behaviour. This was demonstrated in *X v. Netherlands*[28] where the Commission dismissed the protest of a 14-year-old girl who objected to being summarily returned by the authorities to her parents. The court held that such action was justified under Article 8(2) in order to protect her health and morals.

4.5.2.2 Identity and Access to Information

While there is no express protection for the right to identity in Article 8 or any other Convention provision, this has not prevented the court from exploring the extent of a right to information about matters which have a bearing on an individual's sense of personal identity within the general right to privacy and to family life provided by Article 8. The beginning of this process can be traced to the important decision in *Gaskin v. United Kingdom*.[29] The plaintiff, Gaskin, had spent his childhood in care and he sought to challenge the refusal of social services to give him access to the confidential records they held on him. The ECtHR endorsed the view of the Commission that:

> …respect for private life requires that everyone should be able to establish details of their identity as human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification.

However, the court stopped short of finding a general right of access to information about family ties or personal background and found instead that compliance with respect for private life requires the state to put in place an independent system which adjudicates on disputes regarding access to confidential data.

This approach was further reinforced by the High Court of England & Wales in *Rose v. Secretary of State for Health and Human Fertilisation and Embryology Authority*.[30] It was then found that the claimants' request for identifying and non-identifying information relating to their genetic background (both claimants had been born as a result of the AID process) engaged Article 8. The right to establish the details of their identity as human beings included the right to information about a biological parent; as the court reiterated in *Mikulic v. Croatia*.[31] In that case the five year old applicant and her mother instituted civil proceedings to establish paternity and when the alleged father failed to attend for DNA testing on several occasions, the domestic court gave judgment that this corroborated the mother's testimony that he was the child's father. The applicant argued before the European Court that her right to respect for her private and family life had been violated because

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[28] (1974) (Application No. 6753/74) (1975–76) 1–3 DR 118.

[29] (1990) 12 EHRR 36.

[30] [2002] EWHC 1593 (Admin), [2002] 2 FLR 962.

[31] *Op. cit*., where the ECtHR recognised that the identity of a child's parents is integral to the private life of that child under Article 8. The failure, therefore, to provide a procedure whereby a putative father could be compelled to undergo DNA testing to clarify his possible paternity was in breach of the child's rights under that Article.

the domestic courts had been inefficient in deciding her paternity claim thereby leaving her uncertain as to her personal identity. The Court agreed unanimously.

This right may also prevent a local authority from claiming that its child care records are confidential, to be accessed by the subject only at its discretion. For example, in *MG v. United Kingdom*[32] the ECtHR found that the applicant had been wrongfully denied full access to social services files and to the information held therein. This information would have clarified whether his name had been entered on the child protection register and whether his father had ever been convicted of child abuse. The court was particularly concerned that the applicant had no opportunity to appeal against the agency's decision.[33] The fact that the central issue for the court was the existence of adequate procedural remedies, rather than any personal right of access to information held in official records, was clearly demonstrated in *Odièvre v. France*.[34] The applicant then submitted that denying her access to the information necessary to trace her mother, who had abandoned her at birth and who had expressly requested that information about the birth remain confidential, violated her rights under Article 8. Rejecting her complaint, the Grand Chamber held that the French legislation, which entitled adopted children to certain non-identifying information about their birth parents but prohibited contact where birth parents withheld consent, struck a proportionate balance between the competing interests given the wide margin of appreciation enjoyed by the state in this complex and sensitive area. There was, accordingly, no violation of Article 8 (see, further, below).

4.5.2.3 Family Life

Article 8 guarantees the right to respect for family life but the definition of 'family' is not restricted to one based on marriage; it includes unmarried couples, non-marital children and lesbian or homosexual relationships. As the European Court of Human Rights has pointed out:[35]

> … the notion of 'the family'…is not confined solely to marriage based relationships and may encompass other *de facto* 'family' where the parties are living together outside of marriage. A child born out of such a relationship is *ipso iure* part of that 'family' unit from the moment of his birth and by the very fact of it.

Article 8 makes no distinction between the "legitimate" and "illegitimate" family:[36]

> … 'family life' within the meaning of Article 8 includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life.

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[32] Application No. 39393/98, ECtHR, September 24, 2002.

[33] The introduction in March 2000 of the Data Protection Act 1998, c 29, provides such an opportunity.

[34] ECtHR, 13.02.2003. This was most recently endorsed in the U.K. by the decision of the House of Lords in *In re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38.

[35] *Keegan v. Ireland*: Application No. 16969/90 (1994) Series A No. 290, 18 EHRR 342 at para 44.

[36] *Marckx v. Belgium* (1979) Series A No. 31, 2 EHRR 330 at para 31.

- **Parent and child**

In successive cases the ECtHR examined the issue of what constitutes 'family life' and, as Kilkelly[37] has pointed out, broadly found it to be present in the nexus of a parent and child relationship, "in all but very exceptional cases regardless of the parents' marital status,[38] the family's living arrangements,[39] or their apparent lack of commitment to their children."[40] In all cases, however, as the ECtHR recently explained, the existence of such 'family life' is a pre-condition for the operation of Article 8:[41]

> The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 62), or the relationship that arises from a lawful and genuine adoption (see *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, § 148, ECtHR 2004-V).

A number of UK cases explored the specific issue of children being placed for adoption without the consent of one or both of their parents.[42] That there are limits on parental rights in this context was acknowledged, however, as in *Eski v. Austria*[43] when the ECtHR ruled that a step-adoption could proceed despite objections from the birth father who had maintained irregular contact with the eight year old child following family breakdown six years earlier.

In *X, Y and Z v. United Kingdom*[44] it was held that in determining whether a relationship can be defined as "family life" the following factors are relevant:

> …including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by other means….

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[37] See, Kilkelly, U., 'Child and Family Law' in Kilkelly (ed.), *ECHR and Irish Law*, Jordans, Bristol, 2004 at p. 112. See, further, Kilkelly, U., Children's Rights in Ireland: Law, Policy and Practice Tattel Publishing, Dublin, 2008.

[38] See, *Marckx v. Belgium ibid*. (unmarried mother and her child); *Johnston v. Ireland*, no. 9697/92, Series A no. 12 (1987) 9 EHRR 203 (unmarried parents and their child).

[39] See, *Berrehab v. Netherlands*, no. 10730/84, Series A no. 138, (1988) 11 EHRR 322.

[40] See, *C v. Belgium*, no. 21794/93, Reports 1996-III, no. 12, p. 915 and *Ahmut v. Netherlands*, no. 21702/93, Reports 1996-VI, no. 24, p. 2017, 24 EHRR 62. See, also, *Söderbäck v. Sweden*, no. 24484/94, Reports 1998-VII, no. 94. However, purely genetic relationships—such as the relationship between a sperm donor and the child born as a result—are unlikely to constitute family life. See, *G v. Netherlands*, no. 16944/90, Dec. 8.2.93, 16 EHRR 38.

[41] See, *E.B. v. France, op. cit*. at p. 18.

[42] See, for example: *O v. the United Kingdom*, no. 9276/81, 8 July 1987; *H v. the United Kingdom*, 9580/81, 8 July 1987; *W v. the United Kingdom*, 9749/82, 8 July 1987; and *B v. the United Kingdom*, 9840/82, 8 July 1987.

[43] Application No. 21949/03, 25 January 2007.

[44] [1997] 2 FLR 892.

This approach was taken a step further in *Lebbink v. The Netherlands*[45] where the ECtHR accepted that cohabitation was not an essential ingredient of 'family life' but, exceptionally, other factors may serve to demonstrate the required constancy of relationships. In this case the father's position as auxiliary guardian and his established pattern of contact, were sufficient to establish family life with the child.

- **Relative and child**

The Commission/court has also found, in the words of Kilkelly,[46] that "family life may exist between children and their grandparents,[47] between siblings,[48] between an uncle and his nephew[49] and between parents and children born into second relationships."[50]

- **Same sex relationships and child**

The court has had few occasions to consider whether same sex relationships, with or without children, constitute family life. In 1992, in its decision in the Kerkhoven case, the (former) Commission failed to find that a stable relationship between two women and the child born to one of them amounted to family life.[51] In *X, Y & Z v. UK*[52] the court recognised for the first time that family life existed between a child and her social, rather than biological father. In particular, it held that the relationship between a female-to-male transsexual and the child born to his female partner by donor insemination came within the meaning of family life because their relationship was otherwise indistinguishable from that enjoyed by the traditional family. More recently, in *Salgueiro da Silva Mouta v. Portugal*,[53] the ECtHR held there had been a breach of Article 8 when a court awarded the mother custody on the grounds that the father's homosexuality was an abnormality and the children should not have to grow up in its shadow. This decision is a strong statement that discrimination on the grounds of sexual orientation will not be tolerated. There is an obvious tension between this right and the right to non-discriminatory treatment guaranteed by Article 14 (see, further, below).

The decision in *Frette v. France*[54] is difficult to reconcile with the trend developing in the above case law. In that case it was found to be compatible with the Convention to exclude the single, male applicant from the adoption assessment process on the

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[45] Application No. 35582/99, ECtHR, 01.06.2004.

[46] See, Kilkelly, U., 'Child and Family Law' in Kilkelly (ed.), *ECHR and Irish Law*, *op. cit*. at p. 113.

[47] See, *Marckx v. Belgium*, *op. cit*. at para 45.

[48] See, *Olsson v. Sweden*, no. 10465/83, Series A no. 130, 11 EHRR 259. See also *Boughanemi v. France*, no. 22070/93, Reports 1996-II, no. 8, p. 593, 22 EHRR 228.

[49] See, *Boyle v. UK*, No. 16580/90, Comm Rep, 9.2.93.

[50] See, *Jolie & Lebrun v. Belgium*, No. 11418/85, Dec. 14.5.86, DR 47, p. 243.

[51] See, *Kerkhoven, Hinke & Hinke v. the Netherlands*, No. 15666/89, Dec. 19.5.92, unreported.

[52] No. 21830/93, Reports 1997-II no. 35, p. 619, 24 EHRR 143.

[53] [2001] 1 FCR 653.

[54] No. 10828/97, [2003] 2 FLR 9.

grounds that his sexuality rendered him ineligible. This was notwithstanding his clear suitability as an adoptive parent, and the fact that the eligibility process was only the first of two steps to adopting a child under French law. However, in *E.B. v. France*[55] the court reverted to principles established earlier when it ruled that exclusion of individuals from the application process for adoption of children simply because of their sexual orientation was discriminatory and not Convention compliant.

4.5.2.4 Unmarried Father

The presumption favouring family life has been extended to include the role of an unmarried father[56] but this is a presumption that can be rebutted. In *Soderback v. Sweden*,[57] for example, the applicant unmarried father had never cohabited with the mother and had a tenuous relationship with his daughter whom the mother and her spouse were proposing to adopt. The ECtHR ruled that the granting of an adoption order had not breached the father's Article 8 rights.

The ECtHR has also ruled the fact that the law disadvantages an unmarried father, unlike either an unmarried mother or a married father, in relation to parental responsibility will not itself constitute a breach of his rights under Article 8. The difference in treatment for married fathers was justified by the ECtHR in *McMichael v. United Kingdom*[58] on the basis that it was intended to thereby provide a means of identifying "meritorious" fathers.

In *Elsholz v. Germany*[59] the ECtHR ruled that there had been an unjustified violation of an unmarried father's Article 8 rights. This had occurred when a court had refused to grant him contact, without requesting a report from an expert witness, because of the strength of joint objections from mother and child. He was entitled to greater involvement and to have had his interests presented more fully before the court. This was not dissimilar to the earlier case of *Keegan v. Ireland*[60] when the court had held that placing a child for adoption without first informing or seeking the consent of the birth father was an infringement of both his right to respect for his family life under Article 8 and his right to a fair trial under Article 6 of the Convention.

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[55] Application No. 43546/02, 22 January 2008.

[56] See *Johansen v. Norway* (1996) 23 EHRR 33 and *Rieme v. Sweden* (1993) 16 EHRR 155. Note that in *B. v. United Kingdom* [2000] 1 FLR 1 the court found against an unmarried father without parental responsibility and held that the U.K. court had been justifiably discriminatory between his standing and that of a married father as he had no custody rights in respect of the child.

[57] [1999] 1 FLR 250.

[58] (1995) Fam Law 478. See also *B v. United Kingdom* [2000] 1 FLR 1.

[59] [2000] 2 FLR 486. But see also *Sahin v. Germany; Sommerfeld v. Germany; Hoffman v. Germany*, [2002] 1 FLR 119.

[60] *Keegan v. Ireland*: Application No. 16969/90 (1994) Series A No. 290, 18 EHRR 342 at para 44.

4.5.2.5 Privacy of Family Life

Article 8(2) declares that a public authority shall not interfere with the right to respect for family life, the existence or otherwise of which can be determined as a matter of fact. As observed in *Re C and B (children) (care order; future harm)*,[61] under the terms stated in Article 8(2), a state can only legitimately interfere with this right if it satisfies three requirements: that it be in accordance with the law; that it be for a legitimate aim (in this case of the protection of the welfare and interests of the children), and that "it is necessary in a democratic society". However, as indicated by Hale LJ in *Re W and B; Re W*,[62] this right can also be viewed as presenting an opportunity and a challenge to public authorities requiring them to think positively rather than negatively when considering adoption for a child in care.

The presumption underpinning this Article is that the entitlement of parent and child to the mutual enjoyment of each other's company constitutes a fundamental element of family life and should be protected against arbitrary action by public authorities. This approach has been upheld by the court in *K A v. Finland*[63] and *Kutzner v. Germany*.[64] In both cases it was made clear that the essential object of Article 8 of the Convention is to protect the right to respect for family life and that any interference with this right violates Article 8 unless the above three requirements can be satisfied. The court must first look at what additional measures of support can be put into place or what alternatives might exist that would obviate the need to make such an extreme intervention as an adoption order.

Article 8(1) also provides a guarantee for a right to respect for home and correspondence.

- **Family reunification**

In *Johansen v. Norway*[65] the ECtHR considered the decision of a Norwegian court which had directed that a child be taken into care, placed in a foster placement with a view to adoption and refused contact between the child and her applicant mother. The ECtHR viewed these measures as "particularly far reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them". It stressed the importance to be attached to the continuing

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[61] [2000] 2 FCR 614 at 625. See also, *Kutzner v. Germany* [2003] 1 FCR 249, where the court emphasised that any interference with this right will entail a violation of Article 8 unless the three requirements are satisfied. The element of "necessity" implies that the interference must correspond to a pressing social need and in particular be proportionate to the legitimate aim being pursued. An applicant local authority, in such circumstances, must inquire as to what additional measures of support can be given as an alternative to the extreme measure of separating a child from his or her parents.

[62] [2001] EWCA Civ 757, [2001] 2 FLR 582.

[63] (2003) 1 FCR 201.

[64] (2003) 1 FCR 249.

[65] (1996) 23 EHRR 33.

interest of birth parents in the future upbringing of their child. As was subsequently noted in the House of Lords:[66]

> The leading case of *Johansen v. Norway* makes clear that deprivation of parental rights and access should only occur in exceptional circumstances. It would be justified if motivated by an overriding requirement pertaining to the child's best interests… The opposite of a trivial test.

Again, in *R v. Finland*,[67] the court was concerned that the evidence showed a lack of will on the part of state authorities to facilitate family reunification where a child had been placed in a children's home as a consequence of parental incapacity and maternal violence. For three years the father had maintained regular contact and had repeatedly and unsuccessfully sought either the child's return or increased access. Instead access was reduced and the child was moved to a substitute family. The ECtHR found that no serious and sustained effort had been made by the social welfare authority to facilitate family reunification and held that there had been a breach of Article 8.

In England and Wales the courts will need to apply the paramountcy test as determinant of adoption for looked after children with great caution if they are to avoid subsequent ECtHR strictures for employing draconian means of intervention compared with the options chosen in similar circumstances by the courts in countries such as France, Norway and Sweden.

- **Involvement in decision-making**

This principle reflects the emphasis now placed on procedural rights, which have developed to become a crucial aspect of Strasbourg jurisprudence, especially under Article 8.

In *Buchberger v. Austria*[68] the ECtHR found that Article 8 rights had been breached by the failure of a local authority to sufficiently involve the claimant in its decision-making process (see, also, Article 6 above). The case concerned a mother whose children had been taken into care because she had arrived home 45 minutes late from work having left them unsupervised. When she sought through court proceedings to retrieve her children, the local authority failed to provide a statement of reasons for their action and failed to give her copies of documents upon which it relied but which had not been communicated to her.

A capacity to participate effectively in decision-making is also dependent upon access to all relevant information. The ECtHR has made a number of rulings in

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[66] See, Hansard, Lords, 16.10.02, col 929.

[67] Application No. 3414/96, May 30, 2006. See, also, *HK v. Finland* (Application No. 36065/97), 26 September 2006, which concerned a father separated for four years from his child and denied access, which he was given no opportunity to contest, following unfounded accusations of sexual abuse.

[68] Application No. 32899/96, December 20, 2001. See, also, *Re B (A Child: Non-accidental Injury*) unreported, Court of Appeal, April 24, 2002, where it was held that the judge at first instance had erred in refusing to order disclosure of documents to a sibling of B, the subject of proceedings. The disclosure, if made, would have had a direct bearing on the outcome of the proceedings.

which it has emphasised the importance of ensuring that defendants are not disadvantaged by a non-disclosure of documents that may have a material bearing on the outcome of their case. In *TP and KM v. United Kingdom*,[69] for example, the court ruled that the non-disclosure by a psychiatrist to the defendant of a tape recording adverse to the latter's interests was wrong. A parent must be placed in a position where he or she may obtain access to information relied upon by authorities in care proceedings. Provision of information is not itself sufficient if the recipient lacks the capacity to give an informed consent. In *V.S. v. Germany*,[70] however, which concerned a minor who had consented to the adoption of her child, it found that the German authorities had not overstepped their margin of appreciation in finding that under German law a valid consent had been given.

Again, in *Kearns v. France*[71] the court considered and rejected the applicant's claim that her Article 8 rights had been breached by the process and circumstances in which her consent had been obtained for the adoption of her newly born child. She submitted that the two-month period permitted for retraction of consent in the '*accouchement sous X*' process was too short and this, together with the disadvantage she suffered by having no fluency in the French language, in effect invalidated her consent. The court found that Ms Kearns, an Irish citizen, married and resident in Dublin, had travelled to France with her mother, availed of several lengthy interviews and the services of a lawyer and had received information which had been explained to her in English, before signing contractual forms. Not only could she not have misunderstood the timescales and the significance of the '*accouchement sous X*' process, she had deliberately sought to take advantage of it in order to escape the compromising family position she found herself in following an extra-marital affair (see, also, Chap. 11).

However, the ECtHR has also acknowledged that there may be circumstances when there is no right to obtain information held by such authorities. In *Odièvre v. France*[72] an adopted person had sought the release of information identifying her birth mother. As the latter had expressly reserved her right to confidentiality, the Parisian Child Welfare Authorities refused her request. The ECtHR held that the decision was not in breach of either Article 8 or Article 14 on the grounds that France had a pressing reason to respect the privacy of the mother, namely that mothers might abandon or abort their children if confidentiality on adoption could not be guaranteed. Unquestionably, there are difficulties in reconciling this decision with the approach of the court in cases such as *Mikulic v. Croatia*[73] (see, above).

- **Priority of child's interests**

Article 8(2) has been interpreted by the Court as providing that where there is a conflict between the rights and interests of the child and those of a parent which

[69] [2001] 2 FLR 549. Also, see, *Re M (Care: challenging decision by local authority)* [2002] FLR 1300.

[70] Application No. 4261/02, ECHR, 22.05.07.

[71] Application No. 35991/04, ECHR, 10.01.08.

[72] ECHR, 13.02.2003.

[73] *Mikulic v. Croatia*, Application No. 53176/99, ECHR, 07.02.02.

can only be resolved to the disadvantage of one of them (as in *Hendricks v. The Netherlands*[74]), the interests of the child must prevail. The ECtHR, for example in *Sahin v. Germany*, *Sommerfield v. Germany, Hoffmann v. Germany*[75] has stressed the crucial importance of the best interests of the child in such. Again, in *R v. United Kingdom*,[76] where it was held that the parental right of access exists independently of considerations of the child's welfare. In *K and T v. Finland*[77] the approach of the court was clearly stated:

> …a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child. In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.

Again, in *Yousef v. The Netherlands*,[78] the ECtHR for the first time used the phrase "paramountcy of welfare" when comparing the interests of a child with those of the parent:[79]

> The Court reiterates that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.

More recently, in *Pini and Others v. Romania*,[80] the ECtHR had an opportunity to consider a child's rights to consent/object to their adoption. This case concerned two Romanian children, Florentina and Mariana, who had been judicially declared to have been abandoned at the age of three and seven and were nine years old in the care of the Poiana Soarelui Educational Centre in Brasov (the *CEPSB*) when they were made the subjects of adoption orders issued in favour of two Italian couples. The *CEPSB*, a private institution approved by the Brasov Child Protection Department, provided a home for orphaned and abandoned children and gave them an education. The adopters had sought to enforce the adoption orders, but the *CEPSB* refused to deliver up the children's birth certificates or to transfer custody of the children to them. In 2002 Florentina and Mariana issued proceedings to have the adoption orders revoked on the ground that they did not know their adoptive

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[74] (1982) 5 EHRR 223. See also *Kroon v. The Netherlands* (1994) Series A No. 297–C, 19 EHRR 263 where the court commented that it was a principle of good law to hold that the interests of the child were paramount.

[75] [2002] 1 FLR 119. See, also, *Scott v. UK* [2000] 1 FLR 958 where the ECtHR upheld the decision of the court at first instance to dispense with the consent of an alcoholic mother and free her child for adoption because there was no evidence that she would ever be alcohol free and "what is in the best interests of the child is always of crucial importance".

[76] [1988] 2 FLR 445.

[77] [2000] 2 FLR 79.

[78] [2003] 1 FLR 210.

[79] *Ibid*. at para 73.

[80] [2004] EHRR 275. The above account is taken from the press release issued by the Registrar of the European Court of Human Rights on 22.6.2004 and available at http://www.echr.coe.int/Eng/Press/2004/June/ChamberjudgmentPini&Bertini220604.htm

parents and did not wish to leave Romania and the *CEPSB*. The action brought by Florentina was dismissed, *inter alia*, on the ground that it was not in her interests for the adoption order to be revoked. However, the Brasov District Court granted Mariana's application and revoked the adoption order after noting that she was receiving a sound education and living in good conditions at the *CEPSB* and had not formed any emotional ties with her adoptive parents.

The adopters complained to the ECtHR that the Romanian authorities' failure to enforce final judicial decisions was in breach of Article 8 as this had deprived them of all contact with their adopted children. The court noted that there was a conflict of interest between those concerned. Florentina and Mariana now preferred to remain in the socio-family environment in which they had been raised at the *CEPSB*, where they considered themselves to be fully integrated and which was able to afford them physical, emotional, educational and social development rather than the prospect of being transferred to a different environment abroad. Their interest lay in not having imposed upon them against their will new emotional relations with people with whom they had no biological ties and whom they perceived as strangers. The applicants' interest lay in their desire to create a new family relationship by creating a relationship with their adopted daughters.

The court took the view that in adoption cases, it was even more important to give the child's interests precedence over those of its parents, as adoption meant "giving a family to a child and not the child to a family". The applicants' weaker interest could not justify imposing on the Romanian authorities an absolute obligation to ensure that the children went to Italy against their will and to ignore the fact that challenges to the adoption orders were pending. The children's interest meant that their opinions had to be taken into account once they had the necessary maturity to express them, which Romanian law deemed them to possess at the age of 10. In that respect, the refusal they had consistently manifested since that age carried a certain weight. The conscious opposition of the children to the adoption would make their harmonious integration in their new adoptive family unlikely. Consequently, the Court found that the Romanian authorities could legitimately and reasonably have considered that the applicants' right to create ties with the adopted children could not take priority over the children's interest, notwithstanding the applicants' legitimate aspirations to found a family.

Treating a child's welfare interests as paramount does not mean ignoring the Article 8 rights of their parents; these too must be taken into account and full consideration given to the principle that in general a child's welfare is best assured by parental care. There is considerable scope, here, for potential conflict between domestic law and Strasbourg law. Arguably, practice developments in some nations are pushing at the boundaries established by ECtHR case law and at the requirements of Articles 3 and 21 of the Convention on the Rights of the Child.

- **Proportionality**

Article 8 requires that any intervention of the state between parents and child should be proportionate to the legitimate aim for the protection of family life.[81] This

[81] See, e.g. *Re O (A Child) (Supervision Order)* [2001] 1 FLR 923.

'principle of proportionality' has emerged as a key benchmark and has attracted repeated judicial affirmation of its importance in the context of child care cases as noted, for example, by Wall J:[82]

> Inevitably, however, every order made under Section 8 of the Children Order 1989 represents in some measure interference by a public authority (the court) in the right to respect for family life contended in Article 8. The court's interference must, of course, be in accordance with the powers given to that court under the Children Act 1989 and be proportionate. Every application involves a court balancing the rights of the participants to the application (including the children who are the subject of it) and arriving at a result which is in the interest of those children…and proportionate to the legitimate aim being pursued.

Again, and more recently, in *SB v. A County Council; Re P*[83] the Court of Appeal stressed that any placement or adoption order made without parental consent must be proportionate to the legitimate aim of protecting the welfare and interests of the child; only in exceptional circumstances could measures totally depriving a parent of family life with a child be justified.

The principle of proportionality is one which will finally see an end to any remnants of the peremptory "child rescue" approach that characterised much social work intervention in families in the last decades of the 20th century and not only in England & Wales. This was most graphically illustrated in the many cases where newly born babies were removed from the care of their hospitalised mothers. For example, in *P, C and S v. UK*[84] the newborn child of a woman suffering from Munchausen's Syndrome by Proxy was removed from her care in hospital under an emergency protection order which was followed promptly by the instigation of care and freeing proceedings. The ECtHR ruled that:[85]

> … the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure. There must be extraordinarily compelling reasons before a baby can be physically removed from its mother, against her will, immediately after birth as a consequence of a procedure in which neither she nor her partner has been involved.

Draconian intervention of this nature was held to be a disproportionate response to the level of risk presented by the mother and breached the latter's rights under Article 8. Again, in *K and T v. Finland*[86] the same court explained:[87]

> … when such a drastic measure for the mother, depriving her absolutely of her new-born child immediately on birth, was contemplated, it was incumbent on the competent national authorities to examine whether some less intrusive interference into family life, at such a critical point in the lives of the parents and child, was not possible.

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[82] *Re H (Contact Order)* [2002] 1 FLR 22 at 37. See also comments of Hale LJ in *Re C & B (Care Order: Future Harm)* [2001] 1 FLR 611 at paras 33–34 and 620–621 and in *Re O. (Supervision Order)* [2001] 1 FLR 923 at paras 24–28.

[83] [2008] EWCA Civ 535.

[84] *Op. cit*. See, also, the similar case of *Venema v. The Netherlands* Application No. 35137/1977, ECtHR, 17.12.2002.

[85] *Ibid*. at para 116.

[86] (2003) 36 EHRR 255.

[87] *Ibid*. at para 168.

Convention case law clearly indicates that local authorities will now have to exercise great care in determining the degree of authority needed to justify any future such intervention. Sufficient evidence must exist for actions such as the precipitate removal of a child from his or her family home, for justifying a care order rather than a supervision order application, for using a care order rather than any other or no order to supervise home-based parenting and most importantly for warranting the permanent severing of parental rights through recourse to non-consensual adoption rather than availing of a lesser statutory power such as a Special Guardianship Order.

Again, in *KA v. Finland*[88] the court stressed that, to be compliant with Article 8(2), the making of a public care order must involve a careful and unprejudiced assessment of all relevant evidence held on file and be justified by a recorded statement of specified reasons. The latter should be made available to the parent or guardian so as to ensure that they are in a position to participate in any further decision-making including lodging an appeal.

- **Duty to be proactive in protecting children**

Article 8, together with Article 6, must be construed as imposing on a court not only a duty of watchful vigilance, to ensure that the rights enumerated are properly taken into account when determining family proceedings. They also impose an obligation to be satisfied that any orders then made are given effect in a manner which continues to satisfy those rights.[89] It has been argued[90] that this combination of Articles places a positive obligation on the state (either court or local authority), once it is made aware of abuse to a child, to intervene on that child's behalf and secure his or her safety. In effect it has no discretion once it is put on notice of abuse. This interpretation provides a rationale for following through with proactive steps to expedite permanency placements for the children concerned.

4.5.3 Article 12—The Right to Marry and Found a Family

Article 12 provides that men and women of a marriageable age have the right to marry and to found a family, according to national law. The right to found a family is absolute and the state cannot interfere with the exercise of this right, though equally it has no legal obligation to provide the services that may be necessary for the right to be exercised. However, the fact that there is no legal right to adopt or to access artificial reproduction treatment was emphasised in *X v. Belgium and*

[88] [2003] 1 FCR 201.

[89] See *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, as reported in 31 Family Law 581.

[90] See Fortin, J., 'Children's Rights and the Impact of Two International Conventions: The UNCR and the ECHR' in Thorpe, L.J. and Cowton, C. (eds.), *Delight and Dole: The Children Act 10 Years On*. Family Law, Bristol, 2002.

The Netherlands[91] where it was held that unmarried persons cannot claim a right to adopt. The absence of such a right was also considered in *Pini and Others v. Romania*[92] (see above and also at Chap. 5).

4.5.4 Article 14—Prohibition of Discrimination

Article 14 provides that the rights enumerated in the Convention shall be assured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth[93] or other status. This Article deals only with discriminatory treatment based upon the personal characteristics that distinguish people. As Kennedy L.J. observed in *Southwark LBC v. St Brice*:[94]

> In order to establish a claim under Article 14 an individual must show that he has been discriminated against on the basis of 'a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other'.[95]

It must be shown that an applicant is: subject to a difference in treatment from others in a similar situation; in the enjoyment of one of the rights protected by the Convention; which difference cannot be objectively and reasonably justified, having regard to the concepts of legitimate aim, proportionality and margin of appreciation. There is no definitive list of matters constituting discriminatory treatment.

In *R & L v. Manchester City Council*[96] the practice of a local authority was found to be in breach of Article 14 because it discriminated between payments for family based care and foster care to the disadvantage of the former. Article 14 has no independent validity but operates to complement other substantive rights enumerated in the Convention.

In *Frette v. France*[97] the court found that there had not been a breach of Article 14. The case concerned a homosexual man who had been discouraged from proceeding with an adoption application once he had disclosed his sexual orientation. The ECtHR found that a state was entitled to draw distinctions between homosexuals and others in the adoption process and held that a ban on adoption by lesbian or gay individuals did not violate Article 14.

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[91] Application No. 6482/147 (1975) 7 DR 75.

[92] [2004] EHRR 275.

[93] A marital child cannot be accorded prior legal rights over a non-marital child: *Inze v. Austria* (1988) Series A No. 126, 10 EHRR 394. See also *Marckx v. Belgium* (1979) Series A No. 31, 2 EHRR 330.

[94] [2002] EWCA Civ 1138, [2002] 1 WLR 1537.

[95] Citing *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) 1 EHRR 711 at para 56.

[96] [2001] 1 FLR 43.

[97] Application No. 3651/97.

4.6 Conclusion

International Conventions and related case law are now rapidly promoting a harmonisation of adoption law (its principles, policy and practice) across many countries. This provides a framework of established principles and standards within which more refined benchmarks for good practice are gradually emerging. It is a development which facilitates the analysis of national adoption processes, and comparative assessment of national differences in law and practice, addressed in the following chapters.

Chapter 5
Intercountry Adoption and the Hague Convention

5.1 Introduction

Intercountry adoption, sometimes perceived as a rapidly growing modern social phenomenon, is in fact long established. It was and continues to be associated with the disruption to normal family life caused by war, civil unrest and natural disaster. The subjects are often orphans or refugees fleeing danger for sanctuary in any country offering safety and protection. This has recently been the experience of children in the Balkans following the violent breakup of Yugoslavia and is presently the case in Somalia, Darfur, the Sudan and other parts of Africa. Increasingly, however, disruption to care arrangements in the family of origin are now more likely to have their roots in chronic poverty, the affliction of AIDS or other forms of socio-economic deprivation. While the outcome does not necessarily involve the complete and permanent severance of a child's links with their culture and kinship networks, as some may well be absorbed into the homes of displaced relatives or friends of their birth parents, it often does.

However, intercountry adoption is now most usually seen as a consequence of the demand led pressure to satisfy the parenting needs of infertile couples in modern western societies. While inevitably some of the children available will be the orphan victims of war, disease or natural disasters, many will simply be from deprived backgrounds, abandoned in institutional care, with or without parental consent. The transfer of such children to adoptive homes invariably involves a total break with family and culture of origin.

Arguably, in both cases, intercountry adoption is a consequence of a failure in national politics. In the latter instance this failure might be seen as being further complicated by the political complicity of western nations choosing to facilitate the removal of children rather than resource the care and protection infrastructure in the child's country of origin. However, a sense of perspective is needed before entering into this debate: intercountry adoption remains relatively small scale phenomenon. As has been pointed out:[1]

[1] See, Menozzi, C. and Mirkin, B., 'Child Adoption: A Path to Parenthood?', p. 4 at http://paa2007.princeton.edu/download.aspx?submissionId = 70610

K. O'Halloran (ed.) *The Politics of Adoption,*

> Available data indicates that the majority of adoptions worldwide are domestic. Almost 85 per cent of all adoptions are currently undertaken by parents who are residents and citizens of the same country as their adopted children. Domestic adoptions make up 70 per cent or more of all adoptions in some of the countries that register the largest numbers of adoptions such as China, the Russian Federation, the United Kingdom and the United States (p. 4).

This chapter begins by defining key aspects of this phenomenon, providing a brief historical background including a consideration of the role of the parties and countries involved and by tracing the emergence of an international legal response. It then explains and outlines the role played by The Hague Convention as the primary international regulatory mechanism. It concludes by considering in turn, the policy and principles, the law and procedures and finally the practice of contemporary intercountry adoption as regulated within The Hague Convention framework.

5.2 Definitions

Intercountry adoption is currently largely defined and regulated by The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.

5.2.1 Full and Simple Adoptions

'Adoption' in law may be either 'full' or 'simple': in the former the legal relationship between the birth parent/s and their child is terminated; in the latter this relationship is not completely severed. Countries such as the U.K., the U.S., Australia and the Scandinavian countries only give legal recognition to full adoptions while such others as France, Romania, Japan together with many countries in South America and Africa also recognise simple adoptions. Article 26 of The Hague Convention gives recognition to both forms and Article 27 empowers a receiving country to convert a simple adoption into a full adoption if the law of that country permits such a conversion and if the appropriate consents are available.

5.2.2 Intercountry Adoption

The Hague Convention on Intercountry Adoption states that such an adoption occurs when:

> … a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of Origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

Intercountry adoption can occur in one of three ways:

- Adoption of a child from a Hague Convention State in accordance with the national legislation endorsing or incorporating The Hague Convention
- Adoption of a child in a country with "compatible" legislation and
- Adoption of a child from a non-Hague Convention State using other non-Hague Convention related national legislation and procedures

In the U.K., for example, adoption is defined as including a Convention adoption thereby giving automatic effect to the first while allowing for the possibility of granting recognition to adoptions arising by either of the other two methods.[2]

5.2.3 Overseas Adoption

An 'overseas adoption' is one that has taken place in another country and falls outside the definition of a Convention adoption. The term refers to the associated legal difficulties in determining whether and to what effect such an adoption may be recognised by the court in the country where the issue of recognition has arisen. Most often it was an issue that occurred when immigrants sought recognition for an adoption order, issued in their country of origin, so that they could satisfy immigration/citizenship requirements in respect of their child. Essentially, 'overseas adoption' signifies national rules and procedures for managing a conflict of laws and was of particular importance in the years prior to the unrolling of The Hague Convention.

Nations independently legislated for the recognition of overseas adoption that occurred in a designated list of countries where adoption law and practice conformed to certain standards. In England and Wales there is legislative provision for overseas adoptions to be included within their definition of 'adoption' and provision for arrangements to be made for the recognition.[3] As Bridge and Swindells point out, the criteria for such recognition are likely to include:[4]

(a) Confirming that the law in the overseas country ensures that the child has been freely given up for adoption and that this has not been induced by payment or compensation of any kind
(b) Confirming that the overseas country has made attempts to place the child in a family in that country
(c) Confirming that intercountry adoption is in the child's best interests
(d) Requiring that the domestic and intercountry adoption arrangements are the same and
(e) Ensuring that profit is not made from the process

[2] See, section 66 of the Adoption and Children Act 2002.

[3] See, sections 66 and 87, respectively, of the Adoption and Children Act 2002.

[4] See, Bridge, C. and Swindells, H., *Adoption—The Modern Law*, Family Law, Bristol, 2003 at p. 314.

Currently, in many nations, the challenge in relation to overseas adoption is to ensure that it is used appropriately to supplement the procedures of The Hague Convention on Intercountry Adoption. Unfortunately, in some countries, the experience is that adopters are using the overseas adoption rules to circumvent Convention constraints by adopting children in countries that have not ratified it.

5.2.3.1 International Pressure to Improve National Standards of Practice

The use of political pressure to require non-Hague sending countries to raise their standards of practice has from time to time been demonstrated as an effective mechanism for promoting change. For example, the moratorium on intercountry adoption from Romania was imposed, primarily through the EU mechanism, as a carrot and a stick with regard to reform of their child protection laws as much to stop the corruption associated with their processes and procedures.[5] When public policy concerns arise regarding the processes for intercountry adoption, as occurred in relation to Cambodia in 2005 where there were issues regarding the authenticity of parental consent and the scale of financial gain by intermediaries, then the government of a receiving nation, such as the U.K., may suspend all adoptions from that country.[6] More recently, similar problems have arisen in respect of standards of practice in Guatemala resulting in similar external pressure being brought to bear.

5.3 Background

This phenomenon has existed for a long time. It was evident, for example, in the practice of sending many tens of thousands of orphaned, abandoned and/or neglected children from the U.K. and Ireland[7] to Australia, Canada and other British colonial and post-colonial countries in the late 19th and early 20th centuries.[8] Its modern manifestation, however, signifying the movement of children from institutional care in impoverished or conflict ravaged countries into the middle-class homes of adopters in western societies, most probably dates from the aftermath of World War II. This ‘child rescue’ approach has its origins in a very practical and necessary humanitarian response to the plight of refugee children abandoned or orphaned in the many theatres of war.

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[5] The author is grateful to Ursula Kilkelly for pointing this out.

[6] See, *R (Thomson and Others v. Minister of State for Children)* [2005] EWHC 1378 (Admin).

[7] See, for example, Robbins, J., *The Lost Children*: *A Study of Charity Children in Ireland 1700–1900*, Institute of Public Administration, Dublin, 1980.

[8] See, for example, Milotte, *Banished Babies: The Secret History of Ireland’s Baby Export Business*, New Island Books, Dublin, 1997.

5.3.1 Needs

Intercountry adoption, as we now know it, was initially concerned with providing children orphaned by conflict with new families. It most often took the form of adopters extending their family life and parental care to accommodate children additional to their own; the needs of infertile couples were not a particularly relevant factor. It has changed greatly in recent years in response to pressure from the needs of the different parties involved.

5.3.1.1 Children

The modern interpretation of intercountry adoption, in terms of the geographic/cultural distances separating sending and receiving countries and the probable transracial component, first manifested itself in the international response to the physical and healthcare needs of the many young victims of the Korean War. The children concerned were most probably orphans, not necessarily babies and their adopters may well have had children of their own.

As the role played by infertility, a significant motivating factor for adopters, grew to become the driving force, so the needs of children abandoned or abused by parents, rather than simply orphaned, came to be seen as also appropriately met by such adopters. Indeed, as has been rightly said, "for most of the homeless children of the world, international adoption represents the only realistic opportunity for permanent families of their own".[9] However, unlike their predecessors, present day adopters are mostly interested in babies, preferably healthy and voluntarily relinquished, rather than children simply in need of a home. For sending countries, this switch in focus—from providing adopters with children in need of a home to instead providing babies to adopters in need of family life—has presented certain difficulties:

- It removes the most adoptable children from their own country, culture and kin and thereby exposes them to possible future difficulties in relation to matters of identity, racism and language.
- It pre-empts any possibility of meeting the needs of native adopters.
- Thirdly, it leaves behind those children who are statistically less likely to be adopted and who will therefore probably be consigned to institutional care.
- Because the market for intercountry adoption now places a higher value on young healthy babies, there is a correspondingly greater likelihood of market forces introducing profit motivated persons and agencies with potential to compromise the legality of the process.

[9] See, Bartholet, E., 'International Adoption: Current Status and Future Prospects', *Adoption*, vol. 3, no. 1, Spring 1993, p. 90. Also, see, generally Doek, van Loon, and Vlaardingerbroek (eds.), *Children on the Move*, Martinus Nijhoff Publishers, The Hague, 1996.

5.3.1.2 Birth Parents

Maternal choice, to retain rather than relinquish a non-marital child, has played a significant role in reducing the number of children available for domestic adoption in modern western societies. The fading of the stigma traditionally attached to the role of unmarried mother, coupled with the availability of welfare benefits and other support services, has allowed parenting to become a feasible option for many such mothers. As indigenous adoption in some modern western societies changes from being consensually based to coercive in nature, with the availability of children being determined more by the courts than by parental choice (though contemporary trends in the U.S. are somewhat different), the children involved have tended to be older and therefore to have needs for some level of ongoing contact with their birth parents. The latter are now much more likely to have a role in the lives of their adopted children and to attract the involvement of public service support than was the case up to the close of the 20th century.

Conversely, in many underdeveloped countries the lack of any support services and exposure to unremitting poverty increases the likelihood of parental relinquishment or abandonment of children. In some cases the benefit to poverty stricken birth parents in places such as South America and Africa derives not only from the ending of care responsibility and the comfort of knowing that their child will be better cared for by others, but from the direct or indirect payments made by intermediaries seeking to arrange adoption placements. To some this equation presents as just another instance of the west 'outsourcing' its production requirements to third world countries. For birth parents in sending countries, intercountry adoption can also present certain difficulties:

- Circumstances of poverty and hardship can make them vulnerable to pressure to relinquish a child for financial gain.
- The post-adoption opportunities for contact, access or for practicing 'open' adoption are seriously restricted.
- Whether or not financial gain is involved, they can be exposed to subsequent discriminatory attitudes from within their local communities.

5.3.1.3 Adopters

The key factor in the growth of this form of adoption has been the motivation of prospective adopters. Whether driven by altruism or by personal need, they have sought to acquire elsewhere the babies unavailable in modern western society due to the fall in fertility rates, exacerbated by deferred conception to facilitate career choices, an increase in the efficiency and use of birth control techniques together with the modern growth in government support services for single parents. The shortfall in supply relative to demand is well documented, for example:[10]

[10] See, Menozzi, C. and Mirkin, B., 'Child Adoption: A Path to Parenthood?', *op. cit*. at p. 4.

> In Italy, for every local child eligible for adoption there are an estimated 15 couples wishing to adopt. Other countries where the demand for adoptable children exceeds the local supply are Argentina, France, Singapore and the United States. The gap between adoption applications and the number of adoption orders granted is particularly acute in the developing countries.

This does not detract from the fact that in many cases intercountry adoption is triggered by the compassionate altruistic response of prospective adopters to the plight of children, orphaned by war or abandoned to institutional care, in foreign lands.

For some prospective adopters, satisfying parenting needs within their country of origin may have been constrained by religious conviction or by prevailing national laws preventing recourse to such options as AID, GIFT or surrogacy arrangements that might otherwise have been available.[11] For others, particularly those resident in Sweden and Denmark, the fact that no children are available on a non-consensual basis from the public child care system has left intercountry adoption as the only possible means of acquiring a child.[12] Indeed in Sweden there are currently some 800–1,000 such adoptions every year with a total of approximately 40,000 children adopted from overseas since 1969, mostly from Asia and South America.

For all prospective adopters the likelihood of acquiring a baby as opposed to an older child is increased enormously by taking the intercountry rather than in-country adoption route. Adopter choice is also increased in other respects. In countries where the source of children for third party adoptions is very largely via the public child care system the fact is that the majority of those available have problems of some sort, if only in forming attachments, but for many their exposure to abuse and transient relationships have left them seriously impaired—psychologically if not also physically. Adopters seeking a child more in need of love and nurture than long-term emotional rehabilitation will be tempted to look overseas. Then there is the little discussed matter of race. Some adopters opt for racial congruity through their choice of 'sending' country with white Caucasians in Ireland, for example, looking more towards Russia, Romania, and Eastern Europe (approx 65% of all registered foreign adoptions in the period 1991–2006[13]) rather than to Africa for children (see, further, below).

Possibly, also, for some the attractions of intercountry adoption have increased as contemporary adoption embraces the principle of 'openness' and with it the probability of some degree of contact with a parent and/or other members of the

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[11] In Ireland, recourse to such options would not be possible within existing law.

[12] In other countries, such as France and Ireland, the complete judicial termination of parental rights in respect of children in care is a rarity and, coupled with the shift towards single parents keeping their babies, leads to an established reliance on intercountry adoption. The extent of this reliance has been noted by Menozzi, C. and Mirkin, B.:

> "In Finland and Italy, for example, respectively 80 per cent and 90 per cent of persons who applied for an intercountry adoption had no biological children of their own. In Australia, nearly 60 per cent of children who were adopted during the period 2003–2004 were adopted by parents with no biological children (Australia, Australian Institute of Health and Welfare, 2004)." *Op. cit*. at p. 4.

[13] See, The Adoption Board, *Annual Report 2006*, Dublin at p. 43, Table 14. Note the contrast with Sweden where in 2005, for example, of the 1,083 foreign children between the ages of 0–10 years adopted in Sweden, 773 were from Asia.

adopted child's family of origin. The prospect of adopting a child born in a foreign land many thousands of miles away may carry with it assurances of privacy, anonymity and escape from any ongoing complicating entanglements. In fact, this form of adoption may be attractive because it embodies many of the characteristics traditionally associated with 'closed' adoption in western society.

For adopters in receiving countries, intercountry adoption again presents certain difficulties:

- Achieving an appropriate and satisfactory match between their home circumstances and the needs of a child from a different socio-economic and cultural context will necessarily involve a high degree of uncertainty
- Accessing verifiable information regarding parental consents, health and genetic background of the child etc. can be problematic
- The costs will be considerable
- As they are often older than the average adopter, they can have problems coping with the complex adjustments that need to be made by and for their adopted child

5.3.2 The Countries

The socio-economic divide between countries of origin (the 'sending' countries) and countries of destination (the 'receiving' countries) for the children involved in intercountry adoption is unmistakable. The flow of children is now invariably from the more undeveloped countries of the southern hemisphere to the more affluent societies of the north, reversing the direction first established in the latter part of the 19th century and continuing until the middle of the 20th. This contra-distinction points up the reality of the push and pull dynamics that directs the flow of children in intercountry adoption.

5.3.2.1 The Sending Countries

The lack or collapse of the infrastructure of some third-world countries, for reasons of chronic poverty or socio-economic/political turmoil, has been a significant factor in generating the availability of children for adoption. On the African and South American continents, for example, the internal migration of people in search of food, security or employment has in some countries led to a widespread breakdown in the traditional practice of relying on the extended family network to absorb child care needs. Instead, whether orphaned or abandoned, increasing numbers of children are admitted to institutional care. For the public health care systems of such countries, also victims of the prevailing social pressures and often unable to adequately cope with the increased workload, intercountry adoption has seemed a provident solution.

Sending countries, however, are in a position to set the terms for their engagement in a process which is demand led. A political dimension to their engagement in this process has, in some instances, been clearly evident.

- **Poverty**

The experience of Korea illustrates the significant role played by poverty in generating the availability of children. From 1956–1994 this country was by far the most important single contributor to intercountry adoption[14] sending a total of some 150,000 children to adoptive homes in other countries. While initially the flow was stimulated by the plight of many children who as orphans or refugees were the casualties of war, this changed over time as government policy prioritised the use of revenues for industrialisation rather than for developing social and healthcare facilities. In both sets of circumstances, the government's political stance was to deliberately facilitate the export of children as a means of avoiding a drain on scarce national resources.

In the early 1980s, as national prosperity increased in Korea, so its importance as a sending country rapidly declined.

- **Ideology**

Political ideology can also produce the same result. The government decree in China that only one child per family should be the rule, coupled with the preference for male children, led to the current situation of many unwanted female children being absorbed through the intercountry adoption process. Again, in Romania under the Ceauseacu regime, the official policy that each family should have a minimum of four children resulted in many being abandoned in orphanages because their parents could not provide for them.

A political dimension to China's role is evident also in the terms on which it chooses to make children available. For example, it now requires prospective adopters to sign statements that they are not gay or lesbian and it does not allow single people to adopt (following the introduction of China's new international adoption law, which took effect on May 1, 2007), nor those who are obese, taking psychotropic drugs, over age 50, or who are poor.

- **Religion**

In small culturally homogenous countries, where religion is a dominant force in social life and is supported by the institutions of the state, non-marital births can result in the social exclusion of their parents. In such circumstances, as in Ireland up until the mid-1970s, the political complicity with prevailing religious values facilitates the practice of sending 'illegitimate' children abroad for adoption.

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[14] See, Hubinette, T., 'Adopted Koreans and the Development of Identity in the 'Third Space' ', in *Adoption & Fostering*, BAAF, London, vol. 28, no. 1, 2004, pp. 16–24 where the author refers to the resulting Korean adoption diaspora.

5.3.2.2 The Receiving Countries

In all modern western societies, the rapid decline in the number of children available for adoption, particularly healthy babies, generated a need now met by availing of those that are unwanted or cannot be coped with in their countries of origin.

Some countries have demonstrated a particularly strong and consistent interest in intercountry adoption. The U.S., for example, provided homes for two-thirds of all Korean children adopted outside their country of birth and received at least 2,000 children from Ireland during the 1960s. Europe in general and Scandinavia in particular has also over many decades accepted children from other countries for adoption placements. As noted by Hubinette:[15]

> The 45,855 adopted Koreans in Europe represent one out of three of all international adoptees on the continent. France is the leading country with about 11,000 individuals, but large numbers have been placed in Belgium, the Netherlands, Luxembourg and Scandinavia. Koreans constitute half of all international adoptees in Denmark and Norway and one-fifth in Sweden… Finally, there are altogether 5,000 adopted Koreans in Canada, Australia and New Zealand.

For some receiving countries, a political dimension has been evident, driven for example by strategic allegiances, concerns relating to immigration, policies reducing the number of children available for adoption or policy constraints on the use of domestic adoption.

- **Strategic allegiances**

As Hubinette has also pointed out,[16] where intercountry adoption arises from the circumstances of war then the outflow of children tends to be in the direction determined by the political allegiances of the war ravaged countries. So, following the Korean War, by far the majority of children from South Korea placed for intercountry adoption were adopted in the U.S. with the remainder mostly going to adopters among South Korea's other wartime national allies in northern Europe. This pattern was repeated in the period following the wars in Europe and Vietnam.

- **Immigration control**

The U.K., unlike many other countries in Europe, does not have an established history of involvement in intercountry adoption; at least not as a receiving country. This may be partially attributed to its public policy of rigorously policing immigration in any form.[17] It is also probable that unlike other countries, for example Ireland,

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[15] See, Hubinette, T., 'Adopted Koreans and the Development of Identity in the 'Third Space' ', in *Adoption & Fostering*, BAAF, London, vol. 28, no. 1, 2004, p. 19.

[16] *Ibid*. at pp. 18–19.

[17] See, for example, *Singh v. Entry Clearance Officer, New Delhi* [2004] 3 FCR 72 for an illustration of this policy in action in respect of a child whose adoption in India by British relatives was not recognized in the U.K. which refused to issue an entry permit. The Court of Appeal ruled that in this instance the form of adoption constituted 'family life' for the purposes of Article 8 of the European Convention and must be recognized as such under U.K. law.

the U.K. was able to divert the interests of prospective adopters towards children with special needs. Then there is the fact that the legal and professional framework was not conducive to intercountry adoption: adoption law prohibited non-agency placements; and local authority social work staff often treated assessment for foreign adoptions as a distraction from their mainstream work.

- **Policies of permitting and resourcing alternatives to adoption**

In countries where governments have a firm policy of supporting single parents (by welfare benefits, childcare facilities, housing and employment opportunities etc.) then adoption is not, in socio-economic terms, a forced option for such parents. Again, where there are policies permitting access to birth control measures and to fertility clinics (use of GIFT, AID etc.) then a higher proportion of annual births are planned and wanted. Both policy strands, however, result in fewer children becoming available for domestic adoptions which in turn increases the recourse to other countries.

- **Policy constraints on the use of domestic adoption**

In many modern western countries there would seem to be a correlation between a rise in intercountry adoptions and the existence of a government policy preventing the adoption of children in the long-term care of the state due to parental fault or default. Again this political stance is one which restricts the numbers of children available for domestic adoption and redirects prospective adopters to other jurisdictions. This is likely to be the case notwithstanding the fact that prospective adopters are also choosing the intercountry route in preference to domestic adoption because the former offers babies while the latter generally restricts applicants to older or more difficult children accompanied by the likelihood of ongoing involvement with birth families and social workers.

5.4 The Law: Developments Leading to an International Framework

The early history of the law relating to intercountry adoption reveals a primary concern with the prevention of 'trafficking' in children.[18] This term refers not just to the age old practice of parents relinquishing their children for financial reward but also to the absence of an objective determination of the welfare interests of the child, the role played by any intermediaries, the validity of consents (including that of the child), irregular payments and the possible abuse of immigration rules and procedures.

[18] A theme continued in the U.N. Convention (Article 11) and in the Hague Convention (the Preamble).

5.4.1 The Common Law

The Court of Appeal in *Re Valentine's Settlement*[19] stated the general rule that, in keeping with the principle of international comity, recognition will be granted to an adoption made in another country when the adopters are domiciled (or, more recently, 'habitually resident') in that country at the date on which the adoption order was made.[20] Denning LJ adding that the child also should be resident there at the time the order is made. The common law concept of domicile required more than mere residence in a place. It also required evidence of an intention to remain more or less permanently in a place. This rule made the recognition of intercountry adoptions unnecessarily restrictive.

For the purposes of the law in England and Wales, a foreign adoption will be treated as a common law adoption when it is not made in the British Isles, is not a Convention or an overseas adoption but is made within customary or common law rather than a statutory framework. In such cases, formal recognition of the validity of the order will be given by the High Court provided that recognition would not be contrary to public policy.

5.4.2 The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

This Convention established a framework of international rights some of which have a bearing on intercountry adoption. Article 8, which states the right to respect for private and family life has generated considerable adoption related case law with implications for international practice (see, further, Chap. 4).

5.4.3 The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption 1965

As this Convention was only ever ratified by the U.K., Austria and Switzerland it never exercised much international regulatory influence. However, although it has since been overtaken by the Hague Convention 1993, it did begin to shape policy.

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[19] [1965] 1 Ch. 831.

[20] See Dicey, Morris and Collins, *The Conflict of Laws*, Sweet & Maxwell, London, 2006 at p. 1081. For an account of the difficulties that non-recognition of an adoption can cause see Rose, *The Final Decision on Adoption Recognition in Europe*, RD Publishers, 2002.

5.4.3.1 Article 32—Intercountry Adoption Fees

Article 32 obliges a state to ensure that the fees charged in respect of an intercountry adoption are reasonable and relate proportionally to actual costs and expenses incurred.

5.4.4 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally 1986

The General Assembly of the United Nations adopted this Declaration in 1986. Article 13 states that the primary aim of adoption should be to provide a permanent family for a child who cannot be cared for by its own parents. Article 17 recognises that intercountry adoption is a childcare mechanism of last resort and states that:

> If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.

This U.N. Convention, though without the force of law and signed by very few countries, provided a starting point for consideration of further international initiatives to regulate intercountry adoption. It states that the best interests of a child should be paramount including the right to affection, security and continuing care.

5.4.4.1 Article 3—Care Outside the Family of Origin

Article 3 provides that 'the first priority for a child is to be cared for by his or her own parents' but, failing that '…care by relatives of the child's parents, by another substitute—foster or adoptive—family or, if necessary, by an appropriate institution should be considered'.[21]

5.4.4.2 Article 8—Right to Name etc.

Article 8 provides for a child's right to name, nationality and legal representation. It also requires signatory states to provide for the supervision of placements.

5.4.4.3 Article 24—Intercountry Adoption

Article 24 requires due weight to be given to both the law of the State to which the child is the national and the law of the respective adoptive parents. In that context it requires due regard to be given to 'the child's cultural and religious background and interests'.

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[21] See, Article 4.

5.4.5 The United Nations Convention on the Rights of the Child 1989

This Convention is an instrument of international law—binding on countries that have ratified it—which recognizes the rights of the child and the corresponding duties of the state. It declares in its Preamble:

> … that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

This is underpinned by Articles 18 and 20, which again reinforce the principle that the state should give priority to measures that keep children in their families and culture of origin, and by Article 11(1) which requires measures to be taken to combat the illicit transfer and non-return of children abroad. These statements of principle, favouring state support to preserve the integrity of a child's family of origin, are counterbalanced by principles that distinguish the separate interests of children. For example, the Preamble also states that:

> … the child, for a full and harmonious development, should grow up in a family environment, in an atmosphere of happiness, love and understanding…

However, in circumstances where a child's family of origin is unable to meet the needs of that child, then Article 20 requires the state to "ensure alternative care for such a child".[22] Article 21 recognises that intercountry adoption may be considered as an alternative means of providing for a child's care but only after all other options for retaining the child within his or her country of origin have been exhausted. In that event, it requires the child's interests to be treated as of paramount importance. In addition, Article 9 provides that children should not be separated from their parents against their will except where this is determined to be in the best interests of the child and in accordance with law. It is also notable that Articles 11 and 35 place duties on states to take measures to prevent child trafficking[23] (see, further, Chap. 4).

The steady increase in the number of signatories has been accompanied by an increase in the volume of intercountry adoptions. It would seem, therefore, that the countries concerned are protecting and assisting children through facilitating arrangements for substitute family care in other countries rather than through provision of domestic support services that would enable birth families to improve their caring capacity. The Convention framework, by legitimising the transfer of children between countries, albeit within regulatory constraints, is itself politically sanctioning intercountry adoption and serving to increase the practice with inevitable detrimental effects for the domestic child care infrastructure of the sending countries.

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[22] Subject to the requirement that "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

[23] In 2005, the 4th World Congress on Family Law and Children's Rights issued a Communiqué, which, while noting the tension between the Convention on the Rights of the Child and some aspects of international adoption, stated that international adoption has a place, even as a last resort, provided it is properly regulated for the protection of orphaned and refugee children. See 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, 20–23 March 2005 at www.childjustice.org/html/2005.htm

5.4.6 The Hague Conference on Private International Law

The increased mobility of families in the latter part of the 20th century was accompanied by ever more cross-jurisdictional disputes concerning matters such as marriage, divorce, child abduction and adoption. In an attempt to substitute international agreement for country-to-country negotiations on the rules and procedures for regulating such matters, The Hague Conference on Private International Law held a number of conferences to develop Conventions that would state the relevant agreed principles, standards and rules.[24] Eventually three Conventions concerning children were produced including The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993.[25] The latter was a response to increased concern regarding trafficking in children, perhaps generated in particular by the international interest in rescuing children from the orphanages of post-Ceausescu Romania (see, further, below).

5.5 Contemporary Intercountry Adoption: Policy and Principles

The Hague Convention, other international Conventions and much national legislation now reveal an acceptance of permanency planning as a fundamental principle to be applied in the context of intercountry adoption in circumstances where children cannot be adequately cared for in their families and countries of origin. The entitlement of every child to safe family life is to prevail over all other considerations and this is to be furthered through a general policy that includes facilitating intercountry adoption in accordance with agreed standards of practice.

5.5.1 A Controversial Policy

The present harmonious convergence in national attitudes towards intercountry adoption has not been reached without a great deal of controversy. For the value systems of modern western nations—the legal structures of which are highly sensitised to issues of equality and non-discrimination as played out in matters of race, class etc.—the phenomenon of intercountry adoption carries considerable baggage. For third world countries, coming to terms with the legacy of colonialism, this

[24] See, for example, Dyer, A., 'The Internationalisation of Family Law', *30 UC Davis Law Review*, 625, 1997.

[25] The other two being the Convention on the Civil Aspects of International Child Abduction 1980 and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996.

phenomenon resonates with earlier experiences of exploitation. Some of the more strident viewpoints have centred on political interpretations of intercountry adoption where the transfer of children is seen as a proxy manifestation of mercenary national interests. On the other hand there is the view that "the current tendency to glorify group identity and to emphasize the importance of ethnic and cultural roots combines with nationalism to make international adoption newly suspect in this country as well as in the world at large".[26]

5.5.1.1 The 'Commodification' of Children

Intercountry adoption is seen by some as just another form of international trade in which children are the 'goods' to be traded.[27] They are necessarily objectified as neither 'buyer' nor 'supplier' has any real understanding of the singular needs and characteristics of the children involved. In this analogy, the buyers are the middle class infertile couples of western society choosing to acquire babies as they would any other commodity. The suppliers are those in deprived countries relinquishing to foreigners, responsibility for the children for whom they cannot afford to care. The profit element is present in the release from care costs, the fees charged by intermediaries and in the opportunity to parent that would otherwise be denied.

This, somewhat harsh, trading analogy is supported by evidence drawn from an assessment of the 'marketing position' of the supplier. As social stability has returned to countries such as Vietnam, Korea and Romania so their governments have moved to control the availability of the children by restricting or ceasing their involvement in intercountry adoption. Inevitably, this has resulted in western nations turning instead to other countries such as the Philippines, Cambodia and El Salvador to make up the shortfall. For some observers such as Hubinette, intercountry adoption carries "ugly parallels to contemporary trafficking of women and the historic transatlantic slave trade".[28]

5.5.1.2 Cultural Assimilation

The traditional 'closed' adoption system of western society has been predicated upon a perceived need to sever the child's links with the past, assimilate him or her within their new family and build a fresh identity that denies the child's origins. To a considerable extent, intercountry adoption has followed the same route. For the child involved, intercountry adoption has most usually entailed shedding the culture of their family of origin and substituting that of their adopters. Hubinette refers to this as a process whereby:[29]

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[26] See, Bartholet, E., 'International Adoption: Current Status and Future Prospects', *op. cit*., p. 101.

[27] See, further, Triseliotis, J., 'Intercountry Adoption: Global Trade or Global Gift?', *Adoption & Fostering*, BAAF, London, vol. 24, no. 2, 2000, pp. 45–54.

[28] *Op. cit*. at p. 19; citing Hermann, Jr. and Kasper, 1992; Triseliotis, 2000; Masson, 2001; Shiu, 2001.

[29] *Op. cit*. at p. 20.

> assimilation becomes the ideal as the adoptee is stripped of name, language, religion and culture, only retaining a fetishised non-white body, while the bonds to the biological family and the country of origin are cut off.

Denial and assimilation may occur despite the fact that in countries such as the U.K., Adoption Panels invariably seek a commitment from prospective intercountry adopters that they will endeavour to instill and nurture in the adoptee a sense of their culture of origin and not restrict the latter to their own mono-cultural environment. The adopted child inevitably strives to fit in with and assume the cultural characteristics of their adopters.[30]

Intercountry adoptions are often also transracial and in such cases the scope for denial is clearly limited. However, there are those who suggest that perhaps some adopters are attracted by an obvious cultural difference; in fact, the more obvious the difference the stronger the attraction.

5.5.1.3 Colonialism

There are those who take the view that intercountry adoption is simply another modern manifestation of colonialism; seen as not dissimilar to the economic and commercial cultivation of client relationships with third world countries by modern western societies. Hubinette, for example, argues that this has certainly been the experience of Korea:[31]

> Continuous international adoption from Korea can thus be seen as a manifest symbol of Western dependency and the country's position as a client state in the world system, pointing to the persistence of colonial thinking and reflecting global racial hierarchies.

He adds that "many leading supply countries in the field of international adoption fall under the U.S. sphere of influence or have been subjected to U.S. warfare: Korea, Vietnam, Thailand and the Philippines in Asia, and Columbia, Chile and Guatemala in Latin America".

5.5.2 Some Guiding Principles

As intercountry adoption has become firmly established it has been possible to identify certain associated principles. While there is perhaps some truth in the

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[30] A considerable body of research testifies to the ability of transracial adoptees to assume the cultural characteristics of the receiving country; see, for example, Feigelman, W. and Silverman, A., *Chosen Children: New Patterns of Adoptive Relationships*, Praeger, New York, 1983, and Saetersdal, B., 'What Became of the Vietnamese "Baby Life Children"?', Melbourne, paper in conference proceedings on *Permanence for Children*, 1989. However, this must be set against the evidence from adoptees transnational groups that adulthood often brings difficulties with cultural identity.

[31] *Op. cit*. at p. 19.

above controversial interpretations placed on this phenomenon there is also much truth in the observation made by Silberman:[32]

> The other side of the adoption crisis is the tragic condition of unwanted children and the failure of domestic systems to respond to local child care pressures in a way that appropriately ensures the developmental needs of the children concerned. While critics of intercountry adoption view transnational and transracial placement of children as forms of imperialism and genocide, others argue that intercountry adoption offers the only viable opportunity for many of these children.

5.5.2.1 Supporting the Weak Social Infrastructure of Sending Countries

By definition, third world countries lack the sophisticated, flexible yet robust social infrastructure that can withstand political or socio-economic upheaval. In particular their public child care services are often rudimentary and unable to cope with a sudden influx of children requiring, for whatever reason, an alternative to parental care. Institutionalisation, often the only child care resource available, offers a poor and damaging environment not conducive to nurturing the physical, emotional and social development of children who may already be traumatised on admission. They can often be poorly equipped and understaffed 'warehousing' facilities, with little professional child care expertise available, in which children are contained until such time as they reach adulthood. The understandable altruistic response of western nations, with their comparatively refined and well-resourced child care services, is to facilitate child rescue by intercountry adoption. However, as Triseliotis et al. rightly point out:[33]

> Irrespective of the circumstances under which intercountry adoption takes place, it poses political, moral, empirical, policy and practical issues. From the policy and moral perspectives its practice gives rise to many similar questions to own-country adoption. In-country adoption in the West too has often come under criticism for involving the move of children mainly from poor to better-off families. The legitimacy of in-country or intercountry adoption will continue to be questioned until such time as adequate income maintenance schemes and preventative type services are developed to provide real choice for all birth parents.

The fact is that adoption, child care and foster care services are often so under-developed in such countries that intercountry adoption is an easier way of immediately securing the welfare interests of the children involved. Some western nations, while facilitating intercountry adoption, are also investing resources in building the services infrastructure in sending countries that in the long-term will give the latter the

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[32] See, Silberman, L., 'The Hague Children's Conventions: The Internationalization of Child Law', in Katz, S., Eekelaar, J. and Maclean, M. (eds.), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2000 at p. 607; citing D'Amato, A., *Cross-Country Adoption: A Call to Action*, 73 Notre Dame Law Review 1239 and Bartholet, E., 'International Adoption: Propriety, Prospect and Pragmatics', 13 *Journal of the American Academy of Matrimonial Lawyers* 181, 1996.

[33] See, Triseliotis, J., Shireman, J. and Hundleby, M., *Adoption Theory, Policy and Practice*, Cassell, London, 1997 at p. 181.

capacity to cope with their own child care concerns and make better choices to secure the best permanency placement for each child in need.

5.5.2.2 Relieving Pressure on Adopters in Receiving Countries

In modern western nations both the fertility rates and the number of children available for adoption are steadily falling, which inevitably leads to increasing numbers of infertile couples joining the queue of prospective adopters. Intercountry adoption is often the best option for those who desperately want to have their own family and virtually the only option if they want a healthy baby.

The pressures on prospective adopters are potentially harmful not just for them but for all parties involved in this process. Dealing with many officials in a foreign culture can prove to be a very expensive and uncertain business. The considerable costs entailed in acquiring a child can compromise the legality of the adopters' actions while the lack of information on the child can result in inaccurate data relating to his or her legal and health status. The officials with management responsibility for child care institutions can be tempted into putting undue pressure on unmarried mothers, can designate children as orphans when they are not and can receive financial benefits from discharging children into the care of adopters. In particular, needs driven adopters may not be as open to objectively considering whether they rather than anyone else are the best persons to promote the interests of a particular child who will be uprooted from their kin and culture and may also bring with them latent health disorders and associated complex care requirements.

In countries such as the U.K., where there is a relatively high incidence of adoption from the public child care route and methods of assisting conception (e.g., AID, GIFT etc.) and surrogacy are legally available and accessible through the National Health Service, there is also a low rate of intercountry adoptions. In countries such as Ireland the reverse is the case. It may be that every opportunity should be developed for adopters to meet their needs without having recourse to intercountry adoption, at least as a forced option.

5.5.2.3 Balance in Addressing the Needs of Children

All western nations currently involved in intercountry adoption also have children in their public care systems whose needs could be more appropriately met by adoption. These children remain unadopted because of factors such as health and social care problems, age, lack of parental consent, lack of sufficient post-adoption support services and because they are in sibling groups. Even in countries where a facilitatory legal and administrative environment exists, the likelihood of such children being adopted is reduced by the counter attraction to prospective adopters of securing a healthy baby from outside the jurisdiction. Also, however beneficial for the children involved, intercountry adoption potentially provides a context for 'trafficking'. The rights of some children in both receiving and sending countries can thus be

endangered. Arguably, all receiving nations should be investing in facilitating the adoption of children consigned to their child care systems as well as in regulating intercountry adoption.

Again, in all sending countries there are potential carers such as relatives or perhaps foster parents who could be supported, financially and otherwise, to provide permanency through adoption for a child in the public care system. Intercountry adoption can obviate the need in sending countries to develop relevant local services. If such a country is unable to commit resources to this end then arguably there is a moral obligation on the more affluent western nations to do so.

5.5.2.4 Identity and the Adopted Child

The identity issue has always accompanied adoption: a compromised sense of 'belonging' is part of the package. It is felt most acutely by the adoptee, is troubling also for the adopter and it compounds the loss suffered by the birth parent. The rather sweeping and bleak observation made some time ago that "the uneasiness about adoption *per se* attaches itself to the adoptees also … they become sort of psychological vagrants, with no particular ties to anyone …".[34] applies most starkly to those who acquire adoptee status via the intercountry route. This issue is one that comes with significant political connotations.

In the years following the two world wars, when adoption generally became a statutory process, the question of identity was all important: nations were divided and labeled according to ideology; societies were structured according to class and often dictated by bloodlines; monogamous marital family units prevailed; and, in general, individuals were identified by their trade, profession or occupation (whether as 'housewife', 'breadwinner' or 'on the dole', people had social roles with accompanying ascribed expectations). For adoption to fit in with such a tightly ordered world the identity of the adoptee was sacrificed, and he or she was wholly assimilated into that of their adopters. The law (or the common law) saw to it that, in tandem with expunging links to birth parents, all hallmarks of status were duly extended from adopter to adoptee: 'legitimacy', altered birth certificate, citizenship, rights of inheritance and rules of consanguinity etc. Adoption agencies aided and abetted the assimilation by carefully matching adopters and adoptee in accordance with physical characteristics etc. and often also by destroying records. All of this amounted to a comprehensive denial of the adoptees's origins and ensured that they conformed to a socially ascribed identity rather than have the opportunity to acquire one built upon authentic foundations.

In the early years of the 21st century, the issue of identity is much more about individuality and a personalised sense of belonging than about social role. The law now recognizes the importance of genetic links, acknowledges that identity is informed by culture and must be driven by the needs and choices of the individual concerned and guided by the information made available to them. The fundamentals

[34] See, Haimes, E. and Timms, N., *Adoption, Identity and Social Policy*, Gower, London, 1985 at p. 80.

of third party adoption and its political dimensions are left clearly exposed in an intercountry context.

- **Abandonment**

The truth that many if not most adopted children are abandoned, physically and/or psychologically and with or without any fault on the part of birth parents, is unavoidable in intercountry adoption. The act of abandonment is, arguably, one that attracts the collusion of government and agencies in the 'sending' country and is passively reinforced by the 'receiving' country. It often has poverty as its root cause. This is always a particularly hard truth for any adopted child to accommodate. The evidence of abandonment, required by the Hague Convention, can be circumvented by nations choosing to opt for bilateral agreements rather than commit to the Convention.

- **Denial**

Most adoptions cross social boundaries of one sort or another. This is obvious in the majority of intercountry adoptions; visually so, as they are often also transracial in nature. For an adopted person, genetic links to their family of birth can be crucial, if only for health reasons, but other connections are also important: aptitudes, physical characteristics and appropriate role models all go towards building a sense of belonging. The corollary, regarding the integrity of bloodlines, may also be true as members of the adopters family may not view the adoptee as truly 'one of us'; then there is the matter of stigma. Discovering the facts relating to families of origin can be most difficult for the subject of an intercountry adoption as in many cases the information is missing, misleading or false. The aura of taboo and desire for anonymity that characterized the role of relinquishing birth parents in the early stages of domestic statutory adoption in western nations is now strongly associated with their contemporary counterparts in the 'sending' countries. It now has an additional overlay of stigma arising from the betrayal of ethnic solidarity by surrendering a child to adopters from a different racial group.

The questions—'Where do I come from? Where do I belong?—that particularly trouble adopted children, and the answer to which offer signposts for building a self-determined identity, are much more difficult to brush aside when openly advertised in an intercountry adoption. They are also much more difficult to answer given the obstacles of great distances, language, poverty and the paucity of information that must first be overcome.

- **Culture**

An individual's sense of identity is developed or perhaps conditioned through a process of exposure to a shared history, place, language, experiences, icons and physical surroundings etc. with a group which accepts that individual and of which he or she feels a part. The nuances of culture do much to shape, often subliminally, an awareness of where we feel we belong.

For the subject of an intercountry adoption the challenges of accessing their culture of origin, so that it may contribute towards creating an authentic identity, are considerable. Given that normally an adopted child will instinctively strive to demonstrate their loyalty to adopters, and be accepted as belonging to their new social setting, there is an issue as to where the responsibility lies to bridge the culture gap. If receiving countries are to avoid allegations of acquiescing in a modern form of proselytizing, they will have to put in place mechanisms to ensure that links are maintained between the child and the sending country and keep their culture of origin alive for them.

5.6 Contemporary Intercountry Adoption Law: The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993[35] provides the most directly relevant legislation. The European Convention on Human Rights, the European Convention on Adoption and of course the United Nations Convention on the Rights of the Child also contribute to the current framework for regulating intercountry adoption (see, further, above and also, Chap. 4).

5.6.1 The Hague Convention: Aims and Objectives

Replacing the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoptions 1965, the 1993 Convention was signed by the U.K. in 1994 and ratified by it in June 2003.[36]

In its Preamble the Convention states that 'intercountry adoption may offer the advantage of a permanent home to a child for whom a suitable family cannot be found in his or her State of origin'. It declares in Article 1 that its objectives are threefold:

(a) To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his fundamental rights as recognised in international law
(b) To establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children and
(c) To secure the recognition in Contracting States of adoptions made in accordance with the Convention

[35] In the U.K., the Adoption (Intercountry Aspects) Act 1999, which received the Royal Assent on 28 July 1999, gives effect to the provisions of the Hague Convention (see, further, Chap. 5).

[36] As of September 2008, some 81 Contracting States had ratified this Convention.

In Article 4(b) it provides that a Convention adoption 'shall only take place if the competent authorities of the State of origin have determined after the possibilities for placement within the State of origin have been given due consideration that intercountry adoption is in the child's best interests'. It gives effect to these principles through various provisions.

5.6.1.1 Promoting In-Country Child Care

Article 4(b) of the Hague Convention promotes the development of professional adoption services in 'donor' countries i.e. countries which for reasons of poverty and/or social instability are allowing children to be adopted by non-nationals. This is a significant moral stand. The 'child rescue' approach, with its attendant dislocation for human relationships and cultural identity, is not to be the preferred means of safeguarding welfare interests either locally or internationally. Priority is to be given to retaining a child in need within his or her family and social context of origin. Where consensually based retention is not feasible then foster care services should be provided which would permit a child to be placed as close as possible, in terms of geography and relationships, to his or her family/culture/ community of origin. Resort to adoption should occur only when these options are not possible and then preference should again be given to maintaining the child within the cultural norms of his or her family of origin. The Convention views intercountry adoption as the final step in a continuum, to be taken when all others have been tried, when all the professional filters are in place and the adoption process is regulated to ensure that welfare interests are safeguarded. This approach very much echoes that embodied in Article 21(b) of the U.N. Convention.

5.6.1.2 Broad Application to Different Types of Adoption

The Hague Convention applies whenever a child habitually resident in a Convention compliant sending country has been, is being, or is to be moved for the purposes of adoption to another Convention compliant receiving country; it does not matter in which of the two countries the adoption takes place. It applies to both full and simple adoptions and provides for the automatic recognition of all adoptions made in accordance with Convention requirements in any Contracting State. Its broad application ensures that the Convention will eventually regulate the majority of intercountry adoptions.

5.6.1.3 A Framework for Regulating Standards

The Hague Convention provides a framework of minimum standards for regulating intercountry adoption. In its Preamble the Convention declares that a Convention compliant country must 'prevent the abduction, the sale of, or traffic in children'

(and eliminate various associated abuses such as bribery, coercion, falsification of documents and use of unqualified intermediaries).[37] It requires that receiving countries establish 'accredited bodies', which must be non-profit agencies, to carry out related duties; these 'accredited bodies' will most usually be approved adoption agencies though 'independent adoptions' remain permissible. It also requires that a system of co-operation be established between Contracting States to ensure protection for the children involved. Where unauthorised payments have been made the Convention permits the annulment of an adoption on the grounds that this constitutes a breach of public policy.

It also establishes a series of safeguards to ensure, for example, that:

- Free and informed consent is sought from and given by birth parents and the child
- That consent is not enduced by bribery
- That the views of the child, where feasible, have been sought
- That the adoptive parents have received such counselling as necessary and are suitable persons to adopt
- That the child's cultural heritage will be preserved (see, further, Chap. 4)

However, the fact remains that many of the sending countries do not have the resources to ensure that these safeguards are in place; in particular the obligation to ensure the provision of proper consents, uncompromised by financial irregularities, is often unrealisable in practice.

5.6.2 The Hague Convention: Principles

The Preamble to the Hague Convention explicitly states that it is to be read in conjunction with the U.N. Convention on the Rights of the Child (UNCROC).[38] The 1993 Convention, as Duncan has pointed out, provides a "set of minimum standards and procedures, which may be supplemented by additional safeguards thought appropriate or necessary by individual states".[39] It is underpinned by principles, sometimes explicitly stated sometimes not, that are intended to guide international practice.

5.6.2.1 The Welfare Interests of the Child Are Paramount in Adoption Law and Practice (See, Also, UNCROC)

This clear statement, intended to guide the decisions of all bodies involved in the adoption process, usefully reinforces the firming-up of the paramountcy principle in recent ECtHR case law.

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[37] A prohibition given effect in the 2002 Act by sections 83 and 92–97.

[38] The Preamble also refers to its links with the 1986 U.N. Declaration.

[39] See, Duncan, W., 'Regulating Intercountry Adoption—An International Perspective', in Bainham, A., Pearl, D.S. and Pickford, R. (eds.), *Frontiers of Family Law* (2nd ed.), Wiley, Chichester, 1995 at p. 51.

5.6.2.2 Intercountry Adoption Is Only Justified After In-Country Placement Options Have Been Eliminated

This principle is expressed in the Preamble and in Article 4(b).

5.6.2.3 Adoption Is a Service for Children, Rather Than for an Adult Seeking to Acquire a Child (See, Also, UNCRC)

This principle recognises that no person has an automatic right to adopt a child.

5.6.2.4 Children Requiring Adoptive Placements Are Entitled to Know and Have Access to Information About Their Family Background and Cultural Heritage and Maintain or Develop Cultural Identity (See, Also, UNCRC)

This principle recognises that due regard must be given to a child's ethnic, religious, cultural and linguistic background when considering adoption. It also recognises that intercountry adoption must respect the child's fundamental rights which include the foregoing.

5.6.2.5 Natural Parent/s Have an Entitlement to Make Decisions About Their Child's Future Care (See, Also, UNCRC)

This principle recognises that both parents are entitled to make decisions about their child, including consenting to the child's adoption and participating in the selection of approved prospective adopters. Article 4(b) provides that a Convention adoption 'shall only take place if the competent authorities of the State of origin have determined, after the possibilities of placement within the State of origin have been given due consideration, that intercountry adoption is in the child's best interests'.

5.6.2.6 The Child Is Entitled To Be Involved in Decision-Making (See, Also, UNCRC; Article 12)

This principle recognises that on issues relating to his or her upbringing, the child's views must be sought, must be taken into consideration and may be determinative depending upon their maturity.

5.6.2.7 Parties Are Entitled to Negotiate Mutually Agreed Adoption Arrangements (Not Explicitly Stated)

This principle recognises that parties to an adoption are, with mutual agreement, entitled to participate in ongoing information exchange and/or contact after an adoption order is made. The child's views must be sought and must be taken into account.

5.6.2.8 Adoption Should Safeguard and Promote the Welfare Interests of the Child Throughout His or Her Life (Not Explicitly Stated)

This principle recognises the lifelong nature of adoption and the need to ensure that the interests of the adopted person are always given priority over those of other parties.

5.6.2.9 An Adoption Authority Should 'Promote the Development of Adoption Counselling and Post-adoption Services' (Article 9)

This principle requires, under Article 9C, the accreditation of bodies established to provide adoption services. The responsibilities in relation to such bodies are addressed in subsequent Articles.

- **Article 10**

Accreditation shall be granted to and properly maintained by bodies demonstrating their competence to carry out the tasks with which they may be entrusted.

- **Article 11**

An accredited body shall—

(a) Pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State accreditation
(b) Be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption and
(c) Be subject to supervision by competent authorities of that State as to its composition, operation and financial situation

- **Article 12**

A body accredited in one Contracting State may act in another Contracting State only if the competent authorities of both States have authorised it to do so.

- **Article 22**

1. The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.
2. Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15–21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons

who:

(a) Meet the requirements of integrity, professional competence, experience and accountability of that State and
(b) Are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption

5.6.3 The Hague Convention: Procedures

The procedure for acquiring a foreign child for adoption under The Hague Convention can be briefly outlined.

5.6.3.1 Prospective Adopter/s

The person/s wishing to adopt must make application to the designated authority in the country where they are habitually resident. In the U.K. the 'authority', a registered adoption agency, will assign a professional social worker to undertake an assessment of the applicant/s eligibility and suitability to adopt and to compile a 'home study' report on their family background and a personal history for submission to the agency's Adoption Panel. The approved report will then be forwarded to the relevant authority in the country with an available child.

5.6.3.2 Sending Country

On receipt of the 'home study' report and other documentation attesting to the eligibility and suitability of the applicants, the appropriate authorities in the sending country will then make a preliminary determination as to whether or not the proposed placement is in the best interests of a particular child. In so doing the authorities are required, under Article 29 of the Convention, to give due consideration to the child's ethnic, religious and cultural background. A report on the child is then sent to the authorities in the receiving country together with evidence that all necessary consents have been obtained and the reasons for its 'best interests' determination

in respect of the child. Article 16(2) provides for the withholding of identifying information regarding the child's birth parent/s where the authorities deem this to be necessary.

5.6.3.3 Transfer of Child

When all administrative requirements have been satisfied, Article 17 of the Convention allows the child to be 'entrusted' (rather than placed) by the authorities in the sending country into the care of the prospective adopters. The responsibility for ensuring that the prospective adopters accept the transfer of the child rests with the authorities of the sending rather than the receiving country. Both sets of authorities, however, must agree to the proposed adoption and under Article 17(c) either may withhold consent if not satisfied that all legal requirements have been met.

5.6.3.4 Adoption Order

The adoption order may be made in either the sending or receiving country. The sending country bears responsibility for producing in court evidence that:

- Intercountry adoption is in the child's best interests
- All necessary consents have been obtained
- The prospective adopters satisfy eligibility and suitability criteria
- The child is or will be authorised to enter and remain in the receiving country

In some Hague compliant sending countries, such as China, the practice is to finalise the adoption order before the child leaves the jurisdiction.

5.6.3.5 Interim Adoption Order

Increasingly, some Hague compliant countries such as Russia (which has signed but not yet ratified the Convention) are choosing to proceed by allowing the adopters to return home with their child under the authority of an interim adoption order. Thereafter, on return of six satisfactory consecutive monthly reports by the appropriate authority in the receiving country, the adoption order is automatically finalised.

5.6.4 The Hague Convention: Outcomes

Article 26(1) of The Hague Convention states that a Convention compliant adoption order will terminate pre-adoption legal relationships (if permitted under the law of the sending country), vest parental responsibility in the adopter/s, establish a permanent legal parental relationship between adopter/s and the child and be

recognised by the law of the receiving country and that of all other Convention countries.

5.6.4.1 Full and Simple Adoptions

The subsequent legal standing of the birth parent/s in relation to the child will depend on whether the order made in the sending country is a 'full' or a 'simple' adoption order. In the former case the adoption order will then operate to wholly and permanently terminate the rights of the natural parent/s, whereas in the latter these rights are not completely extinguished. The statutory processes of some countries, such as the U.K., have only ever provided for full adoption and while that jurisdiction now provides automatic recognition for that form it also allows for conversion of simple adoptions.[40] Article 26(2) of the Convention provides that, in the case of full adoptions, a Convention compliant adoption order will have a legal effect equivalent to an order made under the statute law of the receiving country.

5.6.4.2 Access to Identifying Information

Under Article 30(1) of the Convention, the sending countries are required to preserve information relating to the identity of natural parent/s and in particular to the child's personal and family history; this is to include information regarding the family's medical history. However, Article 30(2) leaves the issue of access to that information to be determined by the laws of the receiving country. From the perspective of the rights of the child, this raises huge questions—what about information that is not recorded for example? Where does the obligation (to protect the child's right to identity) lie?[41]

5.7 Contemporary Intercountry Adoption Practice

From about the mid-1970s, stimulated in part by the social dislocation in south-east Asia following the Vietnam War, intercountry adoption became a global phenomenon. It by then also embraced sending countries in South America and such receiving countries as Canada, Australia, the U.S. and most of Western Europe. From the 1990s, it extended to include sending countries in Eastern Europe, most notably Romania. Although The Hague Convention now provides an international regulatory framework

[40] In England & Wales recognition is provided under section 66 of the 2002 Act and conversion under section 88 ensures that all Convention adoptions are treated as full adoptions. In order to deal with the diversity of national interpretations encountered in the context of intercountry adoption, section 88 of the 2002 Act also provides a procedure whereby those simple adoptions that are not amenable to conversion, perhaps because evidence of full and informed parental consent is not available, are sifted out and an alternative order is made.

[41] The author is grateful to Ursula Kilkelly for pointing this out.

its capacity to standardise and raise levels of practice is limited by the fact that a number of participants in intercountry adoption are not signatories to the Convention.

5.7.1 The Children

When intercountry adopters were motivated largely by altruism the children then transferred to receiving countries were often older, suffering from a disability and/or with pronounced social and healthcare needs. Contemporary practice, however, is driven more by the needs of infertile couples in western societies.[42] In Finland and Italy, for example, respectively 80% and 90% of persons who applied for an intercountry adoption had no biological children of their own. The need of the involuntarily childless is firmly directed towards acquiring healthy babies.

By the early years of the 21st century, intercountry adoption was continuing to grow in terms of the numbers of children involved as the deficit in babies available for adoption in modern western societies became more marked.[43] From a level of some 20,000 intercountry adoptions annually in the 1980s the number rose to nearly 32,000 annually by the end of the 1990s. As Cretney has recently pointed out:[44]

> Now over 30,000 children from 50 countries are adopted outside their countries of origin each year. The USA is the main receiving country, the main countries of origin are Russia, China, Vietnam, Columbia and Guatemala.[45]
>
> Compared with the rest of Western Europe, the number of these adoptions in the U.K. is low; only approximately 300 orders are made each year.[46]

The age profile of the children involved is very revealing: two-thirds are less than one year old and only 16% are aged three years or older. The correlation between countries with lower fertility rates and high rates of intercountry adoption applications in respect of children aged under-five is unmistakable. Anecdotal evidence would suggest that very few children suffer from an obvious physical or mental

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[42] Research shows that this is the case in 9 out of 10 such adoptions; see, for example, Hoksbergen, R., Juffer, F. and Waardenburg, B., *Adopted Children at Home and at School*, Swets and Zeitlinger, Lisse, 1987.

[43] In 1998 the rate of intercountry adoption, expressed per million of the population in the receiving country was: 116 in New Zealand; 52 in the Netherlands; 26 in Sweden; and 117 for Norway.

[44] See, Cretney, S., Masson, J. and Bailey-Harris, R., *Principles of Family Law*, Thomson Sweet & Maxwell, London, 2003 at p. 832. The U.N. Population Division estimate the current flow at 40,000 annually in recent years.

[45] Citing, Selman, P., 'The Demographic History of Intercountry Adoption', in Selman, P. (ed.), *Intercountry Adoption*, BAAF, London, 2000 at pp. 13–37.

[46] Citing, *Second Report to the UN Committee on the Rights of the Child by the UK*, 1999, para 7.23.8.

disability though many are under-nourished, perhaps have a vitamin deficiency and some are eventually found to be HIV positive.

5.7.1.1 Children in Need

The children adopted are not necessarily those most in need. As has been observed:[47]

> It appears that there are more children available for adoption than are currently being adopted. There are, for example, large numbers of double orphans who are not being adopted. In many sub-Saharan African countries, including the Central African Republic, Kenya, Malawi, Rwanda, Swaziland and the United Republic of Tanzania, double orphans make up 3 per cent or more of the under-18 population (there are currently some 7.7 million double orphans in Africa). Large proportions of double orphans are also found in several Asian countries and in some countries of the Caribbean.

This gives rise to concern that adopter choice, where racial congruity is a factor, rather than child need is all too often the true determinant of which children enter the intercountry adoption process.

5.7.2 Sending Countries

The pool of countries prepared to make children available for intercountry adoption is continually changing. A number of former sending countries have now either stopped or drastically restricted their involvement. Bangladesh, for example, recently prohibited the practice while Peru will only permit it on the basis of bilateral agreements. Other countries such as Korea, Romania[48] and India have developed laws to regulate it. While poverty is clearly a factor in determining whether or not a nation is or continues to be a sending country, politics also plays a role. In 'closed' totalitarian states, such as North Korea and formerly in Eastern Europe countries, governments tend to prohibit intercountry adoption as they would any practice that might permit external involvement, indicate an inability to cope with indigenous social problems and present a risk of political 'loss of face'.

As some countries withdraw others take their place. For example, from the mid-1990s Russia and China were the lead sending countries while at present the Philippines has become a significant supply nation. Recently a number of countries in Latin America have come on-stream as suppliers including El Salvador, Guatemala, Honduras and Brazil.

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[47] Joint United Nations Programme on HIV/AIDS, UNICEF and USAID, 2004; as cited in Menozzi, C. and Mirkin, B., 'Child Adoption: A Path to Parenthood?', *op. cit*.

[48] In 1993 Britain and Romania signed a bilateral agreement which had the effect of practically ending the sending of Romanian children to the U.K.

5.7.3 Receiving Countries

The U.S. has been a longstanding receiving country that in recent decades has absorbed 10,000 children a year through intercountry adoption while approximately the same number is distributed annually throughout northern and western Europe.[49] Some European countries, notably those in Scandinavia, have developed a reliance on this form of adoption. Sweden and Holland receive approximately 2,000 children annually as does Germany while 600 are adopted in Denmark. Norway with a population of 4.6 million has a very high rate of intercountry adoption with 724 such adoptions in 2005.[50] In the U.K., with a population of 60.7 million, only 300 intercountry adoption applications are currently processed annually while perhaps a further 100 bypass formal procedures.[51]

The key factor that now determines the involvement of a receiving is the lack of indigenous children available to infertile couples. In all countries this is largely due to a sharp reduction in consensually relinquished children. In some countries this position is exacerbated by the non-availability of children through the public care system following judicial removal of parental rights. In Sweden and Denmark, for example, the non-availability of children through either consensual or compulsory means has led to a total reliance on intercountry adoption. Other countries, such as Ireland, are heavily though not exclusively dependent upon intercountry adoption for the same reasons. The U.S. and more recently the U.K. have increased their capacity to make children available from their public care systems but still need to resort to intercountry adoption to meet demand. The considerable difference between the U.S. and the U.K. as receiving nations is primarily due to independent and third-party adoption placements being permitted by the former but prohibited by the latter. Independent and third party adoptions are also allowed in countries such as Sweden, Germany, the Netherlands and France. The U.K., in common with Norway and Finland, restricts adoptions to those arranged by approved agencies.

5.7.4 Some Issues in Contemporary Practice

A slow developmental process has seen the 1993 Hague Convention evolve from the work of The Hague Conference on Private International Law that commenced

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[49] See, generally, Doek, van Loon and Vlaardingerbroek (eds.), *Children on the Move*, Martinus Nijhoff Publishers, The Hague, 1996. Also, see, Selman, 'The Demographic History of Intercountry Adoption', in Selman (ed.), *Intercountry Adoption: Developments, Trends and Perspectives*, British Agencies for Adoption and Fostering, London, 2000 at p. 16. See also conference papers entitled 'Intercountry Adoption in the New Millennium: The 'Quiet Migration' Revisited' delivered at the European Population Conference, Helsinki, Finland, 7–9 June 2001 and 'Movement of Children for Intercountry Adoption: A Demographic Perspective' delivered at 24th IUSSP General Population Conference, Salvador, Bahia, Brazil, 18–24 August 2001.

[50] See, www.ssb.no/english

[51] Statistics cited in Triseliotis, J., Shireman, J. and Hundleby, M., *Adoption Theory, Policy and Practice*, Cassell, London, 1997 at p. 183.

with The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption 1965. It now provides a satisfactory framework for regulating intercountry adoption practice. Most of the serious issues that continue to threaten standards in modern practice arise from the fact that a significant preportion of all annual intercountry adoptions are still not subject to the Convention.

5.7.4.1 Bilateral Agreements

The Hague Convention does not apply to many countries currently participating in intercountry adoption. Some developed nations have an established practice of independently negotiating bilateral agreements to govern the flow of children from developing countries (Ireland and the U.S., for example, have a number of contractual agreements with South American countries). It is hard to square this with a commitment to Hague standards. Arguably, such practice represents in national form the rather selfish opportunism that has been traditionally associated with 'trafficking' and it must serve to undermine the international effort to build a principled framework for regulating this form of adoption.

5.7.4.2 The Availability of Children

The Hague Convention puts in place safeguards for ensuring that proper consents are provided in respect of children made available for intercountry adoption: every effort must be made to trace birth parents and to obtain their consent, including that of a birth father.[52] This allows for checks to be made as to a child's status as orphaned, abandoned, consensually relinquished or in respect of whom parental rights have been judicially terminated. It enables counselling services to be offered to birth parents to ensure that consents are informed and freely given; such services are not available in some sending countries such as Brazil. It requires professional medical checks and a proper standard of health and social care to be provided following parental relinquishment; as is the case in countries such as Thailand. It also requires that a child is only made available after a professional assessment has concluded that other preferred options are not feasible and that intercountry adoption is compatible with that child's welfare interests.

However, the fact remains that not all sending countries are Convention compliant and there is research evidence to show that many overseas adoptions involve children who are neither orphaned nor abandoned. In many cases the parental consent requirement is avoided by the claim that the parent/s cannot be found and there is little an authority in a receiving country can then do to satisfy itself that every reasonable effort has been made to locate such a parent. In other cases, where the

[52] Subject to situations where the laws of a country such as Russia, prohibits the tracing of birth parents after a local adoption. See, *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646.

consent of a 'guardian' rather than a parent is acceptable, the authorities in some sending countries offer the consent of an institution. Both types of response, not untypical of practice in countries such as Russia and Brazil, would breach the consent requirements of the Hague Convention.

- **The welfare and wishes of the children**

In *Pini and Others v. Romania*[53] the ECtHR dealt with the attempted intercountry adoptions of two Romanian girls by the applicants, who were two couples from Italy. In 2000, the applicants had obtained orders in a Romanian court for the adoption of the children when they were nine years old and in the care of a private institution in Romania. This state-approved institution provided a home and education for orphaned and abandoned children. The children were declared to have been abandoned by a County Court in Romania, one in 1994 at the age of three, the other in 1998 when she was aged seven.

In 2000, a District Court in Romania made the adoption orders and ordered that the children's birth certificates be amended to reflect this decision. The Romanian Adoptions Board appealed the court decision but it was dismissed as being out of time. The institution where the girls lived refused to abide by the adoption orders and did not allow for the transfer of the girls to their adoptive parents. The institution made a number of applications to court to prevent the enforcement of the adoption orders and also applied unsuccessfully to have the adoptions set aside.

In 2002, both children issued proceedings in the District Court in Romania to have the adoption orders revoked on the ground that they did not know their adoptive parents and did not want to leave their native country and the institution. One of the girls was unsuccessful in doing so. The District Court found that it was not in her interests for the order to be revoked. Despite this decision, the girl did not move to Italy with her adoptive parents and remained in Romania. The other girl was successful in having her adoption revoked. The court decided that she was receiving a good education and living in good conditions at the institution. The court also noted that she had not formed any emotional ties with her adoptive parents. This decision was not appealed and it became final.

The adoptive parents claimed that the refusal by the Romanian authorities to enforce the final adoption decisions breached Article 8 of the Convention. The ECtHR stated that the Convention does not guarantee a right to adopt and that the aim of adoption is to provide a child with family.

In this case, a conflict of interests existed between the wishes of the children and the applicants. The ECtHR noted the deplorable manner in which the adoption proceedings took place and the lack of contact between the applicants and the children prior to the adoptions. The absence of psychological support for the children was also noted. The ECtHR decided that the wishes of the children and their best interests carried significant weight. Therefore, Article 8 had not been breached as Romania was entitled to consider that the children's interests took precedence over those of the adoptive parents. However the ECtHR held that there had been a violation by Romania of Article 6.1 of the Convention for failing, for more than three years, to take effective measures to comply with the final and enforceable judicial decisions. The prospect of

[53] [2004] EHRR 275.

the adoptive relationships developing in the future was seriously jeopardised since the children were still opposed to the adoptions and the move to Italy at the time of the decision of the ECtHR when they were both 13 years of age.

The welfare interests of children may also be threatened by unscrupulous practice. In September 2008, for example, the two-year old bilateral agreement between Vietnam and U.S. was abruptly suspended following media reports of children being kidnapped in the former country and sold to adopters in the latter. It is to be noted that the Parliamentary Assembly of the Council of Europe issued a recommendation on international adoption to the Committee of Ministers of the Council requiring that measures be taken to ensure that the rights of children are protected.[54] It emphasises that the purpose of international adoption, as a child care option of last resort, is to provide children with parents. It denounces the abuses which have sometimes become part of intercountry adoption and calls on member States to ratify the Hague Convention.

- **Equity of access to adoption**

An obvious but important point is that older and disabled children, and those with behavioural problems, are underrepresented in intercountry adoption. This may be no more than one aspect of a more general problem viz. that the preferencing of children for this service unfairly differentiates between them and would seem to militate against certain groups. There are, for example, several millions of children in Africa who are orphaned and/or abandoned as a consequence of the ravages of AIDS and other diseases but for whom the opportunity of intercountry adoption is rarely available. In this context, the politics of adoption works in favour of the young and healthy, perhaps accompanied by a racial preference component, but to the disadvantage of all others, particularly those who require more care.

5.7.4.3 Matching Children with Adopters

Matching the needs of a particular child with the attributes of available adopters is the key component to a successful adoption. This is less likely to be achieved in intercountry adoptions. In the U.K. and other receiving countries a careful professional assessment of applicants is conducted by registered adoption agencies. The assessment of a child's particular needs, however, and the matching process undertaken in the light of those needs, is left entirely to authorities in the sending country; excepting any broad conditions attached to the adopters approval by the authorities of the sending country. Whether or not Convention compliant, most sending countries have relatively weak social and health care infrastructures and are simply unable to dedicate the resources necessary to provide a matching service equivalent to that typically employed by U.K. Adoption Panels.

- **Racial congruity**

The matching of adopter and child on the basis of racial congruity is a fraught moral issue and one with political connotations that to some are intensely important. As

[54] Recommendation 1443 (2000) *International Adoption: Respecting Children's Rights*, adopted by the Parliamentary Assembly of the Council of Europe on 26 January 2000. See www.coe.int

adopter choice determines whether or not child and adopter share the same racial characteristics, the latter's motivation is crucial but whatever that may be it is the implications for the child that should always be the overriding consideration.

Where adopter choice is for racial congruity this perhaps gives the child one less obstacle to overcome when trying to find a personal sense of cultural identity. It may also, of course, indicate some level of discriminatory attitude held by the adopter which may later prove obstructive for an adoptee needing encouragement and support as he or she begins to explore their origins.

Where the choice results in a mixed race adoption this can be more problematic. If the adopter can offer a similarly mixed race extended family and community environment, where differences are accepted and valued, then the child may be readily assimilated into a stimulating milieu of relationships that are likely to prove conducive and helpful to any need to explore matters of cultural identity. Without that context, there is a strong likelihood of the child being troubled by the fact of difference and a risk of their having a conflicted approach to building a personal sense of identity.

A further and more worrying variation of that theme arises where the choice is made for reasons of demonstrating adopter commitment to a lifestyle or set of values that the child thereafter has to represent. Those, for example, who are motivated to embrace a mixed race, multi-cultural ethic which relishes diversity and equality may, perhaps unwittingly, deny their child the space to get in touch with their cultural origins and form an authentic and independent identity. Again, adopter choice may be determined by personal politics: a wish to reach out to a particular country, perhaps in the aftermath of war or natural disaster or because of sympathy with or aversion to a political regime. This too may impose a values framework which could cloud the upbringing of their child and lead to difficulties in facilitating, objectively and encouragingly, the growth of the child's links with their culture of origin.

While there can be no prescriptive rules in this area, when considering adopter motivation, the prospects for the child to develop and sustain an authentic personal identity and cultural affiliation must guide decision-making.

5.7.4.4 Commercially Driven Independent Agencies

Extreme poverty is now most often the root cause of parents in third world countries making their children available for adoption. In that context the involvement of for-profit agencies in arranging adoption placements with couples from western societies carries the risk that this will invalidate the Convention requirement that consents be fully informed and be given free from either duress or financial inducement. Independent commercially driven agencies, often based in the U.S.,[55] are frequently involved in facilitating the adoption placements of children from countries

[55] See, for example, *'All God's Children,* International. Note that since April 2008, when the U.S. ratified the Hague Convention, all such agencies are now required to be registered.

such as Brazil, elsewhere in South America and Russia. When the resulting adoption applications come before the courts, for example in the U.K.,[56] the standards of practice of such agencies are sometimes found to be in breach of Convention requirements[57]. Overseas adoptions bypass the Convention and for that reason attract the involvement of independent commercially driven agencies. It is important that the standards of protection, afforded to all parties under the Convention, are also applied to overseas adoptions.

5.7.4.5 Financial Impropriety by Intermediaries

The profit motive is not confined to the involvement of independent commercial agencies. Anecdotal evidence, drawn from the experience of many adopters dealing with officials in sending countries, testifies to the considerable amount in fees that frequently have to be paid to a range of other intermediaries. Lawyers, doctors, officials in orphanages and/or in emigration, for example, may or may not require payment. For a particular intercountry adoption, as well as for practice in a sending country, to avoid any suggestion of complicit involvement in 'trafficking' it is clearly important that all costs are predictable, transparent and reasonable—as required by the Hague Convention.

5.7.4.6 Effects of Intercountry Adoption on Children

In terms of outcomes for the children involved, this process exacerbates some of the more typical effects of adoption.

- **Identity**

The most immediate effect of such an adoption is the removal of a child from their family, community and culture of origin. Despite the best intentions of all concerned, perhaps not always genuinely shared by the adopters and towards which the child concerned may be at least ambivalent, it often proves difficult to keep alive the links between the child and his or her cultural heritage. The practice whereby some sending countries, for example Korea, facilitate the setting up of culture-specific support groups for adoptees within receiving countries and also on a transnational basis, may well be an appropriate initiative for all participant countries to develop.

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[56] See, for example, *Flintshire Country council v. K* [2001] 2 FLR 476, the 'internet twins' case.

[57] See, for example, *Re M (Adoption: International Adoption Trade)* [2003] EWHC 219 (Fam), [2003] 1 FLR 1111 which concerned a white British couple who had adopted a baby from a black American couple after paying approximately £17,500 to an American adoption agency. The home study reports, prepared by a British social worker, were criticised by the court as "deeply flawed and inadequate documents" and it also referred to "the evil and exploitive trade" of buying and selling babies.

There are issues here about the nature and weight of the obligation resting on sending and receiving countries, on the adopters and on the professionals concerned, as to how they preserve and promote an adoptee's sense of identity and cultural affiliation. Issues also surround the question of where the onus rests to monitor and enforce, if necessary, this obligation.

- **Citizenship**

Some nations have traditionally treated intercountry adoption with suspicion on the grounds that it may be used to circumvent immigration rules and procedures; a suspicion that has not entirely been laid to rest. Currently, the U.K. and other countries such as the U.S. and Sweden grant the adopted child residency status but not citizenship while others such as New Zealand grant citizenship. The legal complexities were recently explored in the Irish case *Attorney General v. Dowse*[58] (see, further, Chap. 7). These inconsistencies need to be replaced by a standardised rule under the aegis of The Hague Convention.[59]

5.7.4.7 Post-adoption Support Services

Most intercountry adoptions unfold satisfactorily for child and adopters. Some, however, do not. A number of children transferred to receiving countries are subsequently admitted to care, a few are severely abused and some even die at the hands of couples who had embarked on this process with the best of intentions. The attraction that some find in this route to adoption, its essentially private nature carrying a promise of minimum involvement with public services, is arguably an area of weakness that leaves both child and adopter unnecessarily exposed to risk. Experience shows that intercountry adoptions carry their own specific vulnerabilities in addition to the risks inherent in all adoptions. The current practice in countries such as Russia to require annual post-adoption reports from receiving countries for three years is clearly sensible.[60] It is important that all intercountry and overseas adoptions are subject to a structured, two-year minimum programme of monitoring and specialist support services and an optional ongoing programme thereafter.

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[58] [2006] IEHC 64, [2007] 1 ILRM 81.

[59] In its 2005 Draft Guide to Good Practice under the Hague Convention, the Hague Conference on Private International Law points out that States should avoid a position where a child would be left stateless, in the context of traditional intercountry adoption where sending and receiving countries are involved. It draws attention to Article 7(1) of the 1989 United Nations Convention on the Rights of the Child which directs that the child shall have the right to acquire a nationality. See, further at www.hcch.net/index_en.php. Also, see, Duncan, W., 'Nationality and the Protection of Children Across Frontiers: The Case of Intercountry Adoption' paper delivered at the 3rd European Conference on Nationality-Nationality and the Child, Strasbourg, 11–12 October 2004.

[60] Several countries now require foreign prospective parents, or the social services of the adopting country, to make regular reports on the child's progress to its country of origin. This "follow-up period" is 10 years in the case of Sri Lanka, four for Peru, three for Paraguay and two for Romania.

5.7.4.8 Access to Identifying Information

The fact that laws recognising rights and facilitating access to information exist in some receiving countries, such as the U.K., is of no advantage in the context of intercountry adoption if they don't exist in the sending country.

Sending countries have established different practices in relation to making information available to the parties concerned in intercountry/ overseas adoptions. In some the characteristics of 'closed' adoption, as traditionally practiced in western nations, are very much in evidence. Frequently, all arrangements are managed by designated intermediaries and in some countries, for example Thailand and India, no contact pre or post adoption is permitted between the parties. Other countries, such as Bulgaria, destroy birth records after an adoption order is made. The Hague Convention requirement, that birth and family of origin information is maintained by the authorities in sending countries, should clearly prevail in all overseas adoptions and rights of access to such information should be as outlined in the legislative provisions relating to in-country adoptions of the receiving country.

5.8 Conclusion

Intercountry adoption is a rapid growth phenomenon that has developed to the point where it now involves some 50 countries and 30,000 children on an annual basis. It is clearly of the utmost importance that the related framework of law, policy and practice also evolves to safeguard the welfare interests of so many children. There is some way to go before we can be confident that this framework is compliant with Article 1 of the Hague Convention and provides "safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".

In some ways, the politics of adoption are more apparent when viewed in an intercountry context. There is, for example, some evidence that a political dimension exists in the flow of children between countries. Also, some of the provisions of the Hague Convention seem to highlight the significance of domestic political choices. In particular, Article 4(b) states that intercountry adoption may be considered as an alternative means of providing for a child's care but only after all other options for retaining the child within his or her country of origin have been exhausted. This principle clearly places an obligation on both potential sending and receiving countries to invest in the resources necessary to retain a child within his or her country of origin as a first option. The principle would also seem equally applicable to domestic child care adoptions. There are real differences between countries, such as the U.K. and Sweden, in this regard. The difference is ultimately attributable to a very different political choice made on the issue as to whether government resources should be invested in providing safe care for children within their families of origin or in providing alternative permanency arrangements through non-consensual adoption.

The Hague Convention, as important as it undoubtedly is, provides only a framework of minimum standards for regulating intercountry adoption. Even if fully implemented by all the countries engaged in this practice it would still fall short of ensuring that optimal standards prevail in all instances for all the children concerned. Currently, however, the main problem with the Hague Convention is that it does not govern the practice of all relevant countries. This in itself presents a significant political challenge if adoption is to safeguard and promote the welfare interests of those children who enter the process.

Chapter 6
The Adoption Process in England & Wales

6.1 Introduction

The Adoption and Children Act 2002, fully implemented in December 2005, repealed the Adoption Act 1976 and significantly amended the Children Act 1989. It marked an important change in the government's policy towards adoption, particularly in the use made of it by local authorities in respect of looked after children, and follows very closely the same process of change in the U.S.[1] The 2002 Act provided a strong lead for the adoption law reviews in Scotland[2] and Northern Ireland.[3] The product of a decade and more of debate,[4] the 2002 Act together with the Children Act 2004 and the Children and Adoption Act 2006, now consolidates the policy, principles and law in adoption and child care practice for England & Wales.

This, the first of the jurisdiction specific chapters, begins with background information on the social and legal contexts and the emerging characteristics of adoption. It continues by identifying the significant trends in modern adoption practice, considering the main elements of current policy and outlining the prevailing legislative framework. The template of legal functions (see, Chap. 3) is then applied to reveal the actual mechanics of the process in action. The chapter concludes with a summary of the more distinctive characteristics of the adoption process in England & Wales.

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[1] See, Sargent, S., 'Adoption and Looked After Children: A Comparison of Legal Initiatives in the U.K. and the USA', *Adoption & Fostering* (BAAF), 27, 2, 2003, pp. 44–52.

[2] See, the Adoption and Children (Scotland) Act 2007 which repeals the bulk of the Adoption (Scotland) Act 1978.

[3] The public consultation process, launched in 2006, concluded with publication of the report *Adopting the Future*.

[4] In 1996, a draft Adoption Bill was published for consultation and the Social Services Inspectorate also published a national report on inspections of local council adoption services entitled *For Children's Sake*.

K. O'Halloran (ed.) *The Politics of Adoption,*

6.2 Background

In 1968 the number of adoption orders reached a high of 25,000 and, thereafter, annual trends have developed a fairly consistent downward trajectory. In 2006, 4,764 children were adopted, 516 fewer than in 2005 (a decrease of 9.8%), their lowest level since 1998.[5] These figures, however, hide the extent of change in the use of adoption in this jurisdiction over a period of two or three decades.

6.2.1 The Social Context Giving Rise to Adoption

In England & Wales, as with all other western nations, the annual decrease in adoptions can be traced to changes in the same cluster of variables within the social and legal context.

6.2.1.1 Unmarried Mothers

Traditionally the main source of children available for adoption, unmarried mothers have, since the late 1970s and despite the steady increase in their numbers, been much less inclined to relinquish their babies. In 2006, for example, nearly a quarter (24%) of children in Great Britain were living in lone-parent families, more than three times the proportion in 1972. The considerable improvement in welfare benefits, housing entitlement, and family credit etc., coupled with the virtual disappearance of any associated stigma (though not among ethnic minority groups), has almost eradicated voluntary relinquishment as the forced option of an unmarried mother. However, it remains the case that it is the children of unmarried mothers that constitute by far the largest proportion of annual adoptees.[6]

6.2.1.2 Abortion

The introduction of legal abortion under the Abortion Act 1967 and the ensuing annual increase in abortions was accompanied by a rapid decline in the number of children available for adoption, an inverse correlation that has continued ever since. The upward trend in annual abortion figures shows little sign of easing. In 2006, for example, a total of 193,700 abortions were carried out in respect of women resident in England and Wales, compared with 186,400 in 2005, a rise of 3.9%.[7]

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[5] See, Office of National Statistics at http://www.statistics.gov.uk/. During 2005, adoption orders decreased by over 15% to 3,867 (see, Annual Judicial Statistics at http://www.official-documents.gov.uk/document/cm67/6799/6799.pdf

[6] In 2005, for example, of 5,280 adoptions 4,025 were in respect of children born outside marriage.

[7] *Ibid*. There were also 7,400 abortions for non-residents carried out in hospitals and clinics in England and Wales in 2006 (7,900 in 2005).

6.2.1.3 Assisted Reproduction Services

The availability of fertility treatment (AID, GIFT etc.) has been an important factor in reducing reliance on adoption. In particular, the Human Fertilisation and Embryology Act 1990 and the consequent improvement in treatment methods have offered an alternative route for childless couples hoping to start a family. In 2006, some 12,000 babies were born to mothers in this jurisoliction as a result of IVF treatment.

- **Surrogacy**

By August 2004, some 500 surrogate births had occurred in the U.K., mostly facilitated by the voluntary organisation Childlessness Overcome Through Surrogacy (COTS) founded in 1988.[8]

6.2.1.4 Marriage/Divorce/Civil Partnerships

A significant proportion of annual adoptions in England & Wales have always been 'family' adoptions. As, most often, these are a legal consequence of reformed family units they are directly affected by the prevailing rates of divorce etc.

- **Marriage**

In England and Wales marriages fell by 10% in 2005 to 244,710, which is the lowest number of marriages since 1896. Remarriages rose by about a third between 1971 and 1972 following the introduction of the Divorce Reform Act 1969 in England and Wales, and then levelled off. In 2005, 98,580 marriages were remarriages for one or both parties, accounting for 40% of all marriages.[9]

- **Divorce**

In 2006 divorces in England and Wales fell for a second consecutive year to 132,562. The divorce rate is now at its lowest level since 1984.[10]

- **Civil partnerships**

The Civil Partnership Act 2004 gave legal recognition to same sex partnerships. Between December 2005 and September 2006 some 15,700 same-sex civil partnerships were registered in the U.K. of which 93% were in England and Wales.[11]

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[8] See, www.surrogacy.org.uk/

[9] See, Office for National Statistics at http://www.statistics.gov.uk

[10] *Ibid*.

[11] *Ibid*.

6.2.1.5 Public Child Care

As noted earlier (see, Chaps. 1 and 2) the law in this jurisdiction had drawn a clear line between entry to the public child care system and entry to the adoption process; a line rigorously policed by the judiciary. Consequently, the system was steadily clogging up. By the late 1970s the number of children in care had reached 100,000 (7.5 per 1,000) with increasing numbers of older children, disabled children and sibling groups being taken into care.[12]

In March 2007 there were 60,000 children being looked after in England, which is about average for the past few years, although some 90,000 actually pass through the care system in any year, as 42% return home within six months. In 2006 the figure was 60,300, a decrease of 2% from 2003, and the rate of care admissions had fallen to 5.5 per 1,000.[13] On average, for the past few years, about 30% of children in care are there on a voluntary basis.

- **Foster care**

In March 2007, of the 60,000 looked after children, 42,300 children were in foster placements (71%). This is an increase of 2% on the previous year's figure of 41,700 and an increase of 3% from 2003 (41,000). It has been estimated that two out of every three children who come into care in the UK are fostered.[14]

- **Residential care**

In recent years, following a succession of inquiries concerning abuse and neglect in children's homes,[15] there has been a sharp fall in the number of residential care places. From a position where most children in care were accommodated in such homes, now only a few tend to be so and they are often children with complex needs, likely to be there on a long-term basis and therefore unlikely to be considered for adoption. In March 2007, some 6,500 looked after children (11%) were in secure units, children's homes and hostels; a proportion that has been unchanged for some years.

- **Family or community**

Around 18% of looked after children, mostly those aged 11 or less on entering the care system, are in fact living with family members (approved as foster parents for that purpose) under the authority of a care order. Some 10% of all such children are placed with birth parents, a proportion has remained fairly constant for several years. A further 2% or 3% are living independently or at a place of employment.

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[12] *Ibid*.

[13] *Ibid*. This represented a decrease in admissions of 1% since 2005 and a fall in the care population from 70,000 in 2004.

[14] See, *Fostering Network* at http://www.fostering.net

[15] See, for example, Waterhouse, *Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd Since 1974*, The Stationery Office, London, 2000.

6.2.2 Resulting Trends in Types of Adoption

The above factors have combined to reshape the traditional social role of adoption.

6.2.2.1 Third Party Adoptions

In 2007, 3,300 looked after children were the subjects of domestic third party adoptions. This represents an 11% decrease from the previous year's figure of 3,700 and a 7% decrease from the 2003 figure of 3,500. In 2005 and in 2006 the proportion of such children voluntarily relinquished for adoption decreased to 9% in 2005[16] and reached 7% in 2007.[17] In short, almost all adoptions from care were fought through the courts by parents who were not consenting to the state enforced adoption of their children. The remaining third party adoptions were largely in respect of the relatively small but steadily growing number of children subject to intercountry proceedings.

- **Adoption of children with special needs**

Whereas previously it could have been anticipated that children admitted to care with a degree of physical or learning impairment would have remained in the system this is no longer necessarily the case. The new levels of investment of ongoing support services and financial allowances, together with careful preparation for placement, has facilitated the successful adoption of a small number of children with special needs. Professional expertise, more relevant support services and the new realities of the adoption 'marketplace' have encouraged third party applicants to widen their expectations as regards the challenges and satisfactions of parenting. However, the proportion of children adopted from care in England that have a disability has never exceeded 1% (averaging 20–30 per year).[18]

- **Child care adoption**

Throughout the 1980s and 1990s, while the number of adoption orders fell the number of children in care continued to climb. However, following the Prime Minister's initiative[19] (see, further Chap. 2) a more assertive policy aimed at increasing the rate of adoptions from the public care system began to produce results.

Between 2000 and 2005 the number of children adopted from care rose by 38% against a target of 40%.[20] Over the three years from 2003 to 2005 the use of court orders to free children for adoption increased by 15% and by 2005 almost half of all children placed by adoption agencies were subject to freeing orders. However, a

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[16] *Ibid*., para 4.14.

[17] See, Department for Children, Schools and Families, *National Statistics*, September 2007.

[18] Ibid.

[19] See, Department of Health, Consultation Report by the Performance and Innovation Unit, *Adoption: Prime Minister's Review*, Cabinet Office, London, 2000.

[20] *Ibid*., para 2.1.

sense of perspective is needed: although government policy to increase the number of adoptions from care would seem to be working, as it is showing a steady increase, nonetheless adoption still only meets the needs of some 6% of all such children.[21] Moreover, there are growing indications of judicial caution in regard to child care adoptions. The governing common law principle that a child's welfare is generally best served by being a member of its natural family unless there are compelling reasons to suggest otherwise was affirmed in by the House of Lords decision in *Re G (Children)*.[22]

- **Same sex adopters**

In December 2005, both the Civil Partnerships Act 2004 and the Adoption and Children Act 2002 came fully into effect (currently, in June 2008, legislation to address issues of parentage is before Parliament). The latter provides explicit recognition, in section 144(4), that an adopting 'couple' may comprise 'two people (whether of different sexes or the same sex) living in an enduring family relationship'. In 2007, 2% of adopters were an unmarried couple (same gender) and 1% of adopters were civil partners.[23] Clearly a fundamental change has occurred in the adoption law of England & Wales following the example set by such other countries as Sweden (see, further, Chap. 10). Coupled with recent rulings of the ECtHR (see, Chap. 4), this will lead to an increase in same sex adoption orders.

- **Intercountry adoption**

In England & Wales, between 2000 and 2005, there were a total of 1,962 intercountry adoptions. In 2005 there were 367, with half of the children being adopted from China.[24] The number of such adoptions is considerably lower than in other jurisdictions studied (e.g. in 2004 there were only 326 while the comparable numbers for France and the U.S. were 4,079 and 22,884, respectively). Currently only 300 such children are adopted annually in the U.K., which amounts to almost 10% of annual adoptions.

6.2.2.2 Family Adoptions

The formalities of the adoption process are relaxed considerably in respect of applications made by relatives of the child; in particular such applicants are not required to submit to assessment by an adoption agency.

- **Step-parents**

For many years step-parent adoptions constituted the largest category of adopters in England & Wales, despite the long-standing concern that they had the effect of

[21] See, Office for National Statistics.

[22] [2006] UKHL 43. See in particular the views of Lord Nicholls of Birkenhead at para 2 and Baroness Hale of Richmond at para 44.

[23] See, Department for Children, Schools and Families, *National Statistics*, September 2007 at http://www.dfes.gov.uk/rsgateway/DB/SFR/s000741/SFR27-2007rev.pdf

[24] *Ibid*., para 4.12.

legally guillotining the interests of all members of one side of the child's family in maintaining relationships with that child.[25] These are now decreasing both in number and as a proportion of annual orders. In 1998, they accounted for more than 50% of all orders made. Adoptions were then achieved by way of a joint application by both birth parent and spouse. This changed following implementation of the Adoption and Children Act 2002 as joint applications are no longer necessary. Section 52(2) enables a step-parent, or partner, to adopt alone without being joined by the child's birth parent.

During 2005, of the 3,867 adoption orders made, 20% (800) were made to step-parents, 3% less than in 2004 (when 1,040 of the 4,539 orders were to step-parents).[26]

- **Kinship**

A relative, for the purposes of adoption law, is defined as a grandparent, brother, sister, uncle or aunt, whether of full-blood or half-blood. The proportion in kinship care is higher in the U.S. (25%) and even higher in Australia (40%).

6.2.2.3 The Children

The profile of children now entering the adoption process in England & Wales differs considerably from the intake of a few decades ago (see, further, Chap. 2).

- **Younger**

The average age of children placed by adoption agencies has been falling in this jurisdiction. Since 1996, for example, there has been a steady annual decrease in the proportion of children adopted from care aged 5–14 and an increase in the proportion of those aged 1–4. In 2006 the average age of the 3,700 children adopted from care was four years and two months: 53% of all children adopted were aged 1–4 compared with 27% 10 years earlier; while 39% of adopted children in 2006 were aged 5–14 compared to 63% in 1996.[27] As family adoptions decline and intercountry adoptions slowly increase this also tends to lower the average age of adoptees.

- **Non-marital**

The strong traditional link between 'illegitimacy' and adoption is, if anything, becoming stronger in this jurisdiction.

In 2006, 78% of the children entered into the Adopted Children Register following court orders were born outside marriage compared with 61% in 1996. In previous years, with an additional 200 or so of unspecified status, the figures were: in 1996, 3,480 of 5,741; 1998, 3,127 of 4,617; 2000, 3,530 of 5,086; 2002, 3,947 of 5,486; and in 2004, 3,995 of 5372.[28]

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[25] See, the Department of Health, *Adoption Law Review: Consultation Document*, 1992 at para 19.2.

[26] See, Department for Constitutional Affairs, *Judicial Statistics Annual Report 2005*, London, May 2006 at p. 71.

[27] *Ibid*.

[28] See, the Adopted Children Register which is administered through the General Register Office and maintains a record of adoptions made on the authority of courts in England and Wales.

- **Post-adoption contact**

The probability of an adopted child retaining some degree of contact with his or her birth family has increased considerably in recent years. A recent report noted that:[29]

> All adoption agencies involved birth families in ongoing contact arrangements to promote and maintain the child's identity. For birth parents, this contact was usually through periodic exchanges of letters and photos.

- **Multi-racial**

The ethnic and cultural background of children now being adopted differs considerably from the more typical white Caucasian adoptee of a few decades ago. The new diversity is as much a reflection of contemporary society as a natural consequence of intercountry adoption.

6.3 Overview of Modern Adoption Law and Policy

After a prolonged period of debate and formulating policy (see, further, Chap. 1), England & Wales now has in place a modern body of adoption legislation and a matching regulatory framework to address the needs of all parties engaged in domestic and international adoptions in its shrinking adoption process.

6.3.1 Contemporary Adoption Related Legislation

While for most purposes it is the 2002 Act that now provides a consolidated legislative framework for regulating the adoption process, it would be a mistake to overlook the importance of provisions that set the standards for practice and those that serve to further unify child care and adoption law.

6.3.1.1 Care Standards Act 2000

This Act, as amended by the Health and Social Care (Community Health and Standards) Act 2003, establishes regulatory bodies for social care in England and Wales, and provisions for registration and standards in social care work and training. It introduced the same inspection arrangements for local council adoption services as for voluntary adoption agencies. This statute provided authority: for the National Adoption Standards, given the force of statutory guidance from April 2003; and the National Minimum Standards for adoption; and, thereby, the means for assessing the performance of all adoption agencies in inspections undertaken by the Adoption and Permanence Taskforce.

[29] See, the Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies*, London, 2006, para 2.8.

6.3.1.2 The Adoption and Children Act 2002

This statute received Royal Assent on 7 November 2002 and came fully into effect on 30 December 2005. Its main provisions have been summarized as follows:[30]

- To overhaul and modernise the legal framework for domestic and intercountry adoption and in particular to replace provisions of the outdated Adoption Act 1976.
- To put adoption law in line with the existing provisions of the Children Act 1989 to ensure the child's welfare is the paramount consideration in all decisions relating to adoption.
- To place a duty on local authorities to maintain an adoption service and provide adoption support services.
- To provide for adoption orders to be made in favour of single people, married couples and unmarried couples.
- To introduce a new independent review mechanism for prospective adopters who feel they have been turned down unfairly.
- To provide a new system for access to information held in adoption agency records and by the Register General about adoptions, which take place after the Act comes into force.
- To provide additional restrictions on bringing a child into the U.K. for adoption.
- To provide restrictions on arranging adoptions and advertising children for adoption.
- To cut delays in the adoption process by establishing an Adoption and Children Act Register to suggest links between children and approved adopters.
- To bring in new court rules governing the making of adoption orders and measures requiring the courts to draw up timetables for adoption cases to be heard. Freeing orders are now replaced by "placement orders".
- To introduce a new special guardianship order for children for whom adoption is not a suitable option but who cannot return to their birth families.
- To provide that an unmarried father can acquire parental responsibility for his natural child where he and the child's mother register the birth of their child together.
- To introduce arrangements for step-fathers to acquire parental responsibility.

6.3.1.3 The Children Act 2004

This Act, which received Royal Assent on 15 November 2004, addresses recommendations made in the Laming Report[31] and provides authority for implementing

[30] See, Compactlaw at http://www.compactlaw.co.uk/free_legal_information/adoption_law/adoptf16.html

[31] See, Laming, L.J., *The Victoria Climbié Inquiry* (the "Laming Report), D.o.H., London, 2003.

the government's strategy as expressed in *Every Child Matters*.[32] Key provisions include the creation of the post of Children's Commissioner for England, closer joint working and information sharing between agencies involved with children, the introduction of Local Safeguarding Children's Boards and a duty on local authorities to promote the educational achievement of looked after children.

6.3.1.4 The Children and Adoption Act 2006

The legislative intent of this statute, which came into effect on 21 June 2006, is:[33]

> … to make provision as regards contact with children; to make provision as regards family assistance orders; to make provision about risk assessments; to make provision as regards adoptions with a foreign element; and for connected purposes.

The Act gives courts a wider range of powers to use in dealing with contact disputes after parents separate, and also contains measures on intercountry adoption, including a statutory framework for the suspension of adoptions from countries where there are concerns about practices in connection with the adoption of children in that country, and provision for the Secretary of State to charge for the administration of intercountry adoption casework.

6.3.2 International Law

This jurisdiction ratified the U.N. Convention on the Rights of the Child on December 16, 1991 and later the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 (ratified and given effect by the Adoption (Intercountry Aspects) Act 1999). It signed the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in 1994 and has since given effect to it through the Human Rights Act 1998. The 1998 Act has had the effect of incorporating 'Convention rights' into the domestic law of the United Kingdom.[34]

6.3.3 Adoption Principles and Policy

The policy articulated in the Prime Minister's Review[35] was responsible for the decision to apply the National Standards to local authority adoption practice and for

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[32] See, the consultation process in relation to the Children Bill: the Green Paper *Every Child Matters*, 2003; and *Every Child Matters: Next Steps* published by the Dept. of Skills and Education, 2004.

[33] See, preamble to statute.

[34] See, *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807.

[35] See, Department of Health, Consultation Report by the Performance and Innovation Unit, Adoption: Prime Minister's Review, Cabinet Office, London, 2000.

driving forward the new approach to child care adoption. This policy, which owed a great deal to a similar initiative launched earlier in the U.S. (see, further, Chap. 8), in effect demolished the principle of 'partnership with parents' that had been such a cornerstone of the 1989 Act. Another policy strand concerned the resolve to remove certain traditional legal presumptions such as the reasonableness of parental withholding of consent for adoption, the marginal relevance of unmarried fathers without parental responsibility, the favouring of married applicants and rejection of the notion that an adoption order should be absolute and unconditional.

6.3.3.1 The Interests of the Child

In a policy change of fundamental importance to adoption law, the paramountcy principle has been incorporated to govern all aspects of the adoption process, including parental consent, and a strategic bridge has been put in place to link that process with the child care system. A customised version of the welfare checklist in the 1989 Act has been embodied in the 2002 Act[36]; some items are deliberately calibrated across both statutes to ensure consistency of interpretation.[37] The adoption specific items on this list include:

- The likely lifelong effect on the child of becoming an adopted person
- His or her relationship with relatives and other significant individuals
- The ability and willingness of relatives, including birth parents or others to provide care and
- The value of any ongoing relationship the latter may have with the child

6.3.3.2 Policy

The new policy that emerged from the protracted adoption law review to inform the 2002 Act and subsequent legislation was anchored on the following key points:

- The paramountcy principle
- The synchronization of grounds for child care and adoption
- The substitution of a form of guardianship for family adoption and for some foster carer adoptions
- An increased adoption service
- Provision for post-adoption contact
- Facilitating post-adoption information disclosure and
- Permitting unmarried and same sex applicants

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[36] Section 1(4).

[37] For example, provisions section 1(3)(a), (d) and (c) of the 1989 Act are replicated in section 1(4)(a), (d) and (e) respectively of the 2002 Act.

6.4 Regulating the Adoption Process

In this jurisdiction both local authority and court retain their traditional regulatory roles. The court also acts as a watchdog in relation to agency practice and the High Court will use its powers of judicial review to intervene when alerted to possible improper practice.

This tightly regulated approach, resting on a body of specific requirements with definite sanctions for non-compliance, underpinned by Court Rules, has been and continues to be a distinctive characteristic of the adoption process in England & Wales and elsewhere in the U.K. In England & Wales it has been further reinforced by the introduction of two separate sets of standards: the National Adoption Standards, given the force of statutory guidance from April 2003; and the National Minimum Standards for adoption imposed under the Care Standards Act 2000 and against which agencies are now inspected by the Adoption and Permanence Taskforce.[38] The efficiency of the process has also been facilitated by the introduction of the National Adoption Register to expedite the matching of child and adopter/s. The net result is a very formal adoption process subject to highly prescriptive statutory and administrative rules—specifying targets, timescales and quality standards—raising fears in some quarters that this leaves very little scope for the discretion that is necessary if professionals are to hold focus on the particular welfare interests of each individual child.

6.4.1 Length and Breadth of the Process

In England & Wales, the introduction of the Adoption and Children Act 2002 has left the stages of the adoption process much as before. It commences with a statutory pre-placement counselling stage and concludes with the statutory availability of disclosure procedures, use of contact registers, possible conditions attached to adoption orders and opportunities for acquiring adoption allowances and other forms of ongoing support from government bodies.

6.4.2 Role of Adoption Agencies and Other Administrative Bodies

The steady growth in the space occupied by mediatory bodies, and the reliance placed upon their findings at the adjudication stage, has become a conspicuous feature throughout all U.K. family law processes. In England & Wales the role of administrative agencies in the adoption process has been enlarged by the legal

[38] See, the Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies*, London, 2006.

requirements in the 2002 Act to provide a more comprehensive adoption service and by the good practice requirements of the National Adoption Standards. The Adoption and Children Act Register, now underpinned by section 125 of the 2002 Act, expedites the workings of the adoption process by providing a national data bank of information relating to children waiting to be adopted and approved adopters.[39]

6.4.2.1 Adoption Agencies

The Adoption of Children (Regulation) Act 1939, brought into force in 1943, first required the registration of all voluntary adoption agencies. The Adoption Act 1958 then gave local councils explicit powers to arrange adoption for those children not in their care (as well as those who were), but not until 1988 were all local councils required to provide adoption services. The Care Standards Act 2000 introduced the same inspection arrangements for local council adoption services as for voluntary adoption agencies and prepared the ground for the three-year inspection programme for both which started in April 2003 and has recently been completed.[40]

An adoption agency is now defined as a "local authority or registered adoption society".[41] The latter includes voluntary adoption societies, which unlike local authorities are required to register, and both are subject to the inspection of the CSCI/National Assembly for Wales against the regulations and minimum standards. The crucial professional functions of such an agency are likely to be borne by the staff of a local authority as voluntary agencies now very rarely get involved in the consensual placement of children for adoption, although they do approve large numbers of adoptive families with whom looked after children are placed on interagency placements. In its recent inspection report, the CSI noted that at present there are 150 local council and 33 voluntary adoption agencies in England.

Each agency is required to set up at least one Adoption Panel.[42] This must take all referrals relating to whether: adoption is in the best interests of a particular child; a prospective adopter should be approved as an adoptive parent and; if the home of a particular approved prospective adopter would provide a suitable placement for a particular child. Although it does not have a role in relation to family adoptions it does screen all assessments of prospective intercountry adopters.[43] The Panel

[39] By March 2004, the Adoption Register had compiled a database of records relating to more than 10,000 children and approved adopters and had facilitated the adoption placements of 50 children.

[40] See, the Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies, op. cit*.

[41] See, section 2(1) of the Adoption and Children Act 2002.

[42] See, Department of Health, *Adopter Preparation and Assessment and the Operation of Adoption Panels: A Fundamental Review*, London, 2002.

[43] The Adoption of Children from Overseas Regulations 2001 require prospective intercountry adopters to submit to the same assessment process as prospective domestic adopters; since reinforced by the provisions of section 83 of the 2002 Act. Intercountry adoptions do not constitute a significant proportion of total annual adoptions in England & Wales; it is estimated that perhaps 300 such orders are made every year.

provides a vital and discretionary function by matching prospective adopters with available children. Although it makes recommendations rather than decisions for its agency, the latter is prevented from taking decisions in those areas without first inviting recommendations from the Panel and must make its decisions before the child is placed for adoption. The Adoption Agency Regulations and the Suitability of Adopters Regulations 2004 in the main continue the previous provisions but make some important additional changes to practice. The prospective adopters, for example, are now to be given relevant information relating to the child in question before referral to the Panel and this must include any plans relating to post-adoption support services and contact arrangements. The equity and non-discrimination legislation also applies to adoption agencies.

6.4.2.2 Local Authorities

The local authority also plays a more structural role in the adoption process. An onus is placed on each agency to justify itself in terms of its contribution to the needs of the adoption process. The adoption responsibilities of local authorities rest on four planks. Firstly, they must contribute to forming and maintaining local adoption services. Secondly, they must link adoption to their other child care services. Thirdly, they must manage their own work as adoption agencies. Fourthly and finally, they must carry out certain supervisory duties in relation to placements. The adoption service requirement entails each local authority ensuring the provision within its area of certain adoption services including:

- Counselling, advice and information
- Financial support
- Support groups for adoptive families
- Assistance with contact arrangements between adopted children and their birth relatives
- Therapeutic services for adopted children
- Help to ensure the continuance of adoptive relationships
- Provision of an adoptive support services advisor and adoption support plans for adoptive families and
- An assessment of the needs of adopted children and their families for adoption support services

6.4.3 Role of the Determining Body

Adoption proceedings are heard in family proceedings courts, or most often in county courts (some of which have been designated Adoption Centres) or occasionally in the High Court.

6.4.3.1 The Role of the Judiciary

Under the Adoption and Children Act 2002, as under all previous legislation, adoption in England & Wales remains firmly a judicial process. The court continues to ensure that eligibility/suitability criteria are fulfilled by all parties, ascertains or adjudicates on consent requirements, confirms that the proposed arrangements are compatible with the child's welfare and then issues or refuses the order sought. However, the 2002 Act has added some refinements such as:

- Flexibility in relation to marital status of applicants
- Application of the welfare checklist
- Obligation to check whether post-adoption contact arrangements are necessary
- Responsibility to determine whether a conditional adoption order would be appropriate and to
- Consider the appropriateness of an alternative order

6.4.3.2 CAFCASS

The judicial role is supplemented by the Children and Family Court Advisory and Support Service[44] which will appoint CAFCASS officers (previously a guardian *ad litem* and a children and family reporter) who are assigned vital roles in adoption proceedings. They will carry out an exhaustive investigation into all the circumstances of the proposed adoption, interviewing all applicants and respondents including, where feasible, the child and ensuring that any factor having a bearing on the welfare of the child is brought to the attention of the court. In particular, section 102 of the 2002 Act requires the CAFCASS officer to advise parents on the implications of giving consent.

Unlike under the 1976 Act, however, the appointment of a CAFCASS officer is no longer necessary in all cases. This marks a significant change to long established practice whereby the appointment of a guardian *ad litem* was mandatory in all adoption proceedings.

The court will also receive a report from the adoption agency or local authority in all cases.

6.4.4 The Registrar General

This official has statutory duties with a direct bearing on the adoption process being obliged to maintain an Adopted Children Register and keep an index of this in the

[44] Established in April 2000, CAFCASS brings together the role, functions and staff of the Probation Service in private law proceedings, the Guardian *ad Litem* Panels in public law proceedings and the child section of the Official Solicitor's Department. This non-departmental body now provides welfare reports and other support services in family proceedings throughout the three tiers of the court system and is accountable to the Lord Chancellor.

General Register Office. The duty imposes a further requirement that records are kept which provide a link between an entry in the Register of Births marked 'adopted' and the corresponding entry in the Adopted Children Register (a link not publicly accessible). This allows for the collection of information sufficient to identify child, adopters, the date and place in respect of every adoption order issued. The Registrar General is required to maintain an Adoption Contact Register which is intended to facilitate those adopted persons and their natural parents who want to contact each other.

6.5 Thresholds for Entering the Adoption Process

The Adoption and Children Act 2002 introduced significant changes to the threshold requirements for all parties entering the adoption process.

6.5.1 The Child

The child must be a 'person' known to the law i.e. he or she must have been born. It is not possible to adopt a foetus. That parties may enter into a contract in respect of a foetus to be carried to full term by a surrogate mother for the purposes of adoption is beside the point. Such a contract could well collapse as the pregnancy may not reach full term or one or more of the parties may decide not to proceed with the adoption etc.[45] The child must also satisfy minimum and maximum age limits by being not less than six weeks old and not having attained their 18th birthday before the application is lodged.[46] A child who is or has been married cannot be adopted. Where of sufficient age and discernment, the child's views must be sought and taken into account; he or she will be made a party to placement order proceedings.

The child must be subject to the courts of this jurisdiction. Children from overseas who are to be adopted here must cease to be subject to the courts of their country of origin and come within the jurisdiction of our courts. This is achieved by being resident if not domiciled within the U.K. and by not being excluded by any provision of international law. In the latter context, however, for Convention adoptions it is of no consequence that the 'habitual residence' of the child is in another country provided that of the adopters is within the jurisdiction.

Additionally, in all adoptions but perhaps mainly in relation to 'family' adoptions, suitability criteria may now either prevent an adoption by diverting applicants (either self initiated or by judicial discretion) from the adoption process to an

[45] See, however, *Re Adoption Application (Adoption: Payment)* [1987] 2 FLR 291 where it was recognised that such a contract was in itself valid.

[46] See, sections 47(9) and 49(4) of the 2002 Act which introduce a new rule permitting the adoption after a child's 18th birthday provided the application was lodged in court before that birthday.

alternative and more appropriate order or it may result in an adoption order subject to a contact condition in favour of a natural parent or sibling. The availability of alternatives to an absolute adoption order is an important and characteristic feature of the adoption process in this jurisdiction. It demonstrates the leverage available for judicial assertion of the public interest to compromise the private interests represented by an adoption order. In relation to 'agency' adoptions the provision of a more comprehensive adoption service including post-adoption allowances has facilitated the adoption option for children with particular needs. As very many agency adoptions involve children with special needs or complex health/behavioural problems, a multidisciplinary assessment will now more often than not be necessary to ascertain a child's post-adoption needs for health, social care or educational services.[47]

Children are now moving through the adoption process more quickly. Those under a year are placed on average within five months of a formal decision being made and older children on average within nine months.[48]

6.5.1.1 The Welfare Threshold

The introduction of the 2002 Act changed adoption law to make the welfare of the child the paramount consideration (complying with Art 21 of the Convention on the Rights of the Child), thereby significantly altering the balance between legal status requirements and welfare interests. In what, perhaps, has been the most radical adjustment ever made to the law of adoption in the U.K., the availability for adoption of a looked after child in England & Wales may now be determined by his or her welfare interests.[49] This has been a point of considerable contention.

There are those who would say that the change from "first consideration" in the 1976 Act to the present "paramount consideration" is not so huge. They might add that the application in practice of the "unreasonable withholding" ground for dispensing with consent under the 1976 Act was more or less decided on welfare grounds. Their position is reinforced by the probability that when the courts apply the checklist, the no order principle, and the consideration of other options in the context of the European Convention, it may not be that much easier to dispense with consent. In particular, application of the Convention's proportionality principle may well make it harder to get an adoption order as special guardianship will offer a less draconian but nevertheless reasonably secure option.

On the other hand for many decades U.K. legislators and judiciary have been at pains to draw a line between the public and private law proceedings of child care and adoption respectively. The difference between "first" and "paramount" consideration, however tenuous, had come to represent that line and many judicial pronouncements

[47] See, also, the National Adoption Standards.

[48] The Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies*, London, 2006, para 2.6.

[49] Unlike the law in other U.K. jurisdictions, and in stark contrast to adoption law in Ireland where factors such as parental consent and marital status of parents continue to be largely determinative of a child's availability for adoption.

laboured the point that they would not countenance the "unreasonable withholding" ground being deployed as a Trojan horse to undermine it. The grounds for a child care order could not be used to passport a child into the adoption process. To concede would be to open the doors to accusations of 'social engineering' (see, further, Chap. 1).

However, whether or not it represents a paradigm shift in U.K. adoption law, the 2002 Act has now bridged the gap between child care and adoption proceedings.

6.5.2 The Birth Parent/s

Whether married or not, any parent with full parental responsibility is entitled to voluntarily relinquish a child for adoption and, following the introduction of the 2002 Act, such consent may be given on an 'advanced' basis. The consent of the other parent, if he or she has parental responsibility, must be obtained or the need for it dispensed with. Unlike the situation before the 2002 Act, an unmarried father may now acquire parental responsibility by registering the birth jointly with the child's mother. While the consent of an unmarried father without parental responsibility continues to be unnecessary, he must where possible be served with notice and his views ascertained[50] (see, further, below). Where the subject is an overseas child, then evidence of parental consent must be brought before the court.

Parents may have their rights restricted by a care order under the 1989 Act and then abrogated by a placement order under the 2002 Act which authorises an adoption placement against parental wishes. Where this occurs it is now almost inevitable that subsequent adoption proceedings will result in the granting of the order sought, as the paramountcy principle will apply as the test of whether or not an adoption order should be made.

6.5.2.1 Failed Parental Rehabilitation

For about 10% of all children committed by care order to the public care system, following evidence of parental fault or default, the placement of choice proves to be a return to their family home under local authority supervision. Achieving permanence through the mandatory care plan is in fact pursued by restoring a child to parental care far more frequently than by adoption. Clearly, for this to happen, the standard of parental care has to improve quickly, significantly and be sustainable. Effectively, the birth parent/s have to be offered a rehabilitation training program and must use that opportunity to demonstrate a capacity to achieve significant change before a placement order is made. Once a child is placed with prospective adopters, often by way of concurrent planning, the clock is ticking against the birth parent/s. As demonstrated in *Re P (Adoption: Leave Provisions)*,[51] once a placement order has been made then even if parental rehabilitation is successful, the probability of a resumption of

[50] See, *Re L (Adoption: Contacting Natural Father)* [2007] EWHC 1771 (Fam).

[51] [2007] EWCA Civ 616.

parental care being judged to be compatible with the paramountcy principle is fading in direct relation to the length of the placement (see, further, below and at Chap. 2).

6.5.2.2 Kinship Placement

Section 1(2)(f) of the 2002 Act directs the agency/court specifically to have regard to relationships with relatives (which, in this context, includes parents). This will result in agency social workers exploring the possibility of kinship care and/or the appropriateness of ongoing contact with relatives, possibly using a family group conference to do so, before referring the case to its Adoption Panel.

6.5.3 The Adopters

All adopters must satisfy eligibility criteria—such as the statutory conditions relating to age, domicile/habitual residence[52] and duration of placement—though these have always been most stringent in relation to third party prospective adopters. Since the introduction of the 2002 Act, adopters no longer have to meet the traditional requirement relating to marital status. Not only may unmarried couples now satisfy the eligibility[53] criteria but so also may same gender couples[54] in respect of a child who has been part of their household for at least the previous six months. For step-parent applicants the minimum care period is six months and for foster-parents it is one year. All other applicants (e.g. a partner of the child's parent) must have had direct care responsibility for the child for at least three years preceding the application.

In addition, the suitability criteria consisting of administrative conditions as applied by adoption agencies and relating to factors such as maximum age, health, quality and duration of relationships, cultural background and lifestyle must also be satisfied but these are now governed by the National Standards and/or the Regulations.

6.5.3.1 Third Party Adopters

Those who are local authority foster carers and can satisfy residence, suitability and notice criteria now have stronger statutory rights in relation to adoption. The 2002

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[52] If the application is made by a couple (whether married or unmarried), both of them must have been habitually resident in the British Isles for at least one year preceding the application or one of them must have been domiciled in a part of the British Isles.

[53] See, also, *In re P and others (AP) (Appellants) (Northern Ireland)* [2008] UKHL 38 where the House of Lords explored and rejected arguments defending an approach that gave preference to married over unmarried applicants.

[54] See, section 144(4)(b) of the 2002 Act which permits applications from 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'.

Act, in the provisions regarding notice/time for child to have lived with such applicants, recognises their singular position and facilitates their applications. In an agency case (designated by the local authority as an adoption placement) the foster carers can now lodge an adoption application on completion of the statutory 10 week care period. In a non-agency case (where the placement has not been so designated) the foster carers can apply to adopt after one year of continuous care without local authority consent, though only after serving at least three months notice.

Capacity to meet criteria of eligibility and suitability is determined in the first instance by the Adoption Panel of the relevant adoption agency. The availability of adoption allowances eases the access of third party adopters to the process.

6.5.3.2 First Party Adopters

These have traditionally received relaxed legislative treatment as regards eligibility and suitability criteria. While this broadly continues to be the case, since the introduction of the 2002 Act parents and relatives are now required to demonstrate that adoption, rather than any other order, is a better means of promoting the welfare of the child concerned. The term 'relative' is now limited, under section 144, to the child's grandparent, brother, sister, uncle and aunt, whether of the full blood or by marriage.

Because adoption is often inappropriate in circumstances where it can obscure the true nature of blood relationships, special guardianship orders now offer relatives an alternative. Relatives applying to adopt must now have cared for the child for three years within the last five unless exempted by the court.[55]

- **Step-parents**

A step-parent is enabled, under section 51(2), to make application alone without the necessity for this to be accompanied by an application from the birth parent partner; regardless of whether that partner is their spouse; on condition that he or she has cared for the child for at least six months prior to the application. Adoption orders issued to such applicants may be made subject to conditions of contact. The definition of step-parent took a new twist in *B and L v. UK*[56] (see, further, Chap. 4). In that case the plaintiff successfully argued that the U.K. was in breach of Art 12 of the Convention by denying him his right to marry (his former daughter-in-law) and found a family (adopt her child i.e. his grandchild).

6.5.3.3 Intercountry Adopters

The Adoption (Intercountry Aspects) Act 1999 gave effect to the Hague Convention 1993 and introduced a new framework to govern the adoption of overseas children by U.K. citizens. It requires prospective adopters to be assessed, approved and

[55] See, sections 42(5) and (6). Previously the care period for such an applicant was only 13 weeks.
[56] [2006] 1 FLR 35.

authorised in the U.K. before children are brought into the jurisdiction;[57] reinforced by the Adoption of Children from Overseas Regulations 2001. It also requires all local authorities to include services to intercountry adopters within the general duty to provide an adoption service; a provision reinforced by section 2(8) of the 2002 Act.

6.6 Pre-placement Counselling

Adoption agencies are now required, under section 3 of the 2002 Act, to ensure the availability of services to all parties involved in arrangements for a prospective adoption.[58] Such services necessarily include counselling,[59] which is specifically addressed in section 63 where provision is made for the relevant regulations to be drawn up, and in the National Adoption Standards.

6.6.1 Adoption Support Services

Section 3(4) of the 2002 Act places a duty upon a local authority to respond to a request from any of the parties to a prospective adoption by carrying out an assessment of their needs for such a service which may include counselling (see, further, below).

6.6.1.1 Wishes, Welfare and Safety of the Child

The National Standards require the needs, wishes, welfare and safety of the child to be placed at the centre of the adoption process. Every child is to have a named social worker who will be responsible for that child and will be required to explain to him or her the matters arising at every stage throughout the process. The child must be listened to and their views taken into account and where his or her wishes are not complied with this must be recorded and an explanation given to the child.

6.6.1.2 Adoption Panel

The issue of whether or not counselling services have been provided, or may need to be, in relation to all parties to a prospective adoption (except family adoptions) will, in practice, be raised by the Adoption Panel. The 2002 Act requires the Panel

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[57] See, *Re C* [1998] 2 FCR 641 and the case of 'the internet twins'.

[58] The Houghton report, *op. cit*., had first recommended that such services be available and this was subsequently given effect by section 1 of the Children Act 1975.

[59] Reg 7(1) of the Adoption Agencies Regulations 1983 specifically required adoption agencies to provide counselling services to relinquishing mothers.

to make its recommendations to the local authority in advance of any such placement.

Providing information to prospective adopters, regarding the child to be placed with them, is an important matter that must be addressed at this stage. The adoption agency is required to ensure that prospective adopters have information relating to the child's family background, health and personal history.[60] Where insufficient or wrong information is provided, the placing agency may find itself liable to a compensation claim by the adopters.[61] This duty has been supplemented by requirements in the National Standards.

- **Review**

The 2002 Act provides for the establishment of a review procedure in respect of decisions made by adoption agencies regarding adoption. A person in respect of whom such a decision has been made will be able to apply for a review of the decision. The intention is to give the prospective adopters a right to request a referral to a panel run by an independent organisation where an adoption panel indicates that it is minded to turn down their application to adopt.

6.7 Placement Rights and Responsibilities

The 2002 Act states minimum and maximum periods for all adoption placements; differences in duration and in the rights and duties of those involved, particularly birth parents and local authority, vary according to the type of adoption.

6.7.1 Placement Decision

The law governing placements is to be found in sections 18–29 of the 2002 Act. An adoption agency may now make a placement either with consent[62] (including 'advanced consent')[63] or by placement order.[64] In the former instance, the child may be placed with prospective adopters identified either in the consent form or by the agency.[65]

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[60] Reg 12(1) of the Adoption Agencies Regulations 1983. Also, see, section 54 of the 2002 Act.
[61] See, for example, *W v. Essex County Council* [2000] 1 FCR 568 and *A and Another v. Essex County Council* [2002] EWHC 2707 (QB). Note, however, that inaccurate information will not provide grounds for revoking an order. In *J and J v. C's Tutor* [1948] SC 636 the Scottish Court of Session refused a couple's plea that they had adopted a child in error induced by misrepresentation and applied for the order to be set aside. They believed they had adopted a healthy child but the child suffered from a severe brain injury sustained at birth. The Court acknowledged the hardship but the relevant adoption statute did not empower the Court to set aside the adoption on such a basis.
[62] Section 52 of the 2002 Act.
[63] Section 20.
[64] Section 21(1).
[65] Section 19(1)(a) and (b).

6.7.1.1 Placement Order

In the latter instance, application for a placement order must be by a local authority, as voluntary adoption agencies are not permitted to use this procedure. The child concerned will be a party to the application and must be the subject of a care order or the court must be satisfied that the grounds for such can be met[66] and that either parental consent is available (and has not been withdrawn) or can be dispensed with.[67] Parental responsibility is vested in the agency[68] and in the prospective adopters[69] for the duration of the placement. This is important. It is intended to avoid the predicament in the U.S. where every year parental rights and responsibilities are legally removed in respect of many thousands of children in preparation for non-consensual adoption placements which are never made, leaving the children with the status of 'legal orphans' (see, further, Chap. 8). While a placement order is in force the child may not be removed,[70] except by the local authority.[71]

If, following the issue of a placement order, an adoption placement is not made, then the birth parent/s with leave of the court can apply under section 24 of the 2002 Act for the order to be revoked (again, to avoid the 'legal orphan' situation).

6.7.1.2 Consent

The 2002 Act largely avoids regulating placement decisions relating to family adoptions and leaves those in respect of intercountry adoptions to be regulated, where possible, by Convention provisions. In either case, as sections 18 and 19 of the 2002 Act make clear, once the child is six weeks old parental consent for the placement must then be formally obtained or the need for it dispensed with. Once placed, parental responsibility for the child is vested in the prospective adopters but must be shared with the placing agency and the birth parent/s until such time as the proceedings are determined.

Where, following counselling, a parent has given their written consent or 'advanced consent' to an adoption agency in respect of a child more than six weeks of age, then the agency may make an adoption placement in respect of the child concerned. The consent must, however, be witnessed by a court appointed Reporting Officer, who first checks that the birth parents fully understand the meaning of adoption and its implications. If the birth parents do not agree to adoption the court will appoint a Children's Guardian (CAFCASS officer) to advise the court whether such an order would be in the child's best interests.

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[66] Section 21(2)(a) and (b).
[67] Section 21(3).
[68] Section 25(2).
[69] Section 25(3).
[70] Section 30.
[71] Section 34.

- **Period of care**

The court cannot make an adoption order until the child has lived with the adopters for at least 13 weeks. This period does not start until the child is 6 weeks old, so no order is ever made before a child is 19 weeks old.

6.7.1.3 Family Adoption

In the context of step-parent adoptions, the 2002 Act has ended the necessity for a birth parent to adopt their own child; the application will now be made by the step-parent alone but not before the completion of a six-month period of care. Family adoptions seldom entail a change of placement except where a natural parent with parental responsibility exercises their right to place with a relative.[72] This exemption is available under section 92(3) of the 2002 Act which continues the right previously available under the 1976 Act; a right not extended to an "inter-country" placement with relatives. Under section 144(1) a "relative" for this purpose is defined as a grandparent, brother, sister, uncle or aunt (whether full blood, half blood or by marriage).

Notice of intention to commence adoption proceedings[73] must be served on the local authority which will then assess and report to the court as to whether there are any issues that need to be addressed and whether the order sought, an alternative or no order would be in the best interests of the child.

6.7.1.4 Agency Adoption

Adoption agency placements may be made with or without parental consent; increasingly they are non-consensual. Indeed, as has been noted:[74]

> The U.K. is closer to the U.S. in the extent to which it is willing to over-rule parental wishes in order to place children for adoption. Elsewhere in Europe there is a much greater reluctance to over-rule the wishes of parents.

The placement may be chosen by the consenting party or by the agency. Otherwise only a local authority can make an adoption placement and only if it first obtains a placement order having established that the consent of both parents is available or can be dispensed with, and the child is the subject of a care order or that the grounds can be met for such an order. Where a consenting parent withdraws their consent before the prospective adopters lodge their application, then too the local authority must obtain a placement order if the adoption placement is to be maintained. The court must give due consideration to the welfare checklist before determining an

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[72] See, *Re P; K and K v P and P* [2005] 1 FLR 303.
[73] Section 44 of the 2002 Act.
[74] See, Performance and Innovation Unit, *Prime Minister's Review of Adoption*, London, Cabinet Office, 2000 at Annex 4.

application for a placement order and placements made by adoption agencies are also governed by the checklist.

- **Culture/religion considerations**

Section 1(5) of the 2002 Act requires agency placements to be made after giving due consideration to the child's religious persuasion, racial origin and cultural and linguistic background. This new legislative directive has been reinforced by the National Standards which require preference to be given to ethnic matching as a determinant of placement choice, all other factors being equal.

However, such considerations will be tested against the requirements of the paramountcy principle as applied to the particular circumstances of the child in question. Where the birth parent/s seek to contest adoption, or impose conditions as to placement, on grounds that this is incompatible with their culture or religious upbringing, there will be a heavy onus on them to prove that such considerations are not outweighed by the broader and lifelong requirement to safeguard the welfare interests of the child. The courts remained unconvinced, when faced with a claim from Muslim parents, that adoption should be denied as this was contrary to their religious and cultural beliefs.[75]

- **Kinship placement**

When considering the adoption option for a looked after child, an adoption agency is required to consider the child's relationships with relatives; including the natural father even if he does not have parental responsibility.[76] This provides an opportunity for practitioners to examine the merits of securing permanency through care arrangements, not necessarily, but possibly by way of adoption, within the child's family. However, this may be dependent upon maternal consent.[77] Following referral to the Adoption Panel, the recommendation and the agency decision, the adoption agency must then draw up a 'placement plan'.

6.7.2 Placement Supervision

There is a legal requirement to ensure that adoption placements are safeguarded and the duties to protect the child's welfare interests are statutory, specific, prescriptive and comprehensive. They rest most rigorously upon all adoption agencies but apply also, though with less intrusiveness, to family adoptions from notification to hearing. During this period parental responsibility remains at least partially vested in the birth parents.

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[75] See, *Re S; Newcastle City Council v. Z* [2005] EWHC 1490 (Fam). Also, see, *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571.

[76] Section 1(4)(f) of the 2002 Act.

[77] See, *Re R* [2001] 1 FCR 238 where the court upheld a natural mother's veto on any such overtures being made to her siblings or other relatives by the local authority.

6.7.2.1 Removal of Child

Where a consensual placement, made within six weeks of child's birth, is terminated by parental retraction of consent within that period then the child must be removed and returned to the parent within seven days; unless a placement order is in effect or an application has been lodged. Otherwise, a parent may withdraw consent at any point up until the application has been lodged[78] in which case the child must be returned to the parent within 14 days; subject to the former caveat. In such circumstances, if it has not already done so, the local authority may apply under section 22 for a placement order if it considers the grounds can be satisfied.

However, from time of lodging an adoption application in court, all consensual placements and those made in respect of children subject to placement orders cannot be terminated without prior approval the court.[79] Before making the order the court must consider whether contact arrangements are necessary.[80] It may then, or at any time during the placement, make a contact order[81] subject to such conditions as it sees fit[82] or authorise the agency to refuse contact. A placement order can be revoked.[83]

6.8 The Hearing

Adoption in the U.K. remains a judicial process and the judicial role is still largely as traditionally defined. If the hearing establishes that certain grounds relating to eligibility, suitability, duration of placement[84] and consent are satisfied then an adoption order can be made. Whether it is made will depend not upon the availability or otherwise of consent but on whether the paramountcy principle applied in conjunction with the welfare checklist indicates that it is the most appropriate order, and better than no order, for the child concerned. Evidence on welfare matters will be submitted to the court by the adoption agency involved. The making of an adoption order requires a predictive assessment of welfare and allows for legal compromises to be made to condition the future exclusiveness of the order. The 2002 Act also makes some significant changes to the powers and options available to the judiciary in England & Wales.

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[78] Section 52(4) of the 2002 Act.
[79] Section 37(a).
[80] Section 27(4).
[81] Section 27(3).
[82] Section 27(5).
[83] Section 24.
[84] Ten weeks in relation to a looked after child (section 42(2) of the 2002 Act).

6.8.1 Where Consent Is Available

The adoption process in the U.K. is gradually becoming less consensual. In England & Wales, as before the 2002 Act, the consent of an unmarried father without parental responsibility is not strictly required. The consent of an older child, the subject of proceedings, is also not required under the 2002 Act; although his or her views will be sought these will not be regarded as determinative. However, even where all necessary consents are available the court may well make an order other than the one sought. There is now a statutory requirement that court and agency consider whether an alternative order under either the 1989 or 2002 Act would be more appropriate and/or whether ongoing contact arrangements will be necessary to promote the welfare interests of the child concerned.[85]

6.8.1.1 Birth Father

The general rule is that notice of pending adoption proceedings should be served on a birth father and his views where feasible should be sought. The exception, as Butler-Sloss, P. once, with considered circumspection, advised, is when "for good reasons the court decides that it is not appropriate to do so".[86] This approach was emphasised in *Re M (Adoption: Rights of Natural Father)*[87] which established that notification was the norm and avoidance required compelling reason. Subsequently the court has held that evidence of settled family life (even where the father had a history of violence, was presently in prison and had no knowledge of the birth of the child in question) required notice to be served on the father.[88]

The recent decision in *Re L (Adoption: Contacting Natural Father)*[89] that an unmarried mother had the right not to name the father of her child (nor any member of her own family), threatens to further constrain the extent to which fathers without parental responsibility or direct care experience, in respect of the child in question, can influence maternal decisions in the adoption process. However, it is probable that this right will shortly attract legislative amendment.

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[85] See, Performance and Innovation Unit, *Prime Minister's Review of Adoption*, *op. cit*., where it is stated that "at least 70% of adopted children have some form of contact with members of their birth families" (para 3.141).
[86] *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646.
[87] [2001] 1 FLR 745.
[88] *Re C (Adoption: Disclosure to Father)* [2005] EWHC 3385 (Fam).
[89] [2007] EWHC 1771 (Fam).

6.8.2 Where Consent Is Not Available

In England & Wales, under section 52(1) of the 2002 Act, there are now only two grounds for dispensing with parental consent whether in the context of agency or family adoptions. This may occur either (a) on the traditional statutory ground that the parent or guardian cannot be found or is incapable of giving consent or (b) on the new ground that 'the welfare of the child requires the consent to be dispensed with'. Section 1(7) of the 2002 Act applies the paramountcy principle of section 1(2) to the issue of dispensing with parental consent; thus consigning to history many decades of complex jurisprudence regarding "the unreasonable withholding of consent".

Once the court makes a finding that adoption is in the child's best interests, gives this finding the weighting required under section 1(2) and considers the matters specified in section 1(6), then the outcome in the context of section 52(1) is in reality a foregone conclusion.

6.8.2.1 Leave to Contest Proceedings

Technically, following an agency placement, birth parents can step back into the process at the hearing to contest the adoption. However, to do so they must first obtain leave of the court,[90] a formidable hurdle that in practice is almost impossible to overcome. The decision to grant or refuse leave is itself governed by the paramountcy principle which, given the mandatory care period that will have elapsed, can only lean towards safeguarding the child's upbringing with the prospective adopter/s. Even if the birth parent/s have good grounds for claiming that their circumstances have changed so significantly as to enable them to now resume care responsibilities, that claim will be measured against the lifelong welfare interests of the child. The welfare threshold just to obtain leave to contest is virtually insurmountable.[91]

6.8.3 The Orders

Apart from granting the adoption order applied for, or granting it subject to conditions, the court may instead make any of the public and private family law orders now available under the 1989 and 2002 Acts. These include residence order, extended residence order, parental responsibility order, care order, supervision order or special guardianship order.

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[90] Adoption and Children Act 2002, section 47.
[91] *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616.

6.9 Thresholds for Exiting the Adoption Process

Since the introduction of the 2002 Act, the decision as to whether the court makes the order applied for, with or without conditions, or any other order or no order will be determined by applying the paramountcy principle in conjunction with the welfare checklist.

6.9.1 The Welfare Interests of the Child

The welfare interests of the child are determined by the "welfare checklist" which serves to identify the "substance" of welfare in relation to the child concerned while the paramountcy test defines the weighting to be given to the sum total of such matters relative to all other considerations. The "no-delay" and the "no-order" principles must also be applied. The no-delay principle is reinforced by the provisions of section 109, which require a timetable to be drawn up and specified steps taken to expedite it.

Whether an adoption order can be made is determined in accordance with the statutory criteria relating to eligibility, suitability and consent. Whether it or a different order will be made, is determined by the particular welfare interests of the child concerned, after applying the 'welfare checklist'.

6.9.1.1 The Welfare Checklist

Section 1(4) of the 2002 Act provides a list of considerations to which, among other matters, the court must have regard.

(a) *The child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding)*. This conservative restating of the law relating to the capacity of a child to influence decisions taken concerning their welfare clearly avoids addressing consent issues. However, the wishes of an older child regarding his or her proposed adoption have to be ascertained and taken into account and case law indicates that good reason will have to shown if an order is to be made contrary to those wishes.[92]

(b) *The child's particular needs*. This clause implicitly refers to the 'physical, emotional and educational needs' in section 1(3)(b) of the 1989 Act and its associated case law which must be interpreted in relation to the particular circumstances of the child concerned. The need to retain the child in the care context in which he or she has formed safe attachments and which offers the best chance of permanency will be crucial to addressing their emotional needs.

[92] See, for example, *Re D (Minors)(Adoption by Step-parent)* (1981) 2 FLR 102.

(c) *The likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person*. This novel requirement imposes on the court the duty to take a long-term view of whether adoption will continue to meet the needs of the subject throughout their adult life. Established case law indicates that even if adoption could only promote welfare in adulthood, this would be sufficient justification for making the order.[93]

(d) *The child's age, sex, background and any of the child's characteristics which the court or agency considers relevant*. This catchall provision gives the court absolute discretion to determine the welfare factor most relevant to the circumstances of the child concerned.

(e) *Any harm (within the meaning of the Children's Act 1989) which the child has suffered or is at risk of suffering*. Again, correlating the provisions of the 1989 and 2002 Acts strategically strengthens the child care context of modern adoption practice and maximises consistency of interpretation. It is to be noted that the definition of 'harm' in the 1989 Act has been broadened by the 2002 Act to include 'impairment suffered from seeing or hearing the ill-treatment of another'[94] to, in effect, allow for the possible non-consensual adoption of children who have suffered harm from witnessing domestic violence.

(f) *The relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the question to be relevant, including*:

  (i) *The likelihood of any such relationship continuing and the value to the child of its doing so*
  (ii) *The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs*
  (iii) *The wishes and feelings of any of the child's relatives, or of any such person, regarding the child*

This provision places a statutory duty upon court and local authority to assess the ability and willingness of relatives to undertake care responsibility for a child and also requires that an assessment be made of the value to that child of any ongoing relationship with a relative. It is likely to be used particularly to safeguard established sibling relationships.

6.9.1.2 The Paramountcy Principle

The rights and reasonableness of the case presented by a contesting birth parent will not deflect the court from now looking to the best interests of the child as the overriding determinant. Even where all parties satisfy eligibility/suitability criteria, relevant consents have been provided, the child is available and it would be demonstrably to his or her material advantage, the court may still determine that disposal

[93] See, *Re D (A Minor)(Adoption order: validity)* [1991] 2 FLR 66.
[94] Section 31(9) of the 1989 Act as amended by section 120 of the 2002 Act.

options other than adoption would better serve the interests of the child concerned. The fact that the child, the birth parent/s, prospective adopters and/or others (including expert witnesses[95]) have a clear and positive view as to what constitutes 'best interests' will not prevent the court from imposing its own contrary decision. It is for the court to decide, after objectively applying the welfare checklist, on a projected basis in relation to considerations throughout the child's life, what order if any satisfies the test of the paramountcy principle.

6.9.2 Representing the Child's Welfare Interests

In England & Wales, the welfare interests of a child in adoption proceedings will be represented by a CAFCASS officer accompanied by a social work report from the relevant agency. In this jurisdiction, however, as before the introduction of the 2002 Act, there is no provision for automatic representation of a child's legal interests by a solicitor, though in contested cases such interests will be asserted by the court making the child a party and enabling him or her to be represented by a solicitor. The 2002 Act explicitly requires that a child's wishes be sought and taken into account but it remains the case that his or her consent is not required. Expert witnesses may be called to give evidence. All family adoptions are subject to prior mandatory professional screening the results of which are judicially taken into account in determining welfare.

6.10 The Outcome of the Adoption Process

Section 1(6) of the 2002 Act requires the court to consider the whole range of powers available under both that legislation and the 1989 Act before making any order. The same provision adds that the court should not make any order under the 2002 Act unless convinced that doing so is better for the child than not doing so.

6.10.1 Adoption Order

In the U.K. the traditional unconditional, consensual, third party adoption order is becoming increasingly rare and in England & Wales has become more so following

[95] See, *Re B* [1996] 1 FLR 667 where an appeal by a local authority, supported by the guardian *ad litem*, argued that the judge at first instance had erred in law in not acting on the unanimous opinions of the experts, all of whom urged that the child be placed for adoption. The court dismissed the appeal, citing with approval the comment of Lord President Cooper in *Davie v. Magistrates of Edinburgh* 1953 SC 34, 40 that "the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert" *per* Ward LJ at pp. 669–670.

the full introduction of the 2002 Act. Adoption orders made in favour of parents and relatives had grown to form the major proportion of annual orders but more recently had decreased, and are now decreasing further, as the 2002 Act has extended the range of alternative permanency orders so as to reduce inappropriate recourse to adoption. The introduction of alternative orders is reinforced by a directive requiring the court to 'always consider the whole range of powers available to it' under both the Acts of 1989 and 2002.[96] A step-parent, for example, can obtain parental responsibility for a stepchild by agreement with the natural parents or by court order. They thereby acquire all the legal rights and responsibilities for their stepchild, and share parental responsibility with their spouse. Alternatively, a residence order will vest parental responsibility in a step-parent. The court now has to be convinced that particular circumstances exist which warrant awarding a step-parent the more absolute powers of an adoption order.

The Court of Appeal[97] recently took the opportunity to stress that the proper test for dispensing with parental agreement to the making of a placement order, under Adoption and Children Act 2002, section 52(1)(b), was whether the child's welfare required adoption as opposed to something short of adoption; under section 1(2) of the 2002 Act the child's welfare throughout his life was the paramount consideration. Welfare meant welfare as determined by the court or adoption agency, having regard to the matters set out in section 1(4) of the 2002 Act, which provided a far wider checklist than that provided in Children Act 1989, section 1(3). The reference to the child's welfare throughout the child's life emphasised that adoption, unlike some forms of order under the 1989 Act, was something with lifelong implications.

6.10.2 Conditional Adoption Order

In most adoptions there is now some form of ongoing contact between the child and their birth parent or with other members of their family of origin. Most often this results from arrangements voluntarily entered into by the parties concerned. However, the issue of an adoption order subject to a condition, most usually directing specified contact arrangements between the child and members of his or her family of origin, though still relatively rare has also become more common in recent years as the courts strive to ensure that each order fits the particular welfare interests of the child concerned. This development will accelerate in the wake of the 2002 Act because of the requirement in section 46(6) that the court consider the necessity for post-adoption contact arrangements. The National Adoption Standards also contain provisions explicitly addressing the need for possible post-adoption contact to be explored with the child, his or her birth parent/s and other members of the birth family. Conditional orders are likely to remain firmly associated with child care adoption with a strong focus on maintaining links between siblings.

[96] Section 1(6) of the 2002 Act requires the court to be satisfied that adoption is a better option than any other available to the court while section 44(2)–(6) requires certain conditions to be met.
[97] See, *SB v. A County Council; Re P* [2008] EWCA Civ 535.

6.10.3 Alternative Private Family Law Order

The requirement that the court consider alternative orders available under the 1989 and 2002 Acts provides an opportunity to choose any one or combination of private family law orders. Moreover, the natural parents retain their right to have an application for a section 8 contact order heard in the course of adoption proceedings.[98] The following orders are among those most likely to be selected.

6.10.3.1 Special Guardianship Order

Available under section 14 of the 1989 Act (as amended by section 115 of the 2002 Act), this order appoints a named person as 'special guardian' of the child and may be made by judge on his or her own motion.[99] It vests in that guardian the degree of parental responsibility necessary to safeguard the welfare interests of the child to the exclusion of others. A 'special guardian' must be over 18, must not be the parent of the child and may be:

- Any guardian of the child
- A person in whose favour a residence order has been made
- A local authority foster parent with whom the child has lived for at least one year
- Any person who the child has lived with for at least three years or
- Any person who has the consent of someone with a residence order or parental responsibility for the child, or a local authority (if a care order has been made) to apply

This order may be accompanied by a section 8 contact order and is likely to be particularly relevant for older children or those being cared for by foster parents (the order discharges the care order) or relatives, for whom the draconian effects of total legal separation from birth family would be inappropriate.[100] In *S v. B and Newport City Council; Re K*,[101] for example, a special guardianship order together with a prohibited steps order were issued, instead of the adoption order sought, as this was viewed by the court as a more appropriate form of authority for grandparents who were anxious to secure existing care arrangements from possible parental interference.

The Court of Appeal has recently cautioned against any approach based on a presumption that this order is to be preferred to adoption in cases involving a family placement. It is likely that long-term carers will seek adoption in preference to special guardianship because of the additional security entailed.[102]

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[98] Section 26(5).

[99] See, *Re S (Special Guardianship Order)* [2007] EWCA Civ 54.

[100] By April 2007, some 359 special guardianship orders had been made: 261 in public law proceedings, 89 in private and 9 in adoption proceedings.

[101] [2007] 1 FLR 1116.

[102] See, *Re S (Special Guardianship Order)* [2007] EWCA Civ 54 [2007] 1 FLR 819; *Re AJ (Special Guardianship Order)* [2007] EWCA Civ 55 [2007] 1 FLR 507; *Re M-J (Special Guardianship Order)* [2007] EWCA Civ 56 [2007] FLR.

6.10.3.2 Extended Residence Order

Available under section 12 of the 1989 Act (as amended by section 114 of the 2002 Act), this order may be made in favour of any person who is not a parent or guardian of the child concerned and may continue until the latter attains adulthood.

6.10.3.3 Parental Responsibility Order

Available under section 4 of the 1989 Act (as amended by the 2002 Act), this order may be made in favour of a step-parent as an alternative to the more informal means of acquiring parental responsibility through agreement with the birth parent/s. It provides for an ongoing sharing of parental responsibilities with birth parents.

6.10.4 Alternative Public Family Law Order

The 1989 Act removed the traditional discretionary judicial option of making a care order, where necessary, when rejecting an adoption application; instead there was a power to require the relevant local authority to conduct an investigation into the child's circumstances. This has been continued by the 2002 Act. If the court should consider, during the course of adoption proceedings, that grounds of significant harm may exist then it can as before refer the matter to the local authority. On a subsequent application from the local authority, the court may in turn issue a care order or a supervision order where the significant harm grounds are satisfied and where it considers this to be more appropriate than any other order or no order at all.

6.11 The Effect of an Adoption Order

A full adoption order remains, after as before the introduction of the 2002 Act, the most absolute and irrevocable of all orders affecting children; as before there are no provisions relating to any possible variation or revocation. However, not all its legal characteristics in relation to the parties concerned are as immutable as they were traditionally.

6.11.1 The Child

An adoption order confers upon the child concerned the status attributes identified in section 67 of the 2002 Act and traditionally associated with adoption. This requires that he or she 'is to be treated in law as if born as the child of the adopters

or adopter' and as 'the legitimate child of the adopters or adopter'[103] (which in the case of same gender adopters introduces equity at the price of logic). It also entails acquiring the nationality,[104] domicile and residence of the adopters and an entitlement to inherit from their estate.[105]

Note, however, that registration of a foreign adoption in the Adopted Children Register does not give an automatic entitlement to British citizenship, unless it is made in a country which has ratified the 1993 Hague Convention on Intercountry Adoption, at least one of the adopters is a British citizen, and both adoptive parents are habitually resident in the UK. This complies with Article 21(c) of the 1989 United Nations Convention on the Rights of the Child. In *Re B (Adoption Order: Nationality)*[106] the House of Lords held that an adoption order should not be recognised if it was obtained solely to acquire the right to live in the U.K. and where the child's welfare would not benefit from the adoption.

The distinctions traditionally made by the law between an adopted and a 'natural' child have been maintained.[107]

6.11.2 The Birth Parent/s

The effects of a full adoption order on the legal standing of the birth parent/s are largely as traditionally defined. Section 46 of the 2002 Act states that the order operates to extinguish "the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order" and any other order or duty unless specifically exempted. However, unlike traditional orders, adoption may now be qualified by conditions providing for ongoing contact arrangements between the child and the birth parent/s.

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[103] See, further, Chapter 4, sections 66–76, *Status of Adopted Children*, the Adoption and Children Act 2002.

[104] See, section 1(5) of the British Nationality Act 1981. However, if the child is adopted in a "designated list" country whose adoption orders the U.K. Government recognises, the child will not automatically receive British citizenship and will have to apply for it to the Home Secretary. Countries included in this designated list are predominantly Commonwealth countries, United Kingdom Dependant Territories and E.U. Member States, whose adoptions the U.K. Government have deemed to be capable of recognition. The fact that U.K. intercountry adoption legislation does not provide automatic British citizenship for children adopted by British citizens in designated countries has attracted criticism.

[105] See, sections 69–73 of the 2002 Act.

[106] [1999] 1 FLR 907.

[107] See, para 30 of Sched 4 of the Sexual Offences Act 2004, which amends the 2002 Act to continue the legal exception to incest where sexual relations occur between an adopted brother and sister aged 18 or more. Also, section 74(1) leaves intact the traditional rule relating to consanguinity and prohibited degrees of relationship.

6.11.3 The Adopters

Again, as before the 2002 Act, the effect of an adoption order is to vest the adopters with all parental rights, duties and responsibilities in respect of the adopted child. The traditional absolute and exclusive nature of the order may now, however, be compromised by a condition permitting post-adoption contact arrangements while its traditional privacy characteristic may equally be compromised by ongoing public health and social care support services.

6.11.4 Dissolution of an Adoption Order

In *Re B (Adoption: Setting Aside)*[108] it was held that, in addition to the lack of any statutory power, the High Court has no common law power or inherent jurisdiction to set aside or nullify an adoption order. The Court held that as a matter of common law "the edifice of adoption would be gravely shaken if adoption orders could be set aside …".[109] The only cases where adoption orders have been set aside are those where there was a procedural irregularity.[110]

This decision was upheld by the Court of Appeal in *Re B (Adoption: Jurisdiction to set aside)*[111] when Sir Thomas Bingham MR noted that:

> The act of adoption has always been regarded in this country as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. It effects a change intended to be permanent and concerning three parties.

6.12 Post-adoption Support Services

The 2002 Act introduced a concept of support services, more comprehensive and with wider applicability than that previously available since 1988 from local authorities. These are to be available at any time (i.e. both pre and post-adoption) and for all parties or others involved in any type of adoption.[112] In relation to adoption services for looked after children, the provisions of the 2002 Act are reinforced by

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[108] [1995] 1 FLR 1.

[109] *Ibid*. at p. 7.

[110] See, for example, *Cameron v. Gibson* [2005] ScotCS CSIH83 (24 November 2005) when the Inner House of the Court of Session in Scotland reversed an earlier decision of the Court of Session in *Cameron v. Gibson* [2003] ScotsCS 298 (2 December 2003) and declared invalid a 1950 adoption decree because the proposed adoptee reached 21 years of age hours before the adoption order was made and the relevant legislation required that he be under 21 when the order was made.

[111] [1995] 2 FLR 1.

[112] Following the 2002 Act, the Dept of Health issued a consultation paper entitled *The Draft Adoption Support Services (Local Authorities)(Transitory and Transitional Provisions)(England)*

the National Standards which apply quite specific requirements in relation to matters such as timescales for service provision, extent of information to be provided etc.

The impact of these services and the necessary accompanying professional intrusion will over time accelerate the changing character of adoption as it becomes more a public and less a private family law proceeding.

6.12.1 Adoption Support Services

Section 3(2)(b) of the 2002 Act places a duty upon all local authorities to ensure the availability of specified adoption support services. Section 4 of that Act requires all local authorities to respond to any request for assistance from a party to an adoption by carrying out a needs assessment, though the provision of related services is a matter that has been left to their discretion depending upon available local resources. Subsequently, the Adoption Support Services Regulations for England (SI 2003) give adopters, adopted children and birth relatives the right to request an assessment of need regarding contact arrangements and it requires agencies to maintain services to assist such contact arrangements. The Regulations require local authorities to appoint an adoption support services adviser, to be responsible for the provision of advice and information to all persons affected by an adoption or proposed adoption.

Services to birth relatives are defined as including assessment, information and advice, support groups, therapy, counselling, intra/inter agency liaison, assistance with indirect contact, casework and advocacy.

6.12.1.1 Adoption Support Agency

This is defined by section 8(1) of the 2002 Act as 'an undertaking, the purpose of which, or one of the purposes of which, is the provision of adoption support services'. Section 8(3) of the 2002 Act amends the Care Standards Act 2000 to permit the registration of independent adoption support agencies in addition to those established by adoption agencies.

6.13 Information Disclosure, Tracing and Re-unification Services

The right of one party to access information given in confidence by another has always been a fraught issue in law and has certainly been so throughout the statutory life of the adoption process. The 2002 Act has introduced some changes to the law previously governing this sensitive matter.

Regulations and Draft Accompanying Guidance, December 2002. See, also, Dept of Health, *Providing Effective Adoption Support*.

6.13.1 Information Disclosure

The role of an adoption agency has now become of central importance as regards the disclosure of information held in the Registers. The responsibilities of the Registrar General continue much as before in relation to compiling information in the Adopted Children Register and the Adoption Contact Register. The former is a register of all adoptions completed in England & Wales and is kept in the General Register Office. It is maintained by the Registrar[113] who uses an index to cross-reference entries marked "adopted" in the main register of live births with entries in the Adopted Children Register. The Register itself is not open to public inspection or search. However, the index of the Register is available for inspection and anyone can apply on payment of a fee for a certified copy of an entry in the register relating to a child who has reached 18.

Access to the information necessary to connect corresponding entries made in the two registers is governed by section 79 of the 2002 Act which performs a dual function. It requires an adoption agency to request the Registrar General to make available that information in respect of a named adopted person. It also permits the Registrar General to divulge on request to any adopted person (i.e., who has attained their 18th birthday) information identifying the adoption agency involved in their adoption.

6.13.1.1 The Adoption Contact Register

This register,[114] again maintained by the Registrar General, is not available for public inspection and search although it is possible to apply for certified copies of entries. Before 30 December 2005, it held contact details of adopted adults and birth relatives who wanted to be put in contact with each other. If a match was made by the Registrar then the adopted adult would be informed of the birth relative's contact details. Since 30 December 2005, the role of the Register has been expanded. Adopted adults can now specify those birth relatives with whom they do or do not wish to have contact: they may enter an absolute or a qualified veto.

However, even an absolute veto may not necessarily terminate all enquiries. An intermediary agency may discover a wish for no contact on the Register, but nonetheless proceed. This may be the case where the birth relative has important information to pass on, e.g., about a hereditary or genetic medical condition, or where the birth relative is terminally ill.

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[113] This facility has a history of being very popular; by 1999 some 70,000 people had sought adoption related information from the Registrar General.

[114] Established by Sched 10 of the Children Act 1989.

6.13.2 Tracing and Re-unification Services

Sections 54 and 56–65 of the 2002 Act govern the provision of such services. Adoption agencies are of central importance and the aforementioned sections define the responsibilities of an adoption agency in relation to record keeping, information disclosure, making contact arrangements and providing counselling.

6.13.2.1 The Adoption Agency

The 2002 Act places the adoption agency in the driving seat for all post-adoption information disclosure and contact purposes including adoptee access to thier original birth certificate. It has been designated the single point of access to identifying information as it is believed that an adoption agency is best placed to provide the support and counselling needed.

6.13.2.2 Agency Records

The 2002 Act introduces new provisions regarding the information that must be kept by:

- Adoption agencies in relation to a person's adoption
- Information that adoption agencies must disclose to adopted adults on request ('protected information')
- Information that courts must release to adopted adults on request and
- Information that adoption agencies may release to adopted adults, birth parents and others

These provisions only apply to adoptions that take place after the Act was implemented. Adopted adults can formally register a qualified or absolute veto with the appropriate adoption agency. An adopted adult can apply to the appropriate adoption agency for 'protected information' about a person involved in an adoption, such as the adopted person, his birth parents or the adoption social worker.

- **'Protected information'**

This is defined as any identifying information sought by someone other than the person it is about. It would include names, residential, educational and employment addresses, case records, legal and medical information as well as photographs and audio-visual material. It also includes any information held by an adoption agency, which was obtained by the Register General or any other information, that would enable an adopted person to obtain a certified copy of his birth record or any information about an entry in the Adoption Contact Register relating to the adopted person.

Adoption agencies have discretion to disclose information, which is not 'protected information', to an adult adopter or other persons including the birth parents—e.g. background information about the child's progress.

6.13.2.3 Agency Disclosure Duty

Section 60 enables an adopted person to obtain the following:

- The information necessary to obtain his or her birth certificate
- Any information given to the adoptive parents on placement and
- A copy of any "prescribed document" held by the court

Section 61 outlines the four stage process whereby an adoption agency responds to a request from an adopted person for information other than that governed by section 60:

- Application made
- Adoption agency considers whether application is appropriate
- If so, then it must take all reasonable steps to contact and ascertain the views of any other person to whom the information relates
- In the light of the particular circumstances, the adoption agency must decide whether or not to disclose the information sought

The right to disclose or refuse disclosure rests with the adoption agency although its decisions will be subject to possible review by an Independent Review Panel to be established by the government. Regulations further specify matters such as type of information, conditions for disclosure etc while the National Adoption Standards also provide guidance relating to the provision of information disclosure services.

6.13.3 Adoption Support Agencies

Under section 98, a registered adoption support agency is authorized to seek access to the information, held in registers or in court or adoption agency records, necessary to advise parties to a pre-1975 adoption on matters relating to identity information and possible contact. Section 98 also gives adult birth relatives a right to request such an agency to discover information and/or make approaches to adopted adults for the purposes of seeking information about them and/or for future contact or reunion.

This service can only be provided by a registered adoption agency (either local authority or voluntary) or a registered adoption support agency (a new type of independent support agency created by the 2002 Act).[115] It can only be requested by

[115] For further information on the services provided by such agencies see www.adoptionsearchreunion.org

adopted adults (i.e. over the age of 18) and adult birth relatives ('relative' being defined as "a grandparent, brother, sister, uncle or aunt, whether of the full blood or half-blood or by marriage). The information sought must be in respect of an adult adopted before 30 December 2005.

The agency has a general discretion not to proceed with any request, "where it would not be appropriate to do so". In coming to this decision, the agency must have regard to the following factors:

- The welfare of the applicant (i.e., the birth relative), the subject (i.e., the adopted adult) and any other persons who may be identified or otherwise affected by the application (i.e. the adoptive parents, siblings and wider family)
- Any views of the appropriate adoption agency (i.e., the one that arranged the adoption or the one that now holds the adoption records)
- Any information obtained from the Adoption Contact Register and
- All other circumstances of the case

6.14 Conclusion

Adoption in England & Wales now sits, uncomfortably, at the crossroads of public and private family law. This is a juncture at which parental responsibilities may be consensually relinquished by birth parents and assumed by others or coercively removed and transferred. Adoption is intimately linked into the family law framework leading to that point and reflects many of the more pervasive principles and pressures currently influencing practice within the broad body of family law. In particular, changes to the legal functions of adoption are indicative of those occurring elsewhere in family law. There is now an unmistakable emphasis on ensuring that adoption satisfies a public interest requirement that this means of providing for the future upbringing of children is subject to much the same controls and supports, and is tested against alternative welfare options, as are other statutory means of doing so. This is evident in the threshold criteria marking each stage of the adoption process. It is evident also in the types of bodies, forums and rules to which the participants are subject. Mostly, it is apparent in the use of the welfare principle to ensure that private purposes pursued by parents and adopters and public purposes pursued by a local authority now respect the best interests of the child as the paramount consideration. This may entail compromises or additions to the order issued by the court that would not have been previously contemplated in adoption proceedings.

Chapter 7
The Adoption Process in Ireland

7.1 Introduction

In Ireland the law of adoption, now consisting of seven pieces of legislation,[1] has provided the legal framework for a practice that has seen 42,000 children adopted[2] since the Adoption Act 1952 first introduced a legal means for making this possible. As elsewhere, this period has seen a steady annual decline in domestic adoption orders—from 1,115 in 1980 down to 222 in 2006. It has also been a period in which there has been an uncoupling of the traditional association between unmarried mothers and adoption as the latter has gradually ceased to be used almost exclusively as a means of regulating the non-kinship placements of voluntarily relinquished illegitimate babies. Instead it is increasingly becoming a means of sanctioning the private family arrangements of birth parents, almost always mothers, in respect of their own children. Adoption as a public child care resource, legislatively expedited elsewhere, is not encouraged by government policy in this jurisdiction which partially explains the steady and significant increase in intercountry adoptions.

This chapter begins with a brief history of the adoption process in Ireland and an account of the main influences that have combined to shape its current social role. This leads into an overview of contemporary law, policy and practice including a guide to the outcome of the recent adoption law review process.

The chapter then applies the template of legal functions (see, Chap. 3) to outline the adoption process, identify and assess its distinctive characteristics and facilitate a comparative analysis with other jurisdictions. In conclusion, some observations are made about the wider significance of the characteristic hallmarks of this process in Ireland.

[1] The Adoption Acts of 1952, 1964, 1974, 1976, 1988, 1991 and 1998; further legislation is imminent.

[2] The annual reports of the Adoption Board (or An Bord Uchtála), available from Government Publications, Molesworth St. Dublin, provide a useful and comprehensive source of information on adoption in Ireland

K. O'Halloran (ed.) *The Politics of Adoption,*

7.2 Background

Adoption as a statutory process has a particularly short history in Ireland. It began 54 years ago, on 1st January 1954, when the Adoption Act 1952 came into effect. However, it did play a part in ancient Irish history as a practice intimately linked to the clan system and governed for hundreds of years by the Brehon laws.[3] Arguably, modern adoption law and practice remains rooted to some degree in ancient practices when clans and kinship networks were central to the social infrastructure of this jurisdiction.

A thousand years ago, under the Brehon laws, a form of kinship adoption had long been practiced whereby members of a child's extended family or clan would undertake to rear him or her as a means of binding the clan group into a stronger more cohesive unit. Much the same ends were achieved by reciprocal placements of children between clans as a demonstration of mutual allegiance.[4] In both, adoption or *fóesam* simply meant "taking into protection" and was seen as a means of allying with the fortunes of others. It had clearly defined legal consequences for the adopted person. As has been explained: "rights of inheritance may be acquired by a person adopted into a kin-group, either through payment of an adoption fee (*lóg fóesma*) or through invitation".[5] Such a person is then described as *fine thacair* or "kinsman by summoning". An adopted son who failed to carry out his filial duties (*goire*) could be disinherited and another adopted in his place.[6]

Eventually, the gap left by the fading authority of social systems based on feudalism, the Brehon laws and the extended agricultural family was filled by the state through the provision of basic containment and shelter as required by the Poor Laws.[7] The Irish Poor Law Amendment Act 1862 enabled young children who would previously have been consigned to the workhouse to instead be "boarded-out" with state approved caring families; an official approach which outlived that legislative framework to become a key component in the 20th century public child care system. However, the non-kinship adoption of such children was not encouraged. The Poor Law administrators feared that the existence of a means whereby parents could be totally relieved of their responsibilities would amount to condoning immorality and encourage the production of more children to become a further burden on the rates of the parish. Kinship fostering, where a family would take in its own rather than let, or be seen to let, relatives go to the workhouse, was both common and encouraged by the Poor Law authorities.[8]

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[3] See, for example, Kelly, F., *Early Irish Law*, Dublin Institute of Administration Studies, Dublin, 1988.

[4] See, Gilligan, R., *Irish Child Care Services: Policy Practice and Provision*, Institute of Public Administration, Dublin, 1991.

[5] See, Kelly, F., *Early Irish Law*, *op. cit*.

[6] *Ibid*. at p. 105 where the author explains that adoption was originally a contract bound by sureties and ratified by the head of the kin. See also pp. 86–90 for an interesting account of the importance of 'fosterage' in early Irish society and the respective duties of foster child and foster parent according to their rank in society.

[7] See, Robbins, J., *The Lost Children: A Study of Charity Children in Ireland 1700-1900, 1980.*

[8] See, Benet (1976) at p. 60. Also, Eekelaar, J., *Family Law and Social Policy* (1984) and Gilligan, R. (1991).

7.2.1 The Social Context Giving Rise to Adoption

In Ireland, during the 54 year period since the introduction of adoption legislation, considerable economic and other social changes occurred, as elsewhere in the western world, which led to a loosening of the legal relationship between the family unit and the state. In all western nations at much the same time, adoption was required to accommodate a similar generic set of problems and to fit in with new emerging social norms governing parenting arrangements.

7.2.1.1 Decline in the Marriage Rate

Marriage became less popular: the annual rate of marriages decreased from 7.0 per 1,000 of the population in 1970 to 5.1 in 2006; the number of people seeking separation, annulment, or a foreign divorce increased dramatically during this period.[9]

7.2.1.2 Increase in Rate of Non-marital Births

Childbirth became less dependent upon marriage: the annual number of non-marital births multiplied from 968 in 1960 to 1,708 in 1970, 4,517 in 1983[10] and reached 16,461 in 1999. In 2006, they accounted for 33.15% of annual births as opposed to 2.14% in 1953.[11]

7.2.1.3 Welfare Benefits for Single Parents

Since 1973, preferential welfare benefits have been available for single parents thereby allowing those with low incomes to consider child rearing as a financially viable option. This also resulted in a lessening of the social stigma traditionally associated with the role of a single mother, reducing the pressure previously felt by many in that position to surrender a child for adoption. Consequently, whereas in 1967 some 96.9% of non-marital births resulted in adoptions, this was true for only 16.74% of such births in 1985 and for a mere 1.93% in 1999.

7.2.1.4 Maternity by Choice

Developments in medicine and law in the neighbouring jurisdictions increased the extent to which maternity for some in Ireland became a chosen option. Pregnancy

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[9] See, Central Statistics Office. The following categories of separated persons were recorded in the 1986 census: deserted (11,622): marriage annulled (983); legally separated (7,187); other separated (13,062); divorced in another country (4,391).

[10] See, Central Statistics Office.

[11] The *Annual Report on Vital Statistics* reveals that 6,019 births were registered as outside marriage in the third quarter of 2007; accounting for 32.4% of all births.
See www.cso.ie

could be either avoided, through the use of improved contraceptives, or terminated by abortion.[12] Pregnancy for the infertile became a stronger possibility due to the introduction of techniques of artificial insemination and the practice of surrogate motherhood.[13]

7.2.1.5 Increase of Children in Care

Finally, increasing numbers of children entered the public child care system. The child care population increased from 1,717 in 1970 to 2,614 in 1988, 3,668 in 1996, 4,424 in 200 and reached 5,060 in 2004. The proportion in residential care was more than half in 1978 but only 26.9% in 1988, the balance being almost exclusively in foster care. By 2001, the care population had increased to 3,600 of which 3,200 were in foster care.[14] In 2008 some 4,500 children were being fostered in Ireland.

Because of the limited access to adoption for children from marital families, provided by the 1988 Act, a far higher proportion of the Irish child care population remain in long-term foster care than is the case in other modern western jurisdictions.[15]

7.2.2 Resulting Trends in Types of Adoption

The adoption of babies by third parties or 'strangers', where the adopter is unrelated in any way to the adoptee was until very recently, in Ireland as in many western nations, the most prevalent form of adoption. In the latter half of the 20th century, much the same set of generic problems in those countries triggered a change in their use of adoption. In Ireland, however, this transformation had a significantly different twist.

7.2.2.1 Third Party Adoptions

The traditional adoption model now known more simply as 'non-family adoptions', grew from and remained rooted in the concept of a Christian family unit, based on

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[12] Annually published statistical data reveal that many thousands of young women, with addresses in Ireland, undergo abortion operations in the United Kingdom.

[13] Note that in relation to some such options, for example surrogate motherhood, there is no legal basis in Irish law. Also and unlike the neighbouring U.K. jurisdictions, IVF is not provided by the public health services in Ireland though, to a very limited extent, it is made available by private consultants and clinics. Thus, in 2006, although there were some 12,000 births attributable to IVF in the UK there were very few in Ireland.

[14] Foster care in Ireland is governed by the Child Care Act 1991 and the Child Care (Placement of Children in Foster Care) Regulations 1995 as supplemented by the National Standards for Foster Care, 2003.

[15] See, further, *Foster Care—A Child Centred Partnership*, Stationery Office, Dublin, 2001 and Gilligan, R., 'Children Adrift in Care-Can the Child Care Act Rescue the 50% Who Are in Care Five Years or More', *Irish Social Worker*, 14, 1.

lifelong and monogamous marital union and defended by the Constitution. The child of such a union, unless orphaned, could not be available for adoption; this legal process was exclusively reserved for non-marital children[16] and indeed in 1967 a total of 96.9% of those born that year were adopted. By 2006, when Irish society had become quite different, the total had fallen to 1.04%.

The Catholic Church played a pivotal role in this process being initially responsible for arranging institutional care for unmarried mothers,[17] the placement of their children and the selection of suitable adopters; it also facilitated the overseas placement of Irish babies, mainly in the United States.

The total number of children adopted by third parties far outnumber those adopted through a combination of all other forms; only in the last decade have family adoptions come to constitute an annual majority in a decreasing total.[18] The annual number of domestic third party adoptions is now steadily falling.[19] In 2006, for example, of the 222 domestic adoption orders issued (down from 253 in 2005): only 69 were third party adoptions of which 36 resulted from placements by health boards and registered adoption societies, 17 concerned children in long-term foster placements and 15 adoption orders were made in respect of foreign children placed for adoption abroad.

So, whereas in the past third party adoption conformed to a very definite model, it now accommodates a number of variants.

- **Adoption of children with special needs**

Children with 'special needs' are defined in this jurisdiction as those suffering from learning or physical disability, or both, with significant social and health care needs. Whereas this variation of third-party adoption has been successful in Northern Ireland, as in the U.K. generally and in the United States, there is little indication that it attracts potential adopters in Ireland. In 1993 10 orders were made in respect of such children; 6 in 1995; 2 in 1996; 3 in 1997; and 1 in 1998. In its most recent annual reports, the Board makes no reference to adoption orders made in respect of such children.

- **Child care adoption**

The increase in numbers of children in care has not, unlike comparable circumstances in the U.K. and elsewhere, resulted in a proportionate increase in child care

[16] The Adoption Act 1952 confined the use of adoption to: orphans and non-marital children aged between six months and seven years; adopters who were married couples living together, widows, the child's birth mother/father and certain relatives (on the mother's side); and to adopters who were of the same religion as the child.

[17] See, the 'Magdalene Sisters' etc.

[18] For example, whereas in 1991 family adoptions constituted 43.6% of the total of 590 orders, by 2000 this had risen to 68.32% of 303 domestic adoption orders.

[19] In 2004, of the 273 domestic adoption orders issued, 185 involved the adoption of children by family members and only 88 were third party adoptions: 26 resulted from placements by registered adoption societies, 20 were placements by health boards and 22 concerned children in long-term foster placements. The remaining 20 involved foreign children placed for adoption abroad in Guatemala, the Philippines and India, who were then adopted under the Adoption Act 1952 or the Adoption Act 1988.

adoptions. Access to the adoption option for a child in care is very largely determined by the marital status of his or her parents which results in very few such adoptions. The Adoption Act 1988 provided for the possibility of non-consensual adoption for children in long-term foster care, whether from marital or non-marital families. Under section 36(1)(c) of the Child Care Act 1991 the Health Service Executive (HSE) can place a child who may be eligible for adoption "with a suitable person with a view to his adoption". Also, under section 6(3), the HSE may "take a child into its care with a view to his adoption and maintain him… until he is placed for adoption". But that agency's capacity to utilise the adoption option for a child in its care has remained virtually unaltered by the 1988 and 1991 Acts because of the stringency with which the test of parental failure is applied. As McGuinness J stated in *Northern Area Health Board v. An Bord Uchtála*[20] "there has to be a complete failure to carry out the day-to day-care of the child". The Supreme Court, in *In re JH (An Infant)*,[21] found that state intervention is only justified if it is established that there are "compelling reasons" why the welfare of the child cannot be met in the custody of the parents. This was reaffirmed in *N v. Health Service Executive*[22] where the Supreme Court decided that "exceptional circumstances" did not exist to justify allowing an infant girl to remain in the care of her pre-adoptive parents.

Consequently, in 2006 the HSE made only four adoption orders under the 1988 Act (five in 2000, none concerning children from a marital family background). In 2006, of the 69 agency placements (68 in 2003) only 17 (20 in 2003) were in respect of children in long-term foster care. Instead, under section 4 of the Child Care (Amendment) Act 2007, which came into effect in July 2007, foster parents or relatives who have been caring for a child for a continuous period of at least five years may apply to the court for a guardianship order. The consent of the HSE is necessary and the consent of the parents or guardians may also be required.

- **Open adoption**

This form of adoption has no specific standing in law, although the practice[23] has developed to become a significant characteristic of adoption in Ireland and is permitted under the 1991 Act (as amended by the 1998 Act) in relation to the adoption of children from overseas. In many family adoptions the adopting birth mother

[20] [2003] 1 IMLRM 481. Also, see, *North Western Health Board v. HW* [2001] 3 IR 622 where parental refusal to consent to the administration of the PKU test in respect of their newborn child was upheld by the Supreme Court. In this case, the State was not permitted to rely on Article 42.5 to step into the parental role because it was held that the parents of the child had not failed in their duty either for moral or physical reasons.

[21] [1985] IR 375.

[22] [2006] IESC 60.

[23] Note that in *W.O'R v. E.H.* [1996] 2 IR 248 the Supreme Court held that any order allowing the non-marital father (or any other person) access is deemed to have lapsed upon the making of the adoption order. For a broad definition, see Triseliotis, J., 'Open Adoption' in Mullender, A. (ed.), *Open Adoption: The Philosophy and the Practice*, British Agencies for Adoption and Fostering, London, 1991 at pp. 17–35.

and her spouse make a voluntary agreement with the child's father to facilitate post-adoption contact arrangements between him and the child. In *Northern Area Health Board v. An Bord Uchtála*[24] McGuinness J commented on this trend:

> Adoption practice in general has become more open in recent years. The old insistence on secrecy and a complete exclusion of the natural mother has virtually gone and it is not uncommon for adopted children to continue to meet their birth parents from time to time.

- **Same sex adoptions**

Co-habiting couples, whether or not of the same gender, may not adopt. Should one partner in a same sex relationship choose to make an adoption application this will prove difficult as the law only permits this in "particular circumstances". The National Census of 2002 recorded 2,580 gay or lesbian couples in settled domestic relationships.

- **Intercountry adoptions**

Social changes in Ireland in the 1980s led to the introduction of the Foreign Adoption Acts 1991–1998 and facilitated the adoption of many children, originally largely from Romania, although countries such as Russia, Guatemala, China, Thailand, Belarus and India have since become more popular.[25] In recent years this type of adoption has been proportionately more significant in Ireland than in neighbouring jurisdictions.[26] Its development is usually traced to the altruistic surge of Irish interest in the very many children found to have been abandoned in Romanian orphanages in the post-Ceausescu period in the early 1990s. However, that interest was also stimulated by the lack of alternative forms of third party adoption. In fact intercountry adoption existed in an inverted form during the years 1948–1968 when as many as 2,000 children born to unmarried mothers were discretely removed by religious organisations from Ireland for adoption overseas, usually in the United States.[27] This, as noted by McGuiness, J, was due to a lack of regulatory control:[28]

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[24] *Op. cit*. Also, see, *J.B. and D.B. v. An Bord Uchtála* (1998).

[25] See, Health Service Executive website at http://www.hse.ie/eng/Find_a_Service/Children_and_Family_Services/Adoption_and_Tracing/Intercountry_adoption/

[26] For example, in 2004 the Adoption Board made 648 adoption orders, of which 375 (58%) were entries in the Register of Foreign Adoptions. This rate of foreign adoptions is high by international standards. By comparison, in the United Kingdom, which has a population of about 15 times the size of Ireland's, 367 children were adopted abroad by U.K. based adopters. While in Norway, with a population of 4.6 million, there were 724 such adoptions in 2005.

[27] Milotte, M., *Banished Babies: The Secret History of Ireland's Baby Export Business*, New Island Books, Dublin, 1997 where the author traces how Irish children were made available to foreign couples for the purposes of adoption. He quotes a German newspaper report from 1951 which stated that "Ireland has become a sort of hunting ground today for foreign millionaires who believe they can acquire children to suit their whims."

[28] See, *Western Health Board v. M* [2001] IESC 104. For an historical account of the difficulties in introducing adoption legislation in Ireland see Whyte, *Church and State in Modern Ireland 1923–1979* (2nd ed.), Gill & Macmillan, Dublin 1980 at p. 185 and Ferriter, *The Transformation of Ireland 1900–2000*, Profile Books 2004.

> At the time of the enactment of the Adoption Act 1952, which was the first legislation permitting legal adoption in this State, a particular problem had arisen by which prospective adopters from other jurisdictions, the majority from the United States, were taking Irish infants abroad for the purpose of adoption. In the main these were infants born to unmarried mothers who in the circumstances of the time felt themselves unable to care for their own children. There was little or no enquiry or assessment as to the suitability of the families or environments to which these infants were being brought and no evidence as to whether their removal from the State was in the best interests of their welfare.

In the mid 1990s Irish people became interested in adopting children from the People's Republic of China. The Adoption Board refused to recognise Chinese adoption orders under the Adoption Act 1991 because Chinese law provided for a form of simple adoption which did not terminate the legal relationship between the natural parent and child. In *B and B v. An Bord Uchtála* this view was challenged by a number of couples who sought recognition of Chinese adoptions. The High Court,[29] and on appeal the Supreme Court,[30] upheld these challenges and ordered that Chinese adoptions be registered under the 1991 Act.

The number of children adopted from overseas has increased every year since the introduction of the Adoption Act 1991 (see, further, below). A total of 2,124 were adopted between 1991 and 2003: 782 (36.82%) from Romania; 489 (23.02%) from Russia; 164 (7.72%) from China; 148 (6.97%) from Vietnam; 146 (6.87%) from Guatemala; the remainder being largely from South America, India, Thailand and from countries that formerly constituted part of Russia. In 2006, the Adoption Board made 400 declarations of eligibility and suitability to adopt outside the State and it made 298 entries in the Register of Foreign Adoptions (in 2003 the figures were 468 and 341 respectively).[31] The tendency for Irish intercountry adoption to be directed more towards Caucasian children has been noticeable (see, also, Chap. 5).

7.2.2.2 First Party Adoptions

The adoption of a child by a person or persons related to him or her is referred to as a 'family adoption' and has become the most common type of adoption in Ireland ('relative' meaning a grandparent, brother, sister, uncle or aunt of the child and/or the spouse of any such person, the relationship to the child being traced through the mother or the father). It is a relatively modern phenomenon in this jurisdiction unlike, for example, in the United States. In the latter jurisdiction some 50% of all adoptions in 1970 were by relatives whereas in Ireland at that time the corresponding proportion was approx 10%. In Ireland, family adoptions increased

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[29] High Court (Flood J) 12 April 1996.

[30] [1997] 1 ILRM 15 (SC).

[31] See, *Report of An Bord Uchtála*, Stationery Office, Dublin, 2006 at para 1.2. In 2004 the Adoption Board made 648 adoption orders, of which 375 (58%) were entries in the Register of Foreign Adoptions.

from 126 in 1975 to 196 in 2001 when 180 were made in favour of step-parents, almost invariably in respect of a non-marital child. By 2004, of 273 domestic adoption orders 185 involved the adoption of children by family members, of which 177 were step-adoptions while 5 children were adopted by grandparents and 3 by other relatives. In 2006, of the 222 domestic adoption orders made (down from 253 in 2005) 153 involved the adoption of children by family members of which 149 were step-adoptions, the remaining 4 orders being in favour of other relatives.[32]

However, in Ireland neither parent can shed their guardianship duties in respect of a child of their marriage and therefore cannot be held to have 'abandoned' that child as the term is construed under the 1988 Act. This presents an insurmountable legal block to an application from a remarried widow/widower in respect of the child of their previous marriage.

7.3 Overview of Modern Adoption Law and Policy

The above influences and trends resulted in significant changes in adoption practice in Ireland and were accompanied by adjustments to the legal framework and challenges to policy. These developments were necessarily constrained by constitutional imperatives.

In Ireland, there is a constitutional presumption that 'the best interests of the child' are to be found within his or her family and only the most compelling reasons will justify the removal of a child from their marital family unit.[33] The state, in Article 42, section 1 of the Constitution, acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. The parents' right and duty to educate their child can only be displaced by state care in circumstances falling within section 5 of Article 42. This provides that, in exceptional cases, where the parents for physical and moral reasons fail in their duty towards their children, the state as guardian of the common good by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child.

In keeping with the religious ethos (specifically, that of Roman Catholicism) pervading the Constitution, there is a strong implication that in law the term 'family' refers to a marital family unit. Article 41 of the Constitution, while not explicitly so defining the term, clearly establishes a preferential status and protection

[32] *Ibid*.

[33] See, *Re JH (An Infant): KC and AC v. An Bord Uchtála* [1985] IR 375 and Duncan, W., *The Constitutional Protection of Parental Rights in Parenthood in Modern Society*, Eekelaar, J.M. and Sarcevic, P. (eds.), Dordrecht, 1993 and reproduced in the *Report of the Constitutional Review Group*, Stationery Office, Dublin, 1996, pp. 612–626.

upon such a family.[34] For that reason, in Ireland the non-marital family, as always, continues to attract less protection in law than the family based on marriage. While an unmarried mother has a guaranteed right, under Article 40.3.1, to the care and custody of her child, there is nothing in the Constitution to prevent her from relinquishing all her parental rights through adoption.

7.3.1 Contemporary Adoption Related Legislation

The Adoption Act 1952 (the 'principal Act') together with subsequent amending statutes (in 1964, 1974, 1976, 1988, 1991 and 1998) and the ancillary Adoption Rules constitute the legislative framework for adoption law and practice in Ireland. This considerable body of law has recently been the subject of consolidation and re-statementing. It will shortly be re-configured on the introduction of formative legislation which, following completion of the protracted adoption law review, has now been pending for some time.

7.3.1.1 The Adoption Act 1952

The 1952 Act introduced adoption as a statutory process in Ireland. It provided for the complete termination of the birth parent's parental rights and responsibilities and for the vesting of all such in the adopters. It also established the Adoption Board, or An Bord Uchtála, to consolidate, regulate and administer the procedures for adoption.

However, in *B and B v. An Bord Uchtála*[35] the Supreme Court noted that, in general the relationship created by an order for adoption is final in its effect and permanent in its duration, but that this is not necessarily so in Ireland. Delivering the leading judgment, Murphy J referred to section 22(7) of the Adoption Act 1952 which expressly recognises that an adoption order made in the state may be "set aside", although he accepted that the circumstances in which this could occur are not identified in any of the Adoption Acts and that no case law existed on this point. He also noted that section 18 of the 1952 Act permits further adoption of a child where the original adopters or sole adopter has died. The court also noted that where the adoptive parents have failed in their parental duties owed to their child,

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[34] See, for example, *The State (Nicolaou v. An Bord Uchtála* [1966] IR 567; *G v. An Bord Uchtala* [1980] IR 32; and *WO'R v. EH (Guardianship)* [1996] 2 IR 248. Note that in *Northampton County Council v. ADF and MF* [1982] ILRM 164, Hamilton J held that Articles 41 and 42 of the Constitution, were applicable to married parents and children who were not citizens of Ireland but who were present in the state. In doing so, he refused the order sought by the applicant English county council so that the respondent child could be adopted in England. See, also, the similar case of *London Borough of Sutton v. M* [2002] 4 IR 488.

[35] [1997] 1 ILRM 15 Irl. See further, Law Reform Commission, *Consultation Paper: Aspects of Intercountry Adoption Law*, Dublin, March 2007 at p. 21.

the child could be re-adopted under the Adoption Act 1988. As a result the court concluded that "the concept of permanence as an incident of adoption is not absolute in this jurisdiction".

7.3.1.2 The Adoption Act 1964

The 1964 Act provided for the adoption of children who had been 'legitimised' by the subsequent marriage of their parents but whose births had not been re-registered.

7.3.1.3 The Adoption Act 1974

This statute empowered the High Court to authorise the Adoption Board to dispense with the need for the consent of a birth mother at time of hearing, in circumstances where she had already consented to placement, where this was justified by the welfare interests of the child. It also provided for adoption by a couple of mixed religion on condition that the birth mother knows the religion of the applicants and does not object.

7.3.1.4 The Adoption Act 1976

This Act was introduced to retrospectively secure adoption orders that might have otherwise been vulnerable to challenge on the grounds that birth parents had perhaps not been advised of, and given every possible opportunity to exercise, their right to withdraw consent up to the making of the order.

7.3.1.5 The Adoption Act 1988

This legislation introduced two important changes to the adoption process in Ireland. Firstly, statutory powers authorised non-consensual adoptions in certain circumstances. Secondly, the children subject to such powers could be from marital family units. However, these opportunities were confined to the small minority of children of married parents who had so totally abandoned their rights as to permit the possibility of non-consensual adoption from care. For the far greater numbers of children whose married parents had neglected, abused or otherwise failed to care for and protect them—but not to the point of total abandonment—the option of non-consensual adoption was unavailable.[36] The very stringent and rigorous requirements to be satisfied under the Adoption Act 1988, imposed to ensure that

[36] See, however, *Northern Area Health Board and WH and PH v. An Bord Uchtála* (December 17, 2002) where McGuinness J held that a failure of parental duty and abandonment of rights while not being the same concepts in law are and will be related in the facts of any particular case.

the Act passed constitutional scrutiny, together with the excessively lengthy and cumbersome procedures required by the Act, have undermined the initial legislative intent. Consequently, many children remain in long-term foster care and a disproportionate number of those are from marital families.

When processing applications under the 1988 Act, the Board is required to refer the substantive issue of parental consent to the High Court where authority lies to determine whether or not the Board can make an adoption order.

7.3.1.6 The Adoption Act 1991

The 1991 Act, later amended by the 1998 Act, was introduced to retrospectively validate all those 'foreign' adoptions that might otherwise have been found to be void due to issues relating to 'simple' forms of adoption, residence and domicile in other jurisdictions.[37] It was enacted in response to the considerable numbers of Romanian orphans brought to Ireland for adoption following the fall of the Ceausescu regime. It provided prospective adopters of a foreign child with a statutory entitlement to an adoption assessment and put in place a related statutory procedure. It enabled Irish adopters of foreign children to be placed in the same legal position as Irish adopters of Irish children.

Between the introduction of the Adoption 1991 Act and 2005, over 4,000 foreign adoptions had been registered by the Adoption Board in the Register of Foreign Adoptions.[38] Then, in 2006, *Attorney General v. Dowse*[39] raised issues concerning the recognition and registration of adoptions which come within the terms of sections 2, 3, 4 and 4A of the Adoption Act 1991 as amended by the Adoption Act 1998; particularly where the adopted person is a child under 18 years of age residing outside the jurisdiction with their adoptive parents, at least one of whom is an Irish citizen at the time the adoption is recognised and registered in Ireland. In such circumstances it was clear that the Adoption Board had no role in relation to: the prior assessment of adoptive parents as to their suitability to adopt; determining whether the natural parents had given valid consents; nor as to whether there had been an appropriate match between the child and the adoptive parents. This case led

[37] Following the ruling in *MF v. An Bord Uchtála* [1991] ILRM 399.

[38] Approximately 70–75% of the 4,000 entries were made under section 5 of the Adoption Act 1991, where the adopters are ordinarily resident in Ireland and adopt a child from abroad. The remaining 20–30% of the entries come under sections 2, 3, 4 and 4A of the 1991 Act, where the adopters were not resident in Ireland at the time of the adoption but were domiciled, habitually resident or ordinarily resident in the foreign jurisdiction. Of these 20–30%, the overwhelming majority involve adults seeking recognition of their own adoption so that they may become an Irish citizen on the basis that one of their adoptive parents is or was an Irish citizen (as cited in Law Reform Commission report, *Consultation Paper: Aspects of Intercountry Adoption Law*, *op. cit*.).

[39] [2006] IEHC 64, [2007] 1 ILRM 81. The case concerned the adoption of an Indonesian child in August 2001, by an Irish citizen and his Azeri wife who were both ordinarily resident in Indonesia at the time of the adoption, under section 4 of the 1991 Act, which was subsequently registered under section 6 of the 1991 Act.

directly to the Law Reform Commission report, *Consultation Paper: Aspects of Intercountry Adoption Law (op. cit.)*, and thence to the introduction of the 2008 Act.

7.3.1.7 The Adoption Act 1998

This legislation provided for circumstances where a birth father wished to be consulted in relation to the proposed adoption of his child.[40] Section 7D of the principal Act (inserted by the 1998 Act) enabled such a father to serve notice of his interest on the Board in which case the Board is required to notify the relevant adoption society accordingly. The latter must then consult with the father prior to placing his child for adoption. It also introduced new pre-placement adoption procedures to be followed by adoption agencies and prohibited direct placements by a birth mother with a non-relative.

7.3.1.8 The Adoption (Hague Convention, Adoption Authority and Miscellaneous) Act 2008

This provides for the creation of the Adoption Authority (replacing the Adoption Board) as the Central Authority required under the terms of the Convention to oversee the implementation of the Convention in effecting intercountry adoptions.[41] It also consolidates and significantly amends the body of adoption law as represented by the above seven statutes (see, further, below).

7.3.2 International Law

The Irish government ratified the European Convention on the Adoption of Children in 1968 (currently under review) and in 1996 signed the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption. It has subscribed to the United Nations Convention on the Rights of the Child 1989[42] and to the European Convention for the Protection of Human Rights and

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[40] Following the ruling in *Keegan v. Ireland*, Application No. 16969/90 (1994) Series A No. 290 (1994) 18 EHRR 342. Note, also, *J.B. v. D.B*. (1998) where the consent of the father in respect of a child conceived as a result of rape was obtained which would seem to indicate that consent of the father in such circumstances should be obtained where possible. I am grateful to Shannon, G., for drawing this case to my attention.

[41] Due for promulgation in autumn 2008.

[42] In Ireland the United Nations Convention on the Rights of the Child is given effect by the National Children's Strategy, launched in 2000, responsibility for the implementation of which rests with the National Children's Office. See, further, Horgan, 'The United Nations Convention on the Rights of the Child and Irish Family Law' (1991) 9 ILT 162.

Fundamental Freedoms 1950. The latter was given effect by the European Convention on Human Rights Act, 2003.[43]

7.3.3 Adoption Principles and Policy

In June 2003, the government launched a review of adoption law to make it:[44]

> … more compatible with life in the 21st century by ensuring that it takes account of the huge changes in society as well as changing trends and practices that have taken place since the 1952 Adoption Act.

In 2006, the United Nations Committee on the Rights of the Child expressed concern that Ireland's intercountry adoption legislation does not fully correspond with international standards, and recommended that legislative reform remedy this situation.[45]

7.3.3.1 The Interests of the Child

The adoption law review was a two-part process. Part 1 consisted of a written consultation, attracting some 300 submissions, which formed the backbone of Part II, an oral consultation held in the form of a conference and workshops in October 2003. The consultation process suggested that the following guiding principles should inform proposals for change:

- That the best interests of the child are paramount
- That the child has the right to be heard in every action taken concerning him or her and to have those views taken into account in accordance with his/her age and development
- That the child has the right to know and be cared for by his/her parents and to preserve his or her identity, including name and family relations
- That the child has the right to continuity of care where possible and
- That efforts must be made to ensure that adoption legislation and service provision are characterised by clarity, consistency and fairness where possible, while retaining the necessary flexibility to meet individual needs

On January 5, 2005, the Minister, announced the outcome of the consultation process. He reported that certain specific legislative proposals had emerged from the 18 month consultation process, had received government approval and appropriate

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[43] This became part of Irish law on 31 December 2003.

[44] See, Minister for Children, Mr. Lenihan, B., TD, in foreword to Shannon, G., *Adoption Legislation Consultation: Discussion Paper*, Dublin, June 2003. Also, see, See, also, Horgan, 'Editorial - The Adoption Law Reform Program - The Shape of Things to Come' [2003] 3 IJFL 1.

[45] See U.N. Committee on the Right of the Child-Concluding Observations: Ireland 29 September 2006 at www.ohchr.org/english/countries/ie/

bills would now be prepared. In addition, a number of significant administrative changes would also be introduced.

7.3.3.2 Policy

Irish government policy was reflected in its proposals for legislative change:

- *The Hague Convention on Protection of Children and co-operation in Respect of Intercountry Adoption 1993 is to be ratified*. This will include a provision making 50 the upper age limit of eligibility for assessment.
- *An Adoption Authority is to be established*. This will replace the present Adoption Board and will include adopted people, natural parents and adoptive parents as well as other people with appropriate expertise. The Authority will take on the role of a central authority under the Hague Convention and develop best practice and set down guidelines for adoption services nationally. It will monitor adoption services in line with guidelines and carry out and commission research.
- *A Tracing and Reunion service is to be established*. To progress this service a National Records Index and a Contact Preference Register are to be set up on a legislative basis.
- *Legislation is to be introduced to address a range of other adoption issues*. There is to be an adoption option for people who are over 18 and who have been in foster care with the same family. The Adoption Authority will have a power to attach conditions to an adoption order, allowing for ongoing contact with birth family, where this is in the best interests of the child. There is to be an adoption option for a step-parent without requiring adoption by the mother, and the adoption option is to be made available to children of a marital family unit where a parent has died.
- *Guardianship*. The option of guardianship will be made available for step-parents and will also be available for foster parents of children in long-term foster care.

As many of the deficits identified were of a service provision nature, certain administrative proposals were also approved.

- *A National Adoption Information and Tracing Service is to be set up*. This is to be based on recommendations from an advisory group including representatives of adoption service users. National protocols and standards will be developed.
- *A National Voluntary Contact Preference Register is to be established*. This will be managed by the Adoption Authority and will be open to adopted people, to natural parents and to any natural relative.
- *A National Adoption Records Index is to be established.*
- *Research into Intercountry adoption is to be undertaken and*
- *The delay in Intercountry adoption assessments is to be addressed.*

As we go to press, the indications are that the imminently expected Adoption (Hague Convention, Adoption Authority and Miscellaneous) Act 2008 will introduce

provisions to address all the above and to underpin those administrative changes already implemented.

However, these changes do not address the legal obstacles to child care adoption. Although the paramountcy principle is to be given legislative recognition, the fundamental issue still stands as to how this is to be balanced against the 'inalienable and imprescriptible' parental rights principle enshrined in the Constitution. Until greater clarity is achieved, probably through a prolonged period of Supreme Court elucidation, it is difficult to predict how the paramountcy principle will effect decision-making not just in relation to the right of a non-consenting marital parent to resist an adoption order but also at other points in the process where the principle and rights are in conflict e.g. authority for placement, contact conditions and post-adoption access to identifying information. Resolving the tension between Convention and Constitution principles remains the central challenge for the adoption process in Ireland. The law and policy in this jurisdiction will therefore be left on a fundamentally different and diverging track from that taken by the U.K., converging instead with the adoption model developed in New Zealand and in such mainland European countries as France, Norway and Sweden.

7.4 Regulating the Adoption Process

In Ireland, the Adoption Board or An Bord Uchtála (soon to be the 'Adoption Authority')[46] is the only agency positioned to hold an overview of the workings of the adoption process and of the contribution made to it by various statutory and voluntary agencies. The main functions of this body are: making/refusing adoption orders; granting declarations for eligibility and suitability to adopt abroad; and formally recognising foreign adoptions. Its regulatory function, however, is restricted to one of minimalist intervention: monitoring practice and registering and de-registering adoption agencies at their initiative.

The adoption process, as statutorily defined, now consists of the following stages:

- Legal procedures regarding availability of child, status of parties and consents
- Placement of child
- Legal procedures relating to application
- The hearing and issue of order/s
- Access to a post-adoption contact register and
- Certain information disclosure entitlements

In addition to the above legislatively required components, some agencies have voluntarily developed services that are now accepted as part of the adoption process in Ireland. These include pre-consent counselling, post-adoption support services

[46] Following the introduction of the Adoption (Hague Convention, Adoption Authority and Miscellaneous) Act 2008.

and tracing and re-unification services. In Ireland, the adoption process has significant jurisdictional characteristics. Most obviously the statutory process is both shorter and narrower than in other modern western jurisdictions. Also of significance is the fact that adoption proceedings are administrative and the role of mediating bodies is less intrusive and less extensive in nature than elsewhere. Finally, as yet, there is no regulatory framework governing the entire adoption process in this jurisdiction.

7.4.1 Length and Breadth of the Process

In the context of family adoptions, the process does not start until an application is lodged; which may be several years after the care arrangements were assumed. This is a singular characteristic of adoption in Ireland.[47] The waiving of preliminary professional scrutiny, and with it any opportunity for public service support in this context, emphasises the process's distinctively private characteristics. The reverse is true in the context of adoption in a public care context where the process cannot begin for at least a year after placement with foster parents. At the end of the process, closure occurs abruptly with the making of an adoption order. The absence of any statutory post-adoption allowances or support scheme, any statutory possibility of attaching contact conditions to adoption orders (notwithstanding the recent introduction of information disclosure procedures) effectively terminates any rights or duties in respect of ongoing services.[48]

In Ireland, the adoption process does not encompass as wide a range nor as uneven a mix of participants as elsewhere. The very small proportion of children entering the adoption process who are either 'legitimate' or the subject of a care order continues to be a particularly distinctive characteristic of adoption in this jurisdiction.[49] Intimately related to that fact is the relatively large proportion of adopted children who originate from overseas.[50] Other distinctive characteristics include: the proportion of parental applicants, for decades very low in Ireland, now

[47] See, section 10(1) of the 1991 Act. This may not occur until several years after placement by which time the adoption is a virtual *fait accompli* as there can be no reasonable alternative.

[48] Some such opportunities may be available through private or agency based practice but not as a statutory service.

[49] The Adoption Board's report for 1989 shows orders having been granted in respect of: three children who were legitimated under the 1964 Act; three whose availability was determined under section 3 of the 1988 Act; and nine declarations made by the Board under the latter Act. In addition, three orders were made under section 3 of the 1974 Act. By way of comparison, the 1998 report gives the following statistics for the respective groupings: 0; 1; and 16; with an additional 0 under section 3 of the 1974 Act.

[50] The Board's annual reports show the following number of adoptions effected overseas and entered into the Register of Foreign Adoptions: 1991, 58; 1992, 305; 1993, 59; 1997, 148; 1998, 260; 2000, 323, 2002, 440; 2003, 487; 2004, 486; 2005, 439; and in 2006, 406.

constitute by far the single largest source of domestic applications:[51] the relatively high proportion of applications from grandparents[52] and the low proportion from single third party applicants[53] and from foster parents.

7.4.2 Role of Adoption Agencies and Other Administrative Agencies

The traditional involvement of voluntary agencies[54] in the adoption process has not been entirely displaced by statutory agencies and in 2006 some 8% of domestic adoption orders were in respect of placements made by them. There is no statutory duty upon adoption societies to ensure that all placement decisions are taken by formally constituted adoption panels but the assumption of such responsibilities by appropriate bodies is a notable characteristic of the adoption process in this jurisdiction. A similar situation exists in relation to the provision of an adoption service. There is a statement of broad principle that a service for the adoption of children should be available but its actual provision is entirely at the discretion of the Health Service Executive and that of such voluntary organisations as may have the necessary resources.

7.4.2.1 The Health Service Executive

The Health Service Executive (HSE) was established on 1st January 2005 under the Health Act 2004 which states that its remit is to provide services that improve, promote and protect the health and welfare of the public. Childcare services, including foster care, residential care and adoption, are among the responsibilities of this agency.

7.4.3 Role of the Determining Body

In Ireland, adoption proceedings are heard in an administrative rather than a judicial setting with hearings held by the Adoption Board, or *An Bord Uchtála*, and orders are made or refused by it. Nonetheless, the High Court plays a significant role in the Irish adoption process as the Board passes disputed legal issues, including disputed

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[51] For example, in 1987 the proportion of parental applications amounted to some 22.6% of the domestic total, rising to 63.23% in 1998 and reaching 67% in 2006.

[52] In Ireland, the proportion has remained stable at approx 3.5% of the total (1% in 2006). Elsewhere, professional caution, judicial discretion and the statutory availability of alternatives would result in few successful applications.

[53] Although it should be noted that the Adoption Board's report for 2006 records some 24 sole adopters registered that year in the Register of Foreign Adoptions.

[54] Currently, the following voluntary societies are registered as adoption agencies in Ireland: Cunamh; PACT; St Louise Adoption Society; CLANN; St Catherine's Adoption Society; and St Maura's Adoption Society.

parental consent matters and in particular all such matters arising in applications made under the 1988 Act, to the High Court.[55]

7.4.4 Registrar General

To this official falls the duty, as stated in section 22 of the 1952 Act, of recording in the Adopted Children Register the particulars of every child in respect of whom an adoption order has been issued. These must include details of date and place of birth, the date of the adoption order, the child's first name and sex, and the name, address and occupation of the adopters. In addition the Registrar General must also maintain an index, linking this information with the corresponding data recorded in the Register of Births. Unlike the latter the index is inaccessible to the general public and the information it contains, or provides access to, may not be disclosed to any person unless the Board or court directs that to do so would be in the best interests of the child concerned.

7.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

Access to the adoption process in Ireland is constrained for all prospective parties. A common restraining factor is marital status. For applicant, subject and relinquishing parent, access is very dependent upon whether or not the individual is from a marital family unit. There are also characteristics affecting each class of participant. Applicants such as birth parents and relatives attract little professional scrutiny while foster parents comprise a low proportion of total annual applicants. Few children subject to care orders and/or with special needs are eligible for adoption. Intimately related to all the foregoing is the fact that the proportion of birth parents who are unwilling participants in adoption proceedings is very low. These, unarguably, are all the consequences of a markedly protectionist policy towards marital family units.

7.5.1 The Child

Under the Adoption Acts, 1952–1976 access to the adoption process is restricted to children: who reside in the State, are at least 6 weeks old and under 18 years of age,

[55] But, see Walsh J., in Binchy, W., *Casebook on Irish Family Law*, Professional Books, Dublin, 1984 at p. viii for a critical analysis of the Board's authority to make adoption orders without judicial endorsement.

though they need not have been born in this country;[56] who are orphans, or whose parents are not married to each other, or whose parents married each other after the child's birth but whose birth has not been re-registered; and where the mother or guardian or any person having control over the child consents to the adoption. In a small number of cases, where consent is not forthcoming, a child may nonetheless enter the adoption process following a High Court order under section 3 of the Adoption Act, 1988 where parents have failed in their duty of care towards him or her. In that instance, the subject may be a marital child.

The twin criteria, normally determining the availability of a child for adoption are, thus, non-marital parental status and parental consent. There is no evidence to show that child welfare (as represented by factors such as the child's wishes, the 'blood-link', degree of bonding, complex health or other special needs) is itself a matter attracting a determinative weighting at point of entry to the adoption process. So, for example:

- A marital child can only become available for adoption on a coercive basis as it is not possible for a marital parent to voluntarily relinquish a child of the marriage.
- The consensual adoption of children by relatives, most usually the child's birth mother and her spouse—in which the welfare factor has a nominal role—is a particular feature of adoption in this jurisdiction.
- Evidence of criminal abuse or neglect of a child is in itself insufficient grounds for the compulsory placing of that child for adoption, there must also be evidence of an 'abandonment' of parental responsibilities.
- An application in respect of a child subject to a care order, making that child available for adoption, must come from foster parents i.e. it is a private rather than a public initiative.
- Suitability criteria are not weighted in favour of welfare interests as evidenced by the very few children with special needs or subject to care orders being placed for adoption and the considerable numbers of healthy babies and young foreign children[57] being adopted.
- The lack of a range of statutory alternatives to adoption is an important and characteristic feature of the law in this jurisdiction.
- The lack of adoption orders subject to a contact condition in favour of a birth parent or sibling is also a significant feature.

These features very clearly illustrate the lack of any leverage available for judicial assertion of the public interest represented by the welfare principle to compromise the private interests represented by an adoption order.

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[56] In *Eastern Health Board v. An Bord Uchtála* [1994] 3 IR 207, which concerned an Irish couple who had brought to Ireland a child born in India, the Supreme Court noted that the only "connecting factor" which a child placed for adoption in Ireland must have is mere residence in Ireland and not Irish citizenship or domicile.

[57] In 1998, of the 400 orders made, only one adoption order was made in respect of a child with special needs, one in respect of a child subject to a care order, but 27 adoption orders were made in respect of children from overseas.

7.5.2 The Birth Parents

Traditionally, the donor role of a voluntarily relinquishing unmarried mother is most strongly associated with birth parents in the adoption process. In contemporary domestic proceedings, however, that role has been largely displaced by the birth parent (usually the mother) as applicant in a step-adoption in which the unmarried birth father may appear as a respondent. In addition, one or both married parents of a child subject to a care order may now appear as respondents in adoption proceedings lodged by the child's foster-parents.

7.5.2.1 Mother

In Ireland, only an unmarried mother is entitled to voluntarily relinquish a child for the purposes of adoption. This she may do in favour of a relative and, until the introduction of the 1998 Act, she could have done so in favour of a complete stranger. She is not legally obliged to serve advance notice on any professional or government agency nor is their approval for the placement required. The only legally operative criteria is that her decision to relinquish is accompanied by her full and informed consent given both at time of placement and at time of hearing. The consent decision, given at time of placement for adoption but subsequently rescinded, is by far the most common reason for natural parents to subsequently appear in court as respondents. In *N v. Health Service Executive*[58] the Supreme Court held that placing a child for adoption did not amount to an abandonment of the child within the meaning of Article 42.5 of the Constitution and the natural parents, who had married since the placement, were entitled to the return of their daughter.

7.5.2.2 Father

The unmarried father of the child in question has limited rights relative to those of the mother. Under the 1988 Act, he must, where feasible, be notified of an adoption application and is then given an opportunity to consult with one of the Board's social workers as to his views on the matter and may appear as a respondent to challenge the mother's decision but only if he has first acquired guardianship rights.[59] In 2006, 116 birth fathers were notified by the Board regarding pending adoption applications in respect of their children: 6 participated in the subsequent Board hearings (3 in 2005, 5, in 2004, 6 in 2002 and 5 in 2001).[60]

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[58] [2006] IESC 60. To the same effect see *In re J* [1966] IR 295 and *In re JH (An Infant)* [1985] IR 375 where the natural parents of children who later married successfully relied on the provisions of Articles 41 and 42 of the Constitution and regained custody of their child placed for adoption.

[59] The Adoption Act 1998 introduced a requirement that such a father be consulted prior to placement so that he may be advised of his right to apply for guardianship, access and/or custody of the child.

[60] See, The Adoption Board, *Annual Report 2006*, Stationery Office, Dublin at para 2.1.5.

7.5.3 The Adopters

The eligibility and suitability of prospective adopters is a matter that falls to be assessed by the HSE/Registered Adoption Society and approved by the Adoption Board. The criteria to be satisfied is essentially the same for all third party adopters, whether they are pursuing a domestic or intercountry adoption, but is more relaxed for first party adopters.

7.5.3.1 Eligibility Criteria

In Ireland, eligibility criteria for adoption are provided for under the Adoption Acts 1952–1998.

The eligibility criteria are in general framed to ensure that third party applicants closely conform to the constitutionally approved marital family unit. Only in exceptional circumstances, under section 10(2) of the 1991 Act, will applications from anyone other than a married couple be accepted. There is a legislative minimum age requirement of 21 years but no stated maximum age limit;[61] if the child is to be adopted by the natural father or mother, or a relative of the child, only one applicant must have attained the age of 21. All third party applicants must satisfy a statutory requirement that they be of the same religion as the natural parents or be of a different religion and that is known to the birth parents. The only third party applicants eligible to adopt a marital child are the foster parents of that child who have to satisfy carer tenure criteria which, unlike other jurisdictions, provides them with a power rather than a right to apply to adopt.[62] In contrast, family adopters in this jurisdiction do not have to satisfy rigorous eligibility and suitability criteria.[63] There is an assumption that the welfare of a child can only be enhanced by family adoption. There is no requirement to serve notice of an intention to make a family placement, no opportunity for professional assessment prior to application and no possibility of a discretionary judicial decision to issue an alternative order on the grounds that such would be more compatible with the child's welfare.

In this jurisdiction, the legal standing of parents or other relatives as prospective adopters attracts preferential treatment in law.

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[61] However, it has been recommended that, in the context of intercountry adoptions, there should be a lower age limit of 25 years and an upper limit of not more than 42 years for the older of the applicants at time of placement. See, further, *Towards a Standardised Framework for Intercountry Adoption Assessment Procedures: A Study of Assessment Procedures in Intercountry Adoption*, Stationery Office, Dublin, 1999.

[62] In Ireland, foster carers must provide a minimum of 12 months continuous care and be supported by the HSE before they can be considered as applicants. In the U.K. jurisdictions, for example, the foster carers have the right to apply independently of the views of the relevant public authority.

[63] However, one of the applicant parties must be at least 21 years of age; Adoption Act 1991; section 10(5)(b).

7.5.3.2 Suitability Criteria

The Adoption Board has set the following standards for assessing prospective adopters:[64]

- The capacity to safeguard the child throughout his or her childhood.
- The capacity to provide the child with family life that will promote his or her development and well being and have due regard to the physical, emotional, social, health, educational, cultural, spiritual and other dimensions. The resources that families can draw on will vary from family to family and may change over time. Whatever circumstances the family find themselves in, the applicant/s will be able to demonstrate their understanding of the importance of maintaining an ongoing and meaningful relationship with their child.
- The capacity to provide an environment where the child's original nationality, race, culture, language and religion will be valued and appropriately promoted throughout childhood. This will include the capacity of the parent/s to recognise the differences between themselves and their child within these areas and to recognise and try to combat racism and other institutional and personal oppressive forces within society.
- The capacity to recognise and understand the impact of being an adopted child from an overseas country on the development of the child's identity throughout their childhood and beyond.
- The capacity to recognise the need for and to arrange for appropriate support and intervention from health, social services, educational, and other services throughout childhood.

7.5.3.3 Classes of Applicant

The following persons are eligible to adopt:

- A married couple living together (this is the only circumstance where the law permits the adoption of a child by more than one person).
- A married person alone—in this circumstance the spouse's consent to adopt must be obtained, unless they are living apart and are separated under (i) a court decree or (ii) deed of separation or (iii) the spouse has deserted the prospective adopter or (iv) conduct on the part of the spouse results in the prospective adopter, with just cause, leaving the spouse and living apart.
- The mother, father or a relative of the child (relative meaning a grandparent, brother, sister, uncle or aunt of the child and/or their spouse).
- A widow or widower.

A sole applicant who does not come within the last two classes of persons may only adopt where the Board is satisfied that, in the particular circumstances of the case, it is

[64] See, An Bord Uchtála, *An Outline of Adoption Law and Procedure*, Dublin, 1998.

desirable to grant an order. It is not possible for two unmarried persons to adopt jointly.

7.5.3.4 Non-Hague Convention Adopters

Any child adopted abroad in a non-Convention country, such as Guatemala or the Philippines, has to be re-adopted under Irish law. Such applications are processed in the same way as any other domestic application. Consents that have been signed by the birth mother in her native country will be invalid if and unless an application for the adoption order is not made within three months of the signing of these consents.

7.6 Pre-placement Counselling

In Ireland there is as yet no statutory requirement to provide pre-placement counselling. Part 11 of the Child Care Act 1991 includes provisions requiring an adoption service to be established and maintained. Under section 6 of this Act the HSE is required to provide or ensure the provision of "a service for the adoption of children". It is empowered to do so by entering into arrangements with any registered adoption agency. Characteristically, in keeping with the significant non-statutory dimension to the adoption process in this jurisdiction, pre-placement counselling services are available from some voluntary agencies.

7.7 Placement Rights and Responsibilities

In practice, a child enters the adoption process when he or she is placed with prospective adopters. This placement decision must be taken by a person or body with the requisite authority; an initial consent is a legal necessity. An agency cannot place a child for adoption until the child is at least four weeks old.

7.7.1 Placement Decision

This decision may still be taken on a private basis by the birth parent/s who remain entitled to place their child directly with a relative. As the number of annual orders made has steadily fallen, so has the number resulting from parental placements.[65]

[65] Of the 422 orders made in 1997, 36 were in respect of placements made by 'natural mothers and others'; in 1999, the figures were 317 and 30 respectively; in 2003, 263 and 24; in 2004, 222 and 16.

7.7.1.1 Foster Placement

Where the child has been in a long-term foster placement for at least a full year and the foster carers decide to adopt, with parental consent, they may do so without recourse to the High Court. Where such consent is not forthcoming, or the child is a child of a marriage, the adoption must be processed by the High Court under the Adoption Act, 1988.

7.7.2 Placement Supervision

In Ireland there is no specific statutory provision that gives rise to any protective duties owed to a child placed for adoption.[66] Ultimately, all placements must be notified to the Adoption Board, but this does not trigger any specific protective duties.

7.8 The Hearing

In Ireland the hearing of an adoption application is conducted by the Adoption Board and is administrative rather than judicial in nature.

7.8.1 Where Consent Is Available

Adoption in Ireland was traditionally based on consent and this very largely remains the case; the parent/s whose consent is required must be informed of their right to withdraw consent at any time prior to the making of the order. In recent years, the disproportionate increase in family adoptions, which are seldom contested, has itself served to strengthen the consensual nature of the process.

7.8.2 Where Consent Is Not Available

In Ireland, the law provides for the possibility of non-consensual adoptions in only two sets of circumstances. Firstly, where it can be shown that the initial placement decision was authorised by an informed parental consent which was subsequently

[66] As regards 'family' placements, the care and maintenance provisions of sections 56 and 57 of the Health Act 1953 require advance notification of placement to be served on the HSE. As regards placements made by child care agencies, these are subject to the boarding out regulations. All adoption agency placements must be notified to the HSE within seven days.

withdrawn.[67] Secondly, where there is compelling evidence of parental abuse or neglect amounting to an abandonment of parental responsibilities.

7.8.2.1 Dispensing with Consent; Private Law

In a private law context no statutory grounds exist for dispensing with parental consent at the time of placement.[68] Much, if not most, case law has been focussed on the contractual grounds for affirming or discounting the consent already given by young unmarried mothers to the placement of a child for adoption. Even if given within six weeks of the birth of the child concerned, such consent will be upheld by the courts. It is a telling irony that such grounds as exist under the 1974 Act to provide for the possibility of non-consensual adoption do so only in respect of an unmarried mother and become operative only if she has already given a valid consent to placement.

Also, in this jurisdiction there is no judicial discretion in relation to first party applicants to make a different order to the one sought (e.g. a residence order or parental responsibility order). The use of wardship, with its reliance on the principle that the welfare interests of the child are of paramount importance, has not played a key role in supplementing statutory powers and authorising non-consensual placements.

7.8.2.2 Dispensing with Consent; Public Law

The Adoption Act 1988 introduced parental failure due to 'physical or moral reasons' as grounds for dispensing with parental consent to adoption, regardless of the marital status of such a parent. However, these grounds are not synchronised with those that constitute criminal fault or default in child care legislation. Case law has shown that parental inaction will be sufficient to convince a court that parents have 'failed in their duty towards the child' within the meaning of section 3(1)(I)(A) of the 1988 Act.[69] The grounds may be satisfied even if the parent concerned is without blame and the failure is attributable to their suffering from a learning disability.[70]

Mere parental culpability, however grave, is insufficient; the conduct must be such as to amount to an 'abandonment' of parental responsibilities[71] and it must be attributable to both parents; failure by one parent but not the other will not satisfy

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[67] The Adoption Act 1974, section 3.

[68] Except under section 14(2) of the Adoption Act 1952 which is restricted to circumstances where the parent/guardian either suffers from mental infirmity or their whereabouts are unknown.

[69] See, for example, *The Southern Health Board v. An Bord Uchtála* [2000] 1 IR 165 where the court was satisfied that while the father had actually committed the acts of abuse the mother was also culpable as she had failed to protect her child.

[70] See, *NAHB v. An Bord Uchtála* [2003] 1 ILRM 481.

[71] See, section 3(1)(I)(C) of the 1988 Act: the degree of parental failure must be such as 'constitutes an abandonment on the part of the parents of all parental rights'.

this requirement. The court will require evidence that the parents, by fault or default, have behaved in a manner constituting an abandonment of all responsibilities in respect of the child; whether or not this was intended or involved actual physical abandonment.[72]

Moreover, the 'abandonment' must have already lasted for a minimum of 12 months and be likely to continue without interruption until the child reaches the age of 18. The courts have looked to past conduct as evidence of probability of continued parental failure and have had no difficulty finding that where conduct has satisfied the grounds of section 3(1)(I)(A) of the 1988 Act then it is likely to continue to do so throughout childhood.

The grounds also require, under section 3(1)(I)(D) of the 1988 Act and in compliance with Article 42.5 of the Constitution, the court to be satisfied that the state, as guardian of the common good, should supply the place of the parents. This places an onus on the court to examine firstly whether it can do so and then whether in the circumstances of the particular child, it should make an order providing for permanent alternative care; which may in either instance indicate an alternative to adoption.

Finally, it is not the fact of parental culpability which triggers a public agency initiative to place for adoption but the fact of foster care tenure which may or may not give rise to a private initiative to apply to adopt the child in question.[73]

In short, the formulation of the grounds for dispensing with parental consent has been worded so as to ensure compatibility with and subservience to constitutional principles with their emphasis on the 'inalienable and imprescriptible rights'[74] of parents. The result is that the grounds for non-consensual adoption are confined to a narrow definition of parental failure and to private rather than public responsibility for commencing relevant proceedings.

7.9 Thresholds for Exiting the Adoption Process

There is no general right to adopt or to be adopted. In this jurisdiction the few alternative options available to the determining body result in a higher proportion of applications concluding with the issue of an adoption order than would be the case in most modern western jurisdictions.

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[72] See, for example, *The Southern Health Board v. An Bord Uchtála, op. cit*., and also *The Western Board, HB and MB v. An Bord Uchtála* [1995] 3 IR 178.

[73] In the U.K. jurisdictions, for example, the freeing process has for decades clearly placed a statutory responsibility upon the public child care services to initiate the process whereby a child in care may become available for adoption. In Ireland, this is left to the discretion of a child's foster carers.

[74] See, Articles 41 and 42 of the Constitution.

7.9.1 The Welfare Interests of the Child

The making of an adoption order is conditional upon a finding that to do so would be at least compatible with the welfare interests of the child concerned.

7.9.1.1 Paramountcy

Section 2 of the Adoption Act 1974 states that the welfare of the child shall be the first and paramount consideration in all decisions of the Adoption Board or any court relating to the arrangements for or the making of an adoption order. This resonates with section 3 of the Guardianship of Infants Act 1964 which states that a court in assessing guardianship issues must have regard to the welfare of the child as "the first and paramount consideration".[75]

7.9.1.2 Constraints

The wishes of an older child regarding his or her proposed adoption have to be ascertained and taken into account; but there is no evidence that a determining weight can be attached to those wishes.[76] There is no statutory requirement to take into account the likely effect of an adoption order on the welfare of the child throughout childhood; welfare is a factor relevant only at the time of hearing.

Family adoptions are not subject to prior mandatory professional screening, the results of which could be taken into account in determining welfare.

In Ireland, the 'blood-link' factor has gained considerable judicial endorsement and has the capacity to transform welfare into the determining factor in third-party non-consensual applications.[77] In other jurisdictions it is the 'bonding' rather than the 'blood-link' factor which is often determinative; as apparent, for example, in the availability of contact conditions to license the continuation of relationships which would otherwise be legally terminated by adoption.

The lack of a more holistic long-term approach to welfare interests is also evident in the absence to-date of statutory disclosure procedures. In short, the welfare factor as a statutory consideration has a less specific, comprehensive and significant impact upon adoption in Ireland than in other contemporary western societies.

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[75] 'Welfare' is defined in section 2 of the 1964 Act as comprising "the religious and moral, intellectual, physical and social welfare of the infant". Reference to the welfare and best interests of the child is also found in sections 3 and 24 of the Child Care Act 1991. See Shannon 'Child Custody Law of the Republic of Ireland' [2005–2006] 39 Fam. L.Q. 353 at p. 361.

[76] See, however, *NAHB v. An Bord Uchtála*, *op. cit*., where the clear informed wish of the 12 year old child to be adopted was taken into account by the court when granting the order.

[77] See, for example, *RC & PC v. An Bord Uchtála & St Louse's Adoption Society* (8th February, 1985), unreported, HC.

7.9.2 Representing the Child's Welfare Interests

Whether or not proceedings are contested, the duty to bring welfare considerations before the Adoption Board rests lightly and on comparatively few professionals in this jurisdiction. There is no guardian *ad litem* or equivalent professional statutorily charged with the duty to act as 'court officer' and represent the wishes or welfare interests of a child before the Board. No specific information on matters constituting 'welfare' as itemised in a statutory report form are required to be brought before the Adoption Board.

However, in *FN and EB v. CO*[78] Finlay Geoghegan J found that children aged 13 and 14 had a personal right to their wishes being heard in any decision made about their welfare in accordance with Article 40.3 of the Constitution. She noted that:

> Section 25 [of the Guardianship of Infants Act 1964] should be construed as enacted for the purpose of inter alia, giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of a child.

7.10 The Outcome of the Adoption Process

In this jurisdiction, legislative intent began by being almost exclusively concerned with regulating the consensual third party applications of indigenous, white, healthy and in all respects 'normal' non-marital babies. The extent to which it has moved away from this baseline may be seen in the present diversified outcome of the adoption process.

7.10.1 Adoption Orders and Third Party Applicants

This, the type of domestic adoption order originally legislated for, has declined in Ireland both in aggregate and as a proportion of the annual total. Placements are almost always religion specific (i.e. Catholic child with Catholic adopter, Protestant child with Protestant adopter).

Consensual applications have traditionally been associated with 'illegitimate' children and this very largely continues to be the case; the majority of applications concern children under the age of two years.[79] However, the adoption process in this

[78] [2004] IEHC 60.

[79] For example, the Board's annual report reveals that in 1989 the number of children aged 24 months or less at time of placement with third party adopters amounted to 358 out of the total of 366; in 2000, they constituted almost 73% of the total of 96; and in 2006 accounted for 64 of the 69 placements or 92%.

jurisdiction now includes a small but increasing number of children born within marriage and a similar small number who, having been the subject of care orders, have subsequently been adopted by their foster parents.[80] Most obviously there has also been a relatively recent but significant and sustained increase in the number of overseas children adopted which has grown to become the main form of third party adoption.[81] The proportion of third party applications which are contested, has always been very small and invariably arises in circumstances where a birth mother withdraws her consent to the adoption of her non-marital child. In this jurisdiction, there is no legislative provision for conditions to be attached to adoption orders.

7.10.2 Adoption Orders; Parents and Relatives

The number of orders granted in favour of birth mothers and their spouses has grown rapidly in recent years and now constitute the most significant characteristic of the domestic adoption process.[82] Other types of first party application—by a birth mother acting alone or by a natural father and his spouse—have remained consistently low.[83] The application is seldom contested or unsuccessful, the subject is almost invariably a non-marital child and the order granted will always be full and unconditional.

7.10.3 Adoption Orders and Relatives

A consistent characteristic of the adoption process in Ireland has been the significant minority of orders made in favour of grandparents. In other jurisdictions, such applications may be open to professional or judicial challenge.

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[80] For example, in 1989 the same report shows four such children who were subject to declarations made by the Board in favour of their foster parents under the 1988 Act and three who were adopted as a consequence of High Court proceedings taken under that Act. The comparable figures in the 1998 report are 16 and 1 respectively; and in 2000 only 5 orders were made under the 1988 Act while 9 declarations were made of which one concerned a marital child. Effectively, the only children born within marriage and available for adoption (as opposed to those who having been legitimated are then adopted) are those in the care of foster parents.

[81] The Board's annual reports provide the following data: 1996, 54; 1997, 51; 1998, 120; 1999, 176; 2000, 209.

[82] From 59 of the 1,115 domestic orders granted in 1980 to 188 of the 615 granted in 1989, 252 of the 400 orders made in 1998, 199 of the 303 made in 2000 and 149 of 222 adoption orders granted in 2006.

[83] For example, the Board's report for 1989 shows that out of a total of 226 family adoptions, only two orders were in favour of 'natural mother alone', zero for 'natural father and wife' and two for 'natural father alone'. More recent comparable figures are: 1998–0, 0 and 1; 2000–0, 2 and 1; and in 2006, 0, 0 and 0.

7.10.4 Other Orders

In Ireland guardianship orders have been the main private law statutory alternative to commencing adoption proceedings and a failed adoption application may well result in the issue of a guardianship order or possibly a wardship order. Rights of guardianship and custody are enshrined in sections 6 and 10(2)(A) of the Guardianship of Infants Act 1964.

This well established use of guardianship instead of adoption, particularly as an option for discharging a child from the public care system, is very similar to practice in New Zealand.

7.11 The Effect of an Adoption Order

In this jurisdiction, the outcome of the adoption process is as it always has been: either no order or a full order with its characteristic permanent, exclusive and absolute legal effects on all parties. That an adoption order continues to have its traditional effect was reaffirmed by the Chief Justice in *I.O'T. v B. and the Rotunda Girls' Aid Society and M.H. v. Rev. G.D. and the Rotunda Girls' Aid Society*.[84] He then stated that "the effect of an adoption order is that all parental rights and duties of the natural parents are ended, while the child becomes a member of the family of the adoptive parents as if he or she had been their natural child".

7.11.1 Effect on the Child

For the one participant who has no statutory right of consent and, generally speaking, no say in the proceedings, the legal consequences of adoption are particularly far reaching. They may be seen in terms of the changes made to his or her legal status and the rights retained despite such changes:

- The rules of 'legitimation' apply and section 24(a) of the 1952 Act prevents the subject from being treated in law as a non-marital child—thereafter he or she is regarded as the marital child of the adopters.
- The rules of consanguinity apply and the child is instantly endowed not only with the name and social standing of his or her adopters but also with a complete set of new relatives—but there is no statutory bar on marriage or sexual relationships between the adopted person and a "sibling" of their new family.
- The rules of domicile apply and thereafter the child's domicile of origin is held to be that of the adopting parents rather than of the natural parents.

[84] [1998] 2 IR 321.

- The rules of succession as stated in section 26 of the 1952 Act apply providing equality of succession rights between a testator's adopted and natural children.

Further, under section 11(1) of the Irish Nationality and Citizenship Act 1956:

> Upon an adoption being made, under the Adoption Act, 1952 (No.25 of 1952), in a case in which the adopter or, where the adoption is by a married couple, either spouse is an Irish citizen, the adopted child, if not already an Irish citizen, shall be an Irish citizen.

In practice, however, the Passport Office requires the foreign adoption to be recognised by the Adoption Board (i.e. the adoption details must be entered in the Register of Foreign Adoptions) before it will issue an Irish passport to the adopted child.[85]

7.11.2 Effect on the Birth Parent/s

The effect of an adoption order on the rights and duties of a birth parent is necessarily absolute and irrevocable. This was confirmed by the Chief Justice in *IOT v. B*[86] when he held that no familial relationship can survive between a legally adopted person and his or her birth mother. For a new family unit to be vested with the full complement of parental rights necessary to attract the protection of the Constitution the previous holder of those rights must first be equally thoroughly divested of them:

- They are divested by section 24 of the 1952 Act of all parental rights and freed from all parental duties with respect to the child.[87]
- All previous orders in respect of that child are automatically quashed.[88]
- A natural parent, under section 4 of the 1974 Act, retains the right to know the religion, if any, of the prospective adopters where this is different from her own.[89]
- The traditional practice of a placing agency to guarantee permanent secrecy to the natural parents has given way to rights and professional practices in relation to information disclosure, contact, tracing and re-unification.

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[85] It is also worth noting that, if it can be proven to the Office's satisfaction that a natural parent of an adopted child is or was an Irish citizen then the child is entitled to be an Irish citizen by descent irrespective of their adoption (as pointed out in the Law Reform Commission report, *Consultation Paper: Aspects of Intercountry Adoption Law*, *op. cit*.).

[86] See, the *Rotunda Girls' Aid Society* case, *op. cit*.

[87] The unmarried father, under existing Irish legislation, does not inherently possess any such rights.

[88] An affiliation order, however, or any voluntary agreement to the same effect, will not be cancelled if the adopter is the child's birth mother.

[89] The constitutional validity of section 12(2) of the 1952 Act was successfully challenged in *J McG & W McG v. An Bord Uchtála & AG* (1974) 109 ILTR 62 (High Court) which led directly to the introduction of the 1974 Act.

7.11.3 Effect on the Adopters

The legislative intent, to fully equip the adopters with the rights of marital parents in respect of the child, is evidenced by the nature of the parental responsibilities vested in them and in the reluctance to accept any attempt to condition the effects of an adoption order. The parental rights and duties transferred to the adopters include:

- The custody and physical possession of the child
- Entailing control of education and choice of religion together with powers to withhold consent to marriage and to administer the child's property
- The duties of a guardian as understood in common law and as stated in section 10(2) of the Guardianship of Infants Act 1964 such as maintenance, protection, control and provision of appropriate medical treatment
- Also rights to determine place of residence, choice of health and social services, travel and the right to withhold consent to a subsequent adoption and
- The full legal status of a parent within the terms of Articles 41 and 42 of the Constitution also thereby vest in the adopter

These transferred rights cannot be qualified in any way. So, the granting of an adoption order operates to extinguish any restriction on an adopter's full enjoyment of parental rights imposed by a guardianship, custody or child care order which may have been in effect up to the time of hearing. This also operates to prevent the attachment of a condition to an Irish adoption order.

In respect of an intercountry adoption, the adopters must then register the order in the Adoption Board's Register of Foreign Adoptions if the child is to be recognised as an Irish citizen (see, below).

7.11.4 Dissolution of an Adoption Order

Under Irish law, an adoption has generally been regarded as being irrevocable and, in keeping with other common law jurisdictions, it cannot be terminated at the request of any of the parties involved. However, the Supreme Court, in *B* and *B v. An Bord Uchtála*[90] made a finding that an adoption order in this jurisdiction is not necessarily permanent and irrevocable. Delivering the leading judgment, Murphy J referred to section 22(7) of the Adoption Act 1952 which expressly recognises that an adoption order made in the State may be "set aside". For most purposes, as in England & Wales (see, further, Chap. 6), any revocation, annulment, cancellation, termination, or setting aside of an adoption order can only occur on the grounds that the order was fundamentally flawed at the outset as a result of a procedural irregularity or where natural or constitutional justice has not been complied with in the

[90][1997] 1 ILRM 15 Irl.

adoption process. This indeed was the case in *M v. An Bord Uchtála and the Attorney General*[91] when the Supreme Court held that an adoption order was null and void because the Adoption Board did not inform the natural mother that she could withdraw her consent to the adoption before the final order was made. In Attorney *General v. Dowse*,[92] a crucial matter concerned the legal effect of revoking the registration of the adoption order in the Register of Foreign Adoptions. It was then found that, as the normal rules of private international law permitted the passive recognition of something not provided for in domestic law, so it was possible to recognise the effect of the dissolution of an adoption in Indonesia and remove the entry in the Irish Register.[93]

7.12 Post-adoption Support Services

Traditionally, in keeping with the essentially private nature of adoption, once an order was made then public intrusion ceased and in the absence of any statutory provision for ongoing post-adoption support and counselling for adopters[94] this largely continues to be the case. However, the development of some such services by both voluntary agencies the HSE has been given added impetus by the requirement in Article 9C of the Hague Convention that every Adoption Authority should promote 'the development of adoption counselling and post-adoption services'.

7.12.1 Adoption Support Services

In practice very few adopters receive post-adoption support. Perhaps the only consistent exception arises in the context of child care adoptions. An important point of difference between the standing of child care and all other adopters is that the former may qualify for a continuation of boarding-out payments. Section 44 of the Child Care Act 1991 made specific provision for the continuation of boarded-out payments in respect of an adopted child who, prior to adoption had been in the care of a health board and fostered by the subsequent adopters. This is now a purely discretionary matter for the HSE. As there are very few child care adoptions the proportion of adopters now receiving support from the HSE is small.

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[91] [1977] 1 IR 287.

[92] [2006] IEHC 64, [2007] 1 ILRM 81.

[93] Note, however, that section 7(1)(A) of the 1991 Act, as inserted by the 1998 Act, provides that if an adoption is "set aside, revoked, terminated, annulled or otherwise rendered void under and in accordance with the law of the place where it was effected", it does not automatically follow that the adoption is correspondingly cancelled in Ireland.

[94] See, Eekelar, *What are Parental Rights'?* [1973] 89 LQR 210; Hall *The Waning of Parental Rights* [1972] CLJ 248; and Bevan and Parry *Children Act 1975*, pp. 208–239.

7.13 Information Disclosure, Tracing and Re-unification Services

Irish law has never provided a right for adopted persons to have automatic access to their birth certificates, neither has there ever been a legal right to access agency records for information[95] on an adopted child's family of origin, nor a reciprocal duty to disclose such information.[96] There is no legislative provision for tracing and re-unification services although in recent years, voluntary agencies sometimes in conjunction with the HSE have sought to provide such services. In 2004, the Adoption Board established its Information & Tracing Unit and subsequently approved protocols, which are now in place, to govern the roles of information and tracing service providers.

7.13.1 Information Disclosure

Articles 7 and 8 of the U.N. Convention established the important guiding principle that every child is entitled to the information necessary to form their sense of personal identity. The Supreme Court in *I.O'T. v. B. and the Rotunda Girls' Aid Society and M.H. v. Rev. G.D. and the Rotunda Girls' Aid Society*[97] found this to be compatible with the constitutional right to know the identity of one's birth mother as guaranteed by Article 40.3 of the Irish Constitution. This case considered consolidated actions brought by two women informally adopted before legal adoption became available. The applicants had sought an order directing the agency that facilitated the placements to disclose the identities of their birth mothers. While these cases concerned informal adoption, the Supreme Court made a number of references to legal adoption. Keane J, in considering the right to privacy, stated:

> I find it difficult to imagine an aspect of human experience which falls more clearly into the constitutional area of privacy… than the circumstances of the natural mothers in the present case.

Barron J held that secrecy "has always been a paramount consideration in adoption law" and while "the public attitude to absolute secrecy has been weakened… there [does] not appear to have been any cases where communication has taken place against the wishes of the mother".

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[95] However, a High Court judgment in 1993 determined that, where an adopted person is seeking information under section 22(5) of the Adoption Act, 1952, then the Board is obliged to inform itself about the circumstances of the individual case and to decide whether to release or withhold the information sought.

[96] Section 22(5) of the 1952 Act generally prohibits public access to the Adoption Index. The prior permission of the Adoption Board is required before any information is released from the Index. Section 8 of the 1976 Act prevents a court from ordering the release of any such information unless satisfied that this is in the best interests of the child in question.

[97] [1998] 2 IR 321.

In short, the Supreme Court recognised a person's unenumerated constitutional right to know the identity of his/her birth mother, but said that this had to be balanced against the birth mother's right to privacy. It stated that neither set of rights was absolute. While the Court implied that access to adoption records might be appropriate in certain cases, this, it held, would depend on many factors including:

- The circumstances surrounding the birth mother's loss of custody of the child
- The current status and circumstances of the birth mother and the potential effect upon her of the disclosure of her identity
- The birth mother's own wishes and attitude regarding the disclosure, and the reasons behind these wishes and the aforementioned attitude
- The current age of the birth mother and child respectively
- The attitude of the adopted child, including the reasons why he or she wishes to seek disclosure of his or her birth mother's identity
- The present circumstances of the adopted child and
- The opinion of the adoptive parents or other interested persons

Considerable judicial emphasis was placed on the birth parent/s privacy rights in this case which concerned the rights of persons informally adopted. It is probable that even greater importance would be accorded to privacy in circumstances where an adoption order had been granted and the links between the birth mother and adopted child were legally severed.

This case generated considerable public debate and resulted in the withdrawal of the Adoption Information Post-Adoption Contact and Associated Issues Bill.[98] Instead, work on draft protocols for information and tracing service providers was initiated in 2005 with consultation progressing throughout 2006. In 2007, the finalized protocols were disseminated to all service providers.

The issue of access to adoption records is also being addressed in the context of the government's review of the European Convention on the Adoption of Children. If, as proposed, the relevant provisions are incorporated in Part 11 of the Convention this will require the confidentiality of the adoption and the birth mother's identity to be safeguarded under Irish law.

7.13.1.1 The National Adoption Contact Preference Register

The National Adoption Contact Preference Register was launched in 2005 and was broadly welcomed by adoption stakeholder groups and the general public. Its success was evidenced in a report, published in November 2007, which assessed its first two years of operation.[99] This noted that by the end of 2006 over 6,000 applications to join

[98] This draft legislation provided for information disclosure services, the safeguarding of records, establishing and maintaining contact registers and provision of a counselling service for both adopted persons and birth parents.

[99] See, An Bord Uchtála, the *National Adoption Contact Preference Register*, Dublin, 2007. Launched by the Minister for Children, Mr. Brendan Smith T.D., on Thursday 22nd November, 2007. See, further at http://www.adoptionboard.ie/booklets/NACPR_final.pdf

the Register had been received by the Board and a total of 240 matches had been recorded.

7.13.1.2 The Register of Foreign Adoptions

Under section 6 of the 1991 Act, the Board is required to maintain a Register of Foreign Adoptions. In this it enters all details relating to those foreign adoption orders obtained by Irish couples who have complied with the procedure as outlined in the 1991 Act. By April 1997, some 750 entries had been made in this Register. In 2006, the Board made 298 entries (down from 323 in 2000).

In order to qualify for an entry in the Register of Foreign Adoptions, foreign adoptions must be consistent with sections 15 and 42 of the Adoption Act 1952 which deal with valid consent (the minimum of six weeks after child's birth) and improper payments, respectively. An Bord Uchtála may also decline an application for entry in the Register on the grounds of public policy or where any of the following information is missing from the court judgment: the child's birth name (both first name and family name), date of birth and gender; the name of the adoptive parents; and the new name of the child (if appropriate). Failure to have a child's adoption entered in the Register may result in the child not being recognised as an Irish citizen.

7.13.2 Tracing and Re-unification Services

The Adoption Board established its Information & Tracing Unit in 2004 and the National Adoption Contact Preference Register was initiated in 2005.

In 2006, the Board received 1,046 applications: 750 from adopted people and 296 from the relatives of adopted persons. A total of 140 matches between adopted people and their birth relatives were made in the Register that year. The applicants involved were referred to the local HSE office or adoption agency that held the original placement file. The above-mentioned draft protocols for information and tracing service providers, initiated in 2005, are now operational on a national basis. The Board has also embarked on a lengthy programme to index all its files in order to facilitate future applications for contact, tracing and re-unification. Pending the introduction of legislation, the Board is committed to establishing a new National Adoption and Information Tracing Service. As the Chairman of the Board recently commented "many of the children adopted in the early 1990s are reaching adulthood. This may prompt an increase in applications for access to birth information."[100]

[100] Geoffrey Shannon, in note to author (02.07.008).

7.14 Conclusion

Adoption in Ireland, in its brief legislative history, can be seen to have acquired certain characteristics; some of which may be attributable to the Brehon law legacy and its reliance upon formal reciprocal kinship care arrangements within and between clans. In its relative openness, its weighting towards family applicants, marginal relevance to children in care, comparatively high recourse to intercountry adoption and its long-standing reliance upon the alternative of guardianship (and to a lesser extent wardship), the characteristics of adoption in this jurisdiction now more closely resemble those of New Zealand[101] than of its neighbouring jurisdictions in the UK.

Most obviously adoption in Ireland is essentially a consensual process, regulated by a disparate series of statutes, involving many voluntary organisations, presided over by an administrative rather than a judicial body that makes or refuses unconditional adoption orders. The special position of the Roman Catholic Church, religion in general, the legal integrity of the marital family unit, an established non-interventionist child care policy and a strong tradition of reliance upon extended family networks to supplement or substitute for parental responsibilities can all be seen to colour the law, policy and practice of adoption. Certain traditional legal presumptions favouring, for example, the marital nuclear family, Christianity and the maternal bond continue to exercise considerable influence. However, the main distinguishing characteristic of this process, as clearly revealed in its output, is a rapidly increasing trend towards the privatisation of adoption.

The use of adoption by a birth parent and spouse to jointly acquire maximum rights and full parental status and thereby deny rights and status to others is very evident in Ireland. This reversal in the traditional role of the birth parent from donor to applicant is a striking example of the extent of change in the social functions of adoption. The assertiveness with which private applicants now use adoption can also be seen in the increase in applications relating to children, usually healthy babies, from other countries. This choice is to some extent a forced one because of the sharp and continuing decline in numbers of children voluntarily relinquished in Ireland.

The lack of use of adoption by public child care agencies is very evident from the annual statistics which show a steady divergence in the correlation between the annual statistics for children in care and adoption orders. In Ireland, the law will have to change considerably if it is to facilitate the government's aim to "ensure that adoption is an option available to all children who might otherwise be denied a permanent home and stable relationships".[102]

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[101] See, Law Commission, *Adoption and its Alternatives—A Different Approach and a New Framework*, Wellington, New Zealand, 2000. This report draws attention to the particularly high rate of intercountry adoption (116 per million in 1998 compared with 26 per million in Sweden and 117 per million in Norway) at p. 119.

[102] See, Report of the Review Committee on Adoption Services, *Adoption*, Government Publications, Dublin, 1984 at p. 10.

Chapter 8
The Adoption Process in the U.S.

8.1 Introduction

The United States of America is a federal jurisdiction of 50 states and the District of Columbia, each of which is a separate geographic jurisdiction with independent responsibility for enacting legislation, providing a judicial system and for managing programmes of service provision. Included within the range of authority of a state administrative system are matters relating to children and the adoption process.

The federal government has responsibilities in relation to funding service programmes across all states and an accompanying oversight role as regards monitoring the effectiveness of such programmes. This power, exercised under the Spending Clause, provides it with considerable authority to shape state policy. The federal government also provides an overarching framework of law that sets out the parameters for state legislation and a federal judicial system that considers issues with a constitutional dimension.

This chapter begins by examining the social and legal contexts that shaped the development of the adoption process in the U.S. and traces the legislative steps that produced the present framework of adoption law. A consideration of the emerging characteristics of adoption practice leads into an overview of contemporary adoption law and policy. The chapter then applies the template created earlier (see, Chap. 3) to track the legal functions of the adoption process and concludes with some comment on the more distinctive aspects of adoption in this jurisdiction.

8.2 Background

Statute law, policy and practice in relation to adoption are very largely determined at state level and vary considerably across the U.S.

K. O'Halloran (ed.) *The Politics of Adoption,*

8.2.1 The Social Context Giving Rise to Adoption

In this country, as in the U.K. and more generally in the western world, the increase in adoption in the 1950s and 1960s was largely conditioned by the same set of prevailing social values, fuelled by the considerable numbers of relinquishing unmarried mothers and absorbed by the many infertile married couples who wished a the child that could pass as their own. To some extent this can be viewed in terms of public status. At that time the pressures on adopters as much as on unmarried birth parents to achieve social conformity—in terms of private, marital family units with children, all subscribing to much the same value system—were considerable.

8.2.1.1 Unmarried Mothers

The stigma of 'illegitimacy' and with it the complications for any entitlement under the laws of inheritance and succession presented a very real burden for the child of an unmarried mother and one which the latter was naturally anxious to avoid for her child. Unmarried mothers were encouraged to view relinquishment as the reasonable decision of a responsible parent acting to secure her child's future.

The postwar boom in pregnancies saw a change in the demographic profile of such mothers. Whereas previously it had been primarily married or divorced working-class women who relinquished their usually older children for economic reasons, after the war it became common for younger, white, more broadly middle-class unmarried women to do so in respect of children in infancy. From the late 1950s until the mid-1970s, the social stigma and financial hardship accompanying the role of single parent made adoption a likely option for many unmarried mothers in the U.S. as elsewhere. More recently, as the stigma reversed and attached to relinquishment rather than to single parenthood, poverty or relative poverty continued to significantly influence the decisions of unmarried mothers. Indeed, Patricia Strowbridge of Adoption Professionals has recently claimed:[1]

> Take Florida, which has 5,000 to 7,000 adoptions a year. Over 80% of them are private and most of these involve young women. In many cases they simply can't afford to keep their babies because income is so low and welfare is so poor. So they get in touch with an adoption agency.

However, a sense of perspective is needed as it has been estimated that since the mid-1990s, fewer than 2% of the millions of children born 'out-of-wedlock' in the United States each year are voluntarily relinquished for adoption.[2] While they may be increasing in the U.S., consensual third party adoptions have become a rarity in most of the jurisdictions studied.

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[1] See, *The Independent Review*, 5th January 2005, as cited by Hilpern K in her feature article 'The Daddy of All Game Shows' at p. 3.

[2] See, Chandra, A. et al., 'Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States', National Center for Health Statistics, Advance Data No. 306, May 11, 1999.

8.2.1.2 Abortion

The Supreme Court decision in *Roe v. Wade*[3] legalized abortion nationwide and had an immediate impact on the numbers of babies available for adoption. As abortion and improved contraceptives displaced adoption, prospective adopters turned from domestic to intercountry sources and the 1970s saw the beginning of an influx of children from Korea. In recent years, infant adoptions per 1,000 abortions have declined from 19.4 in 1996 to 17.0 in 2002.

8.2.1.3 Assisted Reproduction Services

The modern availability of improved fertility treatment (AID, GIFT etc.) has had some effect on reducing the extent to which adoption is the preferred choice for infertile heterosexual couples while surrogacy arrangements have come to be used in conjunction with adoption by some of those in homosexual relationships. There are currently in excess of 50,000 annual IVF births in this jurisdiction.

- **Surrogacy**

When, in New Jersey, the surrogacy case of *In re Baby M*[4] came to court there was no precedent in the U.S. or elsewhere to which the court could turn for guidance. Since the 1990s, surrogacy has become quite common and the legal issue of the enforceability of a surrogacy contract has become accepted as an ancillary aspect of the adoption process. In all states surrogacy can now be the subject of proceedings. Individual states have legislated differently in response to the legal difficulties. For example, in some states, surrogacy contracts are valid if the surrogate is not compensated while in others such contracts are invalid. Many states allow for the revocation of consent within a certain timeframe. Alaska allows birth parents to revoke their consent within 10 days after consent if the court finds it to be in the child's best interests. In New Jersey, once a birth mother relinquishes her child to an agency she cannot revoke her consent but in a private placement she can change her mind within 20 days of receiving notice of the adoption proceedings.

8.2.1.4 Public Child Care

In the U.S. to a much greater extent than in other western societies, the development of adoption legislation must also be viewed in the context of evolving child care provision. This jurisdiction has a high proportion of children in care, (currently some 74 per 10,000 compared with 47 per 10,000 in England).[5] But being in care does

[3] 410 U.S. 113 (1973). It has been estimated that third party adoptions declined from a high of 89,200 in 1970 to 49,700 in 1974 and 47,700 in 1975.

[4] 537 A 2d 1227 NJ (1988).

[5] See, further, data published by the Performance and Innovation Unit (U.K.), 2000.

not ensure safety; 48% of child abuse deaths in 1995 involved children previously known to the authorities.[6] Consequently, there has for some time been a policy to facilitate the adoption of children admitted to the public care system. The U.S. public service provision for children is now so organised that a separate department deals specifically with planning adoption from care (see, further, below).

8.2.2 Resulting Trends in Types of Adoption

In the recent past the needs of infertile married couples, for children they could call their own, were addressed by agency practice in the U.S., the U.K. and elsewhere that carefully sought to fit the child to be adopted with the characteristics of the prospective adopters. Children were matched to adopters in accordance with criteria such as race, class, physical and genetic attributes with the clear intention of providing a couple with the baby that would most readily approximate the child that could have been born to them. This practice, resting on in-built denial, was reinforced by the issue of an altered birth certificate and the lack thereafter of access by any party to identifying information. In the 1950s and into the 1970s, as Katz points out:[7]

> Agencies tended to prefer married couples of childbearing ages, who were well educated, financially secure and who could provide a child with all the necessities of life in order for her to mature into a productive adult. In addition, agencies tried to match the child with the adoptive parents so that the new family would look like it had been created through biology not the law.

By the 1990s this had all changed. In the wake of the new American led emphasis on the psychology of the individual and the importance of psycho-social relations, instead of the previous focus on socio-economic models of the family unit, adoption practice had reversed its approach towards matching adopters and child.[8] The starting point was to be the child. The suitability of prospective adopters came to be measured by the fit between their attributes and the needs profile of the child regardless of any physical resemblance between them. However, although the emphasis on facilitating religious congruity had faded, it was to some extent replaced from the early 1970s onwards by a similar approach towards racial matching.

As the 21st century got underway, bringing with it further social changes, distinct trends could be detected in the statistics relating to annual adoption orders. In 2002 there were a total of 130,269 domestic adoptions of children by relatives and

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[6] See, National Committee to Prevent Child Abuse, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1995 Fifty-State Survey*, NCPCA, Chicago, IL, April 1996 at p. 3. Cited by Besharov, D., *The Future of Children: Protecting Children from Abuse and Neglect*, 1996.

[7] See, Katz, S., *ibid*. at p. 294.

[8] In 1980, the National Council For Adoption (NCFA) was formed to promote adoption as a positive option, provide and disseminate information on adoption, review and perform adoption research and promote excellence in adoption standards.

non-relatives, up from 108,463 in 1996. Adoptions from other countries increased significantly from 11,303 to 21,063 during this period. The number of public agency adoptions increased dramatically from 24,366 in 1996 to 42,942 in 2002, reflecting increases in the number of children being adopted out of foster care. However, the most current foster care data show a total number of children waiting to be adopted from foster care exceeding 114,000. According to the National Council for Adoption, domestic infant adoptions declined 5.3% from 23,537 in 1996 to 22,291 by 2002.[9] There were 16.3 infant adoptions per 1,000 non-marital live births in 2002, down from 18.7 in 1996. When the Census Bureau first enquired about adoption, in 2000, they found a total of 2,058,915 adopted children in U.S. households: three quarters of the adoptees in these families—1.6 million—were under the age of 18; nearly 500,000 were older than 18; only 42,000 were infants less than a year old. These findings are consistent with estimates previously made that there are now far fewer than 50,000 domestic adoptions of infants completed annually, and that infant adoptions represent no more than 30% of all annual adoptions.[10] A definite shift was taking place, from the domestic to the intercountry route, for those wishing to adopt infants.

8.2.2.1 Third Party Adoptions

Perhaps as many as 130,000 to 150,000 adoptions are being approved each year[11] but, as Hollinger has pointed out, "it is estimated that no more than 35% of these adoptions conform to the traditional model of a newborn or young child being adopted by an unrelated and infertile married couple who are "legal strangers" to the child".[12]

- **Adoption of children with special needs**

The United States House of Representatives has defined a 'special needs' child as one "to whom the State determines there is a specific condition, such as age, membership of a minority or sibling group, or a mental, emotional or physical handicap which prevents placement without special assistance". The Adoption and Safe Families Act, 1997 was introduced to address a worsening situation in which ever increasing numbers of such children were living out their childhood in the public care system. In 1992 these 'special needs' children accounted for approximately 15% of total adoptions (a far higher proportion than in the U.K.).

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[9] See, National Council For Adoption, *Adoption Factbook IV*. However, the absence of reliable data on infant adoptions handled outside public child care system does create considerable difficulty in estimating the numbers of private or infant adoptions.

[10] See, further, Hollinger, J.H., *Adoption Law and Practice*, *op. cit.*

[11] See, further, Stolley, K.S., 'Statistics on Adoption in the United States', in *The Future of Children: Adoption*, Spring 1993 at pp. 26–27.

[12] See, Hollinger, J.H., *Adoption Law and Practice* (vol. 1), Matthew Bender/Lexis-Nexis, New York, 2005 update.

The 1997 Act significantly increased the funds available for special needs children.[13] It also provided a system of 'adoption incentive payments' to the states whereby a bounty is payable for every additional adoption above a set quota and it promotes the provision of post-adoption support services.

The new approach has since been implemented, through replicated state legislation, across the U.S.

- **Child care adoption**

Between 1985 and 1995 the population of children removed from home and placed in substitute care almost doubled from 276,000 to 494,000. As explained by Selwyn and Sturgess:[14]

> Between 1986 and 1995 there was a 72% increase in the number of children in care, associated with a rise in the number of child abuse referrals.[15] This trend was most apparent for younger children and the median age of entry to care reduced from 12.6 years in 1982 to 8.0 years in 1999.[16] The rise threatened to overwhelm the child welfare system and kinship care was encouraged whenever possible. By 1999, 547,000 American children were in care with most looked after in foster care placements.[17] The goal for the majority of these children was reunification with their birth families.

During this period the public service tradition of placing children in foster care homes declined[18] as kinship placements became steadily more numerous.[19] This decline has ceased in recent years with the estimated number of children in foster care increasing steadily from 507,000 in 2004 to 511,000 in 2005 and remaining virtually flat at 510,000 in 2006.[20]

Children in the public care system and unable to return to their birth families are, whenever possible: the subject of proceedings brought to permanently extinguish parental rights, and are then placed for adoption; most often adoption is by the child's foster parents with ongoing state financial support.[21] However, the removal of parental rights has not necessarily led to the adoption of the children concerned:

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[13] See, Barth, R.P., Yoshikami, R., Goodfield, R.K. and Carson, M.L., 'Predicting Adoption Disruption', in *Social Work*, 1998, pp. 227–233 for evidence that post-adoption subsidies mitigate adoption disruption.

[14] See, Selwyn, J. and Sturgess, W., 'Achieving Permanency Through Adoption: Following in US Footsteps', *Adoption & Fostering*, BAAF, London, vol. 26, no. 3, 2002 at p. 40.

[15] *Ibid*., citing *National Adoption Information*, 2001.

[16] *Ibid*., citing Children's Bureau, 2001.

[17] *Ibid*., citing *Adoption and Foster Care Analysis and Reporting System*, 1998–1999.

[18] See, General Accounting Office, 1989 as cited by McFadden, E., 'Kinship Care in the United States', in *Adoption & Fostering*, BAAF, vol. 22, no. 3, 1998, p. 8.

[19] The number of foster homes available decreased from 137,000 in 1984 to 100,000 in 1989. By 1993, kinship care accounted for approximately one-third of placements in New York and about one-half in Illinois.

[20] See, AFCARS, 'Trends in Foster Care, 2007'.

[21] See, the Children's Bureau report (1999) which noted that one half of all children adopted from foster care were adopted by their foster parents and that 86% of those received adoption subsidies. Note that some states have legislation that expressly prohibits lesbians or gays from adopting children in foster care.

many now remain in the public care system as 'legal orphans' with no ties to any family; in the period 2000–2005, for example, while the number of children whose parental rights had been terminated ranged from 73,000 to 65,000, those adopted annually remained relatively constant in the low 50,000s. The number of waiting children whose parental rights have been terminated has increased from 74,000 in 2004 to 77,000 and 79,000 in 2005 and 2006 respectively.[22]

It seems anomalous that a by-product of incentivised adoption for children in public care should be the state creation of tens of thousands of 'legal orphans'. Furthermore, while this approach has resulted in many more children being adopted, it has also been held responsible for the considerable increase in failed or 'disrupted' adoptions.

Child care adoptions have increased in recent years. The AFCARS data system reveals that in relation to children in public care "the estimated number of children adopted annually increased dramatically from 37,000 in 1998 to 51,000 in 2000, declined to 50,000 in 2001 and increased to 53,000 in 2002".[23] Since then, the numbers have leveled off at approx 52,000.[24] This trend coincides with a steady annual rise in the number of admissions to care from 293,000 in 2000 to 311,000 in 2005.[25]

- **Same sex adopters**

Adoption applications by same gender couples are an established if minor aspect of the U.S. adoption process. Since the leading Hawaiian case of *Baehr v. Lewin*[26] the judiciary in most states where the issue has arisen have accepted that adoption by same-sex couples can be compatible with the welfare interests of the children concerned. As Justice Ruth Abrams has stated:[27]

> An increasing number of same gender couples, like the plaintiff and defendant are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto…

In some states there is a legal procedure that allows a same-sex co-parent to adopt his or her partner's biological or adopted child; referred to as a 'second parent adoption' or 'co-parent adoption'. This usually involves a female couple in which one partner is the biological mother through donor insemination or has previously adopted a child as a single parent. As Hollinger explains:[28]

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[22] See, AFCARS, 'Trends in Foster Care, 2007', *op. cit*.

[23] See, AFCARS, annual report, 2004 at http://www.acf.hhs.gov/programs/cb/dis/ fcars/publications/dlinkafcars.htm

[24] *Ibid*., 2007, which reveals the following figures for annual adoptions: 2000, 51,000; 2001, 51,000; 2002, 53,000; 2003, 50,000; 2004, 52,000; and 2005, 52,000.

[25] *Ibid*. The care population, however, decreased annually during the same period from 552,000 in 2,000 to 514,000 in 2005.

[26] 852 P 2d 44 Haw (1993); though this was not a 'same-sex' case.

[27] See, *E.N.O. v. L.M.M*. 711 NE 2d 886 Mass. (1999) at p. 891.

[28] See, Hollinger, J.H., *Adoption Law and Practice*, *op. cit*.

> Second parent adoption protects children in same-sex parent families by giving the child the legal security of having two legal parents. Second parent adoption also protects the rights of co-parents, by ensuring that the co-parent will continue to have a legally recognized parental relationship to the child if the couple separates or if the biological (or original adoptive parent) dies or becomes incapacitated.

However, in several states, appellate courts have denied second parent adoptions.[29] At least one—Oklahoma—had enacted a statute that would bar recognition to adoptions granted to same sex couples in other states or foreign countries but this was declared unconstitutional by the federal appeals court.

The Urban Institute has estimated that in 2005 there were more than 60,000 lesbian or gay adoptive households which makes it inevitable that some such households would interact with the adoption process. Indeed, the first ever survey of gay adoption in the U.S. showed that 1.6% of all placements are made with self-identified lesbians or gay men and that 37.7% of agencies had made such a placement.[30]

- **Intercountry adoption**

By the 1990s, the rapid fall in the number of babies voluntarily relinquished for adoption in the U.S. led to a steady increase in adopters prepared to look overseas for a healthy baby. In 1992, there were 6,472 such adoptions constituting approximately 8.9% of the total and in 2004, the peak year for intercountry adoptions, the number had more than tripled to 22,884. By 2005, the rate of recourse to international sources was such that some 22,739 orphans, according to the State Department, were adopted from: China (7,906); Russia (4,639); Guatemala (3,783); South Korea (1,630); Ukraine (821); Kazakhstan (755); and Ethiopia (441).[31] In 2006, 20,679 children were adopted from overseas, a decrease of 10% from the 2005 total and the first decline since 1992. The largest sending countries were China (6,493), Guatemala (4,135) and Russia (3,706).[32]

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[29] See: Colorado, *In the Matter of the Adoption of T.K.J.*, 931 P.2d 488) (Colo. Ct. App. 1997); Nebraska, *B.P. v. State (In re Luke)*, 263 Neb. 365; 640 N.W.2d 3742 (2002) but see *Russell v. Bridgens*, 264 Neb. 217; 647 N.W.2d 56 (2002) (Nebraska courts should recognize second parent adoption granted in another state if that state had subject matter jurisdiction to approve the adoption under its laws even if the adoption could not have been approved originally in Nebraska); Ohio, *In re Adoption of Jane Doe*, 130 Ohio App. 3d 288, 719 N.E.2d 1071)(1998); and Wisconsin, *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994). Cited in Hollinger, J.H., *Adoption Law and Practice*, *op. cit*.

[30] See, Brodzinsky et al., 'Adoption Agency Perspectives on Lesbian and Gay Prospective Parents: A National Study', *Adoption Quarterly*, 5, 3, 2002, pp. 5–23. Also, see, the Donaldson Adoption Institute which reports that in 1999–2000, 60% of the public and private adoption agencies responding to its survey accepted applications from prospective adoptive parents regardless of their sexual orientation. At least 40% of these agencies had placed children with gay or lesbian adoptive parents.

[31] See, State News Service, 'State Department Issues Final Rules on Intercountry Adoption', Washington, February 16, 2006. Accessed June 9, 2006 at Lexis-Nexis; as cited by Mandell, E.R., 'Adoption', *New Politics*, vol. XI, no. 2.

[32] See, Centre for Adoption Policy at http://www.adoptionpolicy.org/facts.html

The US Congress had decreed that only orphans can be brought into the country for adoption and an orphan investigation *Form I-604 Report on Overseas Orphan Investigation* was required in all such cases. However, along with U.S. implementation of Hague Convention (effective from April 2008), the immigration law also changed for Convention adoptions: the orphan definition no longer applies which makes it somewhat easier for child to qualify under the Convention for admission to U.S. It is now possible for both living parents to relinquish their child instead of appearing to have abandoned him or her.[33]

As Hollinger has observed, "with the implementation of the 1993 Hague Convention on Intercountry Adoption now underway in the United States and in nearly seventy other countries, adoptions of foreign-born children by U.S. citizens may soon exceed 25,000 per year, and the very small number of adoptions of U.S. born children by residents of other countries will rise rapidly".[34]

- **Transracial adoption**

While African American children are over represented in the care system,[35] there is a scarcity of available African American foster parents and adopters. Against that background, the question whether transracial adoption is compatible with the welfare interests of the children involved was inevitably going to be more seriously contentious in the U.S. than elsewhere. Proponents and opponents of transracial placements defend their case with such ideological conviction that it is impossible to do justice to their concerns in this context. Transracial adoption in the U.S. has been and continues to be a difficult policy matter.[36]

8.2.2.2 Family Adoptions

As the statistical data clearly demonstrates, by far the largest proportion of all children adopted annually in the U.S. are simply the subjects of a formal process intended

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[33] The author acknowledges the advice of Joan Hollinger on this matter. See, further, Hollinger, J.H., *Adoption Law and Practice*, Chapter 11, for provisions dealing with the new Hague Convention Adoptee requirements….1019b][G] Matthew Bender, Lexis-Nexis, New York (2008 update).

[34] *Ibid*. (2005 update).

[35] See, Stehno, S., 'The Elusive Continuum of Child Welfare Services: Implications for Minority Children and Youth', *Child Welfare*, 69, 1990, pp. 551–562. Also, Tatara, T., *Characteristics of Children in Substitute and Adoptive Care: A Statistical Summary of the VCIS National Child-Welfare Database*, American Public Welfare Association, Washington, DC, 1993.

[36] See, for example, the Evan B. Donaldson Adoption Institute report, *Finding Families for African-American Children: The Role of Race and Law in Adoption from Foster Care*, May 2008, which depicts the institution of transracial adoption as inadequate to meet the needs of many African-American and other minority children in foster care and calls for an end to the policy of not allowing race to delay or deny placements, as mandated under the Multiethnic Placement Act 1994, and the Interethnic Adoption Provisions of the Small Business Job Protection Act 1996.

to legally consolidate their position within a newly configured family arrangement.[37] These family adoptions tend to involve older children.

- **Step-parents**

Hollinger has noted that "perhaps half or more of all adoptions are by step-parents; many others are by grandparents or other relatives, who like step-parents, have long been the de-facto parents of the children they adopt."[38] Usually, as in the U.K., adoption agencies are not required to assess step-parent applicants. Although the latter's eligibility and suitability remain to be judicially assessed, completion of a home study report and a mandatory period of care are not normally required as, for the children concerned, their adoption signifies a minimal adjustment rather than a complete change in home and family life. The fact that for the majority of annual adoptions in the U.S. there is no 'welfare factor', the child concerned having no actual need which this procedure is required to remedy, does, perhaps, raise questions as to the mix of public and private interests now served by adoption in this jurisdiction.

In some states[39] where, following the death of a spouse, the other parent remarries and both adopt the child of the first marriage then the legal relationship between that step-child and the family of their deceased natural parent (e.g. grandparents) continues. This is not the case in many other states, nor in countries such as the U.K.

- **Kinship**

The practice whereby children are placed with members of their extended family was initially most strongly associated with African American culture but is now promoted by public child care agencies as it provides for minimal disruption to a child's sense of belonging within the family, class, culture and locality of their birth. The recent and significant growth in kinship adoptions has been a direct consequence of drug abuse, particularly the rise in addiction to crack cocaine.

8.2.3 Emerging Characteristics of the Adoption Process

In the U.S. contemporary adoption law, policy and practice very much reflect the value context of that society. In keeping with 'open society' principles featuring minimum regulatory constraints on the freedom of individuals and businesses to act independently and for private gain, consensual adoption has been largely treated in law as just another enterprise that should largely be allowed to find its own niche

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[37] See, for example, Kreider, R.M., 'Adopted Children and Stepchildren: 2000' (U.S. Census Bureau, Census 2000 Special Reports, August 2003). The full Report is available at: www.census.gov/prod/2003pubs/censr-6.pdf

[38] See, Hollinger, J.H., *Adoption Law and Practice*, *op. cit*.

[39] For example Arkansas, Alaska, Montana, New Mexico, New York, North Dakota, Ohio and Wisconsin; as cited by Bridge, C. and Swindells, H., *op. cit*., 2003 at p. 300.

in the marketplace. Non-consensual adoption, however, where court rather than parent takes the operative decision, is to some extent treated differently.

Professor Sanford Katz explains that a twin-track approach, involving either a voluntary relinquishment or an involuntary termination of parental rights, each with its own systems has developed in the U.S.[40] He defines the first as "consensual and private, involving non-governmental, non-profit or profit-making agencies or individuals" and the second as "non-consensual and public, involving state agencies". Each, in his view, has its own distinctive goal. In the former this may well be "to provide a childless couple with an infant so as to continue the adopters family name". In the latter it is "to protect children and the disposition of adoption is a vehicle for providing a child with a permanent attachment to a family".[41] He adds that they are further differentiated by class association: "infants voluntarily relinquished … tend to move into the middle class"; but "children who are the subject of termination proceedings tend to be the offspring of poor parents from deprived backgrounds… for the most part, couples who adopt these children are their foster parents".[42]

The Katz typology, however, may not be quite so clinically distinct in practice. While it is true that so far most non-consensual (or child care) adoptions have been made in favour of foster parents, this might have been partially circumstantial due to the backlog of adoptable children in the public care system following implementation of new procedures under the 1997 Act. In future there could be a degree of convergence between his two strands as a greater proportion of non-consensual adoptions feed directly into the private system (as in the U.K.). State agencies, applying the concurrent planning approach, may directly recruit adopters for specific children at point of entry to care.

8.2.3.1 Parental Placements

In marked contrast to practice in other western societies, most states continue to permit private adoption placements; only four restrict placement to agencies in non-relative adoptions. Private adoption placements may be made 'direct' by parents, on a not-for-profit basis, in a final exercise of their parental rights with persons of their choosing, or by a person (e.g. clergyman, doctor or lawyer) to whom the parent has delegated that responsibility. It enables prospective adopters to make a direct personal approach to a birth mother or to do so through the mediation of a third party or perhaps by placing an advertisement in local, national or international journals or on the internet. Placement choice, as exercised by the birth parent, is a distinct characteristic of domestic adoptions in this jurisdiction: often it takes the form of a relinquishing birth mother choosing from agency profiles of prospective adopters registered with an adoption agency; and it may extend to face-to-face meetings.

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[40] See, Katz, S., 'Dual Systems of Adoption in the United States', in Katz, S., Eekelaar, J. and Maclean, M. (eds.), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2001.

[41] *Ibid*. at pp. 280–281.

[42] *Ibid*. at p. 281.

Adoptive parents are generally permitted to recompense the birth mother for reasonable expenses incurred during pregnancy but are otherwise prohibited from making any payments by way of inducement or reward for relinquishing a child.

8.2.3.2 Independent Agencies

A distinguishing characteristic of adoption in the U.S. is that by far the majority of non-family adoptions are arranged by private, independent agencies that usually operate on a commercial or for-profit basis. These agencies are very lightly regulated. Livingstone in her 1994 report to the U.S. Dept of State noted that very few of the 50 states regulate the profit status of individuals or organisations involved in adoption … "as adoption has become a business, a sense of competition has developed. Professional co-operation and efforts towards internal monitoring are hard to find". As expressed by Katz:[43]

> In the past thirty years, an adoption industry has developed. The private placement of children has taken on the characteristics of a business, in effect trading in children…

Some of these independent, for-profit agencies, such as 'All God's Children, International' operate on a global basis placing children from sending countries (e.g. Russia) with adopters from anywhere in the western world (e.g. Northern Ireland).

8.2.3.3 Adoption Alternatives: Permanent Legal Guardianship

This order was introduced because:[44]

> … the emphasis on legally secure permanent placement is meant to provide the child with psychological stability and a sense of belonging and limit the likelihood of future disruption of the parent-child relationship… traditional adoption does not meet the needs of children in public foster care. Legal options for permanent and legally secure placement should be broad enough to serve the needs of all children in care who are not able to return to their homes of origin…

A permanent legal guardian has the legal custody and control of a child including powers to make decisions concerning that child's care, education, discipline and protection. Both birth parents may retain some ongoing rights of contact and access and responsibility for maintenance. This order is intended for use by those relatives who may not wish to see a complete severance of ties between child and family and is particularly appropriate in relation to older children who object to adoption because of an established attachment to their parents.

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[43] See, Katz, S., 'Dual Systems of Adoption in the United States', *op. cit*. at p. 285. But also see (as cited by Katz) the positive findings of Somit, J., 'Independent Adoptions in California: Dual Representation Allowed', in Hollinger, J.H., and Leski, D.W. (eds.), *Adoption Law and Practice* (eds.), 1988, para 5.01–5.09.

[44] See, Department of Health and Human Services, *Adoption 2002: The President's Initiative on Adoption and Foster Care; Guidelines for Public Policy and State Legislation Governing Permanence for Children*, 1999.

In 1998, of the 248,000 children exiting the public care system, 5,836 did so by way of permanent legal guardianship.

8.2.3.4 From Public to Private Care

In the mid-1960s, faced with an increase in the number of children entering the care system, many states moved to simplify the process of terminating parental rights in circumstances where children had been abandoned in foster care.[45] A development which may well have been motivated in part by recognition of a child's legal interest in having a parent. If parents had shown no consistent interest in their child and there was no reasonable or foreseeable likelihood that the parents could, or would, resume care responsibility for their child then new legislative provisions enabled parental rights to be terminated. One of the earliest examples of this process occurred in New York in 1959 when legislation was introduced to free the 'permanently neglected' child for adoption. The term 'permanently neglected' was defined as a child in foster care whose parents "failed substantially and continuously or repeatedly for a period of more than one year to maintain contact with, and plan for the future of the child, although physically and financially able to do so…".[46] The net effect of the New York reform was that termination of parental rights without the birth parents' consent was made possible in circumstances where the birth parents had surrendered their rights to the child by a failure to discharge the obligations of parenthood.[47] This approach was replicated in many other states.

In the U.S. the non-consensual adoption of children from the public care system into private family care has become an established characteristic and one that is now being emulated in the U.K. but is rejected by such other modern western countries as Sweden, France, Australia and Ireland. In terms of the international political context of adoption, this practice whereby state responsibilities for neglected and abused children are privatised and often accompanied by ongoing financial payments, has emerged as something of an ideological fault line.

8.2.3.5 Intercountry Adoption

A characteristic feature of adoption in this jurisdiction is the extent to which it has accommodated children born elsewhere: from at least the era of the Korean war, intercountry adoption has played a significant role. In recent years, however, this

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[45] In the period 1964–1970 the number of children in foster care increased from 192,300 to 326,000; see, further, Fanshel, D. and Shinn, E.B., *Children in Foster Care*, 29, 1978 as cited by Katz, S., 'Dual Systems of Adoption in the United States', *op. cit*. at p. 300.

[46] See, Polier, 'Amendments to New York's Adoption Law: The Permanently Neglected Child', in 38 *Child Welfare* 2, 1959.

[47] See, Pennypacker, 'Reaching Decisions to Initiate Court Action to Free Children in Care for Adoption', in 40 *Child Welfare*, 1961; also Polier, *Parental Rights*, Child Welfare League of America, New York, 1958.

has grown considerably. Hollinger suggests that "the tripling since the 1980s of adoptions by U.S. citizens of foreign born children is at least partially attributable to the desire of many prospective parents, including those who are respectful of their children's general ethnoracial and cultural heritage, to avoid any direct contact with specific birth families".[48]

8.2.3.6 Open Adoption[49]

From the mid-1970s into the 1990s, the practice of 'open adoption'—allowing adoption orders in respect of newborn infants to be made subject to the visiting rights of the birth parent/s—became more common. The rationale for this lay in the realisation that for many birth parents who were failing to provide adequate parental care, the finality of adoption was a barrier which could be overcome by ongoing contact arrangements. In 1992 Washington State enacted 'co-operative adoption' provisions, followed by similar initiatives by Oregon in 1993 and Indiana in 1994. Most states now allow post-adoption contact agreements, though fewer states will actually enforce them in event of non-performance. Such agreements generally rely upon wording such as that "failure to perform a post-adoption contact agreement is not grounds for challenging the validity of the adoption, or of a consent to adoption …."

8.2.3.7 Post-adoption Access to Information

Access to identifying information has been a long-standing and very controversial issue in the U.S. The privacy rights of individuals, as enshrined in the Constitution and protected by the Supreme Court, have provided an effective obstacle to any legislation granting blanket rights of access to records held by adoption agencies or other bodies.

Minnesota, in 1917, became the first state to pass a law permanently sealing all adoption records relating to birth certificates and families of origin. In the aftermath of World War II, all other states passed similar laws. While most states sealed their records in the 1940s and 1950s, some did not do so until much later.[50] These laws have been criticised as "a relic of the culture of shame that stigmatised infertility, out-of-wedlock birth and adoption".[51] Most state legislation, however, usually included provision for records to be opened by court order.

In the second half of the 20th century, some adult adoptees formed advocacy groups to gain access to their birth records and other background information, to which they believed they were constitutionally entitled. In 1954, Jean Paton

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[48] See, Hollinger, J.H., *Adoption Law and Practice*, *op. cit*.

[49] See, Mullender (ed.), *Open Adoption*, BAAF, 1991.

[50] Pennsylvania sealed original birth certificates in 1984 and Alabama in 1991.

[51] See, Bastard Nation: The Adoptee Rights Organisation, 'A History of Sealed Records in the U.S.', *The Basic Bastard*, 2003, www.bastards.org

founded the first of these groups, but the largest and probably the most influential was the Adoptees Liberty Movement Association (ALMA) founded by Florence Fisher in 1971. In response the Association for the Protection of the Adoptive Triangle (APAT) was formed in support of maintaining sealed records by a group of adoptive parents alarmed at the prospect of records being opened and losing anonymity. During the period 1979–1999, several states began introducing legislation facilitating access to adoption information.[52] Now, every state allows release of such information on the basis of mutual consent: about a dozen will release the original birth certificate when the child concerned is 18 or 21; and about half of all states have intermediary "search and consent" procedures. [53] However, the schism between those in favour and those opposed to the introduction of legislation that establishes the right of an adoptee to access their birth records, with or without the consent of birth parent/s, continues to polarize opinion in the U.S.

8.3 Overview of Modern Adoption Law and Policy

Adoption as a formal statutory procedure was introduced in the U.S. by the Massachusetts Adoption of Children's Act 1851 which preceded the introduction of similar legislation in England & Wales by 70 years and set out for the first time some of the more basic functions of the law relating to adoption. By 1929 all states had followed the example of Massachusetts and enacted some form of adoption legislation. Some states, like Michigan in 1891, went a step further and introduced laws requiring inquiries to be made as to the suitability of prospective adopters and their home circumstances. Thereafter, adoption became exclusively a judicial process the successful conclusion of which resulted in the issue of an adoption order.

As there is no national legal framework governing the adoption process, matters of law and policy continue to be determined separately by each of the 50 states and the District of Columbia, though some umbrella pieces of legislation and judicial decisions bring a degree of commonality to law and practice across all states. Family matters, including child welfare laws, have historically been reserved to the state. The Constitution, however, as interpreted by the Supreme Court, requires a state to show compelling reason for infringing rights of family privacy and for overriding parental autonomy as these fundamental liberties are protected by the 14th Amendment and its guarantee of due process.[54] Further, Congress exercises considerable influence over state child care and other family related programmes through exercise of the Spending Power. In practice, therefore, the autonomy of individual

[52] Following the decision in *ALMA Society Inc. v. Mellon* 601 F2d 1238 (2nd Cir), cert denied, 100 S Ct 531 (1979); as cited by Katz, S., 'Dual Systems of Adoption in the United States', *op. cit*. at p. 292. The Supreme Court then held that the adult adopted applicants did not have a right of access to identifying information.

[53] The author acknowledges the advice of Joan Hollinger on this matter.

[54] See, for example, *Meyer v. Nebraska* 262 US 390 (1923), *Stanley v. Illinois* 405 US 645 (1972) and *Wisconsin v. Yoder* 406 US 205 (1972).

states in matters relating to the welfare of children is balanced by constitutional, judicial and budgetary constraints.

In the U.S., all law—whether state or federal, statute or administrative—can be and often is tested against the overarching principles of the Constitution. Together with the Bill of Rights, the Constitution (particularly the 13th, 14th, and 15th Amendments) has influenced the development of adoption law as it has all aspects of family law. To some extent this can be seen in the careful balance it strikes between the powers of state and Congress to enact legislation and control the spending of public revenue. Mostly it is evident in the capacity of certain principles, underpinned by rulings of the Supreme Court, to shape a degree of uniformity in law and practice across the country.

A first principle is, perhaps, the right to privacy. In general terms, this confers on individuals and other entities the right to be protected from government intrusion. There is a legal presumption that the conduct of persons or businesses is a matter for self-regulation unless or until the law is infringed. Its effect can be seen, for example, in relation to the laws governing access to personal information in the form of adoption records, in the private parental placement rights and in the independence of commercial adoption agencies.

Secondly there is the right to due process, both 'procedural' and 'substantive', as enshrined in the 5th and 14th Amendments. Basically, procedural due process requires that the legal system, its processes and protections, are available to all and perform their functions with the utmost propriety. Substantive due process, in this context, has been interpreted to establish a protected interest for parents to raise their children and for those children to be safe. The effect of this due process principle can be seen, for example, in: the requirement that all persons (such as unmarried fathers) are served with notice of proceedings affecting them; that representation be provided to those (such as children) whose interests are being determined; and; that full and informed consents (unless statutorily dispensed with) are available.

Finally, although the 14th Amendment with its due process guarantee is usually associated with the protection of fundamental rights (such as the right to free speech or the right to practice one's religion) it also declares the principle that all persons are entitled to equal protection before the law. Its effect can be seen in relation to the rules governing trans-racial placements, the availability of adoption to special needs children and the non-discriminatory requirements in agency assessments of adopter suitability.

In the U.S. the Constitution reserves to individual states all powers not specifically delegated to the federal government,

8.3.1 Contemporary Adoption Related Legislation

The Adoption and Safe Families Act 1997, in conjunction with the amended Adoption Assistance and Child Welfare Act 1980 and certain other important

statutes together form the contemporary legislative framework for adoption in the U.S. This framework is supplemented by the provisions of international Conventions and by the Intercountry Adoption Act 2000.

8.3.1.1 Federal and Uniform Legislation

Increasingly, in recent years, model statutes are drawn up to provide a template of that which the federal government, at any point in time, considers to be a body of core provisions for U.S. wide legislation. States are free to enact such legislation in whole or in part, or to ignore it. In addition, 'uniform' statutes (providing recommendations for removing obstructive inconsistencies between states in areas of similar legislative provision) are prepared within states which may then attract federal government endorsement, funds and pressure to adopt such legislation.

8.3.1.2 The Statutes

The following are the core pieces of legislation (excluding the complex body of federal child welfare, social security, employee benefits, income tax, jurisdictional, immigration, and citizenship laws etc. that are also relevant) currently constituting the legal framework for adoption in the U.S.

- **The Birthparent Assistance Act 2008**

This provides post-placement counselling services for those birthparents who have placed a child for adoption.

- **The interstate compact on the placement of children (revised 2008)**

Developed in 1974, the compact was designed to ensure protection and services to children placed across state lines. The compact is statutory law and is binding on all 50 states, the District of Columbia, and the Virgin Islands. It imposes a number of procedural requirements on domestic adoptive placements that involve more than one state.

- **The Safe Haven Laws**

Since 1999 most states have passed 'safe haven' laws in an attempt to prevent unsafe abandonment of babies and neonaticide. While statutes vary from state to state, most include the following provisions: parent(s) or those designated by the parent(s) may anonymously leave an "unwanted infant" at a Safe Haven center (hospital emergency room, fire station, police station); no questions are asked, no identification of parent(s) is required and no social or medical history of baby is required; the age of Safe Haven babies range from birth to 5 days though some states permit up to 30 days (South Dakota permits anonymous abandonment up to 1 year).

In 2008, Alaska and Nebraska became the 49th and 50th states to enact safe haven laws, leaving only the District of Columbia without any such legislation. In

about half of the states, immunity from prosecution for abandonment is granted to parent(s) if there is no evidence of abuse or neglect; the remaining states allow an affirmative defence to prosecution.[55] Although some have criticized safe haven laws,[56] it is estimated that more than 1,000 newborns have been placed safely under such laws across the country, and this number includes only the documented cases in 33 states.

- **The Adoption and Safe Families Act 1997**

This legislation, which amended but did not repeal the 1980 Act, introduced two new concepts: the duty of a state to make reasonable efforts at 'permanency planning' once adoption or permanent guardianship becomes the goal; and the concept of 'concurrent planning'.[57] To qualify for federal funds a state scheme must show that 'in determining reasonable efforts… to be made with respect to a child, and in making such reasonable efforts, the child's health and safety shall be the paramount concern'.[58] This shifted the legal emphasis from family preservation to the priority of child safety. It requires: a clear statement made in court when a care order is issued of the changes to be made by the parents within a 12 month period after which the child will either be returned to parental care or placed for adoption; a permanency hearing to be held 12 months after the issue of a care order; mandatory concurrent planning; and, after a child has been in care for 15 out of 24 months, good reason must be shown as to why a petition to terminate parental rights should not be filed.

A principal aim of the 1997 Act is to promote the adoption of children in foster care. This is facilitated by the requirement for a timetable to expedite the termination of parental rights. In particular, there is provision for fast-tracking cases where there is a record of a parent having killed, abused or had their parental rights terminated in respect of another child. In such cases there is a maximum of 30 days to a permanency hearing. The 1997 Act also introduced 'legal guardianship' which provides authority for the transfer of parental rights to a relative enabling them to assume permanent care responsibility for a child failed by parental care.[59] The legislative intent is to speed up the process of removing children from the care system and placing them in permanent alternative care arrangements by use of adoption or legal guardianship. States are eligible to claim financial bonuses

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[55] Safe haven laws were a response to public concern regarding the abandonment of babies: in 1992 65 infants were found abandoned (57 live and 8 dead) and in 1997 out of 3,880,894 births in the U.S. (including 18,507 neonatal deaths) only 105 newborns were abandoned (72 live and 33 dead).

[56] See, Bastard Nation: The Adoptee Rights Organisation, 'Legalized Anonymous Infant Abandonment/Safe Haven Laws', *The Basic Bastard*, 2003, www.bastards.org

[57] 42 USC section 675 (E). See, further, Chap. 2.

[58] 42 USC 671 section 15.

[59] A 'legal guardianship' order bears a strong resemblance to the English 'special guardianship' order. Both offer a strategic half-way-house between long-term foster care and adoption that does not require the extinguishing of birth parents rights.

from federal funds if they exceed their set quota of annual adoptions.[60] In effect the 1997 Act imposes a 15 month time limit on the use of financial resources to achieve family reunification after which resource allocation switches to supporting permanency through adoption. This is seen by some as a worrying development:[61]

> This shift of resources into promoting adoption, as opposed to state-managed foster care, as a solution for children in 'dysfunctional' families can be seen as a form of 'privatising' child welfare.

There are also worries that adoption through the foster care system, will be viewed by some as a low cost and 'working class' alternative to intercountry adoption which, at $20,000 or more for a child, is an option in practice only open to the more wealthy.

The 1997 Act also established the Adoption and Foster Care Analysis and Reporting System (AFCARS), a mandatory data collection system. This provides evidence that the policy drive to use adoption to secure permanency for children unable to return to their birth families is indeed working.

- **The Small Business and Job Protection Act 1996**

This legislation introduced regulatory requirements governing all individuals and agencies involved in adoption or foster care and in receipt of federal funds. The 1996 Act prohibits "a state or other entity that receives federal assistance from denying any person the opportunity to become an adoptive or a foster parent on the basis of the race, color, or national origin of the persons or of the child involved."

- **The Multi Ethnic Placement Act 1994**

This legislation and its 1996 successor prohibits discriminatory practices by banning the denial or delay of a foster or adoption placement solely on the basis of race, colour, or national origin of carer or child. It also compels states to make diligent efforts to recruit and retain foster and adoptive families that reflect the ethnic diversity of 'waiting' children. Two years later it was amended to prohibit any denial or delay in placement on the basis of race, color, or national origin. There is still in existence a provision that requires states to diligently recruit foster and adoptive parents who resemble the children in care who are awaiting placement.

- **The Uniform Adoption Act 1994**

This legislation provides, in Article 4, that a custodial parent's unmarried partner, as well as the parent's spouse, may adopt as a second parent, if the custodial parent consents and the court finds the proposed adoption to be in the child's best interests.

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[60] Federal funds were used as an incentive to encourage states to expedite the adoption of children in the public care system: states would receive $4,000 for every child adopted beyond their best year's total; an extra $4,000 for every child aged nine and older; $2,000 for every special needs child adopted above the baseline year; and additional federal funds if they exceeded their prior number of completed adoptions.

[61] See, Woodhouse, B., *op. cit*. at p. 375.

As Hollinger points out "the consequence of this kind of adoption is that the custodial parent consents to the adoption, but does not lose, or have to relinquish, his or her parental rights … the new adoptive parent becomes a full legal co-parent, thereby giving the child the legal, economic, and emotional security that follow from having two responsible and loving parents".[62] She has also noted that this legislation:[63]

> … has the most carefully drafted provisions on parental consent and notice, especially with respect to unwed fathers. It spells out how to determine if an unwed father, who knows or should have known of the pregnancy or birth of the child, has acted promptly enough to establish an actual parental relationship with the child. Thwarted fathers may be able to veto an adoption but in some circumstances may also have their rights terminated without their consent. It pays attention to the entire adoption process, and attempts to ensure fairness and transparency at every stage.

- **The Family and Medical Leave Act 1993**

This legislation includes provision for adoption related tax credits of up to $10,000 per adoption, and subsidies for families who adopt children with "special needs".

- **The Adoption Assistance and Child Welfare Act 1980**

This statute, a legislative response to concerns that too many children were being removed from parental care only to disappear into the public care system, established the modern legal framework for child care in the U.S. It introduced and positioned within statute law the formative concepts of 'permanency' and 'reasonableness' and provided the basis for a generation of professional intervention focussed on rehabilitating children within their families of origin.

The 1980 Act authorised the channeling of federal funds to those states that implemented child welfare laws emphasising family preservation and reunification and made 'reasonable efforts' to prevent the removal of children from their families or to reunite them as appropriate. It also funded state initiatives to provide post-adoption support for adopters of hard to place children. It was reinforced by the decision of the Supreme Court in *Santosky v. Kramer*[64] which ruled that states must have 'clear and convincing evidence' that parents would be unable to care for their child before terminating parental rights or such action would be in breach of the Fourteenth Amendment. It inaugurated an era characterised by public service investment in family reunification, which saw the number of children in foster care drop from a high of nearly 500,000 in the 1980s to a low of about 275,000, as a result of a vigorous implementation of its permanency planning provisions (as reiterated in the 1997 Act).

Nearly 20 years later, however, as Woodhouse has pointed out, this policy was clearly failing:[65]

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[62] See, Hollinger, J.H., *Adoption Law and Practice*, Lexis Publishing, New York, 1998–2005.

[63] Note to author (12.07.08).

[64] 455 US 755 (1982).

[65] See, Woodhouse, B., 'The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy', in Bainham, A. (ed.), *The International Survey of Family Law, 2000 Edition*, Family

> An over emphasis on 'reasonable efforts' was preventing children who would never realistically be reunited with their parents from moving on to find safe, permanent families through adoption

The reason for failure was identified by the Department of Health and Human Services as due to:[66]

> …well-intended but misguided practices to preserve families through prolonged and extensive reunification services without adequate consideration of the permanency needs of children.

Accordingly, in 1997 Congress passed the Adoption and Safe Families Act in order "to move abused and neglected kids into adoption or other permanent homes and to do it more quickly and more safely than ever before".[67]

8.3.2 International Law

On April 1, 2008, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption came into effect in the United States for all Intercountry Adoptions between the United States and other Hague Convention countries.[68] The U.S. has signed but not yet ratified the Convention on the Rights of the Child 1989. The U.S. Constitution's Bill of Rights together with the 13th, 14th, and 15th Amendments, may be considered to provide a body of provisions equivalent to the European Convention on Human Rights.

8.3.2.1 The Intercountry Adoption Act 2000

This domestic legislation designates the Department of State as the United States' Central Authority with plenary authority to facilitate and oversee U.S. participation, as both a sending and a receiving country, in inter-Convention country adoptions. It is designed to be consistent with the basic principles and provisions of the Convention and provides that only accredited agencies or approved persons will be allowed to provide adoption services with respect to a Convention adoption in which the U.S. is either a receiving or a sending country. As Hollinger explains:[69]

> Thus, the IAA goals are to streamline the costly and cumbersome process of intercountry adoption, eliminate abusive and fraudulent practices, and ensure fair procedures and greater

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Law, Bristol, 2000 at p. 380 citing in support Gelles, R., *The Book of David: How Preserving Families Can Cost Children's Lives*, Basic Books, New York, 1996.

[66] See, U.S. Department of Health and Human Services, *Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption*, Washington, DC, 1997.

[67] See, Senator Rockefeller of West Virginia, 143 Cong. Rec. 12199.

[68] Intercountry Adoption Act of 2000, codified at 42 U.S.C. sec. 14901 *et seq*. The Hague Convention was expected to be ratified by the U.S. by the end of 2004, then by 2007.

[69] See, Hollinger, J.H., *Adoption Law and Practice*, Lexis Publishing, New York, 2008 at para 002–11.

> protection for birth and adoptive families and their children so that inter-Convention countries will serve the children's best interests.

She goes on to make the following important points in relation to the 2000 Act:[70]

> First, the definitions of children and of prospective parents eligible to participate in Convention adoptions are narrower than permitted under the Convention … Second, consumer protection advocates such as the Donaldson Adoption Institute are dismayed that the IAA fails to specifically target for-profit adoption "facilitators" who arrange intercountry adoptions for U.S. parents … Third, it is not clear what kinds of public resources, if any, will be available to provide post-adoption services for inter-Convention country adoptive families … Fourth, it is by no means clear that the procedural requirements and complexities that characterize current intercountry adoption practices will be any less onerous once the United States is a full participant in the Convention … Fifth, the costs of an intercountry Convention adoption are not likely to be any less than the typical cost of current intercountry adoptions from non-Convention countries … Sixth, it is not clear whether the countries that have until recently been releasing the most children for intercountry adoption–China, Russia, South Korea, Guatemala–will remain in or join the Convention once the United States is an active party … Seventh, there is an interest in going beyond the IAA provisions on medical records to encourage public and private entities to develop protocols that can be adapted to practices in different countries and could eventually improve the quality of medical and other background information about a child at the time of placement … Eighth, the substantial changes in United States adoption and immigration policy and practice that will result from our full participation in the Hague Convention may ultimately result in beneficial changes in our legal and political relations with non-Convention as well as Convention countries … Finally, no matter what perspective different research, advocacy, and service entities have on what the IAA regulations should address, there is a consensus that there will be more information available to the general public, as well as to our Central Authority and accrediting entities, about the performance and professional competence of adoption service providers so that people can make more informed choices about intercountry adoption.

8.3.3 Adoption Principles and Policy

The development of modern policy in the U.S. has been marked by a sea change with regard to children in the public care system due to parental fault or default. The Adoption and Safe Families Act 1997 consolidated a policy shift away from public service resource investment in family reunification and towards the promotion of adoption as a private resource for the care of children by non-relatives together with support for kinship care. As expressed by Woodhouse:[71]

> In essence, ASFA shifts money and services from biological families and foster families to adoptive families.

8.3.3.1 The Interests of the Child

The principle that the welfare interests of the child must be the governing consideration in adoption proceedings has been established since 1856 when the Massachusetts

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[70] *Ibid*.

[71] See, Woodhouse, B., 'The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy', *op. cit*. at p. 383.

court in *Curtis v. Curtis*[72] ruled that "adoption is not a question of mere property… the interests of the minor is the principal thing to be considered".

8.4 Regulating the Adoption Process

A distinguishing feature of adoption in the U.S. is that, in keeping with the prevailing 'free-market' ethos, consensual placements are not subject to the type of tight regulatory systems that characterise the way in which other nations, such as the U.K., manage the adoption process. Non-consensual placements, however, and Convention adoptions attract standardized regulatory provisions across the U.S.

8.4.1 Length and Breadth of the Process

The lack of a central regulating agency allows for some variation across the states in how the adoption process is defined. In all states there is little professional involvement in step-parent adoptions and no statutory support services available for such adopters nor for those who acquire children through intercountry processes. There is no mandatory requirement on relevant state authorities to make available pre-adoption counselling services to all parties, nor any consistency in state responsibilities for ensuring provision of post-adoption information disclosure and tracing/re-unification services.

8.4.2 Role of Adoption Agencies and Other Administrative Agencies

In the U.S., adoptions are most usually arranged by adoption agencies that are either public child care agencies or private independent commercial organisations. All private agencies are required to be licensed and to submit to monitoring, periodic inspection and state regulatory systems. As an alternative to making a direct placement, a parent may place their child through an agency after having formally relinquished all rights and this may be done on a for-profit basis. The child may then be advertised for adoption through nation-wide media outlets. This commercial component to private placements is a distinctive and long-standing characteristic of the adoption process in the U.S.

Adoption agencies provide the link between children in need of a home and prospective adoptive parents. They assess prospective applicants, arrange suitable placements and process court applications. They often provide pre and post

[72] 71 Mass (5 Gray) 535, 537 (1856).

support services for birth mothers and usually have very long waiting lists. The pivotal position of such agencies in the adoption process is accompanied by legal responsibilities. An adoption agency may be liable to adopters for 'wrongful adoption' i.e., a failure to disclose facts about a child's history, including genetic information, that could have had a bearing on their decision to accept a particular placement.[73]

Following ratification of the Hague Convention, all private adoption agencies involved in intercountry adoption have to be state-licensed and also accredited through the U.S. Central Authority (the State Department now acts as the Central Authority and has delegated authority to private accrediting entities to accredit or approve adoption service providers which is proving to be a very bureaucratic process). Previously, adoption agencies in the U.S. were licensed and supervised by individual states.

8.4.2.1 Adoption Committee

The functions of an Adoption Panel in the U.K. are usually performed in the U.S. by an adoption committee which comprises much the same mix of executive officers, specialist professionals and some independent members. A licensed adoption agency will normally ensure that tasks of confirming the availability of particular children, selecting approved adopters and agreeing matched placements are assigned to such a committee.

8.4.3 Role of the Determining Body

In all states, adoption is a judicial process set within a statutory framework.

8.4.4 Registrar

All states have laws that provide a formal process for the registration of an adoption order by the state Registrar in a Registry of Births. The Registrar is also responsible for the issue of a birth certificate naming the adopters as parents of the child, for recording in a separate register the facts relating to the birth parents and for determining rights of access to identifying information.

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[73] See, for example, the Ohio case of *Burr v. Board of County Commissioners* 491 NE2d 1101 (Ohio 1986) where the tort of 'wrongful adoption' first attracted judicial notice and *Meracle v. Children's Service Society* (1986) where an agency was prosecuted for willful negligence. Also, see, Blair, D.M., 'Liability of Adoption Agencies and Attorneys for Misconduct in the Disclosure of Health-Related Information', in Hollinger, J.H. and Leski, D.W. (eds.), 2 *Adoption Law and Practice*, 1998 at para 16.01–16.08.

8.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

In the U.S. the criteria governing entry to an adoption process is set by similar statutory requirements in all states and would seem to broadly conform to the adoption typology suggested by Katz.[74]

8.5.1 The Child

The availability of a child for adoption is determined by either the existence of parental consent, the absence of any need for it (i.e., being orphaned or abandoned) or the presence of grounds for dispensing with it (i.e., judicial removal of parental rights) as set out in the Adoption and Safe Families Act 1997.

8.5.1.1 Consent

Where the child is of an age to give a full and informed consent, then this is often an additional statutory requirement. Whether or not articulated in statute law, the right of a 'mature minor' to assert their views, identify matters constituting their welfare interests and often to determine their future care arrangements is well established in the courts of the U.S.

8.5.2 The Birth Parent/s

Where the parents of the child to be adopted are or have been married to each other then the consent of both is required, or grounds for dispensing with this must be shown, if the child is to be regarded in law as available for adoption. In relation to intercountry adoption, evidence is required that the birth parent/s are dead or have abandoned the child (including abandoned to institutional care).

8.5.2.1 Unmarried Mother

The consent of an unmarried mother, or grounds for dispensing with it, must always be available. Most states have laws stipulating a minimum time period following birth of a child before the mother can give a valid consent to adoption.

[74] See, above, under 'Emerging Characteristics of Adoption Practice'.

8.5.2.2 Unmarried Father

Until the early 1970s, the unmarried father of a child relinquished by his or her mother had no legal standing in adoption proceedings; his consent was not required and he was not even entitled to formal legal notice of such proceedings. This situation was irrevocably altered by the case of *Stanley v. Illinois*[75] which marked a fundamental change in American adoption law. The decision was confined to the issue of an unmarried father's lack of status in dependency proceedings affecting his children who lived with him. However, the Supreme Court in a footnote to its judgment—added that such a father should also be given the opportunity to be heard in adoption proceedings. Nonetheless, unless they are aware of and assert their legal rights, unmarried fathers continue to be largely peripheral to the adoption process.

In about 30 states there are now birth father registers which allow a man who is the father of a baby, or thinks he might be, to record his interest in the child. Once registered, such a father must be notified where feasible that adoption proceedings in respect of his child have been, or will shortly be, commenced.[76] Most states, in compliance with developing international law, now also require that the consent of a involved father be obtained or that grounds for dispensing with it be shown.[77]

8.5.3 The Adopters; Eligibility and Suitability Criteria

There is little variance between the U.S., the U.K. and other developed western nations in the criteria applied by agencies and judiciary for assessing the eligibility and suitability of adopters. In this jurisdiction, however, a good deal of controversy has been generated by a perceived political dimension in respect of issues relating to matching the ethnicity of adopters and adoptee, and facilitating same sex adoptions.

8.5.3.1 Third Party Adopters

Some states specifically prohibit discrimination on the basis of sexual orientation in assessing the suitability of prospective adoptive parents.[78] Issues such as the

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[75] 405 US 645 (1972) at f/n 9 where in reference to 'custody or adoption proceedings' it is stated that:

> "Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined" (p. 657).

As cited by Katz, S., 'Dual Systems of Adoption in the United States', in Katz, S., Eekelaar, J. and Maclean, M. (eds.), *Cross Currents: Family Law and Policy in the United States and England*, Oxford University Press, Oxford, 2001 at p. 279. For further Supreme Court rulings positively affecting the *locus standi* of unmarried fathers see, *Quilloin v. Walcott*, 434 US 246 (1978), *Caban v. Mohammed*, 441 US 380 (1979) and *Lehr v. Robertson*, 43 US 248 (1983).

[76] See, for example, *Lehr v. Robertson* 463 US 248 (1983).

[77] See, for example, *Caban v. Mohammed* 441 US 380 (1979).

[78] For example, New York: see, 18 N.Y.C.R.R. § 421.16[h][2].

upper age limit of adopters, same sex applicants,[79] willingness to accommodate contact arrangements and the availability of state financial support have generated much the same the same level of controversy in the U.S. as in the U.K. Trans-racial adoption has been and continues to be a particularly sensitive matter for policy and practice.

In the majority of private placements, the suitability of adopters is decided by the birth mother. This is most obviously the case in step-parent adoptions. It is also, in effect, the reality in agency adoptions when prospective adopters are encouraged to prepare a videotape—in which they relate their qualities—for distribution to birth mothers. The decision of the latter may well be influenced by financial considerations as brokered by the agency.

8.5.3.2 First Party Adopters

Where a birth parent is also an adopter, as in step-parent adoptions, and the consent of the other parent is available, the courts generally find that eligibility and suitability criteria are readily satisfied. In the case of kinship adopters, the courts have shown a willingness to be flexible in relation to age and health criteria.

8.5.3.3 Intercountry Adopters

Since April 2008, such adoptions have been governed by Hague Convention requirements and the criteria applied to assess adopters are therefore the same as in other signatory States (see, further, Chap. 5).

8.6 Pre-placement Counselling

While post-adoption counselling is now a mandatory requirement across all states, the public and private adoption agencies in most if not all states are also required to provide pre-adoption counselling to the birth mother, and to the birth father if he is involved, regarding their legal rights and the options available. Counselling must also be offered to prospective adopters.

8.7 Placement Rights and Responsibilities

The placing of a child for adoption is the most crucial decision in any adoption process. In the U.S., to a much greater extent than in the UK, that decision is taken by a birth parent.

[79] Note that some states, such as Florida, have legislation that expressly prohibits lesbians or gays from adopting children in foster care: see, for example, *Lofton v. Sec'y Dept Children & Family Services* 358 F.3d 804 (11th Cir. 2004).

8.7.1 Placement Decision

The right of a birth mother to place her child for adoption with whomsoever she chooses, or to authorise another person to do so on her behalf, has been embodied in the laws of all but four states which restrict the right to placement with a relative.[80] As Hollinger has noted:[81]

> All but a handful of states permit direct non-agency placements, and most domestic adoptions of infants are the result of voluntary direct placements.

In a private adoption context, placement decisions are mostly made by adoption agencies at their discretion following formal parental relinquishment of the child to the agency. In a public child care context, the placement is made by the relevant government agency following judicial termination of parental rights. Many but not all states also permit independent persons, such as lawyers, to make placement arrangements.

8.7.2 Placement Supervision

The Interstate Compact for the Placement of Children, endorsed by all states, provides procedures to safeguard children in pre-adoption placements.

8.8 The Hearing

A judicial hearing, held in camera and subject to the usual reporting restrictions, but managed in a more relaxed manner than other court proceedings, provides the context for determining all adoption applications across the U.S.

8.8.1 Where Consent Is Available

As has been noted: "a court cannot approve an adoption without proof that a child's birth parents have executed voluntary and informed consents, or, alternatively, that their parental rights were terminated because of their failures to perform parental duties … without a voluntary relinquishment or forfeiture of parental rights, the state has no license to remove children from their parents in order to seek a 'better' placement".[82]

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[80] Colorado, Connecticut, Delaware and Massachusetts.

[81] See, Hollinger, J.H., 'Overview of Contemporary Challenges to State Adoption Laws' at p. 4.

[82] *Ibid*.

8.8.2 Where Consent Is Not Available

In the context of child care adoptions, the child welfare laws of all states provide grounds for the termination of parental rights in circumstances of parental neglect or abuse within the parameters as set out in the Adoption and Safe Families Act 1997. Where parental rights have been so terminated and the child is successfully placed by the relevant public service agency with selected prospective adopters, the latter will then commence adoption proceedings. On the matter coming before the court it will rule that it can dispense with the necessity for parental consent and accede to the application if satisfied that this is compatible with the welfare interests of the child.

In the context of private adoptions, where an application by a parent or relative is contested by a birth parent who withholds consent, the court must proceed to a full hearing, receiving evidence from the parties and perhaps from expert witnesses, making findings of fact, ruling on the respective rights of the parties and ultimately making a determination on the merits of the case and in accordance with the welfare principle. In contested private adoptions, the rights of the parties under the Constitution will play a significant role in what will be more adversarial proceedings than is normally the case in other modern western nations and where the outcome is more likely to be an order other than adoption; guardianship being a probable option.

8.9 Thresholds for Exiting the Adoption Process

The established priority given to 'permanency planning' in law and practice, together with the policy not to regard long-term foster care as a viable option and the absence of a range of alternative orders, have elevated adoption to become the judicial disposal option of choice where family reunification is impractical.

8.9.1 The Welfare Interests of the Child

In all states, the court, in response to proceedings commenced by prospective adopters, will determine whether or not an adoption order should be made. This decision rests on the principle, well established in this jurisdiction, that the adoption order must be in accordance with the welfare interests of the child.[83]

8.9.2 Representing the Child's Welfare Interests

The 'due process' and 'equal protection' requirements, of the 5th and 14th Amendments respectively, necessitate legal representation for all parties to adoption

[83] See, *Curtis v. Curtis* 71 Mass (5 Gray) 535, 537 (1856); cited by Katz, S., 'Dual Systems of Adoption in the United States', *op. cit*. at p. 283.

proceedings. The arrangements for representing the interests of the parties are much the same in the U.S. as in the U.K. and the court will have the benefit of the same type of professional reports from the agencies involved.

8.10 The Outcome of the Adoption Process

In the U.S., as in other western common law jurisdictions, the granting of an absolute and permanent adoption order, with attendant if qualified rights of access to information and to possible ongoing support, is the most usual outcome of the adoption process.

8.10.1 Adoption Order

This order will be for 'full adoption' which conforms to the traditional common law model and has much the same legal effects on the parties involved as in the U.K. and elsewhere (see, further, below). After the order is granted by a court the adopters receive an official decree and a birth certificate with the adopters' name listed as the parent.

8.10.1.1 Adoption Orders with Contact

As Hollinger has pointed out:[84]

> In a striking departure from the legal rules that prevailed in the mid-twentieth century, most states now expressly recognize that the existence of a private agreement for continued contact between a child's adoptive and birth families is not incompatible with the granting of the full panoply of parental rights and obligations to adoptive parents. Moreover, many states have enacted laws that, under certain circumstances, permit the enforcement of post-adoption contact agreements.

Where all parties agree, including the child concerned (if aged 12 years or more), then an adoption order can be made subject to a contact condition. There is a judicial duty to enforce such a condition in those states where the law specifically recognises post-adoption contact and a judicial power to do so in circumstances where this is indicated by the welfare of the child concerned. Failure of the contact condition will not invalidate the adoption.

8.10.2 Other Orders

In this jurisdiction, unlike others such as the U.K., the alternatives to an adoption order are limited. In the U.S., in order of preference, the judicial options to secure

[84] Hollinger, J.H., *Adoption Law and Practice*, *op. cit.*

permanency are either safe reunion with parent/s or family of origin, adoption or permanent legal guardianship.

8.10.2.1 Permanent Legal Guardianship Order

This is recommended in circumstances where reunification with parent/s or family of origin is not possible and adoption is inappropriate. The order does not terminate parental rights but instead transfers custodial rights to a named guardian leaving intact other legal rights such as those relating to inheritance. Permanent legal guardianship is the next preferred option to adoption and is intended for use by relatives of the child. Long-term foster care is the least preferred option. It has been noted that "there seems to have been a more recent shift in emphasis from regarding adoption as the only option for securing permanence to embracing guardianship by relatives and long-term foster carers".[85]

8.11 The Effect of an Adoption Order

In this common law jurisdiction an adoption order has the legal effects traditionally associated with it (see, further, Chap. 3).

8.11.1 The Child

On the granting of a domestic adoption order, the child assumes the name, residence and citizenship of the adopters and will have the same legal rights as a child by birth. Where the child has been the subject of an intercountry adoption the final step in the foreign adoptive process will be acquiring U.S. citizenship for him or her as foreign adoptees do not always become citizens by virtue of their adoption by U.S. citizens. However, under the Child Citizenship Act 2000, which became effective on February 27, 2001, children will now automatically become U.S. citizens when all of the following requirements have been met: at least one parent is a US citizen; the child is under 18 years of age; there is a full and final adoption of the child; and, the child is admitted to the United States as an immigrant.

In a number of states, statute law still allows adopted children to inherit from their birth parents.[86]

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[85] See, Selwyn, J. and Sturgess W., 'Achieving Permanency Through Adoption: Following in US footsteps', *Adoption & Fostering*, BAAF, London, vol. 26, no. 3, 2002 at p. 75.

[86] Including, for example, Alaska, Arkansas, Connecticut, Montana, New Mexico, New York, North Dakota, Ohio and Wisconsin.

8.11.2 The Birth Parent/s

In this as in other common law jurisdictions, the making of an adoption order terminates all parental rights and responsibilities of birth parents subject to the exception that, in some but not all states, birth parents may retain a right to continued anonymity.

8.11.3 The Adopters

An adoption order permanently and exclusively vests all parental rights and responsibilities in respect of the child concerned in the adopters.

8.11.4 Dissolution of an Adoption Order

In all states, the general rule is that an appeal cannot lie against the granting of an adoption order and it cannot be revoked at the behest of any of the parties concerned. It remains indissoluble other than on the usual grounds of illegality, mistake etc.

8.12 Post-adoption Support Services

The involvement of an adoption agency in placement ensures that it is thereafter available to offer support and that its records and counselling services can be made available at a later stage should the parties seek identifying information.

8.12.1 Adoption Support Services

Ongoing post-adoption support services were not necessarily available in the U.S. before the introduction of the 1997 Act. The only definite financial and professional support scheme for permanency placements was then in relation to long-term foster care. Since state implementation of legislation conforming to the 1997 Act, the proportion of child care adoptions receiving financial subsidies has grown to 88% of all annual orders.

8.13 Information Disclosure, Tracing and Re-unification Services

The Uniform Adoption Act 1994 allows access to identifying information upon mutual consent, in cases of medical need, and requires non-identifying information to be released upon simple demand by adoptive parents or adopted individual at age

of majority. This legislation provides a basic framework and states are free to add on additional procedures that would ensure more or easier access. Nearly a dozen states, at least prospectively, now allow access to birth certificates although movement in this direction seems to be slowing down. For most adoptions completed nowadays, identity is not an issue because everyone is identified.[87]

8.13.1 Information Disclosure

Currently, the move is towards greater transparency. As Hollinger states:[88]

> The major legal consequence of the growing skepticism about the as-if model is the enactment in a number of states of procedures that enable adoptees not only to access so-called non-identifying background information about their biological families, but also to seek the consensual disclosure of the identities of their biological parents and other relatives. As of 2006, at least eleven states permit adoptees at age 18 or 21 to request a copy of their original birth certificate, even in the absence of their birth parents' consent.

Nevertheless, there is continued strong resistance to open access from organisations representing the interests of birth parents. This is to some extent another distinguishing feature of modern adoption practice in the U.S.[89]

8.13.1.1 Conditional Access

Conditional access includes provision for disclosure vetoes, contact vetoes and other intermediary systems. Disclosure vetoes, by which an adoptee may access their original birth certificate only if their birth parent does not object, would seem to vest the latter with a privacy privilege.[90]

In *Doe v. Sundquist*[91] a Tennessee semi-open records law (containing both contact and disclosure vetoes) was challenged on the grounds that it violated the privacy of birth parents. The Sixth Circuit Court of Appeals ruled that "if there is a federal constitutional right of familial privacy, it does not extend as far as the plaintiffs would like." The opinion also cited a 1981 decision in which the appeals court found that "the Constitution does not encompass a general right to nondisclosure of private information."

The case concluded in 1998 when the United States Supreme Court rejected the plaintiffs' claim that their right to privacy was infringed and upheld the Appeal Court's ruling in favor of the defendants and open records.

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[87] The author acknowledges the advice of Joan Hollinger on this matter.

[88] Hollinger, J.H., *Adoption Law and Practice*, *op. cit*.

[89] Nations currently facilitating access to records include the U.K., Sweden, The Netherlands, Germany, South Korea, Mexico, Argentina and Venezuela.

[90] Delaware passed a disclosure veto law in 1998.

[91] 943 F. Supp. 886, 893–94 (M.D. Tenn. 1996).

In *Does v. State of Oregon*[92] the legislature in Oregon approved provisions to permit the unconditional opening of original birth certificates to adult adoptees upon request but was immediately challenged in court by six anonymous birth mothers with support from the National Council For Adoption, an anti-open records lobbying organisation. The plaintiffs claimed that open records violated contracts of anonymity made at the time of relinquishments as well as their right to privacy. The case was dismissed in mid-1999, a decision subsequently upheld by the Oregon Court of Appeal and affirmed by the Supreme Court in May 2000.

8.13.2 Tracing and Re-unification Services

Independent agencies providing services for all parties to an adoption—on a continuum from counselling, through information gathering and tracing to possible re-unification—are now well established in the U.S. with many operating on an inter-state and for profit basis. The fact, however, that the law governing access to birth records is shrouded in controversy and varies from state to state results in an uneven patchwork of services.

8.14 Conclusion

Adoption as a legal process has been in existence for nearly twice as long in the U.S. as in the U.K. At first glance, there are strong similarities in the adoption experience of the two jurisdictions. Both are statutory processes, administered by the courts, providing much the same legal protection for the parties involved, regulating the same set of legal functions and concluding, in the main, with similar permanent and absolute adoption orders. They have both evolved in much the same way and at the same pace from the traditional 'closed' model to the present more 'open' form of adoption. In doing so, their practice has shared common contentious issues in relation to matters such as intercountry and transracial placements, post adoption allowances and information rights, special needs children, surrogacy, same gender adopters, the rights of birth fathers and the roles of step-fathers. Most obviously, led by the U.S., both have recently developed very similar policy and legislative initiatives in relation to child care adoption.

There are points of difference, however, of varying significance, which reveal distinctive and representative characteristics of the adoption process in the U.S. Perhaps most obviously the private placement rights of parents, the role of commercial adoption agencies, the extent of intercountry adoption and the lack of open access to birth records together indicate the relative strength of legal protection given to the private rights of individuals to act independently. Where independent

[92] 164 Or. App. 543, 993 P.2d 833, 834 (1999).

action violates public law, as in the context of child protection, then the rates of admission to public care and subsequent recourse to adoption demonstrate a much greater willingness to resort to coercive intervention in family affairs than is the case elsewhere. However, the recent increased reliance on kinship care and a higher tolerance for step-adoption would seem to indicate a greater readiness to use adoption and guardianship to facilitate permanency through family care than has been evident in the U.K.

Adoption in the U.S. very much reflects the values of its social context. The Constitution, in particular, the 5th and 14th Amendments, provides a rights framework for the parties and bodies in the adoption process and generates a tendency towards adversarial proceedings.

Chapter 9
The Adoption Process in Australia

9.1 Introduction

Adoption as a formal statutory procedure began with the Western Australian Adoption of Children Act 1896 and has always been restricted to 'full' rather than 'simple' adoptions. Since the 1920s, some 200,000 Australian born children have been adopted there, of whom one-third were adopted by birth parents or relatives. In keeping with the experience of the U.K., the U.S. and other western societies, the rate of annual adoptions increased in the 1960s, peaked in the early 1970s, and has been in decline ever since.[1] As recently reported:[2]

> While the total number of adoptions has remained relatively stable over the last nine years, there has been a 17-fold decrease in adoptions since the 1970s. This can largely be attributed to a decline in adoptions of Australian children. In contrast, the number of intercountry adoptions has tripled over the last 25 years. There has also been a dramatic increase in the proportion of intercountry adoptions over this period—from 4% of all adoptions in 1980–81 to 73% in 2005–06.

This chapter begins by providing some background information on the social and legal contexts and the emerging characteristics of adoption in Australia. It then identifies the significant trends in modern adoption practice, considers the main elements of current policy and outlines the prevailing legislative framework. The template of legal functions (see, Chap. 3) is then applied to reveal the actual mechanics of the process in action. The chapter concludes with a summary and assessment of the more distinctive and significant characteristics of the contemporary adoption process in Australia.

[1] In 1971/72 annual adoption orders peaked at 9,798; by 1989/90 they had fallen to 543 (Australian Institute of Health and Welfare, 1999).

[2] See, Australian Institute of Health and Welfare, *Adoptions Australia 2005–06*, Canberra, 2006 at p. viii.

K. O'Halloran (ed.) *The Politics of Adoption,*

9.2 Background

Adoption legislation has always been enacted at state rather than federal level and, with the exception of Queensland, has been and continues to be administered as a formal judicial process throughout Australia.[3]

9.2.1 The Social Context Giving Rise to Adoption

In Australia, as in the U.K. and elsewhere, the introduction of a formal legal adoption procedure was a legislative response to public concerns regarding both the social circumstances of unmarried mothers and the vulnerable position of those who voluntarily undertook the care of children in the late 19th century. From the outset it was also intimately linked to the public child care system.

9.2.1.1 Unmarried Mothers

There is much evidence of the inequitable treatment of young single mothers in Australia at the close of the 19th century.[4] The stigma and financial hardship accompanying that role resulted in the voluntary and private relinquishment of many children into the non-kinship, informal care provided by baby minders and foster parents while the public child care system absorbed the victims of failed parental care. Reported incidents of young destitute unmarried mothers being driven to crimes of abandonment or infanticide[5] generated a growing public concern. In 1889, the Society for the Prevention of Cruelty to Children was founded largely in response to the circumstances of such unmarried mothers and accompanying 'baby farming' scandals. By the latter half of the 19th century, a patchwork of largely unregulated private and public arrangements was in place providing care for children for whom parental care was unavailable.

9.2.1.2 Informal Foster Care

Australia, in the latter half of the 19th century, was a 'new frontier' for immigrants from Europe seeking to create a new life. A continuous labour supply was needed

[3] However, the Queensland Government in *The Adoption Legislation Review: Public Consultation* (Dept. of Families, 2003) accepted that a majority of respondents indicated a preference for adoption orders to be made in future by the Children's Court.

[4] See, Swain, S. and Howe, R., *Single Mothers and Their Children*, for an account of the degrading experience of unmarried mothers and the prevalence of 'baby farming' and infanticide in the period 1850–1975.

[5] See, for example, the successful prosecution for infanticide of John and Sarah Makin in 1893. Also, see, Allen, J., *Women, Crimes and Policing in New South Wales* (Ph.D. thesis), Macquarie University, Sydney, 1984, as cited by Marshall, A. and McDonald, M., in *The Many-Sided Triangle*, *op. cit*. at p. 22.

to construct roads, houses and build the necessary social infrastructure. Well into the 20th century, the arrival of many boatloads of orphaned and abandoned children from the U.K. and elsewhere were welcomed into Australian homes. Any child aged 12 years or more could be contracted for employment and paid wages accordingly. Many children were placed by their parents in families for employment purposes and were reared in informal 'adoption' situations. This was a period when the future of the country depended on the contribution of every additional pair of hands.

Against that background, all Australian states and territories experienced protracted legal disputes between birth parents and the foster parents to whom the former had entrusted the care of their young dependent children. Informal adoption arrangements were quite common—but once their children reached an age to be employed then many birth parents sought re-possession.

The Western Australian Adoption of Children Act 1896 was introduced very largely to protect long-term foster parents from the claims of birth parents. Its purpose was "to provide for the adoption of children and to see that when they are adopted they cannot be taken away from those who have adopted them when, perhaps, they are becoming useful".[6] It provided for the adoption of children under the age of 15, thereafter "deemed in law to be the child born in lawful wedlock of the adopting parents".[7] This was eventually followed by the introduction of broadly similar legislation in Queensland[8] and gradually to all Australian states and territories.

9.2.1.3 Public Child Care

Traditionally, each state and territory provided care for children who were orphaned, abandoned, neglected or abused in institutional accommodation where conditions closely resembled those of the English workhouse.[9] Legislation, such as the Orphanages Act 1879 in Queensland, sought to regulate the standards of care provided in state facilities or by charitable organisations for such children under the age of 12 years. Public concern regarding these facilities and 'baby farming' practices, coupled with lobbying from the Society for Prevention of Cruelty to Children, led eventually to the introduction of the Children's Protection Act 1892. The Royal

[6] *Ibid*., citing WA PD 1896, p. 335.

[7] In 1920 Tasmania introduced similar legislation.

[8] The Infant Life Protection Act 1905 made provision for the adoption of 'illegitimate' children in Queensland, was amended in 1921 to provide for the adoption of children aged less than 10 years and replaced by more comprehensive legislation in 1931; in South Australia statutory adoption was introduced by the Adoption Act 1926. See, further, Boss, P., *Adoption in Australia*, National Children's Bureau, Melbourne, 1992 at p. 211 as cited by Marshall, A. and McDonald, M., in *The Many-Sided Triangle*, *op. cit*. at p. 25.

[9] See, the Royal Commission into Public Charities in New South Wales, 1873/74 for a record of the inadequacies of this system.

Women's Hospital in Melbourne, established in 1856, was among the first to establish a policy of providing assistance to unmarried mothers[10] and from 1929 it developed an adoption service.

- **Wards of the state**

Adoption practice in Australia has been facilitated by the fact that the statutory child care framework did not and does not always apply to the children for whom placements are being sought. The legal status of many children in the care of the state was and is that of a 'ward' rather than the subject of a child care order. The decision as to whether to retain a child in wardship rather than seek a care order is one for the relevant state department. This contrasts with the equivalent situation in the U.K. where wardship is not a discretionary option for local authorities which must instead look to the statutory framework for designation of the legal status of a child for whom parental care is not available or is inappropriate. For many such children in Australia the full complement of parental rights and duties are vested through wardship in the state. Indeed, it has been observed that the authority of the Family Court of Australia is very similar in scope to the *parens patriae* jurisdiction of the Court of Chancery in England as devolved to the High Court when exercising its inherent wardship powers.[11]

9.2.1.4 Early Adoption Law

The common experience in all Australian states in the late 19th century, of poverty induced private and public care arrangements for children outside their families of origin, led to the policy of introducing adoption legislation. This was seen as the most appropriate legal means of regulating private parental decisions to relinquish children, protecting the homes voluntarily provided by long-term foster parents and opening up the possibility of secure family based care for many children languishing in the public care system.

The State Children's Relief Act 1881 was introduced to provide a public care 'boarding out' service for orphaned, abandoned, neglected or abused children. This marked an important policy shift in the public child care services by substituting family based care for the former reliance on institutional provision. As explained by Marshall and McDonald:[12]

> The State Children's Relief Act also authorised a form of adoption by which a person could apply to have a child placed in their care. Parents who applied in this way to adopt were subject to the same process of supervision as other boarding out parents, and to the same risks of the child being removed from their care. The difference was that they were not paid

[10] See, McCalman, J., *Sex and Suffering: Women's Health and a Women's Hospital*, Melbourne University Press, Melbourne, 1998 at p. 9.

[11] See, *AMS v. AIF; AIF v. AMS* (1999) 199 CLR 160 *per* Gaudron J at p. 189.

[12] See, Marshall, A. and McDonald, M., *The Many-Sided Triangle*, Melbourne University Press, Victoria, 2001 at p. 24.

> the boarding out allowance. Similar forms of adoption were practiced in all states… In all states some form of boarding out provided the pathway to later adoption legislation.

In this way a statutory adoption procedure, set within but differentiated from child care procedures, was introduced in Australia. The 1881 Act was subsequently amended to permit a child to be boarded out in his or her own family with allowances paid to the parents.[13] This measure, which sought to prevent family poverty and thereby reduce the large numbers of children admitted to public care due to parental destitution, also became available in the state of Victoria under the Child Welfare Act 1916 and in New South Wales under the New South Wales Act 1923. By the early 1930s, all states had introduced adoption legislation broadly sharing the same characteristics which, with some variations between states and territories and with some amendments, provided the legal framework for regulating adoption practice in Australia until the 1960s.

- **Judicial process**

All states, with the exception of Queensland[14] (see, further, below), chose to embed adoption proceedings within the judicial process. This was primarily because of the importance attached to ensuring that the legal requirements governing consent could be properly addressed before all parental rights of the birth parents were extinguished by adoption. The ancillary issue of the level of court most appropriate to deal with adoption proceedings was determined differently by individual states. Responsibility was confined to the Supreme Court in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory, in Victoria it was allocated to both the Supreme Court and the county court, it was assigned to a judicial panel in South Australia while in Tasmania a magistrate was deemed sufficient.

- **Placements**

In some states such as Queensland and New South Wales the responsibility for placing a child for adoption was assigned to a government body while in others such as Victoria it was left to charitable organisations. In practice, adoption placements most often fell to be privately and discretely arranged by whichever professional or other intermediary was most closely involved with the natural parent/s (usually an unmarried mother), at the time of birth. So, adoptions were organised through the agency of doctors, nurses, hospitals, mother and baby homes or clergymen and also often resulted from direct placements made by the natural parent/s or their relatives with persons of their choosing.

- **Closed, confidential process**

Initially, adoption in Australia was probably characterised by a fairly open practice: in South Australia, for example, an adopted child would have kept their birth

[13] The amendment in 1896 also increased the boarding out allowance from 2 to 10 shillings per week per child.

[14] See, the Adoption of Children Act 1935 which, interestingly, required the consent of any child over 12 years of age; subsequently amended in 1941 and 1952.

parent/s surname and had access to their original birth certificate. However, by the 1960s, the adoption process in all states had become shrouded in secrecy with assurances of confidentiality and with hearings invariably held in private. The emphasis on restricting access to identifying information was evident also in the use of separate registers not accessible to the public for recording birth information relating to adopted children.

- **Linked to public child care system**

The advantages of utilizing adoption procedures as an option for securing permanent care for children in the public child care system had been openly debated during the various legislative processes. The benefits were seen in financial terms as well as in terms of promoting the welfare interests of children. As noted by Marshall and McDonald:[15]

> Governments were quick to recognize the very considerable saving to budgets which adoption represented. During the 1928 Victorian debate, it was pointed out, quoting a report from New South Wales, that the 800 adoptions already completed in that state would result in a saving over fourteen years of $300,000.

- **Consensual and non-consensual**

The voluntary relinquishment of a child by the birth parent/s was the normal circumstance catered for in all adoption legislation. However, from the outset it would seem that all states also legislated for situations where children had been abandoned or where parents had been found guilty of child neglect or abuse. Provision was then made for the court to supply the necessary consent.

- **The welfare of the child**

In all states, the legislation required that the welfare interests of the child be taken into account in adoption proceedings though none required a particular weighting to be attached to such interests relative to other considerations.

- **Full and exclusive vesting of parental rights and duties in adopters**

The legal abolition of all parental rights vested in the birth parent/s, followed by the exclusive vesting of those rights together with the associated duties in the adopters, were common features of the adoption processes enacted in all Australian states. This was primarily to assure adopters that their care arrangements would be absolutely secured against any possible future attempt by the birth parent/s to reclaim possession of the child. The surname of the adopted child was changed to that of the adopters and registered as such in the Registry of Births, Deaths and Marriages. The inheritance rights of adopted children was a problematic issue in Australia as in other common law jurisdictions but New South Wales led the way with provision for inheritance rights for such children in respect of the property of intestate adopters.

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[15] See, Marshall, A. and McDonald, M., *The Many-Sided Triangle*, *op. cit*. at p. 30.

- **Adoption orders**

In Australia, unlike the U.K. (see, further, Chap. 2), the introduction of statutory adoption proceedings generated an immediate surge of applications.[16] In New South Wales, for example, some 58,000 adoptions occurred between the first legislation in 1923 and the Adoption of Children Act 1965.

9.2.1.5 Later Adoption Law

Whereas the 1960s in the U.K. marked the onset of a more liberal attitude towards sex, Australia, at this time, remained a very conservative society. The continuing social approbation accompanying the role of unmarried mother served to maintain adoption as a popular if forced option for such mothers and focussed legislative intent on measures to professionalise the adoption process. A more or less common baseline of adoption legislation was gradually introduced throughout Australia, following a co-ordinated approach by the Attorneys-General of all states and territories in 1961, to regulate practice.[17]

- **Licensed adoption agencies**

Initially, privately arranged adoptions, except with relatives, were prohibited under the new legislation in all states and territories; instead placements had to be made by registered adoption agencies with couples who had been professionally assessed and approved.

- **Consent**

In New South Wales, the Adoption of Children Act 1965 introduced for the first time in Australian adoption law a procedure for ensuring the validity of a consent to adoption by the birth parent/s and outlining the latter's right to retract such a consent within 30 days.

- **Confidentiality**

In keeping with the times, measures to shroud the adoption process in secrecy increased, as this was seen as being for the benefit of all parties. The prevailing ethos was that adoption provided for the complete vesting of all attributes of a child's identity within that of the adopters as though the child had 'been born to them in lawful wedlock'. Any contra-indicators were willingly suppressed by all parties. So, for example, after the 1960s adoption orders no longer bore the names

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[16] See, New South Wales Child Welfare Department, *Annual Report 1921–25*: "rich and poor alike are vying with each other to open their hearts and homes to these derelict children" at p. 5 as cited in Marshall, A. and McDonald, M., *The Many-Sided Triangle*, *op. cit*. at p. 30.

[17] See, Turner, J.N., 'Adoption or Anti-adoption? Time for a National Review of Australian Law', 2 *JCULR* 43, 1995 at p. 45 for an analysis of the relative conformity in adoption law across all jurisdictions in Australia in the 1960s.

of the birth parent/s and similarly the birth certificates of adopted children were altered to remove unnecessary information referring to the birth parent/s.

- **The birth parent/s**

During this period, the role of the birth parent/s in the adoption process was almost exclusively confined to unmarried mothers. As far as the putative fathers were concerned, the law focussed on their liability to pay maintenance rather than on any rights or duties they might have in relation to the proposed adoption of their child. At a time when all states and territories were collaborating to formulate a common regulatory framework for adoption, the alternatives for unmarried women in Australia were restricted and remained so until the reforms of the early 1970s. The introduction of welfare benefits for unmarried mothers[18] made government supported child care services available to single parents thereby allowing those with low incomes to consider educational or employment opportunities while continuing to bear parental responsibilities. As in the U.K. and elsewhere, the provision of financial support also resulted in a lessening of the social stigma traditionally associated with the role of a single mother, reducing the pressure previously felt by many in that position to surrender a child for adoption. Abortion remained an illegal procedure throughout the 1960s.[19] Contraception did not begin to become widely available in Australia until 1974 when the Family Planning Association introduced the guidance and treatment available in the U.K. for most of the previous decade. The stigma of 'illegitimacy' did not begin to fade until after the legal removal of this term by the Status of Children Act 1974 in Victoria and Tasmania, followed thereafter in all other states.[20]

Against this background it is remarkable that in Australia many, indeed most, unmarried mothers retained their children. The advocacy and support services provided by the Australian Relinquishing Mothers Society (ARMS) undoubtedly played an important role. During 1959–1976, the peak period for adoptions, 60% of such mothers continued to care for their children; an interesting contrast to their counterparts in Ireland (see, further, Chap. 7). It is noticeable, however, that a consistent feature of domestic adoption in Australia has been the fact that by far the majority of children adopted (88% in 2005/06) were born to unmarried mothers. This proportion has remained relatively stable over the last two decades.

- **Adoption orders with contact**

The Victorian Adoption Act 1984 first made legislative provision for adoption orders subject to a condition permitting contact, direct or indirect, between the relinquishing birth parent/s and child but only with the agreement of the adopters.

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[18] This was effected, for example, in New South Wales by the introduction of the Child Care Act 1972 and subsequently throughout Australia by the Supporting Mother's Benefit in 1973.

[19] Not until the judicial decisions in *Menhennit* (1969) in Victoria and *Levine* (1971) in New South Wales did prosecutions for abortion gradually cease in all states.

[20] See, further, Charlesworth, S., Turner, J.N. and Foreman, L., *Disrupted Families*, Federation Press, Sydney, 2000 at p. 149 and p. 207, f/n 7.

- **Information and post-adoption contact**

The question of access to birth records had become a contentious issue in the 1970s, but in 1976 the New South Wales Review Committee recommended retaining the existing restrictions on adoptee access to their original birth certificates. The Association of Relinquishing Mothers (ARMS), an Australia-wide organisation, successfully campaigned for access to information[21] and in 1984 both Victoria and New South Wales finally made legislative provision for such access. In 1976 the Adopted Persons Contact Register in New South Wales was established providing a means whereby adopted persons and their birth parent/s could, with mutual consent, register their wishes for contact. Two years later similar provision was made in South Australia. During 1984–1994 all states and territories enacted adoption information legislation opening up adoption records for adult adopted persons and their relatives and the availability of non-identifying information rapidly became a standard feature of the adoption process throughout Australia.

9.2.2 Resulting Trends in Types of Adoption

By the late 1970s, adopting a 'normal' healthy baby born in Australia had become an unlikely prospect for most infertile couples.[22] To satisfy their wishes for a family, such couples found they often had to consider either Australian children with 'special needs' or intercountry adoption. This new and broader interpretation of a traditional practice was accompanied, often necessarily, by a move towards greater openness in adoption. In addition, family adoptions continued to grow as a proportion of the total.

In 2005/06, a snapshot of adoption in Australia revealed the following:[23]

- There were 576 adoptions in Australia—73% were intercountry, 10% were local and 16% were 'known' child adoptions
- More than two-thirds of intercountry adoptions were from China (28%), South Korea (24%) and Ethiopia (17%)
- For 'known' child adoptions, 73% of adoptions were by step-parents and 22% by carers
- In local and intercountry adoptions, nearly all children were less than 5 years old (91%), while for 'known' child adoptions, most were aged 10 years and over (71%)

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[21] See, Winkler, R. and Van Keppel, M., *Relinquishing Mothers in Adoption*, 1983.

[22] See, Marshall, A. and McDonald, M., *The Many-Sided Triangle*, *op. cit*. at p. 106.

[23] See, Australian Institute of Health and Welfare, *Adoptions Australia 2005–06*, Canberra, 2006 at p. viii. (In this context, 'known' child adoptions, are adoptions of children who are Australian residents, who have a pre-existing relationship with the adoptive parent(s) and who are generally unable to be adopted by anyone other than the adoptive parent(s). 'Known' child adoptions include adoptions by step-parents, other relatives and carers.)

- Around half of the children in local and intercountry adoptions were adopted into families with no other children, and 56% had adoptive parents aged 40 years and over

9.2.2.1 Family Adoptions

Throughout Australia, section 98 of the Marriage Act 1961 provided, and continues to provide, that the subsequent marriage of a child's parents to each other 'legitimated' that child. However, adoption was the only legal means whereby a birth parent who married someone other than the child's parent could 'legitimate' their pre-marital child. Generally, the use of adoption by relatives other than step-parents is now discouraged due to the confusion and distortion that may occur to biological relationships.[24]

Many such arrangements are informally agreed between the parties or are formalized by written agreements or through recourse to other more appropriate private family law orders.

9.2.2.2 Step-Parents

From the early 1980s adoption by step-parents and other relatives sharply and consistently declined.[25] This has been largely due to the availability of alternative orders coupled with a general acceptance of the principle that adoption is seldom the most appropriate order in such circumstances.

All Australian jurisdictions continue to retain legislative provisions for step-parent and other forms of family adoption but access is now subject to a 'best interests' or exceptional circumstances test.[26] An assessment of a step-parent's attitudes and understanding is now required together with the exploration of matters such as motivation, the alternative options, and the understanding of all parties regarding the effect of adoption on relationships within the family and extended family. The quality and duration of an applicant's relationship with the child concerned will be of crucial significance.[27]

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[24] In Western Australia, for example, adoptions by relatives other than step–parents are no longer permitted under the 2003 amendments made to the Adoption Act 1994.

[25] See, Turner, J.N., 'Adoption or Anti-adoption? Time for a National Review of Australian Law', 2 *JCULR* 43, 1995 at p. 45 for evidence that applications from step-parents and relatives, during the 1970s and early 1980s, dominated adoption proceedings in Australia.

[26] In 1999/2000, only 114 children were adopted by step-parents in Australia. See, further, Bates, F., 'Children of Mansoul Adopted Children and Natural Parents: Some Comparative Developments', 63 *Australian Law Journal* 314, 1989.

[27] See, for example, the Adoption Act 2000 (NSW) which makes an adoption order in favour of a step-parent conditional upon an established three year care relationship between applicant, birth parent and child and requires that the child be at least five years of age. In addition, relevant consents must be available and it must be proven that adoption is better than any other legal option for promoting the child's welfare interests.

9.2.2.3 Child Care Adoptions

A distinctive characteristic of adoption in Australia, relative to other modern western societies, is the comparatively low rate of child care adoptions due to a policy emphasis on family reunification. The annual percentage of adoptions from the public care system currently stands at 6.6% in the U.S. and at 3.8% in the U.K., but it is only 0.8% in Australia.[28] Whenever statutory intervention is necessary, the preferred policy has been to work towards family reunification rather than countenance the permanent severance of non-consensual adoption. As a corollary, it has been recognised that maintaining contact arrangements between a child in care and their family of origin is crucial to successful reunification.

In the 1980s and 1990s, the emphasis in child care public service provision was on prevention. In the period 1983–1993 the number of children in care decreased by 29% but in more recent years this trend has been reversed following a sharp increase in reported cases of child abuse in the early 1990s.[29] In 1998 there were 14,470 children in the public care system of which 87% were in home based rather than institutional arrangements. At that time, over 40% had been in care for two or more years. The Children's Services Act 1986 introduced the requirement for compulsory reviews of court orders to be held in respect of each child within 12 months; every state and territory had the discretion to determine its own time limits.

Moreover, in Victoria, permanent care orders were introduced in 1992 as an alternative to adoption.[30] These were seen as overcoming the uncertainty often associated with placing children on guardianship or custody orders, while providing for permanency planning. Such care orders grant permanent guardianship and custody of a child to a third party and expire when the child turns 18 or marries. The granting of a permanent care order is usually the final step in the process of permanent family placement for children who have been abused or neglected, or who are in need of care and protection for other reasons and are unable to remain safely within the birth family, but for whom ongoing contact with that family is judged to be an essential means of promoting their welfare interests.

- **Committee on the rights of the child**

In its latest report,[31] the Committee noted the considerable increase in the number of children in out-of-home care in recent years as well as the over-representation

[28] See, AFCARS at www.acf.dhhs.gov/programs/cb/dis/afcars

[29] Between 1988 and 1994 there was an annual increase of approx 9% in substantiated child abuse cases. Note that according to the report of the Australian Institute of Health and Welfare, 2006, 94% of all children currently in care are in family or kinship foster care, 40% of whom are placed with relatives or kin.

[30] A total of 1,843 permanent care orders have been granted by the Department of Human Services in Victoria since their inception in 1992; 162 in 2005/06.

[31] See, *Concluding Observations of the Committee on the Rights of the Child, Australia*, U.N. Doc. CRC/C/15/Add.268, 2005 at paras 37–39.

of indigenous children in such care. In particular it expressed its concern regarding:

(a) The lack of stability and security of children placed in alternative care
(b) The difficulties for children in maintaining contact with their families and
(c) The inadequate medical care, e.g. physical, dental and mental health services

The Committee recommended that measures be taken to strengthen the current programmes of family support, e.g. by targeting the most vulnerable families, in order to reduce the number of children placed in out-of-home care. It further recommended that the State party:

(a) Strengthen its support for foster care, e.g. by improving equal access to adequate medical care by children in foster care
(b) Strengthen supervision of foster care and establish regular review of this kind of placement with a view to reuniting the child with his/her natural family and
(c) Promote and facilitate the maintenance of contact of the child in foster care with his/her natural family

The Committee also recommended that the State party maximize its efforts, within a set time period, to reduce the significant number of indigenous children placed in out-of-home care, inter alia by strengthening its support for indigenous families. It further recommended that the State party fully implement the Indigenous Child Placement Principle and intensify its cooperation with indigenous community leaders and communities to find suitable solutions for indigenous children in need of alternative care within indigenous families (see, further, Chap. 14).

9.2.2.4 Children with Special Needs

Initially, adoption was not seen as applicable to children with special needs—defined as being more difficult to place due to emotional, health or behavioural difficulties, membership of a sibling group, being an older child or aboriginal or belonging to a minority group or any combination of the foregoing. Instead such children were placed in specialist foster care or group care facilities.[32] However, adoption was in due course extended to benefit disabled and other 'hard to place' children. From the late-1970s the state child care departments began to successfully place for adoption increasing numbers of children with special needs who had been relinquished by their parents and had become wards of the state; parental consent in such circumstances was not an issue. In Queensland, for example, a Special Needs unit was set up in the early 1980s specifically to facilitate such adoptions. Attracting appropriate prospective adopters, however, could not be achieved by simply diverting the traditional

[32] See, Barth, M. (1998) who documents a clear trend towards the development of specialist foster care services to cater for children with special needs.

type of applicant but most often necessitated actively recruiting people with relevant skills and providing them with ongoing support. While some government agencies established specialised units to further this work, many voluntary adoption agencies also contributed.[33]

In recent years the number of children with special needs available for adoption has decreased[34] due, it has been suggested, to the development of specialist foster care services to cater for such children.[35]

The Committee on the Rights of the Child has expressed its concern about the paucity of information on disabled children, especially when it comes to data on disabled indigenous children, alternative care for children with disabilities and children with disabilities living in remote or rural areas.[36] The Committee also noted that a governmental working group is addressing the issue of sterilization of children with so-called "decision-making" disabilities and urges the State Party:[37]

> To prohibit the sterilization of children, with or without disabilities, and promote and implement other measures of prevention of unwanted pregnancies, e.g. injection of contraceptives, when appropriate.

9.2.2.5 Intercountry Adoption

The airlift of some 300 orphans from Vietnam in the mid-1970s marked the beginning of what has become a significant trend—the adoption in Australia of children born elsewhere. The numbers of such children adopted in Australia peaked at 420 in 1989/90 and thereafter steadily decreased until 1992/93 when only 227 were adopted[38] before experiencing the resurgence of recent years. A total of some 5,000 children arrived in Australia as a consequence of intercountry adoptions over a 20 year period ending in 1999.[39] Recourse to other countries has seen more than a tripling of intercountry adoptions in the last 25 years, from 127 in 1980/81 to 421 in 2005/06; representing a proportionate increase from 4% to 73% in annual adoptions during that period. By far the majority of children have traditionally come from Korea but recent years have witnessed an influx of children from China and the Philippines and more recently also from Ethiopia. In 2005/06, for example, four in

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[33] Barnardos in New South Wales, for example, established a 'Find-a-Family' Centre in 1985 which focussed exclusively on finding placements for children with special needs.

[34] Whereas in 1990/91, 28 infants with special needs in Queensland required adoption, in 1999/2000 there were none and only 1 required such a placement in 2000/01.

[35] See, Barth, M. (1998), *op. cit.*

[36] See, 'Concluding Observations of the Committee on the Rights of the Child', Australia, *op. cit.*, 2005 at para 45.

[37] *Ibid.*, para 46.

[38] See, Australian Institute of Health and Welfare, *Child Welfare Series: Adoptions Australia 1994–95*, No. 14 (AGPS, Canberra) at p. 21.

[39] See, report by the Post Adoption Resource Centre of New South Wales as cited in Marshall, A. and McDonald, M., *The Many-Sided Triangle*, *op. cit.* at p. 196.

every five (81%) intercountry adoptions were of children from Asia, and 17% were from Africa. More than two-thirds of the total intercountry adoptions were from the following countries: China (28%), South Korea (24%) and Ethiopia (17%). The vast majority of these children were younger than five years old (89%), more than half of whom were infants aged less than one year old. Nonetheless, and in contrast to countries such as the U.K. and the U.S., children adopted from outside the jurisdiction tend to be older than those adopted from within (excluding step-adoptions). For example, in 2005/06 almost two-thirds of domestic adoptions were of infants (aged under one year), compared with less than half of children adopted from other countries. This may be due to the fact that it is a lengthier and much more expensive process to adopt a child from another country than it is to adopt a child in Australia. It could also be that children identified by intercountry organisations as available for adoption tend to be older. The fact that so few Australian children are adopted from a child care context undoubtedly contributes to the lower average age for domestic adoptions relative to the U.K. and the U.S.

A working party, established by the Council of Social Welfare Ministers, reported in 1986 with a set of guidelines to govern future intercountry adoptions which was endorsed for implementation throughout Australia. Since then in all states and territories, with the exception of South Australia,[40] the welfare department takes responsibility both for the preparation of the required home study report and for the application to the court for an adoption order. The government agencies are heavily reliant upon the information and support offered by local parent groups which have always played a prominent role in Australian adoption services.

9.2.2.6 Assisted Reproduction

In Australia, as in other modern western nations, the recent development of assisted reproduction technologies, such as in-vitro fertilisation (IVF), has reduced the need for childless couples to rely on adoption. In 2003, for example, there were 6,474 births following assisted reproduction treatment—almost 13 times the number of adoptions in 2003/04. In 2006, there were 9, 291 IVF babies and the number is now growing at a rate of fire per cent a year while the domestic adoption rate continues its steep decline.

- **Surrogacy**

Surrogacy arrangements are now not uncommon and have introduced much the same complications for adoption law as experienced elsewhere. In this jurisdiction, *Re Evelyn*[41] emerged as the leading case at a time when surrogacy arrangements were illegal throughout Australia. The Family Court of Australia upheld the ruling of the court at first instance which had broadly decided in favour of the biological mother who had reneged on the surrogacy arrangement; though both parties were

[40] This is the only state or territory with its own specialist, private and registered intercountry adoption agency, *Australians Aiding Children*, which undertakes all home study reports.

[41] (1998) FLC 92–807. See, also, *Re Evelyn (No. 2)* (1998) FLC 92–187 where the High Court of Australia considered and dismissed the issue of appeal.

ordered to share responsibility for long-term decisions regarding the child's health, welfare and development. The decision was based squarely on the paramount welfare interests of the child and the court reiterated its ruling in *Rice v. Miller*[42] that there could be no presumption favouring a birth parent.

9.2.2.7 Same Sex Adopters

As in other countries, adoption law in Australia neither facilitated nor obstructed adoption by gay or lesbian couples; it had nothing to say on the matter as this was simply outside the contemplation of legislators at that time. So, in particular, the definition of 'parent' in section 60H of the Family Law Act 1975, as amended in 1996, understandably makes no allowance for the possibility of a sperm-donor father. Gay or lesbian couples were left in a situation whereby only a single applicant could apply under traditional legislative provisions while more modern legislation such as the Adoption Act 2000 (NSW) placed them in the same position as other applicants with the requirement that they satisfy the three year co-habitation rule. Recognising the lack of any legislative provisions specifically addressing the issue, the Australian Capital Territory introduced legislation early in 2004 to permit adoption by gay or lesbian couples.[43]

9.2.2.8 Open Adoption

In the latter half of the 1970s most states and territories began to move away from the traditional or 'closed' model of adoption. The use of orders subject to contact conditions and the gradual recognition of post-adoption information rights contributed to the development of a more 'open' approach which first gained legislative recognition in Victoria with the introduction of the Adoption Act 1984. Thereafter, as has been said, "'openness' became the leitmotiv of the reformers".[44]

- **Post-adoption contact**

Open adoption, usually involving some form of contact between birth and adoptive families after a child is adopted, is now practiced in varying degrees throughout Australia. In New South Wales, following recommendations made by the Law Reform Commission (NSW), the provisions of the Adoption Act 2000 (NSW) enable the parties to jointly agree in advance of proceedings a plan for post-adoption contact and exchanges of information.[45] In Western Australia 'openness'

[42] (1993) FLC 92–807 at 85 106.

[43] An initiative promptly condemned by John Howard the then Australian Prime Minister. For evidence of a positive judicial approach to same sex parental care, see *Re Patrick: An Application Concerning Contact* (2002) FLC 93–096.

[44] See, Turner, J.N., 'Adoption or Anti-adoption? Time for a National Review of Australian Law', 2 *JCULR* 43, 1995 at p. 45. Also, see, Barth, M., 'Risks and Benefits of Open Adoption', in *The Future of Children*, vol. 3, no. 1, 1993.

[45] See, Law Reform Commission Report 81, *Review of the Adoption of Children Act 1965 (NSW)*, 1997.

is given legislative effect through similar provisions. In Victoria and the Australian Capital Territory while there is no requirement in relation to adoption plans, legislative provision does allow for the making of adoption orders subject to agreed conditions regarding information exchange and ongoing contact. Again, in Tasmania and the Northern Territory there is no provision for adoption plans but before making an order the court is required to be satisfied that any proposed arrangements for information exchange and/or contact have been taken into account. In South Australia there is provision for open adoption and for this and other matters with a bearing on a child's welfare interests to be formally agreed by the parties after the issue of an adoption order. Family group conferences have a legislative basis in South Australia, New South Wales and Queensland which facilitates openness in planning adoption or other form of permanency placement. In Queensland there is no legislative provision for information exchange or contact but every likelihood that this will shortly be introduced.[46]

In 2005/06, agreements made at the time of adoption indicate that the majority of domestic adoptions are now 'open', with only 5% requesting 'no contact or information exchange'. In fact, the Department of Social Services now refuses to sanction the approval of any prospective adopters who do not agree to 'open' adoption.[47]

- **Post-adoption information rights**

Currently, all states and territories have legislation that grants certain information rights to adopted people aged 18 years or older, and to their adoptive and birth families. However, the extent of these rights and of the protection of the privacy of parties to the adoption varies among the jurisdictions.

9.3 Overview of Modern Adoption Law and Policy

Adoptions in Australia peaked in 1971/72 at 9,798 and have since, in common with all other western societies, decreased steadily. In the period 1997/98 a total of 577 children were adopted including 178 who were born in Australia and adopted by non-relatives.[48] In 1998/99 the numbers had fallen back slightly to 543 of whom 127 were adopted by non-relatives (23%), 244 were intercountry adoptions (45%), 124 were adopted by step-parents or relatives (23%) and 48 were adopted by their carers (9%).[49] The number of children adopted fell to an all-time low of 472 in 2002/03. By 2005/06, of the 576 orders made, 421 (73%) were in respect of intercountry adoptions whereas the number of Australian children adopted in that year had decreased substantially from 2,872 in 1980/81 to 155 (19-fold decline).

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[46] Queensland Government, Dept of Families, *Public Consultation on the Review of the Adoption of Children Act 1964*, 2003 at Chapter 4.

[47] The author is indebted to Professor Frank Bates for this information.

[48] See, *Adoption in Australia*, Report of the AIHW, 1998.

[49] *Ibid*., 1998.

9.3.1 Contemporary Adoption Related Legislation

In the late 1990s, all states and territories began the process of reviewing the 1960s statutory framework for adoption and introducing new adoption legislation to address the policy concerns listed above. The Family Law Act 1975 (amended in 1995), as administered by the Family Court of Australia, provides a framework for establishing principles and developing practice on a nationwide basis.

In 1997 the New South Wales Law Reform Commission published the Review of the Adoption of Children Act 1965 and followed up with the Adoption Act 2000. In Queensland the legislative authority for adoption, provided by the Adoption of Children Act 1964 and the Adoption of Children Regulation 1999, has been examined by the Adoption Legislation Review since 2000 and new legislation is imminent. In Western Australia an adoption law review is ongoing, while the Northern Territory has recently enacted the Adoption of Children Act 2006.

9.3.2 International Law

Adoption practice in all states and territories has been affected by Australia's ratification of both the United Nations Convention on the Rights of the Child which came into effect in 1991 and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption which has been implemented since 1998. The latter, together with the bilateral agreement signed with China in 1999, has succeeded in streamlining the processes for adoption of intercountry children and has significantly contributed to the recent increases in the numbers of such children adopted.

In each state and territory the legal framework for intercountry adoption is now provided by a combination of the Immigration (Guardianship of Children) Act 1946 together with the local adoption legislation and the relevant provisions of the U.N. Convention and the Hague Convention (see, further, Chap. 5). Australian states and territories can now arrange adoptions with the central authority of any of the 46 countries that have acceded to or ratified the Hague Convention but the majority of intercountry adoptions continue to be arranged with countries with which Australia has negotiated adoption agreements.

9.3.3 Adoption Principles and Policy

Modern adoption law, policy and practice in Australia has been greatly influenced by the fact that all states and territories subscribed to the principles outlined in the Council of Social Welfare Ministers' National Minimum Principles in Adoption 1993 and subsequently to the U.N. Convention and the Hague Convention. The result has been a broad consensus among the states and territories as to the principles,

policy and parameters of adoption law and a growing convergence in adoption practice.

9.3.3.1 The Interests of the Child

Section 63E of the Family Law Act 1975, as amended, requires the court to treat the best interests of the child as the paramount consideration; in so doing the court will have due regard to the wishes of that child. As was explained by the Family Court of Australia in *R and R: Children's Wishes*[50] where it was "clear that a court must take children's wishes into account, but is not bound by them".[51]

9.3.3.2 Policy

Throughout Australia, the policy issues arising for consideration during the different adoption law review processes were much the same. These include—

- Determining the objectives and principles underpinning contemporary, child focused adoption legislation
- The development and application of the Aboriginal and Torres Strait Islander Child Placement Principle in adoption legislation and practice
- The circumstances under which the making of an adoption order in favour of a relative or step-parent is warranted
- Accommodating within any future legislative framework the Government's responsibilities in respect of intercountry adoption under the United Nations Convention on the Rights of the Child 1989 and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Provision for how and when consent is obtained, the counselling and information required before consent is given, who can or should give consent (i.e., parents aged under 18, birth fathers, older children), and the revoking and dispensation of consent
- The identification of reasonable and relevant eligibility criteria for selecting prospective adoptive parents that do not exclude people solely because of their age,[52] marital status, impairment or sexuality
- Provision for birth parents' preferences when matching children requiring adoption with prospective adoptive parents, including circumstances where overseas adoption authorities have criteria regarding the placement of overseas born children with adoptive parents in Australia

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[50] (2002) FLC 93–108. 096 at 88.297.

[51] *Ibid*., *per* Nicholson, C.J., Holden, J. and Monteith J.

[52] The National Minimum Principles in Adoption refer to a maximum age difference of 40 years between adopter and child for a first placement and 45 years for any subsequent placement (para 6(1)).

- Determining whether the legal process of adoption, including the making of adoption orders, should be governed by courts and tribunals or by an administrative body
- The role of the state as provider of ongoing support services for adopted children, birth families and adoptive parents once an adoption order is made
- Options for the future delivery of adoption services including provision of counselling and support services, the accreditation of non-government agencies to provide some adoption services, fees for and the cost of adoption services and data collection

9.4 Regulating the Adoption Process

Adoption, in all states and territories, is a modern statutorily regulated process. Although similar in many respects to that of the U.K. it is not so tightly regulated and lacks many of the formal mechanisms for monitoring standards and protecting the interests of the parties that have long been characteristic of adoption in the U.K.

9.4.1 Length and Breadth of Process

In order to manage waiting lists, many states and territories have now introduced 'an expression of interest' procedure and in effect the process does not start until an adoption agency receives such a notification. In New South Wales, South Australia, Western Australia and Queensland[53] the relevant agencies periodically issue a public invitation for prospective adopters to declare an interest and their names are then entered in an Expression of Interest Register. In due course those registered are usually offered an opportunity to attend an education and adoption awareness programme after which a formal assessment will be undertaken.

9.4.2 Role of Adoption Agencies and Other Administrative Bodies

The involvement of voluntary agencies in the adoption process began to fade in the mid-1970s and by 1978 only two remained—the Anglican and the Catholic. Currently, in all states and territories, legislation requires an adoption agency to be approved and in practice these are invariably sited within the relevant government department. Only South Australia has approved a non-governmental body as an adoption (intercountry) agency.

[53] This procedure was established in Queensland in July 2002.

9.4.2.1 Adoption Panel

Some agencies, such as those in Tasmania and Western Australia, now rely on an Adoption Panel to assist in the decision-making process prior to placement though most do not. This is under consideration in Queensland which currently uses a Children's Services Tribunal to review assessments and pre-placement decisions. In Western Australia an Adoptions Applications Committee decides on the approval or otherwise of prospective adopters. All other states and territories rely on adoption agencies internal procedures for pre-placement decisions and refer appeals to an external body.

9.4.3 Role of the Determining Body

Initially, in all states and territories, adoption applications were determined by an administrative body. The current situation is that all except Queensland have relegated this function to the judiciary in courts of different levels. In New South Wales and the Australian Capital Territory the Supreme Court determines adoption applications. In other states and territories lower courts have jurisdiction. In Queensland applications are made to the office of the Director General for state welfare which issues all orders.

9.4.4 Registrar General

In all states and territories, the Registrar General is required to maintain an Adopted Children Register into which must be entered the particulars of every adoption order issued. All access to the information recorded in this register and access to an original birth certificate is through the office of Registrar General.

9.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

In Australia, the essentially consensual nature of adoption is evident in the criteria determining entry to the process.

9.5.1 The Child

As elsewhere, there is a legislative requirement in most if not all Australian adoption legislation that the child concerned must not have attained his or her

18th birthday.[54] In the legislation of most states and territories there is a requirement that when considering adoption due regard must be given to a child's ethnic, religious, cultural and linguistic background.

All states and territories have endorsed the Child Placement Principle in an adoption context and the view that adoption of Aboriginal children should only occur in the most exceptional circumstances (see, further, Chap. 14).

9.5.1.1 Consent

In New South Wales, South Australia, Western Australia and Queensland the consent of a child aged 12 years or more is a legislative requirement for his or her adoption. All other states and territories have no such legislative requirement in relation to consent but instead require the child's views and wishes to be ascertained and taken into account. In New South Wales, South Australia and Western Australia a court may dispense with a child's consent where satisfied that he or she lacks capacity to give a valid consent while in Queensland the child's welfare interests provide sufficient grounds for doing so but there is no legal requirement to ascertain the wishes of a child aged less than 12.

9.5.2 The Birth Parent/s

In Australia, the voluntary relinquishment of a marital child for the purposes of adoption requires the consent of both parents. This is necessary even in circumstances where a spouse is not the birth parent of the child. However, this is not to imply that the law gives any particular preference to the *locus standi* of natural parent/s. As was explained by the Family Court of Australia in *Rice v. Miller*:[55]

> … while the fact of parenthood is an important and significant factor in considering which of the proposals best advance a child's welfare, the fact of parenthood does not establish a presumption in favour of a natural parent nor generate a preferential position in favour of that parent from which the Court commences the decision-making process.

9.5.2.1 Unmarried Mother

The consent of such a mother is always a minimum legislative requirement for consensual adoption in Australia. In some states, notice of an unmarried mother's consent to the adoption of her child must be served on the child's father.

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[54] See, Charlesworth, S., Turner, J.N. and Foreman, L., *Disrupted Families*, Federation Press, Sydney, 2000 at p. 177.

[55] (1993) FLC 92–807 at 85 106.

9.5.2.2 Unmarried Father

Whether the consent of an unmarried father should be required has been the subject of a number of conflicting decisions in different jurisdictions, and has been a difficult question of interpretation. In all states and territories, except Queensland, there is now a legislative requirement that the consent of an unmarried father to the adoption of his child be either acquired or dispensed with. The recognition of such a father's *locus standi* in adoption proceedings was affirmed in New South Wales by the decision of the Family Court in *Hoye v. Neely*[56] where it was ruled that he was a 'guardian' whose consent was required for the purposes of adoption.

In Western Australia the court may dispense with the consent of a father where he does not have day-to-day care responsibility, or a parental relationship and is unreasonably withholding consent. In Victoria, the Adoption Act 1984 gave such fathers the right to be informed of pending adoption proceedings and the right to intervene. By the early 1990s, most states had legislated to include birth fathers in the adoption process. They were required to be at least informed of the proposed adoption, their involvement was generally required and in many states their consent was necessary. In Queensland it remains unnecessary to obtain the birth father's consent nor is he required to be informed of prospective adoption proceedings.[57]

9.5.3 The Adopters; Third Party

The minimum eligibility criteria for adopters are invariably set out in the primary adoption legislation of the states and territories while criteria for assessing the suitability of prospective adopters are most often to be found in ancillary regulations. It is a legislative requirement that assessment of all third party applicants be undertaken by an approved adoption agency.

9.5.3.1 Eligibility Criteria

Australia, in common with other modern western countries, specifies matters such as citizenship, residency, age,[58] marital status, health and period of care responsibility

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[56] (1992) 107 FLR 151. The relevant statutory provision being section 26(3) of the Adoption of Children Act (NSW) 1965.

[57] Arguably any such practice would be in breach of the Anti-Discrimination Act 1991 (QLD).

[58] In Australia the specified age limits are varied: South Australia, 18 to 55; New South Wales, at least 21 years of age or more than 18 years older than the child; in the Northern Territories, at least 25 years of age and more than 25 years older than the child and no more than 40 years older than the first adopted child and no more than 45 years older than any subsequently adopted child. See, also, the Council of Social Welfare Ministers, *National Minimum Principles in Adoption* at para

for the child concerned as constituting minimum eligibility criteria. In Queensland, Tasmania and the Northern Territory, only married couples are allowed to adopt, whereas married and de facto couples are eligible to do so in all other jurisdictions. Same sex couples can also apply in Western Australia and the Australian Capital Territory. The circumstances under which single people can apply to adopt vary for each state and territory, with most only accepting applications under special circumstances.

In some states and territories it is the duration of a couples' relationship that is important regardless of marital status.[59] It is also customary for the adoption legislation in Australia to specify infertility as among such criteria. Applicants are usually required to have had care responsibility for the child concerned for at least the 12 month period immediately prior to application.

Some eligibility criteria as stated in the Australian adoption legislation of the 1960s, such as Queensland's Adoption of Children 1964, are now incompatible with modern anti-discrimination prohibiting discrimination on grounds of age, marital status, impairment or sexuality. In Queensland, for example, single applicants are accepted only in exceptional circumstances or in relation to the adoption of special needs children.

9.5.3.2 Suitability Criteria

In Australia the review of 1960s adoption legislation has seen the transfer of some matters formerly listed under eligibility, such as health and infertility, to their current re-definition as suitability criteria. Other matters to be taken into account include criminal conduct, character references, child protection information and participation in adoption awareness programmes. In the case of Queensland, a corresponding transfer has occurred from primary to ancillary legislation as suitability criteria are now to be found in the Adoption of Children Regulation 1999. The latter, which is fairly representative of suitability criteria applied by other states and territories, requires the following to be considered in all assessments of adopters:

- Quality, duration and stability of relationship
- Capacity to ensure a child's well-being and
- Capacity to provide for a child's emotional, physical, educational, recreational and social needs

In addition, an assessment is required of each applicant's attitudes to and understanding of: children and their physical and emotional development; the

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6.1 (1995) which requires a maximum age difference between adopters and adopted of 40 years for a first child and 45 years for subsequent children.

[59] Victoria, the Northern Territory, Tasmania, New South Wales, Western Australia, the Australian Capital Territory and South Australia.

responsibilities of parenthood; and the significance of adoption and the importance of birth parents and their families. Additional criteria apply in relation to intercountry adoption, or adoption of an Aboriginal child or a child with special needs.

9.5.4 The Adopters; First Party

Where a step-parent, or a relative, decides to commence adoption proceedings then the above eligibility and suitability criteria will broadly apply with additional requirements regarding duration of marriage and of care responsibility for the child concerned. The consents of both birth parents and of the child (age permitting) are usually required.

However, generally in all states and territories, legislative provisions only allow for adoptions by carers or relatives other than step-parents in exceptional circumstances, that is, when a guardianship or custody order would not adequately provide for the welfare of the child.[60] Adoption by relatives other than step-parents is less common because most states and territories have policies that promote the use of parental responsibility orders (e.g. permanent care and guardianship/custody orders), rather than adoption.

9.6 Pre-placement Counselling

In Australia pre-placement counselling is a legislative requirement in most states and territories. It is also provided even in those, such as Queensland, where there is no legislative requirement to do so. Australia, as a signatory of the U.N. Convention, is obliged to ensure that counselling must be provided to those whose consent is required. Consent is only legally valid if given by a mother after the birth of her child. The consequences of giving consent must be explained, it must not be induced by payment or compensation and it may be withdrawn.

9.7 Placement Rights and Responsibilities

9.7.1 Placement Decision

In Australia as elsewhere, the number of approved adopters far exceeds the number of children available. This normally results in approved adopters waiting for long periods before a child is placed with them,[61] though the waiting period is greatly reduced for applicants in respect of special needs children or those from overseas.

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[60] In Western Australia, adoptions by relatives other than step–parents are no longer permitted.

[61] For example in Queensland in March 2003 approved couples had been waiting 10 years for a placement.

Most states now provide for 'open' adoptions. This allows the birth parent/s an opportunity to be involved in the process of selecting adopters.[62] Additionally, in most circumstances they may select the type and level of contact they want with their child during placement and following the issue of an adoption order. In some states, such as Victoria and Western Australia, open adoption arrangements form part of the adoption order and are legally enforceable whereas elsewhere they remain private and may be adjusted or terminated at the will of the parties.

Where the placement decision is taken by a registered adoption agency then adoption procedures require specified matching criteria to be applied.[63] Where the placement is respect of a proposed intercountry adoption then the decision is taken in accordance with the requirements of the Hague Convention.

9.7.2 Placement Supervision

In Australia there is a statutory requirement that prospective adopters complete a minimum period of direct care for the child concerned immediately before lodging an adoption application. In Queensland a 12 month care period is specified.

All children entering Australia for the purposes of intercountry adoption do so under the guardianship of the Commonwealth Minister for Immigration in accordance with the Immigration (Guardianship of Children) Act 1946. An interim custody order is then issued in favour of the prospective intercountry adopters while the relevant government body gives effect to its guardianship duties by supervising the placement. Under the Hague Convention all states and territories are required to provide placement supervision in respect of intercountry placements and reports at periodic intervals to the relevant overseas authority.

In all states and territories except South Australia and Western Australia there is legislative provision for interim care orders to be made in respect of all children in adoption placements. Supervision, placement review procedures and powers to remove a child are generally available.

9.8 The Hearing

The judicial hearing of an adoption application is favoured by all states and territories, except Queensland, because of the inherent focus of a court on procedural fairness, its independence from government policy and independence also from the decision-making processes of adoption agencies. This applies in respect of all adoption

[62] See, for example, the Adoption Act 2000 (NSW).

[63] In Queensland, for example, an amendment to the Adoption of Children Act 1964 effective from July 2002 specifies that the decision may only be made after consideration is given to matters concerning the needs of the particular child, the characteristics of the prospective adopters and the preferences expressed by the child's birth parents.

applications whether, first party, third party, domestic or intercountry. Given the importance of the legal consequences for all parties concerned, it is considered more appropriate that adoption be a judicial rather than an administrative process.

9.8.1 Where Consent Is Available

The principle that any consent must be informed, given in circumstances free from financial or other rewards and from duress, guides practice throughout Australia.[64] In step-parent applications, the consent of the non-custodial parent must also be obtained.

9.8.1.1 Timing/Validity

Issues most commonly arise in relation to those who are underage or suffer from mental illness or intellectual impairment when it is customary to ensure parental consent in respect of the former and independent representation for such other person whose needs require it. The witnessing of any such consent is a general legislative requirement in Australia. All states and territories have a legislative provision allowing for retraction of consent within a stated period during which an adoption order cannot be made.

9.8.2 Where Consent Is Not Available

All states and territories legislatively provide that consent may be judicially dispensed with in much the same sets of circumstances. In practice the following are the grounds most often relied upon:

- The person concerned cannot be found after reasonable inquiry
- Lack of capacity to give a valid consent
- Child conceived as a result of rape or incest
- Where domestic violence by the father causes the mother to be fearful for the physical, psychological and emotional safety of herself and her child

New South Wales, in the Adoption Act 2000, has reduced the grounds to the first two above together with an alternative criterion that it is justified by a serious concern for the welfare of the child and by his or her best interests. The latter is

[64] In Queensland, for example, the Adoption of Children Act 1964 permits maternal consent at any time after five days from giving birth but in practice the concern to ensure a reasoned and informed consent has resulted in no consents being sought until 10–14 days after birth. In New South Wales the Adoption Act 2000 specifies a period of 30 days after birth and a further period of 14 days to retract.

explicitly synchronised with grounds in child protection legislation; the focus is on a child's needs rather than on parental fault/failure.

9.9 Thresholds for Exiting the Adoption Process

In Australia, as elsewhere in most modern western jurisdictions, there is no general right to adopt or be adopted.

9.9.1 The Welfare Interests of the Child

The legislation in all states and territories now carries a requirement that the best interests of the child must be paramount in adoption, which requires consideration of issues affecting their ongoing quality of life both at the time of making an order and later. In many states and territories there is a legislative requirement that an adoption order cannot be made unless the court is satisfied that this rather than any other order is best suited to further a particular child's welfare interests. Further, a statement of the principle that adoption is a service for children rather than for adults seeking to acquire the care of a child generally prevails.

9.9.2 Representing the Child's Welfare Interests

If the child concerned is under 15 years of age, then a legal representative is appointed to protect their interests, though the family court may hear opinions of the minor at its discretion.

The National Minimum Principles in Adoption agreed by the Social Welfare Ministers in 1993 recognise the child's right to independent representation throughout the adoption process. However, this principle has still to be fully implemented and it remains the case that Australian adoption law does not always provide for an independent child advocate in adoption proceedings.

In New South Wales and Western Australia the provision for representing a child's welfare and legal interests, involving a guardian *ad litem* and lawyer respectively, is fairly similar to that in the U.K. In New South Wales, for example, there is provision under sections 122 and 123 of the Adoption Act 2000 for the interests of the child to be independently represented in court by a lawyer. In Queensland this is not a legal requirement but prospective new legislation may introduce provision for such representation as is currently the case under section 110 of the Child Protection Act. Only in the Northern Territory is the child a party to adoption proceedings.

The Committee on the Rights of the Child has expressed its concern regarding the limited extent to which the voice of the child may be heard in Australian courts on matters concerning his or her welfare.[65]

9.10 The Outcome of the Adoption Process

The outcome of a contemporary adoption application is no longer necessarily the granting of the order sought with its traditional permanent and absolute legal effects on all parties. The courts are now increasingly questioning the appropriateness of such applications and even when granted the traditional effects of the order may well be compromised by the rights of others to contact and information.[66]

9.10.1 Adoption Orders; Third Party Applicants

In Australia, as elsewhere, consensual third party applications constitute a steadily decreasing proportion of total annual adoption orders. In this jurisdiction, the majority of such orders are in respect of intercountry adoptions. Non-consensual third party adoption orders are seldom made. This characteristic feature of the adoption process in Australia, which differentiates it from contemporary practice in the U.S. and in the U.K. but corresponds with practice in Ireland, is due to the low level of child care adoptions.

9.10.2 Adoption Orders; Parents and Relatives

Most orders made in the context of 'family' adoptions are in favour of step-parents. Otherwise, modern statutory law in Australia, unlike the U.S. or U.K., generally treats 'kinship' adoption as not necessarily in the best interests of the child.

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[65] See, *Concluding Observations of the Committee on the Rights of the Child, Australia*, U.N. Doc. CRC/C/15/Add.268, 2005. The Committee then notes the efforts of the State party to implement fully article 12 of the Convention, but is concerned that the views of the child are not always sufficiently taken into account in judicial and administrative proceedings affecting the child at para. 29. See, further, *Dysfunctional Families*, *op. cit*. at p. 83 for references to articles offering comment on the law relating to the views of the child.

[66] For many, the legal security and finality offered by the traditional absolute adoption order was the reason why it was to be preferred over all other relevant orders and the modern introduction of compromises (contact, access to identifying information etc.) have greatly reduced its attractiveness. For a thoughtful analysis of the reasons for the growing unpopularity of adoption see: Bates, F., 'Adoption or Anti-adoption', 2 *James Cook University Law Review* 43 and 'Review of the Adoption Information Act 1990 (NSW)', 19 *Monash University Law Review* 343, 1994.

Applicants are usually required to show special circumstances and convince the court that none of the alternative orders available would be more appropriate.[67]

In Western Australia, adoptions by relatives other than step-parents are no longer permitted while in all other states and territories, legislative provisions allow for adoptions by carers or relatives other than step-parents only in exceptional circumstances, that is, when a guardianship or custody order would not adequately provide for the welfare of the child.

In effect an adoption order cannot be made in favour of a step-parent or relative if a parenting order made by the Family Court of Australia can better serve the child's interests.

In Queensland, a number of challenges to adoption applications have been made by grandparents who have succeeded in persuading the Supreme Court to instead issue Family Court orders in their favour.

9.10.3 Other Orders

In non-consensual adoption applications, the courts in Australia have a well-established practice of preferring the less interventionist order of guardianship to the finality of adoption where circumstances permit. The Family Court of Australia, either in response to an application or of its own initiative in the course of adoption proceedings, now has the power to grant a parenting order instead of an adoption order. The court may make any of the following orders:

- **Residence order**

Authorising a child to reside with a specified person, including shared parenting arrangements.

- **Contact order**

Authorising contact between the child and other named person/s, including duration and location of contact.

- **Child maintenance**

Directing that financial support be paid for the maintenance of a child.

- **Specific issues**

Directing that a specified area of parental responsibility be undertaken in a specified manner, including matters such as day to day care, welfare and development, religion, education, sport or other such significant aspects of a child's upbringing.

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[67] See, for example in Queensland where section 12(5) of the Adoption of Children Act 1964 (as amended) states that in such circumstances an adoption order shall not be granted unless "the welfare and interests of the child would be better served by such an order than by an order for guardianship or custody".

These alternatives are very similar to those available in U.K. family proceedings.

9.11 The Effect of an Adoption Order

Whether consensual or otherwise and whether made in favour of parents, relatives or third parties, adoption orders are now quite likely to be influenced by the 'openness' ethos and be made subject to agreed contact arrangements. The making of an adoption order has direct legal effects on all three parties as well as affecting their extended families.

9.11.1 The Child

In New South Wales in 1977, a test case involving the adoption of a 10 year old girl by her mother and step-father, established the legal precedent that a child has the right to know the facts relating to their adoption and to their birth family. In due course this right, available to those aged at least 18 and subject to prior counselling, accompanied by a 'contact veto' clause, was underpinned by legislation throughout Australia.[68] In Queensland, significant additional caveats were attached.[69]

9.11.1.1 Name

The Adoption Act 2000 in New South Wales states as a principle that a child's given name should be preserved. It also requires that for a child aged more than 12 months, there should be no change to the first name unless special reason is shown to the court, a child aged 12 years or more must consent and before a court approves a change to either a first name or a surname it must ascertain and take into account the wishes of the child. In some other states a child's consent is required or their wishes must be ascertained and given due consideration.

9.11.1.2 Citizenship

Under the Australian Citizenship Act 2007, section 13, a person adopted under a law in force in a State or Territory of Australia by a person who is an Australian

[68] Right to know legislation was introduced as follows: Victoria enacted legislation in 1984 and implemented it in 1985; New South Wales and Queensland in 1990 and 1991 respectively; the Australian Capital Territory in 1992 and 1993; and the Northern Territory in 1993 and 1994.

[69] Effective lobbying by the Queensland Adoption Privacy Protection Group, during the legislative process, succeeded in making this right subject to a condition enabling adopters to veto any divulging of information and any attempts by an adoption agency to contact an adopted person.

citizen at the time of the adoption (or by two persons, at least one of whom is an Australian citizen at that time) is an Australian citizen automatically if present in Australia as a permanent resident at the time of adoption.

9.11.2 The Birth Parent/s

The effect of an adoption order is, as always, to terminate the rights and duties of a birth parent but the consequences are no longer necessarily exclusive and permanent. Its absolute nature may now be compromised by implicit or explicit contact conditions while its permanent effects are subject to the information rights of other parties. In particular, the 'right to know' legislation has impacted upon birth parent/s by seriously compromising their traditional right to insist on permanent confidentiality. An adoption agency may now contact an adopted person aged 18 or older to inform, or confirm they have been informed, as to the identity of their birth parent/s. There has been some recent debate regarding the fairness of this legislative provision, which Queensland has failed to enact. However, in general, the 'right to know' issue has not generated anything like the same level of vigorous resistance that continues to polarise views in the U.S.

9.11.3 The Adopters

The traditional legislative intent, to fully vest the adopters with the rights of marital parents in respect of their adopted child, is broadly continued by contemporary legislation. Its essentially consensual character in this jurisdiction, however, coupled with the restrictions on its use, has allowed adopters to more freely accommodate aspects of 'openness' than is the case in other countries.

9.11.4 Dissolution of an Adoption Order

As in other common law jurisdictions, an adoption order can only be set aside in most Australia on the grounds of impropriety. So, for example, section 44 of the Adoption of Children Act 2006 in the Australian Northern Territory provides that a court may discharge an adoption order if the adoption was obtained by fraud, duress or other improper means or where the consent to the adoption was obtained by fraud, duress or other improper means. The 2006 Act states that the court shall not make such an order if the child has attained 18 years or such an order would be prejudicial to the welfare and interests of the child. When the court makes such an order it may make further ancillary orders as it thinks necessary for the welfare and interests of the children including orders relating to the name of the child, ownership

of property, the care, custody and guardianship of the child and the domicile of the child.

9.12 Post-adoption Support Services

Traditionally, in keeping with the essentially private nature of adoption, the focus for service provision was on the pre-adoption stage; once an order was made then no further professional intrusion was generally either available or wanted. This has changed with the growing awareness that the interests of an adopted person need to be safeguarded and supported throughout their life.[70]

9.12.1 Adoption Support Services

Most states and territories now provide financial and/or other forms of support at least to adopters of children with special needs.

9.13 Information Disclosure, Tracing and Re-unification Services

In Australia, the law governing information disclosure is, as Richard Chisholm has pointed out, "a highly complex topic, requiring a careful account of each Act: a tough topic to deal with".[71] However, following a series of legislative initiatives, it would seem that all states and territories have established adoption information services or information and contact registers (or other similar systems). The requirements for accessing these registers differ for each jurisdiction. For example, in Victoria, Tasmania and the Northern Territory, people requesting information must attend an interview with an approved counsellor before the information can be released. In New South Wales, adopted persons and birth parents have the right to information without mandatory counselling, except when the information to be released will be distressing (e.g. the death of the other party). An interview is required, however, when one of the parties wishes to lodge a contact veto. In Western Australia, a person who wishes to gain access to information that was previously restricted by an information veto, and where a contact veto is in place, is required to be interviewed by an approved counsellor and sign an undertaking not

[70] In Queensland it continues to be the case that there is no legislative requirement upon the state nor upon adoption agencies to offer any support services after the making of an adoption order to any of the parties concerned.

[71] Letter to author, 7.10.04.

to contact the vetoer.[72] Adoption agencies, to a varying degree, are engaged in 'origins inquiries'.

The Committee on the Rights of the Child has acknowledged the special position of Indigenous People in this context.[73]

9.13.1 Information Disclosure

On the one hand, there is no general right of unconditional access to identifying information contained in the records held by adoption agency, court or Registrar. On the other, a limited amount of non-identifying information has always been provided to the natural parent/s and adoptive parents prior to placement and at the time an adoption order is made.[74] Adult adopted people and birth parents may now usually obtain some level of non-identifying information at that time or later in circumstances of consensual adoption provided the other party has not registered an objection to such disclosure. In South Australia there is provision under the Adoption Act 1988 for open adoption and for this practice to be retrospectively legitimated; so all adoption records, regardless of when an adoption occurred, are available to all parties concerned. The only caveat is that the release of information is subject to a five year embargo, if a party has registered their veto. In New South Wales, the Adoption Information Act 1990, which became fully effective on April 2, 1991, made original birth certificates accessible by right to adoptees.

9.13.1.1 The Adoption Contact Register

By the early 1990s, such registers were established in most states and territories. They facilitate the reunion of adopted persons and birth parents following matched listings of registered wishes for contact.

9.13.1.2 Conditional Access

Contact vetoes, whereby the birth parent may place on record their wish not to be contacted by the adoptee and to which the adoptee must comply or be subject to

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[72] See, further, Australian Institute of Health and Welfare, *Adoptions Australia 2005–06*, Canberra, 2006 at p. 25.

[73] See, *Concluding Observations of the Committee on the Rights of the Child, Australia*, U.N. Doc. CRC/C/15/Add.268, 2005. The Committee notes the national inquiry carried out in 1997 by HREOC into the separation of Aboriginal and Torres Strait Island children (the *Bringing Them Home* report), which acknowledged the past policies whereby indigenous persons were deprived of their identity, name, culture, language and family. In this respect, the Committee welcomes the activities undertaken by the State party to assist family reunification and improve access to records to help indigenous persons trace their families (at para. 31).

[74] See, further, Harper, P., 'Adoption Law Reform: In Search of Self-Identity—Access to Information', 6 *Legal Service Bulletin* 52, 1981.

criminal penalties, were first introduced when New South Wales passed its Adoption Information Act of 1990. Currently, in some states and territories, a contact veto can also be lodged requesting that identifying information is not released to any other party to the adoption. These vetoes are legally binding and if a person receives identifying information and goes on to contact the other party when a contact veto is in place, legal action can be taken.

There is no provision for vetoes in Victoria. In New South Wales a contact veto cannot be lodged in respect of adoption orders made after 26 October 1990 and in South Australia information vetoes cannot be lodged on adoption orders made after 17 August 1989. In Western Australia, as a result of changes made in 2003, no new contact or information vetoes are permitted to be lodged.[75] The number of vetoes lodged each year has significantly decreased over the last decade, from 426 in 1995/96, to a record low of 56 vetoes in 2004/05.

Usually, as in Queensland, the law tries to strike a balance between the concerns of those involved in adoption when it was a closed and confidential process and those who in recent years would have experienced it as a more open and informative process. The rights of the former group of participants are protected by legal provisions enabling access to identifying information only where other parties to the adoption in question have not registered an objection to disclosure and/or to contact. In contrast, all adult parties to an adoption dating from the early 1990s usually have an unqualified right to access identifying information as adoption records across Australia were then generally declared 'open' to the parties involved.

9.13.1.3 Procedure

Where permitted, a party to an adoption can apply to the Registrar General for a certified copy of the adopted person's original birth certificate. He or she may then make application to the relevant adoption agency for disclosure of information on the circumstances of the adoption held on agency records.

In New South Wales, the Adoption Act 2000 makes provision for a complete record to be kept of birth and adoption information which can be accessed by adopted children, their birth parents and adopters.

9.13.2 Tracing and Re-unification Services

In some states and territories, agencies have been established to provide counselling and support services for adopted persons and birth parents seeking information but this remains an undeveloped level of national service provision. The Australian Institute of Health and Welfare Statistics reports that across Australia some 5,000

[75] As cited in *Adoptions Australia 2005–06*, *op. cit*. at p. 28.

applications for identifying information are received annually. In Victoria, under the 1984 Act, some 24,000 applications (in relation to 64,000 adoptions) or a total of 37.5% had been received by the end of 1999 for identifying information. This contrasts with the experience in New South Wales (102,000 adoptions) where in the same period 19,000 applications had been received or 19% of the total. The majority of applicants, understandably, are adopted persons with only a minority of applications (at best a third) being from birth parents.

All states and territories, excepting Victoria and Tasmania, have some form of procedure for registering a veto against contact and in some cases also against the release of information. In New South Wales the veto must be lodged in person.

9.14 Conclusion

The adoption process in Australia broadly conforms to that of other modern western societies which share a common law tradition; much the same issues of policy and practice are now being confronted by its legislators and judiciary. The Family Law Act 1975 (as amended in 1995) administered by the Family Court of Australia provides a framework for resolving adoption issues in accordance with established principles on a nationwide basis. Nonetheless and unsurprisingly, developmental progress is not proceeding at a uniform rate across the quite different cultures of the states and territories that constitute this vast continent. New South Wales, for example, tends to be in the forefront when it comes to legislative initiatives in the reform of adoption law and practice.

There are some interesting differences, largely of emphasis, in the Australian experience of adoption as viewed from the U.K. Most noticeably, non-consensual adoption is comparatively rare. This is largely due to an established non-interventionist tradition in relation to family matters; other factors being equal, the state will favour the order that authorises least intervention.

This can be seen in the remarkably low rate of child care adoptions. The emphasis on family reunification, which seems out of step with current trends in the U.S. and the U.K., is perhaps in keeping with the earlier (and equally against the trend) experience of single mothers choosing to retain rather than relinquish their parental responsibilities. In particular, and in marked contrast to experience in the latter jurisdiction, Australia has developed a dependency upon intercountry adoption as the main route for meeting the needs of third party adopters. Moreover in Australia, unlike the U.S. and the U.K., the use of long-term foster care is encouraged for children with special needs which reduces the number available for child care adoption. The relatively low level of non-consensual adoption is also attributable to what appears to be a clearer and firmer policy in respect of family adoptions. Adoption by a birth parent and spouse or by a relative is generally viewed by the judiciary as being not necessarily in the best interests of the child concerned; indeed, there is no equivalent to the trend favouring kinship adoption in the U.S. and U.K. Unlike the U.S., for example, there is a clear legislative presumption against kinship adoption and a range of alternative orders has been made available. There is a presumption

in favour of parenting orders and where ‘step parent’ adoption is proposed, leave to adopt must be obtained from courts exercising jurisdiction under the Family Law Act 1975. This diverts many would-be adoption applicants towards other proceedings.

The broadly consensual nature of adoption in this jurisdiction, perhaps also coupled with exposure to the experience of Indigenous people (see, further, Chap. 14), has facilitated the development of aspects of ‘openness’. To a greater degree than most other countries and probably influenced by its neighbour New Zealand, an ‘open’ model of adoption is now practiced throughout Australia. This not only permits varying degrees of post-adoption contact between birth and adoptive families but often also allows the birth parent/s to be involved in the process of selecting adopters. This ‘openness’ has also permitted the introduction of legislation facilitating access to adoption information and the provision of related services.

Chapter 10
The Adoption Process in Sweden

10.1 Introduction

Sweden, a constitutional monarchy, with a racially mixed population of more than 9,000,000,[1] has a highly developed welfare system. It is a strongly decentralised country where most services provided for the benefit of or relating to children are the responsibility of the social welfare board in each of Sweden's 290 municipalities.

Sweden is a civil law country with a constitution which was formally adopted in 1809 but, until relatively recently, of little relevance to the making and practice of domestic law.[2] As in many other civil law countries, Parliament (the *Riksdag*) is by far the most powerful branch of government with little scope remaining for judicial discretion to interpret and develop the law and therefore little in the way of case law for a study such as this to draw from. The roots of the law relating to children lie in the Code which initially addressed marital matters and has existed since 1734.[3] The 'Code of 1734' (as it is referred to in Sweden) was divided into sections based on subject matter, but only one or two of the initial paragraphs are still operative. What has survived is the sectional arrangement which provided a basis for introducing child related laws in the early 20th century. These laws, concerning parental rights and duties, were consolidated in the Parental Code of 1949 and have subsequently been added to and amended many times. Family law cases are heard in Sweden's general court system, usually by three lay judges and one professional judge.[4]

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[1] Although Sweden remains largely culturally homogenous, with some 87% of the population being ethnic Swedes, approximately 12% of residents were born abroad, and about one fifth of the population are either immigrants or the children of immigrants. Sweden has five minority languages—Sami, Finnish, Meänkeli (Tornedal Finnish), Romani, Chib and Yiddish.

[2] See, Ortwein II, B.M., *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405, 411, 2003 at p. 413.

[3] *Ibid*.

[4] *Ibid*. at pp. 405–406. Swedish courts handle only about 30,000 family law cases in an average year.

K. O'Halloran (ed.) *The Politics of Adoption,*

This chapter is concerned both with outlining the adoption process in Sweden and also with examining how that process in a civil law context differs from that which typifies the common law jurisdictions studied in Part III. It applies the same template but does so flexibly in order to note and assess the significance of material that would not otherwise be readily accommodated. Beginning with social and legal background information on adoption, it proceeds by identifying the significant trends in modern adoption practice, considering the main elements of current policy and outlining the prevailing legislative framework. The template of legal functions (see, Chap. 3) is then applied to reveal the actual mechanics of the process in action. The chapter concludes with a summary and assessment of the more distinctive and significant characteristics of the contemporary adoption process in Sweden.

10.2 Background

Relative to many other western countries, Sweden has an established reputation for placing a high social priority on providing support for family life, particularly child welfare, and for doing so in ways that are non-authoritarian, respectful of family autonomy and integrity, while being comparatively non-interventionist. A small, socially cohesive nation with less poverty and a more even distribution of wealth than its European neighbours, an established acceptance of high taxes to fund quality social services, coupled with high levels of civic responsibility and of trust in government, Sweden demonstrates its essentially democratic socialist politics in the relationship of mutual respect cultivated between state and family.

10.2.1 The Social Context Giving Rise to Adoption

The period of rapid industrialisation and urbanisation at the end of the 19th century, affected the established pattern of family life in Sweden as it had done in England and led to similar social problems, including the presence of abandoned or vagrant children roaming the new urban centres of population. The associated perceived issues of criminal behaviour prompted the introduction of Sweden's first child welfare legislation in 1902. Unlike England, but in keeping with Sweden's approach to family matters, responsibility for administering the provisions was given to special child welfare committees in the local communities for preventative measures, rather than ascribed to the justice system for policing and punishment purposes. Children found to be, for whatever reason, without adequate parental care were then placed by the authorities in approved foster care homes or, though a much lesser extent, accommodated in residential units.

10.2.1.1 Development of Child Welfare Policy

The Child Welfare Act of 1924 replaced the legislation of 1902. The grounds for compulsory care were then extended to child abuse with the local child welfare authorities obliged to intervene in families where children were being abused. Even then, however, the authorities acted in conjunction with local respected figures in the community. It has been said that the practice of safeguarding child welfare was for many decades and in most municipalities carried out by laymen.[5]

By the time of the next legislation, the Child and Young Persons Act 1960, Sweden had been transformed into a successful industrial nation with a social reformist policy. Moreover, the municipal organisations administrating child welfare had developed into bureaucracies and a new psychosocial approach to child welfare had taken hold which largely continues to dominate the official approach to children and their behaviour.[6] While the 1960 Act added nothing new to the Child Welfare Act of 1924 it did emphasise the preventive dimension to child welfare work and it regulated the legal procedures and rules for record keeping.

In the early 1990s, the Swedish economy suffered a severe recession and four years of sweeping cutbacks in public spending and major tax increases. As in other modern western countries at that time, the government responded to economic contraction by cutting public service provision. More recently there has been a substantial improvement in public finances combined with falling unemployment rates:[7]

> The recovery after the recession of the 1990s has resulted in improved living conditions for large population groups. More people have work incomes sufficient to meet their needs, fewer are poor and fewer have to depend on social allowances.

This in turn has resulted in improved provision for children and their families. The rate of infant mortality, for example, in Sweden is now among the lowest in the world.

Throughout this period the official approach to child welfare matters developed into its present policy which is firmly anchored on service provision in support of vulnerable families, a psychosocial approach to behaviour and an overall emphasis on preventing family breakdown.

10.2.1.2 Availability of Children for Adoption

As in other developed western countries, the supply of adoptive children in Sweden decreased rapidly in the latter decades of the 20th century. This was a result of more

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[5] Lundstrom, T., *Staten och det frivilliga sociala arbetet i Sverige* [The State and Voluntary Social Work in Sweden], Skondalsinstitutet, Stockholm, 1994.

[6] "The theories of child welfare… changed… from explanatory models based on moral precepts to models based on psychological grounds." (*ibid*., *p*. 268).

[7] See, the National Board of Health and Welfare, fourth national report on social conditions, *Summary Report*, 2006 at http://www.socialstyrelsen.se/Publicerat/2006/9101/Summary.htm

efficient and readily available methods of contraception, more liberal legislation on abortion and surrogacy, a better level of welfare benefits and more accepting attitudes in society, which together made it more probable that single mothers would choose where possible to parent their children. As a consequence very few children are now voluntarily relinquished for adoption in this jurisdiction: in 2000, for example, there were only 16. The fact that it is so seldom used in relation to Swedish children, accompanied by the high rate of recourse to the intercountry option, highlights the extent to which the modern use of adoption has become essentially a service driven by adopters seeking to provide homes for non-Swedish children.

- **Unmarried mothers**

From the end of World War II to the mid-1960s, young unmarried mothers were as a matter of routine recommended/persuaded by local child welfare authorities to voluntarily relinquish their 'illegitimate' children for adoption.[8] Nowadays, however, the lack of social stigma coupled with relatively generous state benefits for single parents results in very few Swedish children becoming available for adoption by third parties.[9]

- **Non-marital birth rates**

The growing numbers of non-marital children born annually in Sweden[10] are such that for many years now the law has ceased to make any legal distinction between children based on the marital status of their parents: since 1970, Swedish law has guaranteed equal inheritance rights for children born to married and unmarried parents; indeed Swedish legislation no longer uses the terms 'illegitimate children', 'children of marriage', or 'children outside marriage'. The policy of non-discrimination towards children of non-marital or extra marital relationships was pioneered in this jurisdiction and has since served as a model for other European nations.[11]

- **Marriage/divorce rates**

Sweden has a high divorce rate. Among 17 year olds, one in three comes from a family that has experienced divorce and is most likely living with a single parent: more than 800,000 families are headed by cohabiting partners and 250,000 by lone parents. Of the latter, the great majority are single mothers with some 40,000 single

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[8] See: Allmanna Barnhuset, A., *Adoption*, Stockholm, 1955; Socialstyrelsen (1959) *Adoption*. Socialstyrelsen, Stockholm (Allmanna Rad och Anvisningar 117/1959; and Vinnerljung, B. (1992) *235 syskon med olika uppvaxtoden - en retrospektiv aktstudie* [*235* siblings raised in non-shared environments - a retrospective case file study]. Lunds Universitet, Meddelanden fran Socialhogskolan 1992, 5.

[9] See, Tiberg, H. (et al., eds.), *Swedish Law*, 375, 1994.

[10] Currently, 50% of Swedish children are 'born out of wedlock' compared to only 1% of children in Japan. Although it should be noted that most are born to cohabiting parents as there are very few single mothers giving birth in Sweden (compared to many other countries).

[11] See, Schadbach, K., 'The Benefits of Comparative Law: A Continental European View', 16 B.U. INT'L L.J. 331, 388, 1998.

fathers and their children. In 2000, just over 3% of all children aged 0–17 were affected by parental separations.

- **Abortion law and policy**

The present liberal abortion law in Sweden dates from 1975 and states that any woman can decide to have an abortion up until and including the 18th week of the pregnancy (12 in France, and 24 in England & Wales on medical grounds). An abortion after the 18th week can only be allowed in special circumstances and with permission from the National Board of Health and Welfare. The majority of abortions are performed before the 12th week of the pregnancy (over 90%).

- **Assisted reproduction services**

Treatment services for infertility and techniques for assisting conception are well developed and readily accessible in this jurisdiction and to some degree serve to lessen the demand for adoption as a resource for infertile couples. For example, the annual number of IVFs during the 1990s increased from 2,700 to 6,200, and the annual number of live births due to this method increased from 712 to 2,278. Donor insemination is also available but is not utilized as frequently. Since the introduction of legislation in 1984, those born by IVF have had a right to access the identity of their donors.

Lesbian couples in a relationship registered under the Registered Partnership Act 1994 were granted a right to access artificial insemination in legislation passed in 2005, a right since extended to cohabiting couples.

- **Policy of family reunification in child care matters**

Parental rights, and the accompanying necessity to obtain parental consent for any decision affecting the exercise of those rights, remain of central importance in the law relating to children in this jurisdiction. Consequently, wherever possible resources are invested in family support services and a policy of long-term foster care or residential care in small group homes for older children, with a professional focus on returning a child to their parents, is the established public service response to problems of serious child abuse and neglect. Children tend to be older than their U.K. counterparts when they enter the child care system, as they only do so after all family support services have been exhausted, and 35–40% remain in it for three years or more. As has been observed "in Sweden the underlying assumption of the law is that 'every parent can be rehabilitated".[12]

10.2.1.3 The Public Child Care Context

Swedish child welfare has developed a social service approach to families with an emphasis on providing support and working with parents. In relation to other

[12] Selwyn, J. and Sturges, W., *International Overview of Adoption: Policy and Practice*, School for Policy Studies, University of Bristol, Bristol, 2001 at p. 42.

western countries, it has an established reputation for placing a high social priority on supporting family life, particularly child welfare, and for doing so in ways that are less authoritarian, more respectful of family integrity and relatively non-interventionist. In Sweden, like Ireland, another traditionally rurally based society, foster care arrangements rather than adoption have historically provided the alternative to care in the family of origin. Private adoptions did flourish in Sweden as in Ireland in response to the particular social circumstances of the 1960s (in which the tension between traditional family values and the beginnings of more liberal attitudes to sex and individualism resulted in an increase in the number of single mothers being shamed into making alternative care arrangements for their babies). In both jurisdictions this failed to generate any corresponding initiative in the public sphere to adjust the legal framework. Residential facilities have also played a part, albeit of a specialized nature.

- **Foster care**

Foster care is by law and tradition preferred to residential placement. Swedish children have been placed in foster homes since the 18th century.[13] At the turn of the 19th century and for the following decades, the state was concerned with how best to cope with all the abandoned and 'illegitimate' children that followed in the wake of industrialization.[14] Mostly, such children were accommodated in day care child or child-minding arrangements while their parents worked; others were found places in a children's home or foster homes.[15] Children born 'out of wedlock' dominated foster care until the late 1950s and as late as the end of World War II, only around half of all such children in Stockholm were in parental care.[16] Research from 1974–1992 clearly showed that the centuries old practice of placing children from urban families in rural foster homes continued[17] although this can now only be done on an official basis as informal placements in private foster homes are prohibited.

When children are placed in care, primary consideration has now to be given to relatives (or other close adults) as substitute caretakers. Many local authorities use contract foster homes for short term or emergency placements and to replace or

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[13] Kalvesten, A.-L., *40 fosterfamiljer med Ska-barn* [40 Foster Families with Ska-Children, Almqvist & Wikdell, Stockholm, 1974.

[14] See, for example, Ohrlander, K., *I barnens och nationens intresse* [In the Interest of the Children and the Nation], Diss. Hogskolan for Lararutbildning, inst for pedagogik, Stockholm, Studies of Psychology and Education no. 30, 1992.

[15] See, for example: Hegeland, H., (1978) *Barnhemsbarn. Min kollektiva uppvaxt* [Child in a Children's Home. My Communal Childhood]. Natur & Kultur, Stockholm, 1978; and Hegeland, H., *SkyddsIingarna pa Ekedalen* [The Wards of Ekedalen], Tre Bocker, Goteborg, 1988.

[16] See: Granath, K.-E., Foraildrar och fosterfolraldrar [Parents and Foster Parents]. *Barnavard och Ungdomsskydd*, 1958, vol. 33, pp. 88–96; and Sjoberg, B., Fosterbam och fosterlegor [Foster Children and Foster-Parents' Fees]. *Barnavard och Ungdomsskydd*, 1959, vol. 34, pp. 131–159.

[17] Vinnerljung, B., *Svensk forskning om fosterbarnsvard En oversikt* [Swedish Research on Foster Care. A Review], Liber Utbildning/CUS, Stockholm, 1996.

complement residential care.[18] The use of foster care decreased steadily from 72% of all initiated placements in 1983 to 55% 1995 but more recently that trend has been reversed:[19]

> Foster home was the most common form of placement among children and young people in care on November 1st 2005: 78 per cent of the children in care under the SoL (Care outside the home under the Social Service Act) and 66 per cent of the children in care under the LVU (Immediate custody under the special provisions for Care of Young People Act) were placed in family homes on that day.

- **Residential care**

In 1980 new legislative provisions stated that if foster homes have four children or more and if the foster parents main income came from fostering, their home should be defined as a residential unit. The rationale behind this legal change was to bring professional care under stricter control but it also paved the way for an expansion in private care.[20] There are now more residential units than at the heyday of residential care in the 1930s, half of which were established during the 1990s. It has been said that Sweden's care system has—if legal definitions are applied—slowly developed toward re-institutionalisation and privatisation during the last 15 years, even if foster family care still is the dominant form of care.[21]

Residential care is mainly used for teenagers (60% of all initiated placements in 1995) and most residential care units are small (for nine children or less). Sweden has had its share of scandals associated with children in residential care but has been spared in number and severity the scale of such tragedies that have plagued child welfare in some other countries.[22]

Placing young children in temporary residential care *together with their parents* is very common: among children's homes for 0–12 year olds, 90% state that they receive children and parents together.[23] By 1985, more than half of all children in children's homes had at least one parent staying with them,[24] a proportion that has

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[18] *Ibid*.

[19] See, Socialstyrelsen, *Barn och ungainsatser år 2005*, 2006 at p 37.

[20] See, Socialstyrelsen, *Vard utom hemmet* [Out-of-Home Care], Stockholm, 1990; Salinas, M. (forthcoming) Barn och ungdomsinstitutioner [Residential Care for Children and Youth], Diss; and Vinnerljung, B., Sallnas, M. and Kyhle-Westermark, P. (forthcoming/a) Sammanbrott vid placeringar av tonaringar i dygnsvard [Breakdown in Placements of Teenagers in Care].

[21] See, Vinnerljung, B., Sallnas, M. and Oscarsson, L. (forthcoming) Dygnsvird for barn och ungdom 1983–1995 [Care for Children and Youth 1983–1995].

[22] See, for example: Levy, A. and Kahan, B., *The Pindown Experience and the Protection of Children*, Staffordshire County Council, 1991; Kirkwood, A., *The Leicestershire Inquiry 1992*, Leicester County Council, 1993; and Colton, M. and Vanstone, M., *Betrayal of Trust*, Free Association Books, London, 1996.

[23] Salinas, M. (forthcoming) Barn och ungdomsinstitutioner [Residential Care for Children and Youth], Diss.

[24] Socialstyrelsen, *Vard utom hemmet* [Out-of-Home Care], Stockholm, 1990. More recently, see, Socialstyrelsen, *Children and Young Persons Subjected to Measures 2005*, 2006, at http://www.socialstyrelsen.se/Publicerat/2006/9253/Summary.htm

since decreased as private small, home-like residential units are increasingly used for longer placements.[25]

Sweden has for decades also had special residential care or '*homes for special supervision*' which provide secure accommodation for drug abusing or violent youths. There are 30 residential units of this category, with around 600 beds, run by a national government agency.

10.2.1.4 Contemporary Child Care Law and Practice

The Social Services Act, Chaps. 5 and 6, now govern the circumstances in which children may be admitted to the public care system.[26] The care population in Sweden typically consists largely of children admitted due to adverse family circumstances with the remainder due to anti-social behaviour.[27] In all studies from the 1980s and 1990s the breakdown of the Swedish care population was approximately as follows: physically and sexually abused children, 5–10%; due to parent's substance abuse, 25–35%; 'incapable' parents, many with a learning disability, up to 20%; mentally ill parents, up to 15%; and children who have left home due to family breakdown, 30–40%.

- **Parental consent**

Child care matters in Sweden are very largely addressed by parents and state officials working together, without the necessity of a court order, to formulate an agreed plan for the child concerned. The 'child rescue' approach, more typical of child protection in the U.K., is not part of the Swedish tradition. For example, in 1997 some 15,500 children and young persons aged 0–20 were in care at sometime in that year (i.e. less than 8 in 1,000 children) of which almost 3 in every 4 were placed with the formal consent of parents, and 1 in 4 after a court order.

Parental rights may be removed in respect of a child placed in the care of foster parents for three years. If, after that period, there has been a failure of all efforts at rehabilitation then under the Social Services Act (in accordance with the Parental Code, Chapter 6, section 8) the authorities are required to consider if it would be better for the child for their custody to be transferred from the parents to the foster

[25] Salinas, M. (forthcoming) Barn och ungdomsinstitutioner [Residential Care for Children and Youth], Diss.

[26] The Government has laid two comprehensive child policy reports before the Riksdag. The first, *Children Here and Now: An Account of Child Policy in Sweden Based on the United Nations Convention on the Rights of the Child* (1999/2000), provides a broad description of children's circumstances in Sweden in a range of areas and an account of government efforts and measures in this sphere. The second, *Child Policy: Towards a Strategy for the Implementation of the United Nations Convention on the Rights of the Child* (2001/2002), focused on the results of the Government's efforts in connection with the strategy for implementation of the Convention.

[27] See, Socialstyrelsen *Insatser for barn och unga 2006* [Children and Youth Subjected to Measures 2006]. Socialstyrelsen, Stockholm (Statistik, Socialtjanst 2007, with English summary).

parents[28] and thereby permit the custody of a child in long-term care to be legally entrusted to others.[29]

- **Corporal punishment**

In Sweden, corporal punishment in all childcare institutions has been illegal since 1960, and in 1979 it became the first country to forbid physical punishment by parents. As the Parental Code Chapter 6, section 1 states:[30]

> Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or any other humiliating treatment.

This absolute legal ban on physical punishment, and attempts to support the law with awareness and enforcement, are credited with causing Sweden's success in protecting its children from physical harm: studies show that while before the ban most Swedes supported physical punishment, today as few as 6% may do so.[31] Consequently, the numbers of children in the public care system are fewer than in comparable western societies.

- **Placements**

Children who are unable to continue living at home are, as an initial priority, to be found accommodation in another family. In 2001, for example, some 20,000 children and young people were at some time during the year being cared for outside their own homes. Most of these, 72%, were looked after in foster care homes and the rest in institutions of various kinds. According to a recent government report:[32]

> During 2001–2005 the number of children and young people in foster care has increased by 5–10% while the number of placements in institutional care has levelled off. It is primarily placements in emergency foster homes that have increased. Out of home care is most common in the 13–17 age group – a group that represented about half of the 24-hour care. Children of persons born abroad are over-represented in institutional care.

The reasons why a child cannot continue to live at home may include an inadequate home situation, his or her own behaviour or a disability of some kind. However,

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[28] There is a corresponding rule in the Care of Young Persons Act.

[29] See, the parliamentary report *Child Abuse and the Police and Public Prosecution Service: Methods and processing times* (Barnmisshandel - Polisens och åklagarnas handläggningstider och arbetsmetoder - SOU 2000:42).

[30] Parenthood and Guardianship Code, Amended 1983, Chapter 6, Section 1. Sweden and six other countries (Austria, Denmark, Finland, Germany, Iceland and Norway) have laws explicitly prohibiting physical punishment of children.

[31] However, note the 2005 report of the National Board of Health and Welfare which includes data on the number of children who have died during the last five years as a consequence of assault by another person (32), who were discharged from hospital after treatment as a consequence of assault (1,295) and the number of children who have sought care at an emergency centre or emergency clinic (approximately 2,500 children per year).

[32] See, Sweden's Fourth Periodic Report to the U.N. Committee on the Rights of the Child 2002–2007, 'Alternative Care' at para 127.

even in those circumstances where children are admitted to the public care system they do not, as in the U.K. and the U.S., then become liable to enter the adoption process (see, further, below).

Placements due to the person's home situation or own behaviour are granted under the Social Services Act or the Care of Young Persons (Special Provisions) Act. Placements due to disabilities are granted under the Support and Services for Persons with Certain Functional Impairments Act 1993.

10.2.2 Resulting Trends in Types of Adoption

Since the late 1960s, as the domestic availability of voluntarily relinquished babies steadily faded, childless couples in Sweden have had to turn to intercountry adoption as the only alternative source available. Consequently, the primary characteristics of adoption in this jurisdiction are its relatively low level of applicability to Swedish children and the high incidence of babies adopted by third parties or 'strangers', where the adopter is unrelated even racially to the child. In 2000, for example, only 113 adoptions concerned Swedish children. In 2005 the figure was 172, of which: 132 children were adopted by a step-parent, 17 children placed in foster care were adopted by the foster parents and 23 children aged between 0–1 years born in Sweden were adopted. In the same year, 1,083 children between the ages of 0–10 years came to Sweden from other countries: 773 from Asia, China in particular (462) and Korea (104); 110 from Europe, including Russia (34); and 129 from Africa, mostly 46 from South Africa (46) and Ethiopia (37).[33] The overwhelming majority of adopted children are very young; in 2000, only about 10 young adults (i.e. between 15 and 21 years of age) were adopted.

10.2.2.1 Third Party Adoptions

In this jurisdiction, where birth parent/s or other family members are unable to undertake permanent care responsibility, it is nevertheless unlikely that adoption by a third party will be an option for the child concerned. Long-term foster care is the preferred means of providing for a child in need of an alternative to care in his or her family of origin.

- **Adoption of children with special needs**

Swedish children with special needs very rarely enter the adoption process. The policy has long been that as far as possible, children with disabilities are to be treated the same as others and given the chance to go on living in the parental home.

[33] See, Singer, A., 'The Current Situation in Sweden', paper presented at the conference *Legal Framework for Adoption: Putting Children's Interests First*, State Duma, Moscow, 19–20 October 2006.

The parents of children with disabilities, in need of occasional relief and the opportunity to devote time to any other children in the family, can be given such assistance either under the Support and Services for Persons with Certain Functional Impairments Act 1993 if the child qualifies under this law, or under the Social Services Act. On 1 September 2001, for example, almost 14,800 children and young people aged 0–22 years were receiving one or more measures under the Support and Services Act.

Children with learning disabilities constitute a discrete and separate group. As the vast majority of these children now live at home with their parents, the support they and their parents receive—and the way in which it is structured—is crucial to the child's development. Swedish policy recognizes that over and above the needs all children and young people have as they grow up, children with learning disabilities need special support to compensate for their functional impairment.

- **Child care adoption**

In Sweden, statutory intervention in family affairs on child care grounds occurs much less frequently than in the U.S. or U.K., with proportionately far fewer children compulsorily in the public child care system and fewer still leaving it to enter the adoption process. Although, as mentioned above, there is a legal procedure for a transfer of parental rights to foster parents in the absence of parental consent, which could then lead to adoption. In practice, however, this is never used which is a clear indication of public policy. When children do enter the care system it is much more likely to be a consequence of consensual than coercive state intervention with all crucial rights and responsibilities remaining firmly vested in the birth parent/s. A policy of working towards family reunification takes precedence over compulsory adoption, even if this was considered desirable, and this is facilitated by the practice of foster care placements within the extended family wherever possible.[34] An estimated 15% of the children placed in foster care are found accommodation with relatives.

- **Open adoption**

Adoption in Sweden is very largely intercountry adoption and in such cases the dictates of geography allow few opportunities for practicing 'openness' in terms of arrangements for ongoing contact between an adopted child and members of their family of origin. However, as a consequence of a ministerial memorandum,[35] emphasizing the importance of informing a child about the adoption and about his or her origins, it has been suggested that a provision be introduced into the Parental Code requiring the person or persons who adopted the child to inform him or her about the adoption as soon as this is deemed appropriate; thus reinforcing the moral obligation of 'telling' with the full force of law. It is also noteworthy that in 1984,

[34] For current provisions concerning the committal of children to custodial care in Sweden and information on what kinds of premises children committed to care may be kept at see CRC/C/65/Add. 3, pp. 152–154.

[35] *Parental Consent to Adoption, etc*. (Föräldrars samtycke till adoption m.m. – Ds) 2001:53.

Sweden introduced legislation to allow children born as a result of IVF to discover the identity of their donors.

- **Same sex adoptions**

Since February 1, 2003, gay and lesbian couples registered in a legal partnership, permitted in Sweden since 1995, have been able to adopt children both within the country and from abroad.[36] This legislation brought the law in Sweden into line with that prevailing in Denmark, Iceland and the Netherlands.[37] In addition, legally registered partners and cohabitees of the same sex are also eligible to be appointed as special joint custodians of children.

- **Intercountry adoptions**

Relative to its size, Sweden, more so than other western nations, has for some decades relied particularly heavily on intercountry adoption as a means for meeting the needs of its prospective adopters (for outcomes in respect of the children involved, see, further, Chap. 5). As explained by the Swedish Intercountry Adoptions Authority (MIA):[38]

> Since the mid-1970s, between 900 and 1,800 children have come to Sweden every year for adoption. Today there are an estimated 45,000 Swedes from different parts of the world who have been adopted in Sweden. Statistics show that one out of every hundred new children in Sweden today is adopted from abroad.

Approximately 90% of all children who have been the subjects of intercountry adoption, arranged through an authorised agency, have come from either Colombia, India, China, Poland, Russia, South Africa, South Korea, Thailand, Vietnam and Belarus. This trend is likely to accelerate following the introduction of the Intercountry Adoption Affairs Act 2005 (see, further, below).

10.2.2.2 First Party Adoptions

The law governing adoption of a child by a person or persons related to him or her was the subject of a ministerial memorandum[39] which considered the profound legal implications of an adoption order, together with the child's need of contact with and access to both its biological parents. It suggested that an adoption against the wishes of a non-custodial parent was inadvisable. This will require the provisions

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[36] Legislation making such provision was passed in the Swedish parliament by 198 votes to 38, with 71 abstentions.

[37] The Netherlands, unlike Sweden, has a policy of refusing homosexual couples permission to adopt from abroad on the grounds that this could alienate 'sending' countries to the detriment of heterosexual Dutch couples seeking intercountry placements.

[38] See, MIA, *Adoption in Sweden: Policy and Procedures Concerning Intercountry Adoption*, 2005. Moreover, "one out of every 50 children is an adoptee" (see, Centre for Adoption Policy at http://www.adoptionpolicy.org/pdf/eu-sweden.pdf).

[39] *Parental Consent to Adoption, etc*. (Föräldrars samtycke till adoption m.m. – Ds) 2001:53.

on consent to adoption to be amended so that consent must be obtained from both parents, i.e. including the one without custodial responsibility.

Two partners in a registered partnership can now jointly adopt a child and one may adopt the other partner's children.

10.3 Overview of Modern Adoption Law and Policy

The first adoption legislation was introduced in 1917. It was then viewed as an alternative to foster care and as offering a more permanent solution for the child. The legal consequences of adoption were at first very limited with retention of legal ties to the birthparents. After 1958 adoption was strengthened with the removal of all legal ties to the birthparents. In 1970 all adoptions, regardless of when they had been granted, were transferred into permanent and unqualified orders. Since then Sweden has further developed its adoption law.

The civil law context for adoption in Sweden is evident in many ways. Most apparent is the absence of any comparable body of adoption specific regulatory legislation, characteristic of common law nations, that logically itemizes and consolidates all provisions and procedures relating to the rights and responsibilities of parties and agencies in separate laws neatly labeled in accordance with a clearly defined subject. Missing also, is the weight given to case law precedents; there is no judicial trail of sequential judgments recording the milestones in the development of adoption law and practice such as would be familiar to those from a common law background. Such differences indicate but fail to fully convey the extent of the consequent reliance on holistic principles, established practices and the broad consensually based nature of Swedish law.

10.3.1 Contemporary Adoption Related Legislation

The fundamental regulations concerning adoption are to be found in Chapter 4 of the Parental Code, as amended. In the case of foreign adopted children, some international civil laws also apply.

10.3.1.1 The Parental Code 1949

The Parental Code, introduced in 1949 and since considerably amended, states in Chapter 6, section 1 that children should be treated with respect for their individuality. They may not be subjected to physical punishment or other degrading treatment. By legally giving children these 'rights', the law also defines the responsibilities of parents (or other caretakers). Although the state ascribes to itself the right to intervene if basic needs are not respected or fulfilled, this Code differs from comparable

common law legislation in that its objective is educational rather than coercive and a breach of its provisions will not trigger criminal sanctions. The Code continues, as amended, to provide the foundations for the law in Sweden as it relates to children.

- **Chapter 4 of the parental code**

This Chapter governs domestic adoption in general. It requires adoption applications to be decided by a court. Permission to adopt will then be given only when it is considered to be in the best interest of the child and the adoptive parents have brought the child up, or intend to bring the child up, or if the personal relationship between the child and the adoptive parents give rise to special reasons for allowing adoption.[40] The Code also contains the following provisions in relation to adoption:

- A spouse may adopt the other spouse's child[41]
- A person more than 12 years of age cannot be adopted without his or her consent[42]
- The opinion of a child under 12 years shall be taken into consideration when judging whether adoption is in their best interests[43]
- A person under 18 years cannot be adopted without the consent of their parents[44]
- Non-consent by a parent without custody rights must not prevent an adoption that is considered to be in the best interest of a child[45]
- Adoption cannot be granted if either side has been given or offered financial compensation[46]
- In any investigation of the adoptive parents' suitability, information should also be given about the child and if possible about the child's view on adoption[47]

10.3.1.2 International Legal Relations Concerning Adoption Act 1971

This legislation clarified the circumstances in which Swedish courts have jurisdiction in relation to an adoption where the child or one of the parties is a foreign national. Applications concerning adoption are considered by a Swedish court if the applicant or applicants have Swedish citizenship or are domiciled in Sweden (section 1). An application will be considered in accordance with Swedish law (section 2). An adoption order made in a foreign state shall apply in Sweden if the

[40] The Parental Code, Chapter 4, section 6.

[41] *Ibid*., Chapter 4, section 3.

[42] *Ibid*., Chapter 4, section 5.

[43] *Ibid*., Chapter 4, sections 6 and 10.

[44] *Ibid*., Chapter 4, section 5(a).

[45] *Ibid*., Chapter 4, section 10. Also, see, *Söderbäck v. Sweden*, (Judgment 28 October 1998, 113/1997/897/1109).

[46] *Ibid*., Chapter 4, section 6.

[47] *Ibid*., Chapter 4, section 10.

applicants were citizens of, or were domiciled in, the foreign state when the order was made. An adoption decision is automatically valid in Sweden if it relates to a foreign adopted child, and the adopter was a citizen of or resident in that foreign state when the decision on adoption was taken.

10.3.1.3 The Care of Young Persons Act 1980

This legislation governs the circumstances when children and youths may be taken into care without consent from their parents, or from the children themselves when aged 15 or more. Generally, Swedish child welfare has its main emphasis on social support and service, rather than on child protection. Swedish child welfare legislation makes no strict distinction between child protection and youth justice: whether behaviour stems from deprivation or depravation it is viewed as giving rise to welfare considerations rather than to criminal proceedings. Local authorities mainly work with social support to and in partnership with families, regardless of the age of the children or the reason for intervention.

10.3.1.4 The Care of Young Persons (Special Provisions) Act 1990

This Act deals with the age of criminal responsibility and the consequent procedures applicable where a juvenile or young adult has been engaged in an offence.[48] It was amended, with effect from 1 July 2003, to strengthen the child's legal position. A provision was then inserted stating that the best interest of the young person shall be the deciding factor in any decisions taken under the Act, that the young person's point of view shall be clarified and that account shall be taken of their wishes with due consideration of his or her age and maturity. Further, when a child has been placed at the same family home for three years, the social welfare committee shall determine—in accordance with the best interests test—whether there is reason to apply for a transfer of custody to the foster parents.

10.3.1.5 The Intercountry Adoption Intermediation Act 1997

This legislation applies where a child from overseas is to be adopted by a person or persons domiciled in Sweden. According to the Act, The Hague Convention has the standing of law in Sweden. Adoptions in accordance with the Convention are automatically valid in Sweden. In all other cases, adoption applications are determined by a Swedish court in accordance with the Children, Parents and Guardians Code. Other legislation was simultaneously introduced: the International

[48] In Sweden, the age of criminal responsibility is 15; there are no offences under Swedish legislation which may be exclusively committed by juveniles or by young adults (a young adult is a person who is older than 15 and has not attained the age of 21).

Adoption Agencies Act 1997; and the International Adoption Assistance Act 1997 (now repealed).

The 1997 legislation requires intercountry adoptions to be carried out through an MIA authorized non-profit organization (section 3). In individual cases private adoptions can be allowed if the MIA has given permission before the child leaves its home country (section 4). Breach of this regulation can result in fines (section 15).

10.3.1.6 The Social Services Act 2001

Under Chapter 6 of the 2001 Act, children may not, without the consent of the social welfare committee, be received for permanent care and upbringing in a private home that is not that of one of their parents or of any other person with custody rights.[49] The social welfare committee is required to satisfy itself that certain conditions have been met where the child concerned is resident abroad and is being received for the purposes of adoption.[50]

Sections 12–16 of the same Chapter, govern intercountry adoptions. This Act was amended in 2005 to provide that a person or persons intending to adopt a child from another country must have the consent of the local social welfare committee in their home municipality before the child leaves its country of origin. Prior to adoption, the adoption applicants must also have undergone parenting training arranged by the municipality.

10.3.1.7 The Intercountry Adoption Affairs Act 2005

This legislation enabled the National Board for Intercountry Adoptions (NIA) to be reconstituted as the Swedish Intercountry Adoptions Authority (MIA) from 1 January 2005 and for the latter to become the Swedish central authority for the purposes of The Hague Convention.

10.3.2 International Law

Sweden has ratified both the U.N. Convention on the Rights of the Child (in June 1990) and the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1997), but has withdrawn from the European Convention on the Adoption of Children.

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[49] As incorporated in the Social Services Act 2001, section 6.

[50] *Ibid*., section 12, as amended by the Intercountry Adoption Affairs Act 2005.

10.3.3 Adoption Principles and Policy

In Sweden, adoption without parental consent has never become part of practice. The public child care system has steadfastly avoided the use of adoption even in respect of children for whom parental consent was available.[51]

10.3.3.1 The Interests of the Child

The government has stated that a key component of its policy in relation to children is that "the best interests of the child are to guide decision-making and all measures relating to children and young people."[52]

10.3.3.2 Policy

Government policy in relation to intercountry adoption was clearly articulated in an introductory statement to its Bill which presaged the present 2005 Act. It then explained that its aim was:

> … to secure both an ethical and transparent adoption operation, which proceeds in the best interests of the child and to formulate development cooperation which in the long term improves social and economic conditions in the countries of origin. The ultimate goal should be that intercountry adoption becomes unnecessary.

Sweden's withdrawal, effective from January 4, 2003, from the European Convention on the Adoption of Children (which it had ratified on January 25, 1968) was a decision taken on policy grounds. At that time Sweden's new adoption laws permitting adoption by homosexual couples in registered partnerships conflicted with a prohibition on such adoptions contained in Article 6(1) of the Convention. The decision to formally denounce the provision and disassociate itself from the Convention is a not untypical Swedish act of leadership in matters of social policy, duly emulated eventually by its European neighbours.

10.4 Regulating the Adoption Process

Since 1998 the municipalities' social welfare boards have had special responsibility for adopted children and young people. The courts also have a key role to play. In practice, as the adoption process largely concerns intercountry adoptions, the lead regulatory body is the Swedish Intercountry Adoptions Authority (MIA).

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[51] Richard Barth, a leading U.S. child welfare researcher, noted with some surprise that Swedish child welfare workers did not promote adoption of children in long-term foster care, even when birth parents suggested it. He regarded the absence of adoption in Swedish child welfare practice as a problem, considering every child's primary need of a family for life (Barth, 1992).

[52] See, *Sweden's Fourth Periodic Report to the UN Committee on the Rights of the Child 2002–2007*, 'Child Policy and its Goals' at para 54.

10.4.1 Length and Breadth of the Process

The fact that the process accommodates pre-placement counselling, requires consents to be sought from all parties including the child concerned (in many cases) and that of the relevant Social Welfare Committee, while also allowing for post-adoption support services, results in Swedish adoptions being rather more complex and thus lengthier than those of some other countries. The process can take two to three years from when the Swedish authorities approve the application of the adoptive parents until the parents receive the child.

10.4.2 Role of Adoption Agencies and Other Administrative Agencies

Sweden currently has six registered agencies specializing in intercountry adoption. The oldest of these is the Adoption Centre Association, established in 1969, which in 1996 arranged approximately 600 (or 72%) of all intercountry adoptions. They are regulated by the MIA according to criteria that includes: a proven capacity to act as an intermediary; the need for intercountry adoption to be an activity conducted independently of any other work done by the association; and the requirement that the association should accept all prospective adoptive parents who have been deemed suitable by the Swedish social services. The authorization of associations involved in intercountry adoptions can be withdrawn.

10.4.2.1 The Social Welfare Committee

Chapter 6, section 12 of the Social Services Act 2001 requires applicants to secure the consent of their local Social Welfare Committee to receive a child for adoption before applying to an organization for a child. That consent will be conditional upon the Committee receiving a satisfactory report from the assessing social worker (see, further, below). Once the consent has been received the applicants can apply to one of the adoption organizations. When a certain child has been proposed for adoption the applicants must then apply for permission from the Social Welfare Committee to continue with the adoption procedure.

10.4.3 Role of the Determining Body

Under Chapter 4, section 9 of the Parental Code, the court for the district in which the prospective adopters reside has jurisdiction to determine their adoption application. Where this is not possible or appropriate then the matter is determined by Stockholm City Court.

10.4.3.1 The Swedish Intercountry Adoptions Authority (MIA)[53]

This government body, which based in Stockholm,[54] must approve any adoption or a decision in favor of an adoption by a Swedish court. It is responsible for all intercountry adoptions in Sweden and acts as the Swedish Central Authority for the purposes of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption. If an adoption has been completed in the child's country of origin, the adoptive parents must, nevertheless, apply to the Authority to have the adoption order declared valid in Sweden. An adoption abroad is invalid if it was carried out for a purpose other than to create or strengthen a parent-child relationship.

10.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

Adoption in Sweden is a consensual process. This imposes certain entry requirements on the parties concerned in addition to the usual eligibility and suitability criteria.

10.5.1 The Child

Under Chapter 4, section 5 of the Parental Code the consent of a child aged 12 years or more is a legal requirement for their adoption. However, consent is not required in circumstances where the child is either aged 16 years or less and it would be to his or her detriment to be asked or the child is permanently prevented from consenting due to mental health or other such serious difficulties. Under section 5(a) a person aged less than 18 may not be adopted without the consent of their parents. Under section 6, in relation to adoption, there is a requirement to take a child's opinions into account in accordance with their age and maturity. Unlike many other modern western jurisdictions, the adoption process in Sweden is available to young persons without an upper age limit provided that it confirms a parent/child relationship; it can, therefore, be used in respect of adults with a learning disability.

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[53] This government body was: established in 1973 as the Swedish Council for Intercountry Adoptions (NIA); in 1981 it became the National Board for Intercountry Adoptions (NIA), within the Ministry of Health and Social Affairs; and in 2005 it was relaunched as the Swedish Intercountry Adoptions Authority (MIA).

[54] See, further, at (info@mia.adopt.se) (www.mia.adopt.se).

10.5.2 The Birth Parents

The consent of birth parents is a prerequisite for the adoption of their child (i.e. less than 18 years of age). Under Chapter 4, section 5(a) of the Parental Code, a mother cannot give a valid consent to the adoption of her child until she has sufficiently recovered from her confinement. This provision also states that consent is not required where the birth parent is suffering from serious mental health problems, or has had no share in the custody of the child or if their whereabouts are unknown.

10.5.3 The Adopters

The criteria to be satisfied by prospective adopters in Sweden are not dissimilar to those required of their counterparts in other modern western nations.

10.5.3.1 Eligibility

Any man or woman aged 25 years or older,[55] whether single or married and less than 42 years of age at the time of application (the age limit can be raised in special circumstances), is eligible to adopt. The right to apply to adopt is also provided for persons aged 18–25 if the adoption involves a related child, e.g. a niece or a nephew, or the child of his or her spouse or if special circumstances exist.[56] Spouses must adopt jointly.[57] However, one spouse alone may adopt a child when the other spouse's whereabouts are unknown or is suffering from a serious mental illness. One spouse may also, with the consent of the other spouse, adopt that spouse's child as his or her own child.[58] Same sex couples can adopt under the same conditions as heterosexual couples as long as they have registered their partnership.[59] Cohabiting couples cannot adopt together. Single parent adoption is possible and has increased considerably in recent years. The prospective adopters must be legally resident in Sweden.

10.5.3.2 Suitability

The municipal social services department (or 'Social Welfare Committee') completes a home study report in relation to the prospective adopter(s), their circumstances and on their general suitability as adopters. The investigating officer

[55] The Parental Code, Chapter 4, section 1.

[56] *Ibid*., Chapter 4, section 1.

[57] *Ibid*., Chapter 4, sections 3–4.

[58] *Ibid*., Chapter 4, section 3.

[59] The Partnership and Adoption Act came into effect on February 1, 2003.

will seek evidence relating to family history including childhood experience and adolescence, education, occupations and relationships with parents, brothers and sisters; current living conditions; previous and present state of health; personality; religious affiliation and/or attitudes; marital status and marital relationships; motives for adoption; knowledge and experience of children, ideals of upbringing; and expectations and preparations in respect of parenthood. The officer must be satisfied as to the applicant/s knowledge of children and of the latter's needs at different developmental stages. References will be sought from at least two persons who know the applicants well and an assessment is then made of the resources and abilities of the applicants as adoptive parents. A full report, assessing the prospective adopters in accordance with the above criteria, is compiled by the officer.

In relation to intercountry adoptions, the importance of satisfying suitability criteria is evident from the following excerpt from Chapter 6 of the Social Services Act:

> A child domiciled abroad, may not be received for purposes of adoption, by a person who is not the child's parent or guardian, without the consent of the Social Welfare Committee. Consent must be obtained before the child leaves the country of domicile.
>
> Consent may only be given if the applicant is suitable to adopt a child. The assessment of suitability must pay particular attention to the applicant's knowledge and insight concerning adopted children and their needs and the implications of the planned adoption, as well as to the applicant's age, state of health, personal qualities and social network. Moreover, prior to adoption the applicant must have taken part in a parenting course commissioned by the municipality.
>
> If the applicant has previously adopted a child from abroad, consent may be given even if he or she has not taken part in a parenting course.
>
> The consent will lapse if the child has not been received into the home within two years of consent being given.

The consent of the Social Welfare Committee is essential for the adoption process to formally begin.[60] If approved, the subject/s must make an adoption application to their local district court within the ensuing two years. If rejected, the subject/s can appeal to an administrative court.

10.6 Pre-placement Counselling

The adoption of Swedish children, whether following voluntary relinquishment or judicial removal of parental rights, is such a rare phenomenon that pre-placement counselling is in practice a service for prospective adopters rather than the birth parent/s. Parental training before adoption is provided by authorised agencies and evidence of having completed such a training course is an eligibility requirement for prospective intercountry adopters. The quality of parental training and

[60] Social Services Act 2001, section 25.

opportunities for participation varies countrywide, as does the content of the training and its cost.

10.7 Placement Rights and Responsibilities

In practice, by far the majority of Swedish adoptions are in respect of children from overseas. As soon as such a child arrives in Sweden the local social welfare authority must be notified.

10.7.1 Placement Decision

Chapter 6 of the Social Services Act requires the consent of the local social welfare committee as a prerequisite for the placement of any child in a home that is not that of the child's parent/s or the home of a person with custody rights in respect of that child. The placement decision cannot, therefore, be taken on a private basis by the birth parent/s whether or not the proposed placement is with a relative. An adoption agency cannot place a child within four weeks of his or her birth.[61]

10.7.2 Placement Supervision

From the arrival in the jurisdiction of a child for adoption until the completion of the adoption process, the placement is required to be supervised by the local social welfare authority.

10.8 The Hearing

All matters concerning adoption are heard by an ordinary court of law, which will pass judgment after considering the report compiled by the officer acing on behalf of the Social Welfare Committee, seeking further advice if necessary from the Committee or from the Swedish Migration Board if the child comes from outside the Nordic region. In certain cases when an adoption has taken place abroad, it is valid automatically in Sweden. Where the subject of an intercountry adoption has not been adopted in their country of origin then the National Board for Intercountry Adoptions (MIA) must approve the adoption, or else the prospective adopters have to apply by petitioning a district court.

[61] Adoption Act 1974, section 15(1).

Under Chapter 4, section 6 of the Parental Code, the court is required to satisfy itself that "the adoption may suitably take place" and may not grant the application unless it finds that the proposed adoption is for the benefit of the child.

10.8.1 Where Consent Is Available

As adoption is an almost exclusively consensual process in Sweden, the law gives particular attention to ensuring that all relevant consents are acquired. The consent of birth parent/s (or legal guardian[62]) of a child who has not reached the age of 18 years must be obtained. In addition, the consent of the child concerned if aged 12 years or older, must be available unless the statutory grounds for dispensing with the need for it can be satisfied.

10.8.2 Where Consent Is Not Available

Non-consensual adoption, following a judicial removal of parental rights due to conviction for abuse or neglect of the child concerned, while possible, is extremely rare in Sweden. A child or young person, under the age of 16 years, may be adopted notwithstanding an absence of consent if to seek it would be to their detriment, or if they are mentally ill.[63]

Under Chapter 4, section 6 of the Parental Code, in circumstances where the consent of the child is not required, the court must nevertheless take into account his or her wishes having due regard to their age and maturity. Similarly, under Chapter 4, section 10, in circumstances where the consent of the birth parent/s is not required, the court must nevertheless hear their views whenever possible.

10.9 Thresholds for Exiting the Adoption Process

An adoption order cannot be made until the child concerned is at least six weeks old and at least three months have passed since the application was lodged. The only substantive criterion for making an adoption order, in circumstances where all eligibility and suitability requirements have been satisfied, is that the order if made would be in the best interests of the child concerned.

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[62] The Children, Parents and Guardians Code, Chapter 4, section 5a.

[63] *Ibid*., section 5.

10.9.1 The Welfare Interests of the Child

The making of an adoption order is conditional upon a finding that to do so would be in accordance with the best interests of the child. In the absence of the child's consent, the court must seek and take into account his or her wishes, having due regard for their age and maturity. The court must also be satisfied that no financial or other form of consideration has been given or promised in relation to the adoption.[64]

10.9.2 Representing the Child's Welfare Interests

Under the Social Services Act 2001 and the Care of Young Persons (Special Provisions) Act 1990 children who have reached the age of 15 may plead their own case in a court of law or in matters brought for adjudication. Children under 15 should be heard if in the opinion of the court they are unlikely to suffer harm as a result and younger children are sometimes also given the same opportunity.

The rights of children involved in adoption proceedings were strengthened by provisions introduced in the Intercountry Adoption Affairs Act 2005.

10.10 The Outcome of the Adoption Process

The only possible outcome is the granting or refusal of the adoption order sought. An adoption incorporating conditions such as contact rights between the adopted child and members of their birth family is possible in Swedish law but is never used. Chapter 6, section 15 of the Parental Code states that the child has the right to contact with persons other than a parent. This could be used after adoption, and has been considered in a few cases but that step has never been taken.

Under Chapter 4, section 11 of the Parental Code, a right of appeal is available to an applicant or other party, in respect of any decision taken by the court in relation to an adoption application.

10.11 The Effect of an Adoption Order

Any adoption carried out in a foreign jurisdiction, in accordance with The Hague Convention, is valid in Sweden as are all other domestic adoptions conducted as outlined above.

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[64] In Sweden, the "best interests" principle was part of the Parental Code even before the Convention on the Rights of the Child.

10.11.1 Effect on the child

Under Chapter 4, section 8 of the Parental Code, the effect of adoption is to sever all legal bonds between the child and their birth parents and place the child in a legal relationship with the adopters as though born to them. The same paragraph provides an exception to this rule where otherwise stated or where it follows from the nature of the situation. This, for example, allows adopted siblings to marry since the impediments against marriage are based on genetic kinship. The adopted child inherits from, and is inherited by, its adoptive parents and their relations. Swedish regulations on custody and maintenance also apply. The child acquires the family name of the adopters but can also be given permission to retain their former family name in combination with the new name if so desired. In fact and in law children 12 years or older may not have their names changed without their consent.

A child who is aged under 12 and who has been adopted by a Swedish citizen automatically receives Swedish citizenship upon adoption if:

- The child has been adopted as the result of a decision taken in Sweden or in another Nordic Council country
- The child has been adopted as the result of a decision taken abroad and approved in Sweden by the National Board for Intercountry Adoptions (MIA)
- The adoption is valid under Swedish law

The adoption must have been officially decided or approved after 30 June 1992. A child aged 12 or more at the time of their adoption may acquire Swedish citizenship by application.

Similar rules apply in respect of residency status. Children under the age of 12 become Swedish citizens automatically when adopted and therefore do not need to apply for a residence permit while older adopted children can acquire residency status on application. In 2000, for example, residence permits were granted to almost 900 adopted children.

An adopted 'child' may marry or enter into a registered partnership with a birth 'child' or with another adopted sibling of their parents but, since 2005, is prohibited from marrying their adoptive parent. A foreign adopted child under the age of 18 may be granted a Swedish residence permit without the requirement of having lived with the adoptive parent, if the latter was resident in Sweden at the time of the adoption.

10.11.2 Effect on the Birth Parent/s

The effect of an adoption order is to absolutely and permanently terminate all legal rights and duties of the birth parent/s in respect of the subject of that order. There is no possibility, as in many common law regulatory systems, for birth parents to acquire or retain residual rights in respect of their adopted child.

10.11.3 Effect on the Adopters

An adoption order vests in the adopter/s all the rights and responsibilities in respect of the child concerned that previously belonged to the birth parent/s. Under Swedish law, a parent is now prohibited from marrying their adopted child.[65]

10.11.4 Dissolution of an Adoption Order

An adoption cannot be annulled, revoked, cancelled or otherwise qualified.

10.12 Post-adoption Support Services

Since January 1, 1998 the municipalities' social welfare committees have, according to Chapter 5 paragraph 1 of the Social Services Act, an explicit responsibility for providing help that may be needed after an adoption. This responsibility does not include service provision in respect of adult adoptees.

10.12.1 Adoption Support Services

Since January 1, 1989 a state grant has been payable to the adopters of children from abroad. The grant amounts at present to SEK 40,000 per adopted child, and is paid out on completion of the adoption process. As this is payable in circumstances where the child is less than 10 years of age when placed with the adoptive parents, in practice it is applicable to most adoptions.

10.13 Information Disclosure, Tracing and Re-unification Services

In Sweden there is no formal procedure for responding to requests for information, tracing and re-unification involving a system of designated agencies regulated by government bodies. There is no law specifically assigning rights or responsibilities in respect of these matters.

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[65] As a consequence of provisions inserted into the Marriage Code (Chapter 2, section 3, third paragraph) by the Intercountry Adoption Affairs Act 2005.

10.13.1 Information Disclosure

An adoptee has long had a right to information regarding the identity of his or her birth parents, whether or not the latter wish to retain their annonymity.[66] The relevant records are kept and maintained at the central social registry.

10.13.1.1 Post Adoption Contact

Social services have always been willing to trace birth parents and mediate contacts with them and the adult adoptee, or provide information about an adoptee and their birth parent/s, or arrange for exchanges of information between them, when one or other has not wished to make personal contact. Where information on an adopted child's birth parents could be found, the associations mediating the adoption were obliged to give it to the adopted child, upon request.

10.13.2 Tracing and Re-unification Services

Again, Swedish law does not provide any explicit rights or services in this context. Nonetheless, where both a child and their biological parents wished to meet, the agencies involved in the adoption have, as a matter of practice, always been willing to facilitate such arrangements.

10.14 Conclusion

The civil law tradition in Sweden provides the setting for an adoption process that is deeply consensual in nature, judicially determined, results in a full adoption order and is very largely concerned with children who are born outside the jurisdiction.

The long established tradition of recourse to intercountry adoption is driven, as elsewhere in western developed nations, by the rapidly worsening ratio of voluntarily relinquished babies to prospective adopters, for all the usual well documented reasons, and is influenced also by a resolute government policy to invest resources in supporting and restoring failing family units. Not until rehabilitation of the child/parent relationship has proved impossible will alternative arrangements, usually long-term foster care, be introduced. This policy leads to few children being admitted to the public child care system. Those that are admitted mostly come with parental consent, are usually considerably older that their U.K. counterparts and thus enter with attachments and opinions that would make third party adoption problematic. In practice, although non-consensual adoption from care is legally

[66] Laws of Confidentiality.

possible, children are simply not placed for adoption either with or without parental consent. The fact that proportionately fewer children are compulsorily admitted to the public child care system in Sweden than, for example, in the U.K. and the U.S., and none leave it by way of state sponsored adoption, is arguably due in large part to the secure bond that exists between the Swedish state and its citizens. In a child care context, this was illustrated by the widespread acceptance of the pioneering government policy to prohibit parental chastisement of children in 1979, resulting in an immediate and sustained fall in rates of children admitted to care for reasons of child abuse.

There are some particularly notable features of the Swedish adoption process. Its fundamentally consensual nature, for example, is illustrated by the fact that the consent of a person more than 12 years of age is a pre-requisite for their adoption and, if they are aged less than 18, then parental consent is also necessary. The fact that there is no upper age limit for such a person to be adopted in Sweden is unusual and indicates an orientation of the process towards welfare considerations. It is a process that has long embraced principles of ‘openness’ and, unlike many of its common law counterparts, has for some time also provided pre and post adoption support services. Again, unlike most other jurisdictions, Swedish law explicitly states that adoption cannot be granted if either side has been given or offered financial compensation.

Chapter 11
The Adoption Process in France

11.1 Introduction

The Republic of France, an economically thriving developed nation, with a population of some 64.5 million people, has a legal system based on the civil law and governed by a constitution.[1] The principles underpinning that system are drawn from the Declaration of the Rights of Man and of the Citizen[2] while its basic rules are to be found in the Napoleonic Code.[3] The law is laid down in statute form for interpretation and application by the judiciary. The strong democratic and egalitarian traditions of this nation, developed through its revolutionary experiences of the late 18th century, have done much to shape contemporary family law and the role of adoption within it.

This chapter outlines the adoption process in France in accordance with the template of legal functions (see, Chap. 3). It is primarily concerned to identify and examine those distinctive features of this archetypal civil law jurisdiction that distinguish the legal aspects of the process from its common law counterpart. As with the other jurisdictions studied, the chapter begins by considering the social and legal context of adoption, the emerging trends in types of adoption and their more prominent characteristics. It notes current government policy and identifies the relevant legislation before examining in some detail the regulatory framework, the main agencies and processes and the role of the parties as they relate to the adoption process. The chapter concludes with a summary and assessment of the more distinctive and significant characteristics of the contemporary adoption process in France.

[1] See, the Constitution of October 4th 1958 and also the preamble of the Constitution of October 27th 1946.

[2] August 26th 1789.

[3] Formulated by Napoleon to give effect to the principles of the French Revolution, the Code was promulgated in 1804.

K. O'Halloran (ed.) *The Politics of Adoption,*

11.2 Background

The social construct of 'family' as defined in French law is quite singular. For legal purposes the rules and proceedings governing family matters are to be found in the Civil Code, as amended, but the Code itself is a product of the Napoleonic era and is conceptually rooted in the revolutionary ideology that gripped France at the turn of the 18th century. Central to the meaning then attached to 'family' is the concept of 'filiation'.[4] This continues to be of key significance in family law and the development of adoption law and practice in France has to be viewed in the overall context of 'filiation'.

While the debate regarding the ideological interpretation given to the role of the family in an egalitarian society, and the symbolism associated with status, is too complex to be explored at present it is necessary to note the importance attached to matters of social and cultural identity in the Civil Code. In a break from the feudally structured pre-revolutionary France, where the integrity of family lineage and the rank ordering of families was paramount, the new concept of 'filiation' was to be socially rather than genetically determined. The law gave effect to this by ensuring the existence of opportunities for status relationships to be ascribed, instead of being automatically acquired, and for putting in place rules governing the conferring of status. So, French citizenship is not simply acquired by being born in France nor is French ethnicity seen as synonymous with its borders (it accommodates the Quebecois, for example, but not necessarily all resident Algerians or others with their own distinct ethnic orientation). Again, rights of inheritance are not immutable, they can be changed by parental action (adoption etc.)[5] and even filial attachment with the ancillary right to claim the family name does not automatically come as a birthright (mothers can choose not to acknowledge their children). Family law and the law of adoption have to be seen in this context: matters of individual and cultural identity, the role of the family unit in society and the acquisition of status based relationships, are more socially determined than genetically prescribed.

11.2.1 The Social Context Giving Rise to Adoption

In France, as in other modern western nations, the ready access to improved methods of contraception, the availability of legal abortion, the change in society's attitude towards 'single mothers', coupled with more relevant welfare benefits, the introduction

[4] See, further, Fulchiron, H., 'Egalite, Verite, Stabilite: The New French Filiation Law After the Ordonnance of 4th July 2005', *The International Survey of Family Law*, Jordan Publishing, Bristol, 2006, pp. 203–216.

[5] See, Ancel, L'Adoption dans les legislations modernes (1958) where it is pointed out that between 1804 and 1939 a provision in the Civil Code provided that adoption did not remove a person from his family of origin; the function of adoption was to add to the adopted person's rights, not take away (paras 62–63).

of better techniques for assisting conception (although surrogacy is not legally available[6]), have combined in recent decades to radically reduce the number of unwanted births. Consequently the number of children offered for adoption, has dropped significantly. The number of prospective adopters, however, has doubled over the past 15 years. In 2003, there were 25,000 approved potential adopters on waiting lists for a child.[7] Inevitably, the imbalance in domestic demand and supply is driving up the number of intercountry adoptions.

11.2.1.1 Non-marital Births

In 2003, 44% of births were of children born outside marriage. Around 1,000 babies a year are voluntarily relinquished by their parents, taken into care and adopted, usually within 12 months.[8] The legal consequences of non-marital and extra-marital births were eased with the introduction of the Act of 3 December 2001 which, among other measures, eliminated the discrimination in inheritance rights that traditionally disadvantaged children 'born out of wedlock'. This, in conjunction with improvements in the social consequences for unmarried mothers, has resulted in far fewer babies '*nés sous X*' becoming wards of state as a first step to adoption.

- ***Accouchement sous X***

A woman's right, under Article 341–1 of France's Civil code, to give birth anonymously is known as '*accouchement sous X*', because the birth mother will be recorded on the birth certificate as 'X' and the child will be referred to as '*nés sous X*'. French law states that "at the time of her delivery a mother may demand that the secret of her admission and of her identity be preserved."[9] This right, added to the Civil Code in 1993, has existed in one form or another since 1793 when, under The National Convention of the French Revolution, secret pregnancy and birth were protected by law.[10] It is the absence of recognition by the mother of the child (or denial of filiation) to whom she had given birth anonymously, that removes the necessity to obtain her consent for the child to be taken into state care.[11]

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[6] See Article 16–7 of Civil Code. The Cour de cassation in 1991 invalidated a decision of lower jurisdictions giving effect to surrogacy by creating a filiation link between the child and the wife of the biological father after the completion of such a contract. Actually reform is on the way and the Sénat established in December 2007 a Commission to review and make recommendations on a possible reform of French legislation on this matter. The author is grateful to Laurence Francoz-Terminal for this information.

[7] See, Direction générale de l'action sociale—Situation des pupilles de l'État au 31/12/2003, Statistical document issued by the Ministère des solidarités, de la santé et de la famille, 2004.

[8] See, Initial report to CRC, 1993, as cited by Selwyn, J., and Sturgess, W., *op. cit*. at p. 37.

[9] Article 341 of the Civil Code, introduced in 1993, precludes a child born to X from establishing any legal tie to the mother, even if her identity should be discovered.

[10] See, Donovan, K., '*Real* Mothers for Abandoned Children', *Law & Society Review*, 2002, p. 1.

[11] See, Article L. 224–4, point (1), of the Social Action and Families Code.

This right was examined by the ECtHR in the course of its judgment in *Odièvre v. France*.[12] At that time the court decided in favour of upholding the right of anonymity, despite finding that the concept of anonymous births is relatively rare throughout Europe. In fact, as the court noted, a far greater number of states actually require the names of both mother and father to be registered at birth (see, further, Chap. 4). In January 2002 this right was modified by the introduction of a law allowing mothers who have a baby in secret to place their name in a sealed envelope thus leaving open the possibility to decide later in life if they wish to meet their child or not. Arguably, in the absence of any further modification, the law still leaves intact the maternal right to choose permanent anonymity (see, further, below).

11.2.1.2 Abandoned Children

Under Article 350 of the French Civil Code, an abandoned child is one who has been in the care of a private person, or an institution or the Child Welfare Service for a full year during which the parents have shown no interest in him or her. At the end of that period the court may issue a declaration of abandonment, unless the parents are in 'great distress', and vest full parental rights in the carers.

11.2.1.3 Abortion

The introduction of legal access to abortion in the 1970s had a dramatic effect on the number of babies termed '*nés sous X*', or born to anonymous mothers, available for adoption. The abortion law reduced the number of '*nés sous X*' from an estimated 10,000 babies a year to between 500 and 600[13] (see, further, below). Abortion is legal only up to 12 weeks[14] (as opposed to 24 in the U.K.). In the years spanning the end of the 20th and beginning of the 21st centuries the rate of abortion leveled out at approximately 343,000 annually.[15] It is estimated that the ratio of minors having abortions compared to the total number of abortions jumped 13-fold during the 1955–2003 period.[16] This is significant as the majority of children available for adoption have always been due to 'unwanted pregnancies', such as babies born to minors with no means of support.

11.2.1.4 Divorce

Perhaps the most revealing indicator of change in the social context of adoption is the increase in recourse to divorce, the rate of which more than doubled from

[12] [2003] 1 FCR 621. Also, see, *Kearns v. France* Application No. 35991/04, ECHR, 10.01.08.

[13] See, for example, Lefaucheur, N., *Etude - enfants nes sons X*, CNRS-IRESCO, Paris, 2000.

[14] See Article L. 2212–1 of the Code de la santé publique.

[15] In 1955 there were 1,170,143 abortions; 550,127 in 1985; 343,024 in 1995; and 341,588 in 2001.

[16] In 1955 there were 14,000 abortions performed on minors compared with 40,000 in 2003.

142,000 in 1980 to 290,000 in 2002. The use of adoption as an addendum to divorce, consolidating the reforming of families and a significant generator of domestic adoption proceedings in this as in all modern western nations, has in France been confined to ordinary or 'simple' adoptions.

11.2.1.5 Public Child Care

In 1990 the French child care population was 112,800 or some 0.8% of all children, which is relatively high compared to other western European countries.[17] The majority of children then in care were aged 11 years or older. As has been observed:[18]

> France encourages the adoption of younger children but children with special needs especially those with a disability are far less likely to be adopted. France also regards successful integration into a foster family as a satisfactory form of permanence. All children in care in France, irrespective of age and status, must by law be put up for adoption as rapidly as possible once it becomes clear that return home is no longer a possibility.

In practice, for most of the children concerned, entry to the public care system is much more likely to lead to long-term foster care or to institutional care than to adoption.

- **Foster care**

In 1990, of 112,800 children in care, 55% were in foster care.[19] Most children in the public care system are accommodated with foster families where they were placed by court order, their placements being subject to annual review. All foster carers receive professional training, even those registered as long-term, and are supported by local social work teams. Maintaining links between the foster child and their family of origin is a necessity because the majority of the birth parents retain their parental rights and responsibilities. The traditional reluctance to breaking family ties militates against resorting to adoption for children in foster care.

- **Residential care**

In France, a relatively high proportion of children in public care are in residential care; indeed, a recent survey concluded that "France had the highest total of young children under three in institutional care in the E.U."[20] In 1990, of 112,800 children in care, 32% were in various forms of institutional care.[21] In 2002/03 more than 2,000 children, all less than three years of age, were in residential care.[22]

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[17] Compared with: the Netherlands, 0.24%; Austria, 0.5%; Portugal, 0.6%; and Luxembourg, 0.7%.

[18] See, Selwyn, J. and Sturgess, W., *International Overview of Adoption: Policy and Practice*, University of Bristol, Bristol, 2000 at p. 37.

[19] See, Initial report to CRC, 1993.

[20] See, Chou, S. and Browne, K., 'The Relationship Between Institutional Care and the International Adoption of Children in Europe', *Adoption & Fostering*, 32, 1, 2008 at p. 47.

[21] See, Initial report to CRC, 1993.

[22] See, Chou, S. and Browne, K., *op. cit*. at p. 44.

11.2.1.6 Wards of the State

'Wards of the state' (*pupille de l'Etat*) is a collective term used to identify those children who are otherwise without legal status: the state, as carer of last resort, assumes total parental rights and duties in respect of them. In two-thirds of cases, the local Child Welfare Service assumes care responsibility for the child, following rejection by birth parents. They may also be children abandoned by parents who have given their consent to adoption, or children who are declared as wards after parental rights are withdrawn in court, or after being orphaned. Falling from 24,000 in 1977 to 7,600 in 1987, the number of wards of the state has stabilised at approximately 3,300 since 1997.

Once declared a ward of the state, it is a legal requirement that the child be placed for adoption as quickly as possible.[23] However, this is not always achieved. In 2001, only 1,195 wards had been placed in a family with a view to adoption. By the end of 2003, out of 2,882 such wards (average age 2 years and 10 months), only 1,009 were so placed. If not placed within the first few months of becoming wards, children are unlikely to be so later on: 78% of placements occur within the first six months and 95% within two years. While age is a significant factor affecting placement, it is not the only one as among unplaced children under one year of age, some 37% have a physical or mental health problem. It has been estimated that overall, one-third of wards are not placed because of a disability or health problem, and 12% because they have brothers and sisters with whom an established relationship complicates placement opportunities.[24]

Wards of the state 'fostered with a view to adoption' are children fostered with a family approved for adoption or for whom the foster family has submitted an adoption application. They must share the home of their future adoptive parents for at least six months before the plenary adoption decision.[25]

11.2.1.7 Child Abuse

It has been estimated that in France some three children die from abuse or neglect every week;[26] a rate of death by maltreatment that is four to six times higher than the average for other modern western countries.[27] According to the Interior Ministry, there were 14,713 incidents of rape, sexual harassment, or sexual attacks against minors during 2005 together with 12,404 cases of abuse, poor treatment, or

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[23] Article L.2251 of the Code de l'action sociale et des familles.

[24] See, INED adoption survey.

[25] Article 345 of the French Civil Code.

[26] The Committee on the Rights of the Child has expressed its concern regarding "the number of children under the age of 15 who die each week under troubling circumstances". See, *Concluding Observations of the Committee on the Rights of the Child, France*, U.N. Doc. CRC/C/15/Add.240 (2004) at para 36.

[27] See, 'A League Table of Maltreatment Deaths in Rich Nations', *Innocenti Report Card*, 5, September, 2003 at p. 2.

negligence as opposed to 16,791 and 11,283 incidents recorded in 2004. This would indicate that the rate of child abuse is falling; although the data collection systems, for statistics relating to children, are imperfect. Confirmation of child abuse results in admission to the public care system. At that point, adoption, with all the safety and emotional rehabilitation implied in making a fresh start for a wanted child in the home of those needing to parent, would seem an attractive means of achieving permanency. Unfortunately, this is as difficult to achieve in France as elsewhere and an abused child is much more likely to be admitted to either foster care or to accommodation in a residential unit.

11.2.1.8 Early Adoption Law

In France, the number of couples or single individuals seeking to become parents through adoption, and who are approved by the Child Welfare Service (ASE—*Aide Sociale à l'Enfance*), has tripled in 15 years, reaching 23,000 in 2001. In contrast, it is estimated that from 3,500 to 5,000 children each year are the subjects of plenary adoption. The legal characteristics of the adoption process in this jurisdiction were established at an early stage.

- **Simple and plenary adoptions**

There are two types of adoption in France: a plenary adoption order (*adoption pleniere*) results in the adopters and the adopted child assuming the same legal relationship as if the child had been born to the adopter/s within marriage; and a simple adoption order which results in the adopted child keeping some legal bonds with his original family while being given a legal relationship with his new family. This duality corresponds closely to the similar distinction made in Japanese law.

- **Judicial process**

Adoption in France, although including a significant administrative component, is essentially a judicial process. It falls ultimately to the District Court (*Tribunal de Grande Instance*) to either grant or refuse the adoption order sought.

- **Anonymity**[28]

Until the 1960s, an estimated 10,000 babies a year were '*nés sous X*', or born to anonymous mothers with no trace of their parent/s identity on their birth certificates or on any other official records. This has resulted in a situation where an estimated 450,000 people, mainly adoptees, have been left searching for origins information that has been officially edited out by the French state. Their mothers not only gave them up for adoption at birth, they took advantage of a law allowing them to have

[28] The exercise by any woman of this right, which is enshrined in Article 341–1 of the Civil Code and which the legislature has to date shown no intention of reconsidering, is governed by the provisions of Article L. 222–6 of the Social Action and Families Code, as amended by the Act of 22 January 2002.

a baby in complete anonymity. There is little in the way of a culture of 'openness' in the French adoption process.

The '*nés sous X*' right to anonymity was unsuccessfully challenged in *Odièvre v. France*[29] when the ECtHR ruled that denying children given up at birth the right to discover their biological parents' identity did not violate the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and that such children were not unduly discriminated against (see, further, Chap. 4).

11.2.2 Resulting Trends in Types of Adoption

There are serious difficulties with the child related data sources in France: few statistics are available, they are aggregated, overlapping and are often approximations.[30] Most data from administrative sources are not produced annually, but only on alternate years. They provide information on the number of children adopted, the number of adoptive parents and the number of candidates who have been approved and are waiting for a child. To estimate the number of children adopted each year, it is necessary to combine the figures produced by three different ministries: the Ministry of Justice keeps an account of plenary adoption awards;[31] the General Department of Social Services (DGAS—*Direction générale de l'action sociale*) produces biannual statistics on wards of the state who benefited from plenary adoption;[32] and the Ministry of Foreign Affairs' Intercountry Adoption Mission (MAI—*Mission de l'Adoption Internationale*) keeps a record of intercountry adoptions.[33] Unfortunately, to some degree, these data sources overlap.

11.2.2.1 Family Adoptions

As in other developed western nations, the use of adoption by a parent or relative of a child in order to legally consolidate a reformed family unit, is well established; a large

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[29] *Odièvre v. France* [2003] 1 FCR 621.

[30] These problems have been a cause of concern to the Committee on the Rights of the Child. In its *Concluding Observations of the Committee on the Rights of the Child, France*, U.N. Doc. CRC/C/15/Add.240 (2004), the Committee regrets the reluctance of France to collect disaggregated data (para 12).

[31] However, the number of court decisions is counted rather than the number of children involved, no distinction is made between intra- and extra-family adoption and adoptions in foreign countries where adoption legislation is equivalent to plenary adoption are not counted.

[32] However, children born in France and directly entrusted to an accredited adoption association by their parents, are not officially registered anywhere.

[33] However, their database records the annual number of visas issued for the purpose of plenary adoption, by country of origin, which always exceeds the actual number of formally completed adoptions: many applications for plenary orders result in simple adoptions; foreign residents in France may request a visa to allow a child from their family, already adopted in their country of origin, to join them in France; and the year of the court decision may be later than that when the visa was issued.

proportion of annual adoptions would be by step-parents. Unlike other nations, however, in France as in Sweden such arrangements are confined to simple adoptions.

Same sex step-adoptions, where one person for example adopts the child of their divorced lesbian partner, are now possible following the decision in *E.B. v. France*[34] (see, further, below).

11.2.2.2 Third Party Adoptions

The few French children available for adoption in France are either newborn babies that can be adopted very rapidly (most often born to anonymous mothers), or older children who became wards of the state at a later stage.

- **Adoption of children with special needs**

The number of third party domestic adoptions is very low and tends to be confined to babies and young healthy children. As in the U.K. and elsewhere, there is a distinct lack of prospective adopters for children with a disability. In France, such children are most usually accommodated in small specialist residential units.

- **Child care adoption**

In France the adoption of children from the public care system is largely confined to those who are younger, healthy and relatively 'normal'. As Selywn and Sturgess point out:[35]

> There are children in care who are not adopted, either because they are "too old", sick or disabled or are part of a sibling group i.e. children who do not conform to the expectations of would-be adoptive parents. These children often do not find a family … the numbers of domestic children adopted in France each year is still fairly low. In 1989, there were 1,566 domestic adoptions, only 1.4% of children in care.[36]

- **Same sex adoptions**

The decision of the ECtHR in *E.B. v. France*[37] determined that the exclusion of individuals from the adoption process simply because of their sexual orientation is discriminatory and in breach of the European Convention of Human Rights (see, further, Chap. 4). This decision lays to rest the degree of uncertainty resulting from the earlier ruling in *Fretté v. France*[38] where the ECtHR had ruled that the exclusion of a gay man from the adoption process, because of his sexual orientation, did not violate the Convention. However, *E.B. v. France* does not alter the prohibition on

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[34] Application No. 43546/02, 25.01.08.

[35] See, Selwyn, J. and Sturgess, W., *op. cit*. at pp. 37–38.

[36] *Ibid*., citing Initial report to CRC, 1993.

[37] Application No. 43546/02, 22 January 2008. In the court at first instance, the plaintiff's adoption was denied because of an "absence of a paternal presence or involvement and because of the ambiguity of the petitioner's companion with respect to the adoption procedure."

[38] Application No. 43546/02, 25.01.08.

same sex adoption in France, as adoption is only available to married couples. What it does do is open more widely the possibility of adoption by a single person over 28 years, by requiring that any consideration regarding sexual orientation is disregarded. This is because the ECtHR, in the latter case, took the view that by interposing a requirement that the applicant should establish the presence of a referent of the other sex among her immediate circle of family and friends, the French authorities had fatally compromised the applicant's right as a single person to apply for authorization to adopt. Where a gay or lesbian applicant is in fact living with a same sex partner, the adoption is restricted to the applicant and no legal tie will be created at all between the adopted child and the partner.[39]

- **Intercountry adoptions**

About 30,000 foreign children were adopted in France over the past 15 years and the numbers are increasing annually. In 1997, a total of 3,528 children from 70 countries were adopted by French parents, compared with 971 from 10 countries in 1979. In 2003, of the 4,500 children adopted in France, almost 4,000 (90%) were born abroad. France now ranks second in the world for the number of foreign children adopted, just behind the U.S. which accounts for over 20,000 per year. In relative terms, however, international adoption is less common in France than in certain northern European countries: Norway, Sweden and Denmark account for 10–12 such adoptions per 1,000 births, compared with 5 per 1,000 in France.

Twenty-five years ago, four-fifths of foreign-born adopted children were from Asia—primarily South Korea—while very few were from Africa or Europe.[40] Today, 27% are born in Asia, 27% in Africa, 26% in America and 20% in Europe. The top three countries of origin for international adoption in France are currently Haiti, China and Russia. Together they accounted for more than a third of all foreign-born adopted children in 2004.

The fact that most adopted children have come from countries that have not ratified the Hague Convention and that a high percentage of intercountry adoptions are not made through the accredited bodies but through individual channels have been matters of concern to the Committee on the Rights of the Child.[41]

11.3 Overview of Modern Adoption Policy and Law

There is very little in the way of official documentation examining adoption policy and law in France. Such as there is relates in the main to the government's periodic reporting obligations to the Committee on the Rights of the Child.

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[39] The author is grateful to Laurence Francoz-Terminal for this assessment.

[40] See, Mission de l'adoption internationale (MAI), Ministère des affaires étrangères.

[41] See, *Concluding Observations of the Committee on the Rights of the Child*, France, U.N. Doc. CRC/C/15/Add.240 (2004) at para 33.

11.3.1 Adoption Related Legislation

The present adoption system, first introduced in the 1804 Civil Code has since been subject to periodic reviews and updating. Currently the statutes (66–500 of 11 July 1966, as amended) and Part VIII of the Civil Code ('Of Adoption') constitute the primary legal framework for adoption in France.

11.3.1.1 The Statutes

The main statutes governing adoption in France are:

- **Statute n° 66–500 of 11 July, 1966**

This statute introduced the two legal forms of adoption that now exist in France: plenary adoption which severs the links between the child and its birth family and creates a new set of parental relationships; and ordinary (or 'simple') adoption which institutes a second set of relationships with the adopting parent/s without severing the links with the family of origin. Whereas previously *legitimation adoptive* was restricted to two non-separated spouses, *adoption plénière* was now available to an unmarried person. Moreover, consensual adoption for both 'legitimate' and 'illegitimate' children was introduced for circumstances where both mother and father have given their consent. The presence of 'legitimate' children in the prospective adopter/s family was no longer a bar to adoption.

- **Statute n° 76–1179 of 22 December, 1976**
- **Statute n° 93–22 of 8 January, 1993**

This statute removed obstacles, in existence since the Napoleonic Code, to the bringing of proceedings alleging paternity in respect of a child 'born out of wedlock' but left a plaintiff with a heavy burden of proof. It also states that an application for disclosure of details identifying the natural mother is inadmissible if confidentiality was agreed at birth.

- **Statute n° 94–629 of 25 July, 1994**
- **Statute n° 95–125 of 8 February, 1995**
- **Statute n° 96–604 of 5 July, 1996**

This statute (the MATTEI Act) makes adoption easier by relaxing certain restrictions and simplifying administrative procedures, for example by reducing the time-limit for withdrawing consent from three to two months.

- **Statute n° 98–771 of 1 September, 1998**

This statute establishes the arrangements for appraising applications for authorisation to adopt a child in State care (Articles 1, 4 and 5).

- **Statute n° 2004–111 of 6 February, 2001**

This statute introduced provisions relating to intercountry adoption.

- **Statute n° 2001–1135 of 3 December, 2001**

This law abolished any distinction in adoption procedure based on the type of filiation: whenever filiation has been established, father and mother must consent to the adoption. The rights of all children, legitimate, natural or adopted, have since been identical in respect of: the rights of the surviving spouse and of children born out of wedlock; all discrimination against children born out of wedlock was abolished in respect of inheritance.

- **Statute n° 2002–93 of 22 February, 2002**

This statute granted former adoptees and wards of the state the right to access their records. It also created a new commission, the *Conseil national pour l'accès aux origines personnelles* (CNAOP), to mediate between the interests of adopters, adoptees and birth parents.

- **Statute n° 2002–304 of 4 March, 2002**

This statute introduced provisions concerning parental authority.

- **Statute n° 2003–516 of 18 June, 2003**

11.3.1.2 The French Civil Code: Part VIII; of Adoption (Articles 343 to 370–5)

- Chapter 1—Of Plenary Adoption (Articles 343 to 359)

  Section I—Of the Requisites for Plenary Adoption (Articles 343 to 350)
  Section II—Of the Placing for Purposes of Plenary Adoption and of the Judgment of Plenary Adoption (Articles 351 to 354)
  Section III—Of the Effects of Plenary Adoption (Articles 355 to 359)

- Chapter II—Of Simple Adoption (Articles 360 to 370–2)

  Section I—Of Requisites and Judgment (Articles 360 to 362)
  Section II—Of the Effects of Simple Adoption (Articles 363 to 370–2)

- Chapter III—Of the Conflict of Laws relating to Adoption and of the Effects in France of Adoptions

Ordered Abroad (Articles 370–3 to 370–5)

11.3.1.3 The Interests of the Child

The Committee on the Rights of the Child has expressed its concern at inconsistencies in French legislation as well as the fact that, in practice, the interpretation of the legislation and determination of which child is "capable of discernment", may leave

possibilities of denying a child the right to express their views and have them taken into account, or make it subject to the child's own request and may give rise to discrimination.[42]

11.3.2 International Law

France has signed but not ratified the European Convention on the Adoption of Children which came into force on 24 April 1968. It has signed the U.N. Convention on the Rights of the Child 1989[43] and its two Protocols.[44] It has also signed and ratified The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption 1993.[45]

11.3.3 Adoption Policy

In response to recommendations made by the Committee on the Rights of the Child, and as a consequence of adverse rulings made by the ECtHR, France has in recent years adjusted its laws relating to adoption to increase compliance with Convention provisions. There is no indication of any independent French policy initiative in respect of adoption. The correlation between a high incidence of young children in residential care and a high level of intercountry adoption may indicate an unaddressed policy issue in respect of the needs of the former group for family based care.

11.4 Regulating the Adoption Process

The adoption process in France, being essentially consensual in nature and catering for both simple and plenary adoption orders, in domestic and intercountry proceedings, is subject to a lighter regulatory regime than is applied in most modern common law countries. The process requires two successive steps: an administrative procedure, which leads to the grant of an assent (*agrement*), and then a judicial procedure leading to the adoption order. The responsibility for making adoption orders is therefore vested in both the Head of the District Council (*President du Conseil*

[42] See, *Concluding Observations of the Committee on the Rights of the Child*, France, *op. cit.* at para 21.

[43] Signed on January 26th, 1990.

[44] The Optional Protocols on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict, as well as the ratification of ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

[45] Signed on April 5th, 1995 and ratified on June 30th, 1998.

General) and his agents regarding the administrative steps and in the courts with regard to the judicial procedure.

11.4.1 Length and Breadth of Process

In keeping with its civil law tradition, the French adoption process is not as structured, into carefully delineated stages each with accompanying specific statutory responsibilities, as is the case in most modern common law countries. There is no statutory pre-adoption counselling service for birth parents, for example, nor does the process extend to include statutory tracing and reunification services.

11.4.2 Role of Adoption Agencies and Other Administrative Agencies

The *Direction de l'Action Sociale, de l'Enfance et de la Santé* is the government office that maintains an overview of adoption matters in France. In practice any person wanting to adopt a ward of the state or a foreign child has to apply to the Child Welfare Service in their *département* of residence for approval. Prospective adopters intending to adopt a child from outside the jurisdiction will most often avail of the services of a specialist authorized adoption agency.

11.4.2.1 The Child Welfare Service

The first step for prospective adopters is an application to the Child Welfare Service (ASE—*Aide Sociale à l'Enfance*), for an assessment of their suitability. The approval of this agency has been compulsory for adopting a ward of the state since the law of the 6th June 1984, and for adopting a foreign child since the law of the 5 July 1996 (Article 11.-I). Once granted, the assent remains valid for five years. Only registered child-minders and those intending to acquire a child over two years old with parental consent, may adopt without approval. In case of rejection, administrative and legal recourse is possible.

Once approved, three options are open to the prospective adopters: they may submit a request to their Departmental Department of Health and Social Services (DDASS) to adopt a ward of the state; or they may apply to an accredited private adoption organization or they may take independent steps to adopt abroad. Candidates trying to adopt in another country are not obliged to inform the Child Welfare Service of each step they take; once a child has been suggested, however, they must submit an application in order to obtain the documents needed for its adoption.

11.4.2.2 The National Council for Access to Personal Origins (CNAOP)

This agency was established in 2002 by a statute that also granted former adoptees and wards of the state the right to access their records and find out the names of their parents, relatives and their medical conditions.[46] The role of the agency is to mediate between the interests of adults who wish to know their origins, those of pregnant women wishing to maintain their anonymity, and those of children who have the need to access the information necessary to form an authentic sense of personal and cultural identity.

11.4.2.3 Mission de l'Adoption Internationale

This government agency, located within the French Ministry of Foreign Affairs, has been established in order to coordinate the process of international adoption. It acts as a central authority for the purposes of the Hague Convention and is responsible for authorizing and supervising intercountry adoption agencies.

11.4.2.4 Adoption Agencies

All adoption agencies, whether engaged in domestic or intercountry adoptions, must be registered with and authorized to provide adoption services by the *Direction de l'Action Sociale, de l'Enfance et de la Santé*. Such private agencies as *Famille adoptive française* or *Les Nids de Paris* are accredited and supervised by government officials and may have their licence withdrawn if they are found to have breached regulations or standards of practice.

11.4.3 Role of the Determining Body

The adoption process in France is ultimately a judicial process as it falls to the court to make the final decision as to approval or rejection of an adoption application. Like the common law jurisdictions, however, the bulk of the assessment work in respect of the adopters, and as regards ensuring that the proposed application is in keeping with the welfare interests of the child concerned, is conducted within an administrative framework. The Head of the District Council (*President du Conseil General du department*), an elected local authority, together with his internal agents, in particular the Childhood Welfare Service (ASE—*Aide Sociale à l'Enfance*) and the Assent Commission (*Commission d'agrement*) are the lead government regulators of the administrative stage of the process. On completion of

[46] Loi no. 2002–93 du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et pupilles de l'Etat.

that stage, the District Court (*Tribunal de Grande Instance*) then finalises the adoption process.

11.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

In France, the consensual nature of adoption and the more loosely regulated approach is evident in the criteria governing the parties entry to the process.

11.5.1 The Child

Under Article 347 of the Civil Code, the following may be adopted: children in respect of whom the mother and father or the Family Council have validly consented to adoption; wards of the state (found children, neglected children and orphans); and children declared abandoned under the conditions provided for in Article 350. The Family and Social Welfare Code governs the adoption of children from the public care system. Article 63 states:

> Children in State care may be adopted either by persons given custody of them by the children's welfare service wherever the emotional ties that have been established between them warrant such a measure or by persons granted authorisation to adopt …

Foreign children may also be adopted. Article 100–3 of the Family and Social Welfare Code states:

> Persons wishing to provide a home for a foreign child with a view to his or her adoption shall apply for the authorisation contemplated in Article 63 of this Code.

For those under 15 years old, adoption is normally only allowed where the child has lived in the home of the prospective adopters for at least 6 months.[47] For older children, plenary adoption is permitted (assuming all other conditions are met) "during the minority of the child and within two years following his coming of age" only if the child, before reaching 15 years of age, either (i) lived in the home of persons who did not fulfil the statutory requirements for adopting or (ii) was the subject of a simple adoption.[48]

In domestic adoptions, when the child is under two years of age and is not related to the adopter by kinship or marriage, he or she must be handed over to a child welfare service or to a duly authorised body for adoption. This provision[49] is

[47] Article 345 of the French Civil Code.

[48] *Ibid*.

[49] Article 348–5 of the French Civil Code.

designed to avoid direct contact between the biological family and potential adopters.

There is no age limit for adoptees in the context of simple adoption; they may be adopted even though they are past the age of majority.

11.5.1.1 Consent

Where the child is older than 13, then his or her personal consent is a necessary prerequisite for a plenary adoption. It is also necessary for a simple adoption.[50]

11.5.2 The Birth Parent/s

In French law adoption requires the consent of the biological parents. Once the child's filiation to both parents has been established, their consent is necessary, unless grounds exist for this to be dispensed with (see, further, below). The persons whose consent is required for adoption must have been counselled or offered counselling and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin. The consent must have been given freely, by way of a certified document before a judge in the court of first instance in the parent/s place of domicile or residence, or before a French or foreign notary, or before French diplomatic or consular agents.[51]

11.5.2.1 Unmarried Mother

The consent of such a mother is required unless this can be dispensed with or cannot be obtained as, for example, if the child concerned has been abandoned. It cannot be accepted as valid unless given not less than six weeks after birth. Having given consent, the parent then has a two-month period during which she can change her mind and retract the consent.[52] The law and procedure governing an '*accouchement sous X*', which applies regardless of marital status, was outlined by

[50] See Article 360 *in fine* of the Civil Code: L'adoption simple est permise quel que soit l'âge de l'adopté.
(…) Si l'adopté est âgé de plus de treize ans, il doit consentir personnellement à l'adoption.

[51] Article 348–3 of the Civil Code.

[52] *Ibid*.

the ECtHR in the recent case of *Kearns v. France*[53] (see, further, Chap. 4) as follows:

- Two days after giving birth, the mother had a protracted interview with the social services, at the end of which she signed a record of the child's placement in state care in accordance with Article L. 224–5 of the Social Action and Families Code and handed over a folder intended for the child, which contained a letter, photographs and administrative documents. The record stated that she wished to have the child taken into State care, requested secrecy and gave consent to adoption under Article 348–3 of the Civil Code.
- She was given "Information on the placement" which stated that
  - A child who is claimed back within a period of two months by the parent who entrusted the child to the Child Welfare Service will be returned to that parent without any further formalities.[54]
  - If the child has a second parent who did not entrust him or her to the service and who claims the child back within a period of six months, the child will be returned to that parent without any further formalities.[55]
  - Once these periods have expired (2 months if the sole parent or both parents entrusted the child to the service; 6 months if the second parent did not entrust the child to the service), an application for judicial review of the child's placement in State care may be lodged, within 30 days from the date of the formal registration, with the *tribunal de grande instance*.[56]
  - Beyond these time-limits if the child has been placed for adoption, any application to have the child returned will be inadmissible.[57]
- She was given a notice setting out the effects of placement in state care and of consent to adoption and the conditions for recovery of the child and withdrawal of consent.
- She was given a model letter requesting the return of the child and/or withdrawing consent to adoption, if consent has been given.
- On the same day, she gave her consent to the child's adoption and certified that she had received the above information, understood the effect of giving consent and accepted the consequences of the '*accouchement sous X*' process.

The child, who now had no legally established parentage, was then placed with foster parents by the state authorities with a view to her adoption under Article 351 of the Civil Code. Such a placement for adoption, by virtue of the provisions of

[53] Application No. 35991/04, ECHR, 10.01.08.

[54] Article L. 224–6, paragraph 2, of the Social Action and Families Code.

[55] *Ibid*.

[56] Article L. 224–8 of the Social Action and Families Code.

[57] Article 343 of the Civil Code.

Article 352 of the Civil Code, constitutes a bar not only to the return of the child to the mother but also to any declaration of filiation or recognition.[58]

11.5.2.2 Unmarried Father

Again, where the identity and whereabouts of the unmarried father are known, his consent is required unless grounds exist for it to be dispensed with. However, this is only the case where filiation is established: the consent of a putative father, without any legal link to the child in question, is neither required nor sought.

11.5.3 The Adopters: Third Party

The criteria applied for approving adopters vary in nature according to the type of adoption order sought, whether simple or plenary, and are applied with more stringency to third party adopters than to those who are related to the child.

The request for adoption must be addressed to the Head of the District Council (*President du Conseil General du department*) of the District in which the applicant resides. The relevant Child Welfare Service (ASE—*Aide Sociale à l'Enfance)* is notified and it informs the applicants as to the procedure. If they wish to proceed, the applicants must provide the Child Welfare Service, together with their application:

- A copy of his or her birth certificate and family file (*liveret de famille*) if the applicant has children
- A copy of his or her police record (bulletin no. 3 *du casier judicaire*)
- A medical certificate attesting that his or her health and the health of those persons living in his or her home are compatible with welcoming the adopted child and
- Documents attesting to his or her financial means

They are also required to complete a questionnaire provided by the Child Welfare Service, stating their marital status, their past and present family situation, providing some information on their family of origin (parents, brothers and sisters), their occupation, income, financial commitments and, very briefly, their reasons for adopting. The applicant/s must be then assessed in accordance with the usual eligibility and suitability criteria.

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[58] However, note the view of Laurence Francoz-Terminal:

> "The 2 months period under challenge in *K. v. France* was not the 2 months period regarding consent to adoption according 348–3 of the Civil Code. The 2 months period under challenge was the delay that precludes an anonymous mother from claiming the child back in order to establish a filiation tie in accordance with art. L.224–6 of the Code de l'action social et des familles. Indeed, the consent to adoption is never required from a woman that has given birth under '*accouchement sous X*' as in law she's a woman that never gave birth, and so she is not the mother of the child. Since she's not the mother her consent is not needed to free the child for adoption" (note to author).

11.5.3.1 Eligibility Criteria

Article 343 of the Civil Code states that:

> Adoption may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age.

Thus, applicants may be a married couple living together (not judicially separated) and applying jointly. For both domestic and intercountry adoptions spouses seeking to adopt must have been married for more than 2 years, unless both are older than 28 years.[59] There is no upper age limit. Third party adopters must be not less than 15 years older than the child whom they propose to adopt.[60] There are no requirements regarding race or religion.

A married person may apply alone. If not judicially separated, however, then his or her spouse's consent is required unless that spouse is incapable of expressing his or her intentions.[61] An unmarried couple cannot make a joint application;[62] only one of the partners can be the child's adoptive parent.

Article 343–1 of the Civil Code states that:

> Adoption may also be applied for by any person over twenty-eight years of age. …

Thus, where the applicant is a single person, he or she must be over 28 (though in practice getting approval from the Child Welfare Service can be difficult).[63] Given that French law expressly permits single persons the right of adoption, the state cannot therefore take 'discriminatory' actions in applying the law such as refusing to accept applications from homosexuals or lesbians.[64]

11.5.3.2 Suitability Criteria

The prospective adopters are assessed by the Child Welfare Service (ASE—*Aide Sociale à l'Enfance*) in accordance with the usual criteria relating to psychological, financial, social, educational and family situation.

Where the Child Welfare Service has refused approval or not issued it within the legal time limit, the court can nevertheless grant the adoption if it deems those making the request fit to look after the child, and that this would be in the latter's best interests.

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[59] Article 343 of the French Civil Code

[60] Articles 344 of the French Civil Code.

[61] Articles 343 and 343–1 of the French Civil Code.

[62] Articles 346 of the French Civil Code.

[63] Articles 343–1, 343–2 and 343 of the French Civil Code.

[64] See, the ruling of the ECHR in *E.B. v. France,* Application No. 43546/02, 22 January 2008.

11.5.4 The Adopters; First Party

Where both spouses are applying to adopt the child of one of them, there is no age limit nor any requirements regarding duration of marriage.[65] There must be an age difference of 10 years between adopters and the child concerned;[66] though the court may make an order where the age difference is less in certain circumstances.[67] The minimum age of 28 years for adoption by a sole applicant does not apply where that person is adopting their spouse's child.[68] In that case a plenary adoption is permitted only if: the said child has a legally established filiation exclusively with said spouse; if the parent other than the spouse has been completely deprived of parental authority; or if the parent other than the spouse is dead and has left no ascendants in the first degree, or if these have obviously lost interest in the child.[69]

11.5.5 The Assent Committee (Commission d'Agrement)

Within nine months of the registration of the application, the applicant is notified of the grant or refusal of the assent. Committee approval is conditional upon a finding that "the conditions offered at the family, educational and psychological levels correspond to the needs and best interests of the child."[70] The decision will state the number of children, if any, that may be adopted, and may include a statement regarding restrictions on the children to be adopted, such as the number and their age. If the grant of assent is refused, the applicant can appeal the decision to an administrative court.

The assent is effective for a five-year period, and remains valid if the applicant moves to another location in France, subject to a registration to the Head of the District Council (*Conseil General*). Since 1 September 1998[71] any approved person wishing to adopt a ward of the state or a foreign child must confirm each year their continuing intention to adopt.

11.6 Pre-placement Counselling

There is no explicit statutory obligation resting on any specific agency to provide a pre-placement counselling service to the birth parent/s but as a matter of good practice, in relation to domestic proceedings for plenary adoptions, this would be undertaken by the Child Welfare Service.

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[65] Article 343–2 of the French Civil Code.

[66] Article 344 of the French Civil Code.

[67] Article 344 of the French Civil Code.

[68] Articles 343–1 and 343–2 of the French Civil Code.

[69] Article 345–1 of the French Civil Code.

[70] See, Article 4 of decree n° 98–771, 1 September 1998.

[71] Decree no. 98–771.

11.7 Placement Rights and Responsibilities

Once the Assent Committee has formally approved the prospective adopters, the latter are then free to make preliminary arrangements in respect of establishing contact with a child available for adoption. The appropriate agency to make this arrangement will depend upon the status of the prospective adopters as first or third party applicants and whether they propose to pursue a domestic or intercountry adoption.

11.7.1 Placement Decision

Before a final adoption order is made, the child is usually placed with his or her prospective third party adopter/s on a trial basis. This normally occurs two months after consent has been given for adoption. If, after the expiry of that period, consent has not been withdrawn, the child concerned may then be placed with a view to adoption.[72] Any proceedings to establish filiation or paternity must be taken before the child is placed. Placement of the child in a family with a view to his or her adoption (*placement en vue d'adoption*) precludes any restitution of the child to the family of origin.[73] Where the intending adopter/s are related to the child and the latter is at least two years of age, then application to the court usually follows directly after acquiring parental consent (i.e. without an intervening supervised placement).[74]

11.7.2 Placement Supervision

From the time a child arrives in its new family until the adoption order is granted, the Child Welfare Service monitors the placement. The welfare interests and health of wards of the state remain the responsibility of the Service until the court decision alters their legal status. In the case of an intercountry placement, if requested by the country of origin or by the adopters, the child placed may also be monitored by the Service or by the organization that arranged the placement of a child born abroad.

11.8 The Hearing

A formal judicial hearing of the application marks the final stage in the French adoption process. This is necessary whether the applicants are seeking a simple or plenary adoption order.

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[72] Articles 348–3 of the French Civil Code.

[73] Article 352 of the French Civil Code.

[74] Article 347 of the French Civil Code.

11.8.1 Application to the District Court

The applicant must bring his request for an adoption order to the local District Court of the district in which he resides. Such request can be brought as soon as the child subject to adoption is placed with the applicant. However, if the request is for plenary adoption the Court can examine the request only after the expiry of a six-month period in which the child is temporarily placed with the applicant.[75]

The request is made through a lawyer.

11.8.1.1 Supporting Documents

The legal conditions applying to the applicant and to the adopted child are verified. The validity of the necessary assents is also verified. The court proceeds to a general inquiry and has a power of investigation to assess whether adoption is in the best interests of the child. The Child Welfare Service can provide the court with information acquired during the assessment stage. The *Procureur de la Republique* can also conduct such investigations that she or he thinks may be necessary.

11.8.2 Consent

The court must satisfy itself that all required consents have been given, unless grounds exist for this to be dispensed with.

11.8.2.1 Birth Parents

Both birth parents must give consent. When one is dead, unable to give consent, or has lost parental rights, the consent of the other is sufficient. When parentage is established with regard to only one parent, then the consent only of that parent is necessary. When both parents have died without leaving any instructions, or both have lost parental rights, then consent is given by the family council (*conseil de famille*) after consultation with the person with actual care responsibility for the child. The same procedure applies where the parentage of the child is not established.[76]

11.8.2.2 The Child

For both simple and plenary adoption the personal consent of the child concerned is also required if he or she is aged 13 years or older; validity is not conditional upon the child having sufficient understanding.[77] Consent is given before the chief

[75] Article 353 of the French Civil Code.

[76] Articles 348, 348–1 and 348–2 of the French Civil Code.

[77] Articles 345 and 360 of the French Civil Code.

clerk of the local court (*tribunal d'instance*) of the jurisdiction where the party resides, before a notary (notaire) or before French consular or diplomatic agents.[78]

11.8.2.3 State Authority

Where a child is a ward of the state or is otherwise in the public care system and the parents have not consented to adoption, consent is given by the family council responsible for the child. No consent is needed for the adoption of children whom the courts declare to have been abandoned.[79] The Court may grant an adoption order if it determines that consent has been unjustifiably, or abusively, refused by one or both of the birth parents, or if they are disinterested in the child or if they are at risk of endangering the child's health or morality.[80] Except where there exists a bond of relationship by blood or by marriage up to the sixth degree inclusive between the adopter and adoptee, the consent to the adoption of children less than two years of age is valid only if the child was actually entrusted to the Child Welfare Service or to an authorized adoption agency.[81]

11.8.2.4 Timing/Validity

The consent of birth parents may be revoked within two months[82] but no retraction is possible for the child concerned after he or she has given their agreement.

11.9 Thresholds for Exiting the Adoption Process

In France there is no right to adopt or to be adopted, nor any general right to start a family.

11.9.1 The Welfare Interests of the Child

The general standard applied by the District Court is the best interests of the child. The Committee on the Rights of the Child has urged France to incorporate the concept of the child as a subject of rights in all policies, programmes and projects.[83]

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[78] Articles 348–3 of the French Civil Code.

[79] Article 350 of the French Civil Code.

[80] Articles 348–6 of the French Civil Code.

[81] Articles 348–5 of the French Civil Code.

[82] Articles 348–3 of the French Civil Code. See, also, *Kearns v. France, op. cit*.

[83] Concluding Observations of the Committee on the Rights of the Child, France, U.N. Doc. CRC/C/15/Add.240 (2004) at para 5.

11.9.2 Representing the Child's Welfare Interests

Until recently, if a child requested a hearing, this could only be refused by a decision giving very detailed reasons.[84] However, the 5 March 2007 law n° 2007–293, relating to child protection, amended this point. The new Article 388–1 of the Civil Code now states that where a child requests to be heard then this request must be granted.[85] The Committee on the Rights of the Child had noted with regret, in its 2004 report, that earlier recommendations made regarding the expression of views by children and the weight to be given such views remained insufficiently addressed.[86]

11.10 The Outcome of the Adoption Process

The outcome of a contemporary adoption application is most usually the grant or refusal of the adoption order sought. However, the court is also entitled to make an order for simple adoption in response to an application for a plenary adoption.

The court judgment can be appealed within 15 days of receipt, by the applicant, the *Procureur de la Republique*, or by any third party who was notified of the decision.

11.10.1 Adoption Orders; Third Party Applicants

Third party applications, almost invariably consensual, constitute a majority of the total annual adoption orders. Most of such orders relate to intercountry adoptions with many of the remainder being in respect of '*nés sous X*' and wards of the state. The proportion of contested adoption applications concerning children in the public care system is very low.

11.10.2 Adoption Orders; Parents and Relatives

Unlike many common law countries, the law in France clearly resists allowing stepparents to use adoption as a means of usurping the legal standing of a birth parent.

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[84] Article 388–1 of the French Civil Code.

[85] The author gratefully acknowledges the advice of Laurence Francoz-Terminal on this matter.

[86] *Op. cit*. at 'Introduction'.

11.10.2.1 Simple Adoption Order

Where the subject is the birth child of a spouse then the other spouse, as applicant, is only eligible for a simple adoption order during the lifetime of their spouse. The order in marked contrast to step-parent adoptions in the common law jurisdictions, does not terminate the child's legal ties with their family of origin.

11.10.2.2 Plenary Adoption Order

A full or plenary adoption order may be granted after the death of the spouse who was the birth parent of the child concerned, but only if that spouse leaves no first-degree ascendants (e.g. grandparents) or if these have clearly taken no interest in the child.[87]

11.10.3 Other Orders

The court may grant an ordinary adoption, which at a later date could be converted to plenary adoption if the biological parents, fully informed of the facts, give their consent.[88]

11.10.4 Revocation

Under French law a full or plenary adoption is irrevocable.[89] A simple adoption order can be revoked but only in exceptional circumstances and only after a full judicial hearing.[90] French law has no particular procedure for the annulment of an adoption, although the decision may be set aside, for example because of a formal defect.

11.11 The Effect of an Adoption Order

The effect of an adoption order made in a French court depends entirely on whether it is simple or a plenary in nature.

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[87] Article 345–1 of the French Civil Code.

[88] Articles 370–5 of the French Civil Code.

[89] Article 359 of the French Civil Code.

[90] Article 345 of the French Civil Code.

11.11.1 The Child

Plenary adoption confers on the child a filiation with their adopters that substitutes for their original filiation. The adopted child assumes the same relationship as a child born to the adopter/s and of their marriage. Any legal bond with the original family is extinguished. The adopted child automatically assumes the nationality of the adopter/s. The child loses all inheritance rights in respect of their birth parents and instead acquires the same such rights in respect of their adopters as a marital child.

In a simple adoption, the adopted child becomes a member of his new family but retains some legal bonds with his family of origin and does not automatically acquire the nationality of the adopters. However, the legal barrier preventing marriage between the adopted person and the ascendants or relatives of the adopting person applies.[91] Also, the adoptee can inherit from birth parents and from their adoptive grandparents.[92] If the adoptee dies and leaves successors, rights of inheritance are determined by common law. If not, the inheritance is divided, half going to the birth family and half to the adoptive family.

11.11.1.1 Name

In a simple adoption, the child retains the name of his family of origin in addition to that of the adopters while in the plenary form the child assumes the family name of the adopters.

11.11.2 The Birth Parent/s

The effect of a plenary adoption order is that birth parents lose all parental rights in respect of their child and are freed from all duties. All such rights and duties are transferred to the adopter/s. A simple adoption order does not irrevocably extinguish all legal ties. For example, birth parents remain bound by their duty to maintain the adoptee (the *obligation alimentaire*) but in practice this can only be activated if the adoptee first establishes that he or she could not obtain such maintenance from their adoptive parents.

11.11.3 The Adopters

In simple adoption, the adopters are vested with parental rights and responsibilities including a maintenance obligation (*obligation alimentaire*) in respect of the adoptee.

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[91] Article 366 of the French Civil Code.

[92] Article 368 of the French Civil Code.

Where the child is adopted, by the cohabitee or registered partner of the birth parent, who has custody, then the latter loses parental authority over the child.

11.12 Post-adoption Support Services

Such post-adoption services as are available are provided as a matter of course at the discretion of the agency involved, usually the Child Welfare Service, rather than as a specific statutory duty.

11.13 Information Disclosure, Tracing and Re-unification Services

In France, the law governing information disclosure has been a cause of concern for the Committee on the Rights of the Child. The Committee noted the introduction of the law adopted on 22 January 2002 relating to the right to know one's origins,[93] and allowing mothers who have a baby in secret to place their name in a sealed envelope thus leaving open the possibility to decide later in life if they wish to meet their child or not.

However, the law does not impose any duty on such a mother to reveal her identity, even confidentially. A woman who requests, at the time of delivery, that her admission and her identity be kept secret, is encouraged to leave, on a voluntary basis, information on her health and that of the father, the origins of the child and the circumstances of birth, as well as her identity, in a sealed envelope. In this sealed envelope, she can specify her name, her date and place of birth. On the cover of the envelope are written the first names that she may have chosen for the child, as well as its sex, date, hour and place of birth. This envelope is stored and can be unsealed only by a member of CNAOP if solicited by the child or by his or her legal representative. In that event, CNAOP can then initiate a search for the mother and contact her. If contacted, she can then elect to either maintain or waive her anonymity. In fact the mother can at any time waive the secret of her identity, but she does not have the right to search for the child.

The Committee remained concerned that the rights enumerated in Article 7 of the Convention may not be fully respected by the State party and that the right of the mother to conceal the identity, if she so wishes, is not in conformity with the provisions of the Convention. It noted with regret in its 2004 report that its earlier recommendations regarding the right to know one's origin (para 14) remain unaddressed.

[93] In its latest report (Convention on the Rights of the Child) (Distr.) (GENERAL) (CRC/C/15/Add.240) (30 June 2004) the Committee notes that the concerns and recommendations (CRC/C/15/Add.20) it made upon consideration of the State party's initial report (CRC/C/3/Add.15) in respect of the right to know one's origin (para 14), remain insufficiently addressed.

11.13.1 Information Disclosure

The general rule is that an adopted child has access to all the documents in his or her administrative file, upon request if the child is of age, otherwise via his or her legal representative. The identity of the biological parents will not be disclosed if they formally requested confidentiality at the time of the birth and have not officially retracted that request. The entrenched right of parental veto, endorsed by the decision in *Odièvre v. France*[94] has strongly differentiated French law from that of the U.K. and most of Europe.

11.13.1.1 Plenary Adoption

In a full or 'plenary' adoption, the provisions governing access to public records give adopted and adopting persons access to official documents (full copies of birth certificates) that mention the fact of adoption but not the identity of the birth parents.

11.13.1.2 Simple Adoption

In simple adoption, the child concerned and other parties to the adoption have rights of access to relevant official documents (e.g. full copies of birth certificates) on which the identity of the birth parents may be recorded, as there is no termination of the connection with the biological family. However, persons with no legitimate interest do not have access to documents mentioning adoption (plenary or simple) or to the identity of the original parents.

11.13.2 Tracing and Re-unification Services

Legislation passed in France in 2002 has put in place a national government body with the power to determine requests from adopted children and their birth parents for identifying information and to assist those seeking to trace birth relatives. This legislation, may well provide the means for an applicant to contact his or her birth mother. Consequently, the practical value and relevance of the *Odièvre* judgment is now questionable.

The absence of any unconditional right of access to identifying information regarding family of origin, has so far obviated the need for contact registers etc.

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[94] [2003] 1 FCR 621.

11.14 Conclusion

France belongs to the civil law tradition. Adoption, here, reflects the principles that currently hold the balance in French family law, some of which are being tested by the ECtHR, and is set within the distinctively egalitarian culture of this nation. The consensually based and judicial nature of the French adoption process has some characteristics that distinguish it from its counterpart in common law and other jurisdictions. For example, the concept of anonymous births, known as '*accouchement sous X*', is relatively rare throughout the jurisdictions studied. The fact that the consent of a child older than 13 is a pre-requisite for his or her adoption is also atypical as is the lack of any upper age limit on prospective adopters. In the context of an unusually high rate of child abuse, a high level of children in public care and the highest total of young children under three in institutional care in the E.U., the low rate of consensual adoption from the public child care system is very evident. This has to be contrasted with the fact that France has the second highest number of foreign children adopted, on an annual basis, in the world.

Of particularly interest is the distinction made in French adoption law between plenary and simple adoptions. The traditional form, third party adoption of a child whether in a domestic or intercountry context, constitutes a majority of the total annual adoption orders and invariably warrants a plenary order with all the absolute vesting and divesting of rights normally associated with a full order in a common law jurisdiction. On the other hand, step-adoptors are clearly marked out as requiring a much lesser form of adoption by being restricted to a simple order which leaves clear legal ties between adoptee and their family of origin. This two-tiered system allows for meaningful distinctions to be drawn in the social roles available to adoption in France.

In some ways, this jurisdiction with its international reputation for pushing the boundaries of social convention, is remarkably conservative in relation to adoption issues. Aspects of French adoption law, policy or practice have in recent years been brought before the ECtHR and found to be non-Convention compliant.

Chapter 12
The Adoption Process in an Islamic Context

12.1 Introduction

The world of Islam encompasses many different countries and cultures. It spreads from North Africa, throughout that continent and the Middle East to include much of South East Asia. In addition to those countries that are wholly Islamic there are also many more with significant Muslim populations, including jurisdictions that feature in this book. In some countries, such as the Arabic nations, religion and government are closely intertwined to form an Islamic state. In others such as Turkey the government remains secular in the midst of a majority Muslim population. Some like Jordan and Tunisia, and to some extent Egypt, have evolved a modern codification of traditional Islamic teachings while others, notably Saudi Arabia, rely more exclusively on *Shari'ah* law.[1] Then there some like Nigeria and Bosnia in which there are divisive tensions between secular and religious leaders. In short, the location of the Muslim population is not necessarily synonymous with Islamic culture, which in turn serves to indicate the dangers involved in making assumptions regarding Islamic law.

The geography of Islam can be misleading. It can suggest a focus on Islamic law rather than on the law in countries with Muslim populations. Even where jurisdiction and religion coincide, as in the almost exclusively Muslim populated countries of Iran and Iraq, this does not lead to coherence in culture and law. The basic schism between the Sunni and Shi'a Islamic traditions with their respective doctrinal schools (4 Sunni and 3 Shi'a) has endured for centuries; although Iraqi law seemed to successfully unite the Sunni and Shi'a rules. Moreover, in many countries the Muslim population retains a residual affiliation to its pre-Islam culture and practice which does not always fit comfortably with Islamic law. Often in African countries,

[1] *Shari'ah* is an Arabic word which comes from a root word meaning 'a pathway for water', There is no strictly static codified set of laws of *Shari'ah*. It is based on the *Qur'an*, then the *Sunnah* (i.e. the large collections of *Hadith*, the sayings and doings of Muhammad, as primary textual sources). These are supplemented by two major and much-contested methods of interpretation by specialist scholars, *ijma* ('consensus') and *qiyas* ('analogy') and centuries of debate, interpretation and precedent (as cited in Pilcrow Press at http://pilcrowpress.com/articles/?aid = 04.

K. O'Halloran (ed.) *The Politics of Adoption,*

for example, tribal customs can still exercise persuasive authority alongside the requirements of Islamic teaching. It must also be borne in mind that even *Shari'ah* law is not uniformly applied in accordance with traditional principles and to some degree is itself open to conflicting interpretations. As Menski comments "centuries of juristic debate have created a rich field of debate and interpretation, so that there is always a general statement about 'the law' and then much room for debate and adjustment to socio-cultural reality".[2]

However, *Shari'ah* law does govern matters relating to family life, a matter of central importance to Islamic culture and to contemporary Muslim communities wherever they may be located. Islam places great importance on family relationships, parentage and lineage. Despite the doctrinal constraints, in practice it leaves much room for negotiation when it comes to the handling of children's rights, and to adoption and foster care arrangements. In particular, the relationship between parent and child is regarded as crucial. Adoption is one aspect of such family matters.

Notwithstanding the above caveats regarding the difficulties inherent in defining 'Islamic law', this chapter examines the practice and process of adoption in an Islamic context. It does so by first recognizing that adoption is conceptualized differently in that context. *Kafala*,[3] which means 'to feed', is the Islamic term that comes closest to depicting the relationship known elsewhere as adoption. This interpretation is the one enshrined in *Shari'ah* law and in practice it accounts for most of the alternative family based care arrangements for children who cannot be reared by their birth parents. In addition, some Islamic states also provide for a statutory form of adoption, not dissimilar to that in other jurisdictions studied, which allows non-relatives to assume parental rights in respect of an orphaned or abandoned child. Further, some Islamic states are signatories to the Hague Convention which necessarily brings them, as sending or receiving countries, into contact with adoption as it is known in the common law world. The differences in interpretation are important and need to be taken into account when considering the law relating to adoption in an Islamic context.

This chapter begins by exploring the social and legal background to the current use of adoption. It identifies the characteristics that differentiate *kafala* and statutory adoption and assesses their cultural significance. It notes the significant trends in modern adoption practice, considers the main elements of current policy and outlines the relevant legal provisions. The template of legal functions (see, Chap. 3) is then applied to track the workings of the adoption process, to highlight its distinguishing characteristics and to pinpoint the areas of jurisdictional difference. Unlike the other jurisdiction specific chapters, this one draws from the experiences of a range of Islamic countries in order to reveal the diversity of law and practice that constitutes adoption in an Islamic context.

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[2] Note to author (11.07.08).

[3] *Kafala* is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until he or she reaches majority. A form of unilateral contract, it is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption. But unlike adoption, *kafala* neither confers inheritance rights nor any right to use the grantor's family name.

12.2 Background

Islam does not, strictly speaking, recognize the term 'adoption'.[4] In most Islamic states, adoption as it is known in western nations is impossible. Any process that purports to alter family genealogy, to change the authentic identity of an individual and potentially disadvantage 'legitimate' children, is generally frowned upon in Muslim culture. Adoption in particular is anathema as it involves the permanent and absolute transfer of parental rights to adoptive parents, a denial of ancestry and a falsifying of bloodlines. This is in marked contrast to the previously established approach in what are now Islamic states.

Among pre-Islamic Arabs, for example, the adoption of an orphan or helpless child was a popular and moral practice whereby the adoptee was treated as a birth child, acquiring the adopter's genealogy and name, all the rights of a legitimate son including inheritance and becoming subject to the prohibition of marriage on grounds of consanguinity. Typically, a man would adopt (*tabanna*, "to make one's son") any boy of his liking as son (*mutabanna*), declare it publicly, and the boy would become like a son to him, sharing the responsibilities and rights of his adopting family. The adoption was allowed despite the fact that the adopted son might have a known father and come from a known lineage.

In the culture of many African countries, where Islam and tribal custom have an uneasy relationship, children are still regularly exchanged among families for the purpose of adoption. Like the reciprocal transfer of brides from one family to another, these informal adoptive placements are meant to create enduring connections and social solidarity among families and lineages. This is not unlike traditional practice in the clan based social system that prevailed in Ireland (see, further, Chaps. 1 and 7).

12.2.1 The Social Context Giving Rise to Adoption

The traditional patriarchal culture embodied in Islamic law has, with varying success in different countries, resisted the value systems accompanying the socio-economic modernization of the other jurisdictions studied. This patriarchal orientation resonates very strongly with the similar experience in feudal England and to some degree with that of modern Japan (see, further, Chaps. 1, 2 and 13). In some countries, such as in parts of Africa and the Middle East, where the authority of *Shari'ah* law and the mullahs have created theocratic states, the social roles of women remain very constrained and the welfare of children is a matter largely left to be determined by their fathers in whom all guardianship rights are held to be vested. However, while the Muslim father

[4] See, *Mohammed Allahdad Khan v. Mohammad Ismail Khan* (1888) IL10 All. 289, 340 where it was held that there was nothing in Islamic law similar to adoption as recognized in the Hindu System.

alone holds guardianship rights, the mother may have custody of a small child i.e. her responsibilities are held under the father's supervening authority. Further, as Menski has explained:[5]

> The father may lose this right if he does not behave as a good Muslim father should do, for example if he does not maintain his own child. In such situations, the courts in Islamic countries have often held that the best interests of the child should prevail, and custody should go to the mother.

Other developing Islamic nations have, however, succeeded in introducing some level of reform to counteract paternal dominance of family affairs. Most usually, as in Tunisia, this has been restricted to secular changes, creating tensions with tribal custom and the guidance of the *Qur'an*,[6] but intended to reduce or frustrate the incidence of such traditional practices as child-marriage, polygamy, and the husband's right to unilaterally repudiate marriage.

12.2.1.1 The Family

The nuclear family orientation, so characteristic of developed western nations, is not the preferred social unit for contemporary life in Islam. Instead reliance is placed upon maintaining a strong network of relationships within a wide circle of family members. This approach, of looking to the extended family and its history for a sense of personal and collective identity and as a resource for sharing responsibility, is again similar to the traditional clan system that prevailed in countries such as Ireland and remains very evident in modern day Japan. It is one that places great value on lineage, patriarchy and care of the weak. It cultivates a bond of pride in shared family history and requires loyalty, transparency and a level of openness in acknowledging and dealing with problems. This approach is one with direct implications for child care matters particularly adoption.

12.2.1.2 Muhrim

This term (also '*mahrem*' or '*mahram*') refers to the rules that govern relationships, determine status and regulate marriage and other aspects of family life. It denotes a fixed and reciprocal relationship. A child, taken in or 'adopted' by persons other than his or her birth family cannot under Islam acquire the same degree of relationship with their adopters as a child born to them. When the child is grown, members of the adoptive family are not considered blood relatives, and are therefore not *muhrim* to him or her.[7] This is demonstrated by the rules relating to consanguinity, inheritance, family name etc.

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[5] Note to author (11.07.08).

[6] The *Qur'an* consists of the scriptures of Islam as 'revealed' to Muhammad.

[7] *Qur'an* 4:23.

12.2.1.3 Hijab

Hijab, or the rules governing boundaries, is not confined to dress codes but applies also to relationships between men and women. In Islam an adoptive child can acquire a relationship with the adoptive parents' family through nursing. The adoptive mother may nurse the child and by virtue of this act, the child becomes *muhrim* to the adoptive parents and their family.

12.2.2 Public Child Care

Alternative care arrangements are sometimes necessary for a child. This may be due, for example, to the death of parent/s, abandonment, imprisonment or long-term parental incapacity. It would, however, be a very rare occurrence for a child to be completely uncared for, as Islam places a great emphasis on the ties of kinship and requires every effort to be made to locate a relative to care for the child, before allowing someone outside the family, much less outside the community or country, to adopt and remove him or her from their familial, cultural, and religious roots. Whether orphaned, abandoned or otherwise in need of care, such a child would generally be known and a home found for them somewhere within the extended family. A completely abandoned child is a rarity.

12.2.2.1 Abandoned Children and Orphans

Respect for those who undertake the care of an orphan is well established in Islamic culture. Indeed it is strongly associated with the foundations of Islam itself.[8]

A stringent set of rules and regulations exists in Islamic countries governing the treatment of abandoned children or 'foundlings'. As Dr. Ahmad Al Qubaisi has explained "in Arabic, children abandoned by their parent or parents for whatever reason, are known as *laqeet* which literally means 'to pick up a child from death'—one of the holy acts for a Muslim … it means that you are saving a soul from death and it is your responsibility." In the Islamic tradition, orphans, or *yateem*, are those

[8] See, for example, Imad-ad-Dean Ahmad, The Islamic View of Adoption and Caring for Homeless Children, where he explains:

> "The most famous orphan in Islamic culture is, without doubt, the Prophet Muhammad, peace be upon him. His father died before he was born and by the time he was eight he had lost both his mother and the grandfather who named him. He was subsequently raised by his uncle Abu Talib who continued to be his protector until his own death, when Muhammad was an adult of almost fifty years of age. When Muhammad's wife Khadijah gave to him a slave named Zaid, Muhammad freed the boy and raised him as if he were his own son. The importance of taking homeless children to care for them is well-established in Islam."
>
> As cited at < http://www.fostercarelink.com/islamandfostering.htm >.

whose parents are known, but either the father or both parents are deceased. Moreover, taking care of *laqeet* is deemed to be more holy, because *yateem* have families to take care of them. In both cases, the child's lineal identity should not be changed and their birth parents should be acknowledged. When the child's parents are unknown, 'they must be made brethren in faith and clients of their fellow Muslims'.[9] As a matter of Islamic public policy, falling under the rules of good governance (*siyasa shari'yya*), an abandoned child should be brought up as a Muslim.

In the United Arab Emirates, the law defines *laqeet* as a child of unknown parentage, abandoned by their parents for reasons such as fear of poverty or reprisals for adultery, or because they have special needs. For the purposes of public child care arrangements, a *laqeet* is treated as *yateem* and both are at least initially placed in 'orphanages'.

- **Residential care**

Despite *Qur'an* endorsement for foster care, the fact is that unless a child is absorbed into their extended family the probability is that he or she will be reared in an orphanage with little prospect of being placed in a family.[10] This may in part be due to the social stigma attached to couples who choose to take in a child of unknown lineage; members of the extended family may object. A contributing factor lies in the policy of some orphanage administrators to resist the prospect of discharging their children to the private care of 'strangers'. Mostly the reliance on residential care can be attributed to the lack, in Islamic states, of any counterpart to the cohort of professional child care workers and integrated systems for managing children entering public care that are to be found in developed western nations.

- **Foster care**

Islamic tradition and the accompanying legal system have long encouraged the fostering of orphaned and abandoned children, as well as providing them with legal protection.[11] In Egypt, for example, the law allows an orphaned child in an orphanage to be available for foster care up until he or she reaches four years of age. Should that child be fostered, the foster parent protects, feeds, clothes, teaches, and loves him or her as his own without attributing the child to him, but also without giving him or her the rights which are reserved under *Shari'ah* law for natural children. Fostering, in theory, is positively encouraged because it does not involve any transfer of parental rights nor does it obscure a child's identity. Indeed, there is always the possibility of such children being fostered by non-relatives. Childless couples (even foreign Muslim childless couples) may take in a child from an orphanage, or a 'spare' child from a large family, and then later, in another country, may adopt that child. In Pakistan, for example, as long as the child is to be brought up as a Muslim,

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[9] *Qur'an* 33:4–5.

[10] See, for example, Kosansky, O., 'Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco (review)', *Anthropological Quarterly*, vol. 76, no. 4, Fall 2003, pp. 807–812.

[11] *Qur'an* 2:220; 4:2, 6, 10, 127; 17:34.

the courts will agree to such arrangements and will give permission for the child to be taken abroad.[12]

In practice, however, few children entering the public care system leave it for foster care or domestic adoption.

12.2.2.2 Child Abuse

Child abuse knows no frontiers and occurs in Islamic states as it does elsewhere. However, the child protection ethic—with accompanying laws, professional staff and management systems—is not as developed and does not have such social prominence as in contemporary western societies. The patriarchal nature of Islam, together with the open and mutually supportive nature of relationships within the Muslim extended family network, probably help to explain the relatively low rates of reported child abuse. However, some abused children do enter the public care system following conviction of their parents. It would be unlikely, though not impossible, that such a child would become available for foster care let alone adoption by a 'stranger'.

12.2.3 Modern Influences on the Development of Adoption

As in Christian theocratic states, or in any other where a particular religion exercises significant influence on social mores, the rules governing family matters in Islamic countries act as a powerful enforcer of socially acceptable behaviour. Inevitably, transgression leads to a strong sense of alienation. This is particularly the case where sexual 'infidelity' is concerned.

12.2.3.1 Unmarried Mothers

Islam safeguards lineage, not only by prohibiting legal adoption, but also by prohibiting adultery (*zina*) and non-marital sex. Unmarried mothers in Islamic states face exposure to social denigration and being ostracized by the extended family. The pressures are such that illegal abortions, abandonment and even infanticide are not uncommon. Informal adoption, preferably discretely arranged within the extended family, is often the preferred means of coping.

12.2.3.2 Marriage/Divorce

The *Qur'an* allows a man to have up to four wives. It also permits a quick and easy form of divorce which requires the wife to be provided for, and generally allows the

[12] The author acknowledges the advice of Werner Menski on this matter.

father custody of the children, except where the child is being breast-fed. In some countries, such as Syria and Iraq, divorce is a judicial procedure requiring an appearance before a judge to repudiate a marriage. Adultery is seldom a cause for divorce because it is regarded as such a shameful act of betrayal and a threat to the integrity of the entire extended family. Adulterers are sometimes put to death.

If a mother is divorced and then remarries, the strict Islamic position is that the mother loses custody of her child who remains in the home and within the guardianship of the father. This would be particularly likely if the child concerned is a daughter (who would otherwise have to live under the same roof with a stranger male, with possible complications arising under the principle of *zina*). However, as with other aspects of Islamic doctrine, there is flexibility. Where the circumstances permit, a child may accompany her mother to their new home. In some instances the new father may then apply for joint custody and even for adoption (in one successful U.K. case). There have also been instances where the name of the child has been changed to that of their new father, though this is for reasons of social convenience (schools etc.) and must not be used to obscure the reality of the father/child relationship.[13]

12.2.3.3 Abortion

Islam prohibits abortion. The *Qur'an* proclaims a right to life and sanctifies the life of every child. Nobody, including the parents, have the right to take the life of a child.[14] Sometimes, in order to avoid an abortion, a foster care arrangement may be made for the unborn child, which in practice closely resembles a surrogacy arrangement. This, again, can be seen as an illustration of the flexibility in allowed in the application of Islamic doctrine which, in this instance, places greater weight on the unborn Muslim child's right to life than on the principles constraining use of 'adoption'.

However, abortion clinics do function in Islamic states. In Pakistan, for example, a fairly recent survey of three clinics found that 452 women, almost all of whom were married, had their pregnancies terminated between October and December 1997.[15]

12.2.3.4 Assisted Reproduction Services

The emphasis in Islam on the protection of lineage and bloodlines extends to a prohibition on artificial insemination if the donor of the semen is other than the

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[13] Again, the author acknowledges the advice of Werner Menski on this matter.

[14] *Qur'an* 17:3 1; 8 1:8–9.

[15] See, Rehan, N., Inayatullah, A. and Chaudhary, I., 'Characteristics of Pakistani Women Seeking Abortion and a Profile of Abortion Clinics', *Journal of Women's Health & Gender-Based Medicine*, 10, 8, October 1, 2001, pp. 805–810. doi:10.1089/15246090152636569. Pakistan has an estimated abortion rate of 29 abortions per 1,000 women of reproductive age, despite the procedure being illegal except to save a woman's life, according to report published by the Population Council of a study it conducted from 2002 to 2004.

husband. Recourse to artificial insemination by an anonymous donor is regarded as a serious offence in the same category as adultery. Unlike most of the other jurisdictions studied, the improved techniques of assisted reproduction services are unavailable as an alternative to adoption in Islamic states.

12.2.4 Characteristics of the Adoption Process

In Islam what can be termed adoption is at best an alternative care arrangement for a child whose parents have died or are unable to provide the necessary physical care, love and protection. Such children are then cared for by a set of parents or guardians who act as caregivers with the consent, whether written or verbal, from the natural parents or next of kin. Natural parents do not give up their parental rights. Instead, by mutual agreement, they make care arrangements with others for the upbringing of their child. The basis of this relationship lies in the concept of *syura* or consensus.

12.2.4.1 Judicial Process

Generally, domestic adoption arrangements in Islamic states proceed with a minimum of formality. For example, there are no court proceedings involved with adoption in Jordan. In Pakistan, applicants may seek a guardianship order in respect of an orphan or foundling and, as a first step, will be assessed by government officials known as Deputy Commissioners. The assessment will take the form of a home study report accompanied by the usual references and an assessment of their eligibility and suitability to provide a home environment likely to safeguard the welfare of the child concerned. If approved, the child will then be transferred from an orphanage to their care and they will be vested with custody and guardianship rights. If the child's parents are known to the authorities, and the applicants wish to 'adopt', then they will have to enter into an irrevocable, bilateral, intra-familial agreement in writing in which the birth parent/s clearly waive any right to reclaim their child. In Algeria the requirements for *kafala* are that applicants: be of Muslim faith; have a decent home; be less than 60 years of age (man) and 55 years old (woman); and have a minimum net income of £700. They are required to produce: a letter of motivation; a copy of their Consular Registration card; birth certificate/s; police clearance or criminal record issued by British or Irish Authorities; an employment certificate and their last three payslips; accommodation evidence (tenancy agreement, rent receipt etc.); and medical certificate/s as evidence of their good health.[16]

Should such applicants wish to take the child to live outside the jurisdiction, the courts will simply attach to the guardianship order the special permission required for the child to accompany the guardians for permanent residence elsewhere.

[16] See, the Algerian Consulate London, KAFALA, DOC05.

Finally, when so resident, if the guardians wish to consolidate their position as adopters then the status of the child as orphan or abandoned, together with consent of the Deputy Commissioners, should allow this to proceed.

12.2.4.2 Openness

In Islamic culture, the adopted child is aware of the existence of his or her natural parents and they are free to communicate with one another. The child is given the liberty to decide with whom they want to live when they come of age.

12.2.5 Resulting Trends in Types of Adoption

The use of adoption in Islamic states does not correspond to the pattern now well established in most modern developed western countries.

12.2.5.1 Family Adoptions

Because of the importance placed upon respecting and protecting lineage, adoption in Islam is largely family or kinship based: a child will most usually be placed with members of the extended family.

12.2.5.2 Third Party Adoptions

The adoption of a *laqeet* by a non-relative is increasingly common in some countries where migration to the relative anonymity of teeming cities, such as Cairo or Mumbai, and the pressures of poverty, can result in parental abandonment of children. While increasing, due to rising rates of involuntary childlessness, the actual numbers of children subject to domestic third party adoptions remain at a very low level relative to the numbers of children in the public care system and relative to practice in developed western nations. Islamic culture differs entirely from that of most western nations in respect of third party adoptions.

- **Child care adoption**

Non-consensual adoption of a child with known and living parents is not possible in Islamic states. Whether or not convicted of child abuse, parents cannot in law deny their parentage nor can the law countenance the compulsory transfer of a child with known lineage and identity to a family of a different bloodline.

- **Intercountry adoptions**

By the same logic, children unavailable under *Shari'ah* law for domestic adoption are likewise, as a rule, unavailable for intercountry adoption.[17] However, the third party adoption of an abandoned or orphaned child, where parental consent and family lineage do not present issues, may be possible (see, further, below).

12.3 Overview of Modern Adoption Policy and Law

Since the 7th century, the doctrines of Islam have maintained a strong grip on the Muslim cultures of Asia, the Gulf states and elsewhere in the eastern hemisphere. Adoption law and policy, lying as it does at the heart of Islam and its central concern to safeguard the identity and integrity of family lineage, has undergone little change over the centuries. While in some states, such as Jordan and Tunisia, there has been some loosening of the Islamic rules in respect of matters not at the heart of the institution of marriage, including for example the right of a wives to travel and find employment, there have been virtually no developments in relation to adoption.

12.3.1 Adoption Policy

Islam views adoption as falsifying the identity of the individual, corrupting the integrity of bloodlines and lineage, and as undermining the natural order of society. The prohibition of legal adoption has been ordained to protect the rights of the adopted, adopter, natural parents, other individuals affected by the adoption, and society as a whole.

12.3.2 Adoption Law

For all Muslims the sources of authority, both primary and secondary, governing adoption and other matters of central importance to the Islamic concept of 'family' are to be found in the *Qur'an* (the Holy Text believed to be the direct word of God) and the *Hadith*, the *Sunnah* (the example, whether in word or deed, of the Prophet Muhammad incorporated in Islamic scriptures), the *Ijma*, *Qiyas* and the *Ijtihad* (or the law of deductive logic). The law falls, as in other jurisdictions, to be applied by the courts and in the words of Sajjad Ahmad J:[18]

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[17] Though, as the Madonna case illustrates, there can be exceptions.

[18] *Jilani v. Government of Punjab* Pak LD (1972) SC 139 at p. 261.

> A law is not law merely because it bears that label. It becomes law only if it satisfies the basic norms of the legal system of the country (enshrined in the *Qur'an*) and receives the stamp of validity from the Law Courts.

The courts apply *Shari'ah* law which "draws no distinction between the religious and the secular, between legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life."[19] The law governs adoption then, as it does other aspects of family life, in accordance with the rules of *Shari'ah*.

For those Muslims living in the western developed nations, who wish to make long-term care arrangements for children outside their family of origin, they must look to legal processes such as guardianship and custody rather than adoption. Where Muslim children enter the public child care system of nations such as England & Wales and the U.S., which provide for the removal of parental rights and compulsory adoption, this presents a serious challenge to the values and principles of Islam.

12.3.2.1 The Statutes

For that minority of Muslims living in countries which have introduced laws to moderate some of the harsher aspects of Islamic constraints on family matters, there is a little more flexibility available in relation to adoption. A new codification of laws, designated as clarifications of the *Qur'an* teachings, have gradually tempered the traditional Islamic approach. In Egypt, for example, this has resulted in a small but growing number of annual third party domestic adoptions of children from orphanages while in Jordan there are now a number of intercountry adoptions. In most Islamic states, however, it remains the case that while informal guardianship arrangements are common, adoption as a formal legal process is not possible.

- **The Guardians and Wards Act 1890**

Brief mention must be made of the 1890 Act, part of the legacy of British imperial rule, which was passed to formalize all adoptions in what is now India, Pakistan and Kashmir. It acknowledged that, in an Islamic context, the status and legal rights of a child 'adopted' by a family were different than those of any child born into that family. It required adoptive couples to become the permanent legal guardians of any adopted child and outlined their duties to provide shelter, food, clothing, love, security and permanence for that child. In Pakistan, for example, this legislation still provides a secular framework for addressing issues relating to the care of children.

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[19] Bharathi Anandhi Venkatraman, Comment, Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?. 44 Am. U. L. Rev. 1949, 1964 (1995) (citing Hodkinson, K., Muslim Family Law: A Sourcebook (1984)); as cited in Schnitzer-Reese, E.A., 'International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court', *Northwestern University Journal of International Human Rights*, 2, 7 at http://www.law.northwestern.edu/journals/jihr/v2/7.

12.3.2.2 The Interests of the Child

In Islamic states, the test of the best interests of the child is most frequently construed as satisfied only when his or her upbringing conforms to the doctrines of *Shari'ah* law. This theological interpretation of one of the more crucial concepts of modern family law is an indicator of how politics and family, or public and private interests, are merged in Islamic states. The cultural distance between the theocratic application of this test in such countries, as opposed to its professional application (as dictated by psycho-social norms of attachment, bonding etc in relation to the needs of the individual child) in the other jurisdictions studied, is considerable.

While some Islamic states, such as Pakistan, have ratified the United Nations Convention on the Rights of the Child, there is little evidence that this has resulted in the changes to law and practice necessary to ensure compliance with Convention principles (e.g. in that country, the suitor of a girl aged 12 years or more, promised to him in marriage, cannot be prosecuted for any allegation of rape occurring during the pre-marital engagement period of *khitbah*). The Committee on the Rights of the Child has expressed its concern at the weak protection given to the rights of children in particular Islamic states.

12.3.2.3 International Law

There is an inescapable conflict between some of the traditional patriarchal dictates of *Shari'ah* law and the provisions of contemporary international Conventions. This is broadly evident in the context of human rights and in family matters regarding, for example, the rights of women, gender equality and property rights. The tension is perhaps particularly acute in respect of the law relating to children, their custody, upbringing and adoption. Where Islamic states have been able to ratify and/or be signatories to Conventions this has most usually been subject to the condition that Convention provisions do not breach *Shari'ah* law in which case, by implication, the latter will prevail. Alternatively, some states have sought to circumvent the clash by introducing a substitute Islamic term or concept, even if not quite compatible with the corresponding Convention provision, as occurred with the introduction of the concept of *kafala* in lieu of adoption. This has allowed some Islamic states to subscribe, if only technically, to the requirements of international law as it relates to foster care, adoption and to the rights of the child more generally.[20] The United Nations Convention on the Rights of the Child, for example, has now been ratified by most Islamic countries, with the notable exception of Somalia, while the Hague Convention has been ratified by some.[21]

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[20] Note the Universal Islamic Declaration of Human Rights, 21 Dhul Qaidah 1401, 19 September 1981, (*at* **http://www.shrc.org/english/docs/uidhr.htm**.) and the Cairo Declaration on Human Rights in Islam, 4 Muharram 1411, 5 August 1990, (*at* **http://www.humanrights.harvard.edu/documents/regionaldocs/cairo_dec.htm**.).

[21] Bosnia, a substantially Muslim country, is party to the Hague Convention while Turkmenistan and Uzbekistan in Central Asia, both Muslim-majority countries, are bound by accession to it.

12.4 Regulating the Adoption Process

Islamic countries have no equivalent to the highly regulated adoption process that typifies modern common law jurisdictions. This is partly because of the decentralised nature of government administration in Islamic society: provision of judicial and social services is most usually organized at local community level, within the parameters of *Shari'ah* law and Islamic teaching as monitored by the mullahs; domestic adoption is largely a matter to be resolved locally. It is also due to the relative underdevelopment of social infrastructure in many Islamic states. Mostly, however, it is a natural consequence of the fact that adoption as such is not wholly recognized within Islamic culture and law: there is no comparison with the salience long given to adoption in the other jurisdictions studied; Islam has no need for an institutional framework to regulate a process dedicated to facilitating the transfer of children from birth families to 'strangers'.

12.4.1 Length and Breadth of Process

The adoption process in an Islamic context bears little resemblance to its counterpart in modern western nations. It is not so sophisticated, nor as structured and does not involve as many professionals. The fact that it is simplified and without the full sequence of stages that characterize the process in other jurisdictions does not, however, mean that it is necessarily more expeditious. In many Islamic countries, such as Egypt, the best intentions of prospective adopters are often defeated by a grindingly slow and torturous bureaucracy which results in most adoptable children being left in orphanages.

12.4.2 Role of Adoption Agencies and Other Administrative Agencies

The provisions of the Hague Convention, to which many Islamic states are signatories, require a certain minimum level of professional and organizational activity if the standards for processing intercountry adoptions are to be met. In addition, the management of orphanages, the assessment and supervision of foster-parents and the need to respond to the enquiries of prospective adopters impose their own staffing requirements. The effective management of public child care requires an administrative capacity in Islamic states as it does elsewhere.

12.4.2.1 Adoption Agencies

The existence of adoption agencies as such would raise issues in Islamic states. There are none for example in Jordan, though the functions of such an agency may

still need to be performed. In Jordan, an assessment to determine suitability as foster parents is conducted by officials from the Ministry of Social Development. This is very similar to the process in other countries such as Egypt. It usually takes about three months and requires submission of the usual personal and family history information (see, further, below).

12.4.3 Role of the Determining Body

As a matter of practice, the operational decisions determining whether or not prospective adopters will succeed, are taken by those in control of the supply of children: the officials with management responsibility for an orphanage have the authority to discharge a child into the care and custody of a prospective adopter. In many Islamic states, there is no judicial involvement. In Jordan, for example, the Ministry of Social Development is the only entity that can grant adoption applications.

12.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

In Islamic states, the eligibility of children and prospective adopters to engage in an adoption process is determined, in effect, by the government officials with management responsibility for orphanages. Whether for domestic or intercountry adoption, the terms of that engagement are set by the standards required for guardianship; only after that stage has been successfully completed does the possibility of adoption arise, and then only in some Islamic countries.

12.5.1 The Child

Under Islam, no child is available for adoption if one or both parents, or a relative however distant, is known. Therefore, the only children available for adoption are those for whom there are no known relatives.

12.5.1.1 Consent

In most Islamic states, children in orphanages are only available for third party adoption at an age when it would be impractical to seek their views on that prospect. In Egypt, for example, an upper age limit of four years is usually the practice. Where the child is older, as might well be the case in a kinship placement, there is

no requirement in law to consult with him or her prior to making arrangements for their adoption.

12.5.2 The Birth Parent/s

Adoption, in the secular systems typical of the other jurisdictions studied, rests on the consent of birth parent/s: this must either be given or the need for it statutorily dispensed with; it must be accounted for. In Islam it is not, in theory, possible for a parent to give consent to such a total and permanent abnegation of their responsibilities and dilution of their lineage, nor is there any provision in the culture or in law for bypassing or dispensing with the necessity for it. In Islam, the bond between a natural parent and a child cannot be given away. A child is the gift of Allah to the parents and it is their responsibility to care for the child to the best of their abilities and to be accountable for his or her wellbeing. Therefore, only if a child's birth parents are dead or unknown, can their rights and responsibilities in respect of that child pass permanently others. In practice, Islamic doctrine on this and other matters can allow some flexibility if this required to alleviate undue hardship.

12.5.3 The Adopters: Third Party

The adoption of a child by a 'stranger', as opposed to the fostering of such a child, is anathema to Islamic culture. It is accommodated within Islamic law, with difficulty, in circumstances where parents are dead or unknown and no other relatives can be found.

12.5.3.1 Eligibility Criteria

As in the other jurisdictions studied, eligibility for adoption rests on certain formal components. In Jordan, for example, all prospective adopters must be Muslim and be married for five or more years. The husband must be between 35 and 55 years of age and the wife must be between 30 and 50 years of age. Parents must be medically certified as infertile. They may have up to two children, including adopted children. If the parents have one child already, then the adopted Jordanian child must be of the same sex. Parents who have previously adopted in Jordan must wait a minimum of two years before adopting another child of the same sex. Single people cannot 'adopt' children in Jordan. As there are no Jordanian residency requirements for prospective adoptive parents this facilitates intercountry adoption.

12.5.3.2 Suitability Criteria

Again, the suitability of applicants is determined as in other jurisdictions through an assessment conducted by officials from a designated government agency who examine the personal history, home circumstances, present health and finances of the applicants. In Jordan, for example, all prospective adopters are first required to apply to the Ministry of Social Development to be assessed as foster parents. The usual personal details and social history data are submitted, together with employer(s) information as to income, employment status, etc. Original doctor's reports about the health of the applicants must also be provided, including medical proof of their infertility. If either or both of the applicants are converts to Islam, a copy of the conversion certificate must be provided.

12.5.4 The Adopters; First Party

The adoption of an orphaned child by a relative, the most common and in some countries the only form of domestic adoption, is permitted in Islamic culture and law.

12.6 Pre-placement Counselling

In Islamic states there is no requirement to provide pre-placement counselling for the benefit of the birth parent/s or for any of the other parties involved in an adoption; except insofar as this may be necessary to fulfill agreed procedures in respect of intercountry adoptions in circumstances where the country concerned is a signatory to the Hague Convention.

12.7 Placement Rights and Responsibilities

By far the majority of adoptions in Islamic states take the form of informal, long-term, first party, care arrangements (or *kafala*) within the child's extended family and, as there are no placement rights as such, the parties are essentially left to their own devices. In third party domestic adoptions, where all rights in respect of the orphan or abandoned child are vested in the designated government agency, the placement procedure is controlled by that agency. While this is not tightly regulated, with specific agencies and professionals being responsible for statutorily defined roles, the practice is not unlike that of adoption agencies in the common law countries. In the small minority of cases where the child is the subject of an intercountry adoption governed by the Hague Convention then all arrangements are required to be Convention compliant (see, further, Chap. 5).

12.8 The Hearing

In Islamic states, the *Shari'ah* courts administering *Shari'ah* law have jurisdiction in respect of issues arising in family matters such as marriage, divorce and inheritance. In those few instances where an adoption is not a matter informally arranged within the extended family, it will be brought before the local *Shari'ah* court. Effectively, adoption applications most often appear before a judge when the applicants are unrelated to the child who is an orphan or abandoned and most usually resident in an orphanage.

12.8.1 Consent

Adoption is fundamentally consensual in Islamic culture and law. Parental consent will always be necessary in *kafala* arrangements, while in any third party adoption of an orphan the required consent will be that of the appropriate government official and the head of the orphanage.

12.8.1.1 Birth Parents

Paradoxically, it is the absence of any need to address the issue of parental consent that is a characteristic feature of adoption in an Islamic context, as a parent is prohibited from permanently and irrevocably giving away their child.

12.8.1.2 The Child

The consent of the child concerned is not a requirement for his or her adoption in any Islamic state.

12.9 Thresholds for Exiting the Adoption Process

In Islamic states, not only is there is no right to adopt or to be adopted, nor any general right to start a family, but there is resistance to any attempt to interfere with established bloodlines and a reluctance to facilitate those who wish to change the identity of a child for the purposes of creating their own nuclear family based upon compromised bloodlines and a denial of the importance of lineage. However, where the child concerned is an orphan or abandoned with no known relatives, then a *Shari'ah* court will have little difficulty in granting an adoption in favour of married Islamic applicants who fulfill the necessary eligibility and suitability criteria.

12.9.1 The Welfare Interests of the Child

While, in general, the benchmark applied by the *Shari'ah* court is the best interests of the child, these 'best interests' are in turn defined as meaning an upbringing that is wholly Islamic. It is hard to estimate the judicial weight given to this factor in determining an adoption application, but it is clear that it would be not regarded as a matter of paramount importance; it does not, for example, outweigh the importance of parental consent.

12.9.1.1 Representation

Shari'ah law does not provide for consultation with children in adoption proceedings. The requirement of the United Nations Convention on the Rights of the Child, that children be heard and be allowed to participate in matters that affect their lives, has no bearing on adoption proceedings in Islamic states.

12.10 The Outcome of the Adoption Process

In Islamic states, for most purposes, the outcome of such a process is in fact and in law the determination of an application for *kafala*. However, in many countries with predominantly Muslim populations, statutory adoption processes also exist but there the outcome does differ in some important respects from the equivalent process in the other jurisdictions studied.

12.10.1 Adoption Orders; Third Party Applicants

Only when an application is by a third party, whether on a domestic or intercountry basis, in respect of an orphan or abandoned child, will the adoption process conclude with the issue of an adoption order.

12.10.2 Adoption Orders; Parents and Relatives

In Islamic countries, most domestic adoptions are first party informal care arrangements or *kafala* and are not necessarily endorsed by court orders. The rationale for kinship and step-parent adoptions in the other jurisdictions studied does not apply in an Islamic context: there is no equivalent social pressure to use adoption as a means to tidy up family status. In fact, the reverse is the case: there is definite pressure not to deliberately obscure actual genetic relationships; the use of adoption to tidy up matters relating to family names and inheritance rights would not be compliant with Islamic teaching.

12.10.3 Other Orders

There is no equivalent in Islamic countries, to the range of court orders, generally available in the other jurisdictions studied, which authorise alternative care arrangements for a child for whom parental care is not possible.

12.10.4 Revocation

Kafala can be revoked at any time at the initiative of either of the parties involved, including the child.

12.11 The Effect of an Adoption Order

The Islamic concept of adoption is fundamentally different from its common law equivalent. This difference is apparent in the effects of an adoption order.

12.11.1 The Child

In Islamic culture an adopted child is never seen as having been legally severed, permanently and irrevocably, from their family of origin and cannot be placed in the same legal relationship to their adopters as though born to them and of their marriage. As most domestic adoptions are 'kinship' in nature, the following rules then fully apply, but in circumstances governed by the Hague Convention the legal effects of the order on all parties must be Convention compliant.

12.11.1.1 Name

Islam does not allow a child to deny their family of origin. In some circumstances it might be possible to take the family name of a non-biological parent (i.e. an adoptive parent) but only if this also involves retaining an awareness of their original family name.[22] He or she must retain respect for their birth family name (surname).

[22] Surah Al-Ahzab Verse 4 to 5: "… nor has (Allah) made your adopted sons your real sons. These are the things which you utter from your mouths, but Allah says that which is based on reality and He alone guides to the Right Way. Call your adopted sons after their father's names: this is more just in the sight of Allah. And if you do not know who their fathers are, then they are your brothers in faith and your friends…"

12.11.1.2 Inheritance

Inheritance is governed by the *Qur'an* which confines inheritance rights to relationships based on bloodlines and marriage.[23] An adopted child, therefore, inherits from his or her biological parents, not automatically from the adoptive parents. In fact, an adopted child is prohibited from inheriting the property of adoptive parents, as this would necessarily undermine the inheritance rights of birth children and Islam places great importance upon respecting the inviolable integrity of the 'natural' family unit. While he or she has no inherent legal rights of inheritance in relation to their adopters, the latter may make arrangements during their lifetime to confer property rights on their adopted child.

12.11.1.3 Consanguinity

An adopted child, for the purposes of the laws relating to incest and the prohibited degrees of marriage, cannot under Islamic law be granted the same *locus standi* as if born to the adopters. When the child is fully grown, members of the adoptive family are not considered blood relatives, and are therefore not *muhrim* to him or her. An adopted person is *ghayr muhrim* to a sibling in their adoptive family and they can marry each other.

12.11.2 The Birth Parent/s

In Islamic states, the effect of a domestic adoption order on birth parents is that they shed their day-to-day care and maintenance responsibilities in respect of their child but, unless they are dead or unknown, do not otherwise lose all parental rights and duties. The child remains in law a member of their birth family and continues to be subject to the rules of inheritance, consanguinity and family name as though he or she had never left. The birth parent/s may maintain contact and/or demand the return of their child as they see fit. While the birth parent/s or any other family members are alive or known then the child cannot, under Islamic law, be wholly and irrevocably legally separated from his or her family of origin.

12.11.3 The Adopters

Islam rejects the notion of an adopted child becoming an integral part of their new family to be treated in law as though born to the adopters. Whether the order granted is in fact adoption or, as is much more likely, *kafala*, the child is ascribed the status of non-*Muhrim* and in both law and practice the distinctive rules of that status apply to remind the adopters that this is not their birth child.

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[23] *Qur'an* 8:75.

In Islamic culture, adopters are not taking the place of the biological family—instead they are trustees and caretakers of someone else's child. The *Qur'an* specifically reminds adoptive parents that they are not the child's biological parents: "Nor has He made your adopted sons your (biological) sons."[24] This is evident in rules such as those relating to family identity and property rights. While adopters are permitted to choose the child's first name, they may not automatically substitute their surname for that of the child's birth family. If the child is provided with property/wealth from their birth family, adoptive parents are required to hold it separately from their own and ensure that it passes intact to the child. The *Qur'an* has thus declared that only the wives of birth sons, "the wives of your sons who are from your (own) loins",[25] not the wives of the adopted sons, are permanently forbidden in marriage. Accordingly, it is permissible for a man to marry the divorced wife of his adopted son, a member of the adoptive family would be permissible as a possible marriage partner for an adopted person, and rules of modesty exist between the grown child and adoptive family members of the opposite sex.

Moreover, in Islamic law and culture there is little equity in the marital relationship: the husband bears the traditional patriarchal role as it was once defined in the law of England & Wales (see, further, Chap. 1) to which his wife and children are subordinate. One consequence of this is that custody of the adopted child, and responsibility for taking welfare related decisions regarding health and education etc., is seen as vested in the male adopter. Included in this responsibility is the duty to ensure that the upbringing of the adopted child conforms to Islamic requirements.

12.12 Post-adoption Support Services

Islamic states do not provide a statutory entitlement to post-adoption services comparable to those available in the developed common law nations. Such intervention would be viewed as an unwarranted government intrusion into the patriarchal family unit, even if the resources were available.

12.13 Information Disclosure, Tracing and Re-unification Services

Kafala does not require the above services as it is a process built on transparent consensual arrangements that allow for ongoing relationships between all parties: there is never any room for doubt as to the identity and location of those involved. The statutory adoption process, however, whether domestic or intercountry can give rise to issues regarding information disclosure etc.

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[24] Qur'an 33:4-5.

[25] *Qur'an* 4:23.

12.13.1 Information Disclosure

Identity and family history are matters of great importance in Islamic law and culture. It is considered essential that every Muslim has an authentic identity which in turn necessitates access to all relevant information. This can clearly pose difficulties for the subjects of third party adoptions.

In Jordan, the Ministry of Interior, Department of Civil Status has a novel approach to dealing with the problem of officially registering the subject of a third party adoption. It chooses four fictitious names for the mother and father, which along with the child's first name are placed on the Jordanian birth certificate. Parents' names, which are chosen at random and do not identify with any common Jordanian family or tribal names, are required for issuance of a Jordanian birth certificate. Thereafter, in Jordanian law, the child will carry the names of the fictitious father.

12.13.2 Tracing and Re-unification Services

In Islamic states, third party adoptions are usually in respect of orphans or abandoned children for whom all members of their birth family are either dead or unknown. Tracing and re-unification services are thus in most cases unnecessary.

12.14 Conclusion

Adoption in an Islamic context is largely a misnomer. Afforded recognition on a domestic basis in respect of some orphans or abandoned children, and on an inter-country basis by those countries that have acceded to the U.N. and Hague Conventions, for all other purposes adoption is known and interpreted as *kafala*.

Islamic culture, specific to some countries and accommodated by many, does not itself permit the total transfer of all parental rights and responsibilities in respect of a child from one family to another. It is a culture built around the importance of the identity of the individual and the family, within Muslim society, as traced by bloodlines back through the generations. Preserving the integrity of the family lineage, safeguarding the place of current family members relative to each other and passing on an intact genetic heredity to the next generation, are among the more binding duties that rest on the patriarchal head of the family. The extent to which this conceptualisation of the 'family' and the traditional interpretation of the patriarchal role is wholly Convention[26] compliant, as it interfaces with contemporary

[26] Not just the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, but also the United Nations Convention on the Rights of the Child 1989, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 and the European Convention on the Adoption of Children 2008, among others.

individual rights and freedoms, is a matter for ongoing debate. Unquestionably, however, it does impact upon the law, policy and practice of adoption as this is known in a secular context.

Where a child has no known family, due to being orphaned or abandoned, then he or she may be eligible for adoption by Muslim adopters if all parties are resident in a country that has an appropriate statutory scheme. Parental rights in respect of such a child are then wholly vested in the adopters, though the rules relating to *muhrim* and *hijab* and as regards inheritance, where the adopters have their own birth children, will apply. Even though eligible, however, few orphans or abandoned children are adopted and by far the majority live out their childhood in orphanages. It is probable that Islamic culture, as expressed through the attitudes of the extended family and members of the local community, would not be wholly supportive of adopters who took such a step.

Kafala, on the other hand, readily finds approval from within the Islamic culture, local community and family. Those Muslims who undertake the care of another's child, for no reward and remain mindful of the rightful place of the child's family of origin, are treated with respect. This is more of a foster-parent relationship, whereby the parent/s assume a guardianship role in respect of the child, who may be an orphan or abandoned but is much more likely to be from a known family. Needless to say, *kafala* requires not only adherence to the rules relating to *muhrim* and *hijab* and inheritance, but also Islam would not countenance naming a boy after his guardian father if the child's family of origin is known. *Kafala*, like the 'simple' form of adoption, leaves intact the basic legal components of the child's relationship with his or her family of origin. This encourages, indeed requires, a degree of openness and transparency in dealing with origins information and facilitating the child's awareness of their birth identity, family lineage and cultural heritage.

Chapter 13
The Adoption Process in Japan

13.1 Introduction

A constitutional monarchy with a population of 128 million, its legal foundations underpinned by the Civil Code but accommodating customs from its imperial past (though the powers of the Emperor are now much curtailed), Japan is in many ways an intriguing mix of tradition and modernity. The cultural context it provides for adoption is quite unlike that of other modern developed nations and results in idiosyncrasies of law and practice that offer an interesting contrast with the experience of other jurisdictions studied, particularly those sharing a common law heritage. Although its population is twice that of the U.K., the proportion of children adopted is far lower and its continuing tradition of providing for the adoption of adults, is without any comparable precedent among developed nations.

In this chapter the concern in applying the template is as much to identify the ways in which Japan fails to fit the mould as to gather data equivalent to that found in respect of other jurisdictions. However, the chapter unfolds in the same way, beginning with a brief historical background and an outline of the social context. It then deals with the emerging characteristics of the adoption process and the modern influences on its development before providing an overview of modern adoption policy and law. In the main, as in the other jurisdiction specific chapters, it focuses largely on the regulatory framework: dealing with the roles of the parties and agencies involved; examining the thresholds for entering and exiting the process; the orders made by the court and their effects; and the consequences in terms of information rights etc. for all parties. The chapter concludes by considering the more singular characteristics of the adoption process in Japan and their significance.

13.2 Background

In the mid-19th century Japan's policy of isolationism, successfully maintained for two and half centuries, came to an end. The ensuing Meiji era saw the introduction of numerous western institutions including a modern government and legal and parliamentary systems which accompanied the steady rise of Japan as a military

K. O'Halloran (ed.) *The Politics of Adoption,*

power, an empire and a global centre for trade and commerce. In 1896 the Japanese government established the Civil Code, which was modeled closely on European law as derived from Roman precedents but not to the exclusion of traditional law and custom. As Morris at the time remarked: "while their Civil Code contains many Articles on the subject of adoption which are taken almost word for word from certain European Codes, and have an undoubted ancestry in the *Corpus Juris Civilis*, there is also a great quantity of material relating to customs indigenous to Japan."[1] While the Civil Code continues to govern adoption and other family law matters, it was completely revised in 1947 and is now totally different from the Civil Code of 1898. Parts 4 and 5 of the current Civil Code govern family matter parts.

Centuries of wary engagement with the outside world, however, coupled with the cultivation of elegant codes of social conduct, left a legacy that continues to permeate Japanese institutions, modes of governance etc. and is perhaps particularly evident in all aspects of family law including adoption. An inward looking and very formal society, surrounded by quite different Asian cultures, Japan has assiduously developed and finessed rules for relationships within the family, between families and between family and the state that are quite distinctive and in that respect set this nation apart from its neighbours and from the developed nations of the west.

13.2.1 The Social Context Giving Rise to Adoption

In Japan the concept of adoption or *yoshi* has a much wider meaning than in modern western nations. Before World War II, for example, adoption placements of children were often informally and directly made within the extended family and with non-relatives for purposes such as to provide the adopters with a male heir, or an extra pair of hands to work the family farm. The placement of a son in a combined marriage and adoption arrangement with a family with a daughter but no male heir was a not uncommon practice; the adoptee being known as a *muko yoshi* (adopted husband). The marriage had to occur first as the Civil Code, giving precedence to adoption over consanguinity, prohibits marriage between an adoptee and adoptive sibling. Girls were also adopted (known as *yojo*), sometimes to provide care for the elderly but for many other reasons as well.[2]

13.2.1.1 The Marital Family

Public respectability is highly valued in Japanese culture. This is particularly evident in the importance attached to the traditional patriarchical family unit as reinforced by the *Iye* system.[3] The concept of 'family' in Japan has characteristics of

[1] Morris, R., 'Adoption in Japan', *4 Yale Law Journal*, 1894, p. 143.

[2] The author acknowledges the advice of Satoshi Minamikata on this matter.

[3] See, Matsushima, Y., 'Japan: What Has Made Family Law Reform Go Astray?' *The International Survey of Family Law*, ISFL, Martinus Nijhoff Publishers, The Hague, 1999, pp. 193–206 where this explanation is offered:

extensiveness and duration, attracting a veneration that distinguishes it from corresponding interpretations in other modern western societies. It more closely resembles a clan system consisting of many interrelated family groups with their own distinct sense of group identity, unique bloodline, lineage and proud history. Buddhism, combined with more primitive Shinto beliefs with its emphasis on ancestral worship, served to reinforce the central social significance of the family. The position of family 'head' has thus always been held in great esteem and many Japanese view their families as a privileged, almost sacred group. In recent years the nuclear family unit has become as ubiquitous in Japan as elsewhere and while this has diluted the traditional importance of the wider collective intergenerational sense of 'family' it has yet to wholly displace it.

Within this hierarchical, almost feudally organised society, marriage confirmed status and social identity. The social standing of a marital family could also be bolstered or extended by the addition of a suitable male and adoption was often used explicitly for this purpose. Like marriage, adoption was viewed as a means of conferring status: on adopters as much as on the adopted, in fact "in all times past it has been held to be almost as important a factor as marriage itself in the making of families".[4] An adult male, selected for his lineage and capacity to continue that of the adopters, could prove an adroit social investment for a family in need of an heir.[5] As Morris observed, when considering the social role of adoption in the late 19th century, "certainly its most important function in Japan, is in the case where it is employed as a means for transferring the headship or *katoku*, and the property of a house". In more modern times adoption has come to serve much the same social role in relation to the marital nuclear family unit.

13.2.1.2 Kinship Adoption

Arguably, the Confucian influence on Japanese society has been such that adoption developed from and remains embedded in the overriding principle that the integrity of family boundaries must be preserved and bloodlines protected. This influence may account for the long established use of adoption within the extended family as a means of strengthening bloodlines and kinship bonds. As an inevitable corollary, the social standing of a family that included an unmarried daughter who relinquished

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"Iye was the vertically extended family system in which every family member was subject to the control of the head of the family and women were always subordinate to men" at p. 197.

The Civil Code reforms of 1947 ostensibly abolished the *Iye* system.

[4] Morris, R., 'Adoption in Japan', *op. cit*. at p. 145.

[5] In keeping with the ancient Roman practice of 'adrogatio' or 'adrogation' whereby an a *sui iuris* male was adopted to became the legal heir of a childless man so as to ensure the continuity of the family name and the undertaking of religions rituals and memorials after his death (Gai institutiones 1.99-107 and later Digesta Iustiniani 1.7.2 (preamble). See, further, Borkowski, A., *Textbook on Roman Law* (2nd ed.), Blackstone, London, 1994, pp. 136–137 and Kaser, M. (translated by Dannenbring, R.), *Roman Private Law* (4th ed.), Pretoria: South Africa, 1993, p. 310.

a child for adoption to strangers had their status compromised nearly as much as the family which adopted that child. Such an adoption was, and to some extent remains, associated with diluted bloodlines, with flawed lineage and with connotations of taboo, secrecy and shame. As has been said: "children in need of adoption have been stigmatised by notions of pure and impure or good and bad blood".[6] There is thus an inherent cultural resistance to third party adoption which explains why the official number of adoptions of unrelated children is only a fraction of that in most western countries.

Most 'ordinary' adoptions occur in relation to children who are related to their adopters. This may help explain the consequent failure to develop adoption as an option for children in public care.

13.2.1.3 Modern Influences on the Development of Adoption

Traditional Japanese society, with its hierarchically organised families, stratified in accordance with bloodlines and with its hallmarks of privacy, respectability and public duty began to yield to the pressures typical of modern western societies in the latter half of the 20th century.

- **Divorce**

Perhaps the most revealing indicator is the increase in recourse to divorce, the rate of which more than doubled from 142,000 in 1980 to 290,000 in 2002 and declined somewhat to 257,475 in 2006.

- **Abortion**

Abortion is legal only up to 22 weeks. In the years spanning the end of the 20th and beginning of the 21st centuries the rate of abortion leveled out at approximately 343,000 annually.[7] It is estimated that the ratio of minors having abortions compared to the total number of abortions jumped 13-fold during the 1955–2003 period.[8] This is significant as the majority of children available for adoption are due to 'unwanted pregnancies', such as babies born to minors with no means of support. However, the majority of abortions are carried out in relation to the 'legitimate' pregnancies of married couples who have chosen abortion for financial reasons etc.[9]

- **Child abuse**

Child abuse was 'discovered' in the late 1980s and the rate of reported abuse increased throughout the 1990s.[10] Child abuse and the sexual abuse of children were legally defined in Japan for the first time with the introduction of the Child Abuse

[6] Hayes, P. and Habu, T., *Adoption in Japan: Comparing Policies for Children in Need*, Routledge, London/New York, 2006 at 'Preface' p. xii.

[7] In 1955 there were 1,170,143 abortions; 550,127 in 1985; 343,024 in 1995; and 341,588 in 2001.

[8] In 1955 there were 14,000 abortions performed on minors compared with 40,000 in 2003.

[9] The author acknowledges the advice of Satoshi Minamikata on this matter.

[10] From 1,101 reports of abuse in 1990 to 11,631 in 1999; since escalating to reach 37,323 in 2006.

Prevention Law 2000. Under Japanese law, the age of sexual consent is thirteen.[11] There are grounds for concern that child abuse is under-reported in Japan, perhaps because of the innate aversion to state interference in family life.[12]

13.2.1.4 Emerging Characteristics of the Adoption Process

Japanese culture does not readily accommodate interventionism; such an approach perhaps runs counter to an ingrained need to maintain the formalities of mutual respect as a working basis for social and personal relationships. Consequently, there is no established ethos of state intervention in family matters. The gradual creation of a legislatively based adoption process involving the state, adoption agencies and professional staff did not displace but simply added to traditional informal practices. As the introduction of 'special' adoption was unaccompanied by prescriptive provisions prohibiting former practices and requiring adherence to new procedures, there has never been a real incentive to abandon traditional ways nor a necessity to invest in the professional staff and administrative machinery so characteristic of the contemporary adoption process in other developed nations. The result is that, in reality, the contemporary adoption process consists of two parallel routes, including a number of different types of agencies (government, independent and hybrid) operating alongside private initiatives, to bring proceedings before the Family Court which may conclude with either an 'ordinary' adoption, a 'special' adoption or a form of custody order.

- **Judicial process**

The Family Court is the sole determining body with authority to adjudicate on 'special' adoption applications; it does not have a role in family adoptions. The adoption process in Japan is not wholly subject to judicial determination as many 'ordinary' adoptions are concluded without being brought before a court.

- **Weak professional mediation**

As Hayes and Habu observe, "the absence of an adoption orthodoxy in Japan is connected with the near lack of an adoption profession."[13] This is evident in the relatively low levels of professional involvement, staff expertise and qualifications and the number and profile of the agencies engaged in the process.[14]

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[11] See, Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.231 (February 26, 2004) where the Committee noted that it finds that age to be "low" (at para 126).

[12] See, Committee on the Rights of the Child, 1998, *op. cit*., which states:

> "The Committee notes with concern that insufficient measures have been taken to ensure that all cases of abuse and ill-treatment of children are properly investigated, sanctions applied to perpetrators and publicity given to decisions taken. It is also concerned about the insufficient measures taken to ensure the early identification, protection and rehabilitation of abused children" at para 19.

[13] *Op. cit*. at p. 9. However, Satoshi Minamikata suggests that this may be a misperception due to a 'western' view of an appropriate level of professional intervention.

[14] Note the existence of the Society for Study of Adoption and Foster Placements for Children.

- **Private arrangement for adoption of adult**

The Civil Code makes specific provision for continuance of the traditional practice of adopting an adult for the purpose of providing a family with an heir (or, indeed, with a carer). This occurs by way of an 'ordinary' adoption, requires little more than the lack of a son and heir, the consent of all parties, the presence of witnesses and the recording of the adoption by the relevant government official. The result being to vest in the adopted adult all the necessary rights to enable him to succeed to the *Katoku*, or position as head of the family. Having thus acquired succession rights—including the family name, lineage, its titles and entire property—the adoptee is required to renounce the rights of succession in relation to his birth family that he would otherwise be entitled to in an 'ordinary' adoption. In the feudal past, such an adoption would quite often be followed by the *inikio*, or abdication by the adopter in favour of the adoptee as head of the family.[15]

However, traditional adoption for *Katoku* purposes has no place in the modern process presided over by the Family Courts. Instead, the adoptee is treated as the legitimate child of the adopting parent(s), his/her legal relationship with birth family is completely severed and their inheritance rights are no more or less than any other child in the family.

- **Private arrangement for adoption of child**

Direct placements of a child by the birth parent/s or by an intermediary acting on behalf of the birth parent/s, with relatives or non-relatives, for adoption purposes, have long been and continue to be a characteristic of the adoption process in Japan. Typically, an 'ordinary' adoption takes the form of a placement within the extended family, an arrangement made with the approval of the male head of the family, for reasons associated with perpetuating the bloodline in matters of lineage, inheritance, business or simply as a means of keeping alive the family name.

- **Consensual**

The voluntary relinquishment of a child by the birth parent/s has been and remains the normal circumstance catered for by Japanese adoption law. As Hayes and Habu comment:[16]

> A situation where most children available for adoption are babies born to single mothers is reminiscent of the situation in the U.K. and in other western states about 40 years ago. It is also in contrast to the current position in the U.K., as there has been a transition away from single mothers giving up their babies and an increased willingness to take children into care and free them for adoption if they have been abused or neglected. The divergence between Japan and the U.K. reflects the continuing strength of a conservative paternalistic ethos in Japan …

[15] The Civil Code now tightly regulates the circumstances in which the *inikio* can take place.

[16] See, Hayes, P. and Habu, T., *Adoption in Japan: Comparing Policies for Children in Need*, *op. cit*. Although, it remains the case that most adoptions of minors in Japan are family adoptions, usually by step-parents.

Where that child is placed with a family member then, with the consent of all concerned, an 'ordinary' adoption is effected without any need to involve the Family Court. Where the placement is with a married couple unrelated to the child then, even though the consent of all parties is available, recourse to the Family Court is necessary to ensure the complete and irrevocable vesting of parental rights and duties in the adopters.

- **The welfare of the child**

In Japan it is now a legal requirement that the welfare interests of the child concerned must be promoted by the proposed adoption.[17] The Family Courts use the criterion of protecting the welfare of an adopted minor, which is not dissimilar in practice from employing the equivalent checklists for section 8 orders in the Children Act 1989 in England & Wales. If necessary, a Family Court judge can order a court officer to examine the case and to submit a form of welfare report to assist the court assess and promote a child's welfare interests.[18]

However, 'welfare' in this jurisdiction, is also open to a much broader interpretation than its customary association with attachment and nurture. The 'welfare' of a male child, for example, may be interpreted as consonant with prospective socio-economic benefits, resulting from his adoption by those in need of an heir to perpetuate their family, family name or business. Moreover, the lack of weight given to this principle within the Code is such that it can fail to protect a child from discrimination.[19]

- **Weak links to the public child care system**

Although Japan has far fewer children in state care than many other countries, most notably the United States, institutional care is of central importance to its provision unlike the position in those countries. In 2006 there were a total of 36,151 children in the public care system[20] of which: 3,293 were in foster care; 3,008 were babies in

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[17] Ministry of Foreign Affairs 2001: 113, 143.

[18] The author is indebted to Satoshi Minamikata for this information.

[19] See, Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Japan*, U.N. Doc. CRC/C/15/Add.90 (1998) which states that:

> "The Committee is concerned that legislation does not protect children from discrimination on all grounds defined by the Convention, especially in relation to birth, language and disability. The Committee is particularly concerned about legal provisions explicitly permitting discrimination, such as article 900(4) of the Civil Code which prescribes that the right to inheritance of a child born out of wedlock shall be half that of a child born within a marriage, and about mention of birth out of wedlock in official documents. It is also concerned at the provision of the Civil Code stipulating a different minimum age of marriage for girls (16 years) from that of boys (18 years)" at para 14.

These same matters were the subject of concern for the Committee in its 2004 report (see, paras 22 and 23). Note also the Committee's recommendation "that the State party amend its legislation in order to eliminate any discrimination against children born out of wedlock, in particular, with regard to inheritance and citizenship rights and birth registration, as well as discriminatory terminology such as 'illegitimate' from legislation and regulations" (at para 25).

[20] Statistical material produced for the meeting of heads of the child welfare section of the Ministry of Health, Welfare and Labour on 23 February 2007. See, further, at http://www.mhlw.go.jp/shingi/2007/02/dl/s0223-2a.pdf

special facilities; and the vast majority of 29,850 were resident in Japan's 527 state-run or subsidized children's homes;[21] admitted because they have been abandoned, neglected, abused or voluntarily placed by their birth parents. Once in the public child care system very few children transfer to the adoption process. This is not due to an absence of legal provisions permitting such a transfer: the Civil Code does enable a Family Court to dispense with the need for parental consent in respect of the proposed adoption of a child that has suffered abuse at the hands of that parent; the court simply very seldom takes the step of dispensing with parental consent.

The reasons why the bridge between child care and adoption is unused, as with other aspects of life in this society, are more oblique. Partially this is due to patterns of state funding, which favour large privately owned children's homes in preference to adoption and foster care and thereby provide a disincentive for owners to facilitate a move to such alternative forms of care. Partially, also, it is a consequence of legal difficulties relating to the rights of a parent who is 'missing' rather than one who has 'abandoned' their child. It is probable, however, that the main reason lies in the particular regard for the family of origin in Japanese culture: birth parents would prefer the anonymity of a children's home than face the exposure of another family undertaking the care they cannot provide; prospective adopters view with some unease the opportunity to take into their family a child of uncertain origins; state administrators take the view that a neutral positioning of the child leaves open the possibility of reclaim by family of origin and leaves untouched the integrity of family origins; while adoption professionals lack the leverage to challenge the bloodlines taboo.

- **Full and exclusive vesting of parental rights and duties in adopters**

The 1988 legislation strengthened the legal position of adoptive parents by providing for the absolute severing of all legal links between birth parents and child and the full transfer of parental rights and duties to adopters on completion of the 'special' adoption process. However, as most annual adoptions continue to be of the traditional 'ordinary' form, which does not require a complete severance of all such legal links, the Japanese adoption process as a whole is more compromised than its common law counterpart.

- **Registered and unregistered adoption agencies**

Private arrangements, sometimes involving third parties including agencies, continue to be a prominent feature of the adoption process in this jurisdiction. This is facilitated by the fact that in Japan, unlike other modern developed nations, there is no central regulating agency authorized to coordinate the roles and responsibilities of all parties, professionals and other agencies that comprise the adoption process. Japan's Welfare of Children Act does not requires adoption agencies to register

[21] The average such home caters for approx 51 children. Since 2000, a number of small 'group homes' and 'family homes' catering for 4–6 children have been established; see, further, Hayes and Habu, *op. cit*. at pp. 98–99.

with the municipal government and although at a local level registration may be required there are no penalties for not registering. All such agencies are prohibited from profit-making and are allowed to receive payment only for 'expenses' (which covers 10 categories, including travel, phone and counselling services) but there are no restrictions on financial gains received from 'donations'. Adoption agencies may evade registration by restricting their activities to placements ostensibly for reasons other than adoption but which over time are converted to become adoption placements. One such agency, a national association of doctors, places many babies direct from maternity hospital to applicants approved following a single interview on the basis of: secure income, good health and education; approval of relatives; general suitability; and on being aged more than 40 (in curious contrast to national norms elsewhere) but less than 50. The practice of using 'contracts' with unmarried mothers, to secure the relinquishment of their baby or perhaps unborn child, is strongly associated with unregistered adoption agencies.

The role played by unregistered agencies has been a source of concern, particularly as regards those engaged in placing Japanese children for adoption in other countries. In 2005 this concern was addressed when the Ministry of Health, Labour and Welfare commissioned the Society for Study of Adoption and Foster Placements for Children to examine the activities of unregistered agencies.[22]

Registered adoption agencies are in practice closely linked to government bodies such as their local Social Welfare department and Child Guidance Centre from which they receive financial grants and children for placement respectively.[23]

13.2.2 Resulting Trends in Types of Adoption

The balance between family and third party adoptions has always been uneven in this jurisdiction. The adoption of babies by third parties or 'strangers', where the adopter is unrelated in any way to the child, is not a practice deeply embedded in Japanese culture.

13.2.2.1 Family Adoptions

This, the traditional adoption model, now accounts for most 'ordinary' adoptions and continues to dominate the adoption process in Japan.

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[22] Cited by Hayes, P. and Habu, T., *Adoption in Japan: Comparing Policies for Children in Need*, Routledge, London/New York, 2006 at p. 10.

[23] *Ibid*., see, Chapters 3 and 4 for contrasting accounts of two such agencies.

13.2.2.2 Third Party Adoptions

The adoption of a child by a married couple unrelated to that child is now commonly catered for by the 'special' adoption statutory procedure. However, whereas in the past third party adoption conformed to a very definite model, it now accommodates a number of variations.

- **Adoption of children with special needs**

Children with 'special needs' such as suffering from learning or physical disability or both, possibly with social and health care needs, or from mixed race or uncertain social background, are not readily assimilated by the adoption process because, in general, Japanese prospective adopters tend to be more selective and less flexible in their expectations of the 'type' of child they wish to adopt than their counterparts in, for example, the U.K. The International Social Services Japan adoption agency does, as part of its service, accept 'harder to place' children (often from CGCs) and has considerable success in arranging for their adoption by foreign couples resident in Japan. However, the definition 'harder to place' refers in the main to children who deviate relatively marginally from the norm (perhaps by being of mixed race, from a minority racial group or simply by being a male child aged five or more) and would not usually be interpreted as including sibling groups, children with severe health or behavioural problems as in the U.K.

- **Child care adoption**

A much smaller proportion of the Japanese child care population transfers through to the adoption process than is the case in countries such as the U.S. and the U.K.

- **Open adoption**

The introduction of principles of 'openness' to adoption practice has proved problematic; there is much in the traditional ethos of Japanese social relations that is inimical to transparency and insistence on such an approach may prove counter-productive in an adoption context. As Hayes and Habu explain:[24]

> The open philosophy is somewhat at odds with the traditional Japanese cultural emphasis on reserve, social duty and the masking of individual feelings. There are also potential conflicts of interest between an agency and parents; if an adoption agency is too forthcoming about the backgrounds of the children in its care, then this may make their placement more difficult. This means that a policy of openness is not necessarily an advantage in helping as many needy children as possible.

- **Same sex adoptions**

While there is no specific legal obstacle to prevent cohabiting couples from adopting, in practice whether or not the applicants are of the same gender, a Family Court does not make such orders.

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[24] *Ibid*. at p. 45.

- **Intercountry adoptions**

As with many other nations, the first significant experience of intercountry adoption in this jurisdiction came in the aftermath of World War II. In the chaos of the closing years of that war, Chinese families adopted some 2,500 Japanese children. This was followed by a steady flow of mixed race children to the U.S. for adoption, facilitated by the Refugee Relief Act 1953, resulting in hundreds of Japanese children being adopted annually in the U.S. Japan's role as a 'sending' nation has been maintained in recent years, with forty or more children now being adopted annually by U.S. couples.[25] Indeed, between 2000 and 2003, a total of 106 children born in Japan were adopted by people overseas; much to the consternation of some in the Japanese media.[26] As a 'receiving' nation, its courts currently process some 300–500 intercountry adoptions annually (a figure which excludes those children whose adoptions are finalized before entering the jurisdiction).[27] It is very noticeable that only a small proportion of such adoptions are 'special'.

Currently, however, Japan has neither ratified nor signed the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption 1993, for reasons which may be to do with an inability to provide a body to act as a 'central authority' as required by the Convention, while its role in intercountry adoption is further complicated by restrictive immigration laws.[28]

13.2.2.3 Adult Adoptions

A singular feature of the process in this jurisdiction is the fact that it continues to be used for the adoption of adults.

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[25] Causing protest from the Japan Federation of Bar Associations which, in 2003, asked why "the Japanese government has taken no measures to prevent our children going abroad to live as adopted children". Cited by Hayes and Habu, *op. cit*. at p. 81.

[26] According to a September 20, 2004 article in the *Washington Times*, 'Japan to Probe Overseas Adoption', Japan plans to scrutinize its adoption agencies and related legal procedures relating to overseas adoptions after recent reports that some adoptive families have been asked to make huge donations to agencies. See, further, at http://washingtontimes.com/upi-breaking/20040919-111609-9435r.htm

[27] Hayes and Habu, *op. cit*. at p. 82. Also, see, Judicial Statistics, General Secretariat, Supreme Court of Japan which provides the following data for international adoptions: 1996, 382 and 30 'special' adoptions; 1997, 403 and 23; 1998, 450 and 29; 1999, 446 and 26; 2000, 500 and 34; and 2001, 460 and 31.

[28] See, Committee on the Rights of the Child, *op. cit*., which states:

> "In light of article 21 of the Convention, the Committee is concerned at the lack of necessary safeguards to ensure the best interests of the child in cases of intercountry adoption" at para 17; and
>
> "The Committe recommends that the State party take the necessary steps to ensure that the rights of the child are fully protected in cases of intercountry adoptions and to consider ratifying the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption" at para 38.

13.3 Overview of Modern Adoption Policy and Law

In Japan, a strong legacy of family autonomy accompanied by entrenched respect for parental rights tends to prevail over modern adoption law and policy to ensure that adoption practice conforms to, or does not stray too far from, traditional values.

13.3.1 Adoption Related Legislation

The Domestic Proceedings Act 1947 (*Kaji Shimpan Ho*) provides the procedural framework that governs the jurisdiction of the family court on many family matters, including adoption: it authorizes adoption agreements in respect of minors (under 15 years of age) and it provides for the determination of 'special' adoptions. Otherwise, there is no body of adoption specific legislation, associated procedures and case law precedents to guide an understanding either of current Japanese adoption law or of its development. Apart from the introduction of 'special' adoption in 1988, there has been no significant change in adoption law since the end of World War II. Although Japan has ratified the U.N. Convention on the Rights of the Child, it has yet to make the adjustments necessary to ensure Convention compliance in respect of some of its laws relating to children (as noted above).

13.3.1.1 'Ordinary' and 'Special' Adoptions

It is necessary to make a distinction between two types of adoption: *futsu yoshi*, or 'ordinary' adoption and *tokubetsu yoshi*, or 'special' adoption. The former has perhaps always existed in Japan and continues today. It is based on a simple agreement between the parties, is used in respect of minors and is not required to be registered in court. Instead, after the court issues an order, one of the parties registers the adoption in the family *koseki* at their local office.[29] The second, introduced in 1988 and intended to be the modern equivalent of other western models, is a formal statutory process in which the legal rights of the parties involved are recognised and given some protection. Both forms of adoption are currently operative and although the statutory form attracted some 3,000 applicants in its first year this has since stabilised at a much lower level (approx. 300–400 annually) leaving the traditional version (approx. 1,500 annually) to prevail as the preferred option.

- **Wards of the state**

Children who are abandoned, or are found in circumstances which indicate parental abandonment, automatically become the responsibility of the local Child Guidance

[29] Civil Code, 798. The author is indebted to Satoshi Minamikata for this information.

Centre. In such cases willful parental neglect is presumed and, following application to the Family Court, the parent forfeits their rights in relation to the child and custody together with all parental rights become vested in the Director of the CGC who then authorises residential care in a children's home. The same outcome occurs where a parent voluntarily places their child in a children's home, perhaps following divorce or family breakdown, but is thereafter 'missing' and ceases all contact. This is not an infrequent occurrence (though no statistical information is available) due to the social opprobrium and lack of social welfare support that accompanies the status of an unmarried mother. Once in institutional care[30] there is little proactive professional initiative from the local CGC to introduce the possibility of adoption and virtually none in respect of the child of a 'missing' parent or one who has known relatives.

- **Emergence of state role**

Private adoptions, arranged directly between birth parent/s and adopters, first began to become subject to state control in 1875 when the Meiji government introduced compulsory family registration, which included a requirement that adoptions be registered. However, it was not until the years following the end of World War II, in response to an urgent need to provide for the many war orphans and refugees and within the framework of the Civil Code then imposed upon defeated nation, that the state and other parties began to develop their contemporary role in the adoption process. The growing public concern, generated by reported cases of 'baby farming' in those years, led eventually to the setting up of the first adoption agencies which commenced their mediatory function, later attracting state subsidies, of arranging the placement of children with suitable prospective adopters.

13.3.1.2 Child Welfare Law 1948

State control of care provision for orphans and abandoned children was initiated by this legislation, while all those in institutions automatically became subject to its provisions. To be vested with parental rights in respect of a child suspected of being neglected or abused by parent/s or guardian, it was first necessary to seek authority under Articles 27–28 from the local Family Court to remove him or her to the care of a Child Guidance Centre. Where a child was voluntarily placed by the parent/s, in a CGC or children's home, who thereafter ceased contact with their child, then the parent/s were designated as 'missing'.

This legislation provided the legal framework for establishing a national foster care system with paid foster parents and for the current network of child guidance centres. It also prohibited adoption agencies from profit making.

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[30] See, Committee on the Rights of the Child, *op. cit*., which states:

> "The Committee is concerned at the number of institutionalized children and the insufficient structure established to provide alternatives to a family environment for children in need of special support, care and protection" at para 18.

13.3.1.3 Civil Code 1948

In this year the Civil Code was revised to require all adoptions by non-relatives of children under the age of 20 years to be approved by the Family Court in accordance with the welfare interests principle. Where the child was less than 15 years of age the consent of birth parent/s or legal representative was necessary.[31] The Civil Code defined two types of adoption in Japan: ordinary adoption and special adoption.

- **Ordinary adoption**

This creates a legal parental relationship between the adopters and the adoptee, whether adult or child, but not wholly to the exclusion of legal links between the latter and his or her birth parent/s. An ordinary adoption has the effect of conferring the status of 'legitimacy' on the child. If the child to be adopted is a minor then, except in certain circumstances, leave from the Family Court is in principle required. The Family Court determines each case on the basis of whether the adoption is consistent with the child's welfare interests. The adoption takes effect when formally recorded in the *koseki* by the relevant authorities and may be readily dissolved with the consent of all parties; in the absence of consent, then either party is free to make application to the Family Court for an order dissolving the adoption.

Leave from the Family Court is not required in cases where the adoption is in respect of a minor who is a lineal descendant of the adopter/s, including a child of the adopter's spouse. Even in these cases, however, officers in charge of the *koseki* or family register may only formally record the adoption after examining the arrangements to ensure that all the essential conditions have been met. For example, if the child to be adopted is less than 15 years of age, they ascertain whether the adoption is accepted by the legal representative, whether it violates other laws and regulations, whether it amounts to adoption of a minor who is a lineal descendant of the adoptive parent or his/her spouse, etc.

- **Special adoption**

Again, this creates a legal parental relationship between adoptive parents and child, with the latter then acquiring the status of a legitimate child. In this case the child must be under six years of age at the time of application and the Family Court has to determine whether or not the proposed adoption is compatible with his or her welfare interests. In a special adoption, the legal relationship between the adopted child and his/her birth parents is terminated. It tends to be regarded as the default option reserved for complex situations. In addition, consent of the child's parents is also required except where this is unobtainable or where the child has suffered abuse, serious neglect or been abandoned by the parent/s. Unlike an 'ordinary' adoption a special adoption is indissoluble[32] except in certain circumstances when the Family Court may permit dissolution.[33]

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[31] The Civil Code, Article 798.

[32] The Civil Code, Article 834.

[33] The Civil Code, Article 817, para 10.

- **Assisted Reproduction Services**

Surrogate births and IVF have slowly gained social acceptance in Japan, where the first surrogate birth occurred in 2001. In 2003, approximately 1.5% of all births were attributable to IVF. The following year, the government introduced state subsides for IVF which were increased further in 2006. In 2004, IVF contributed 18,000 babies or 1.6 per cent of total live births for that year.

13.3.1.4 Contemporary Adoption Legislation

The current law governing adoption is as stated in the Civil Code while ancillary legislative provisions are to be found in the Social Welfare Law.

An emerging pattern of family breakdown, particularly the resulting pressures on unmarried mothers, led to new legislation introducing 'special' adoption in 1988. In Japan, the balance traditionally struck between public and private, as reflected in family law matters, carries through to its contemporary experience of adoption.

13.3.2 International Law

Japan is not a signatory to the Hague Convention but it ratified the Convention on the Rights of the Child in April 1994, submitted its initial report for this Convention in May 1996 and its third in April 2008.

13.3.3 Adoption Policy

The respect traditionally accorded to parental rights, in Japanese society generally and in family law in particular, shapes the policy governing the law as it relates to children. In the context of adoption this can be seen in the virtual absence of anything resembling a coherent strategy or programme for related service provision. Adults and children may be adopted. There are no prescriptive provisions requiring greater weight to be given to the welfare interests of an abused/neglected child than to the parental right to withhold consent to the adoption of that child. Birth parents wishing to relinquish their children for adoption may choose from a number of different routes. Adoption agencies are free to develop their own individual approaches to prospective adopters. The interface between child care law and adoption law remains in practice almost impermeable due to a legislative reluctance to restrict a judicial discretion that, in such circumstances, is most usually exercised in accordance with traditional values. Few children with 'special needs' are admitted to the adoption process.

13.4 Regulating the Adoption Process

In this jurisdiction, it is perhaps a misnomer to refer to 'the adoption process' when in practice neither the subjects, the official bodies, the role of professionals nor the outcomes are standardized components; there is a conspicuous lack of data regarding annual adoptions. The general lack of a professional regulatory framework has attracted criticism from the Committee on the Rights of the Child.[34]

13.4.1 Length and Breadth of Process

In many respects the Japanese adoption process does not conform to the common law model and this makes any comparison on the basis of length and breadth, or indeed as regards most other aspects of the process, an illusory exercise. It also renders the process in this jurisdiction less susceptible to being governed by a similar regulatory system. As has been pointed out "the Japanese state provides a comprehensive and free adoption service, however, it has not, thus far, created a central professional body to govern practice, but has taken a relatively laissez faire approach to the regulation of adoption".[35]

13.4.2 Role of Adoption Agencies and Other Administrative Agencies

Unlike the strictly statutory adoption process of the U.K. and other developed common law nations, typified by a coherent and carefully integrated sequence of stages with legally designated agencies and professions playing powerful statutorily defined roles, in Japan the adoption process remains remarkably loosely structured and lightly regulated.

13.4.2.1 The Child Guidance Centres

The CGC network (broadly equivalent to U.K. local authority social services departments) and the staff of its centres play a central role in the 'special' adoption process. They arrange placements and home study reports and issue the all important certificate identifying the child placed as a 'child who requires protection' which will be required

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[34] See, Concluding Observations of the Committee on the Rights of the Child, Japan, U.N. Doc. CRC/C/15/Add.231 (2004):

"The Committee is concerned that there is limited monitoring or control of domestic and intercountry adoptions, and that there is very limited data available on domestic and intercountry adoptions" at para 39.

[35] Hayes, P. and Habu, T., *Adoption in Japan: Comparing Policies for Children in Need*, Routledge, London/New York, 2006 at 'Preface' p. xii.

by the Family Court in respect of all 'special' adoptions. CGC staff, however, being few in number and low in professional qualifications relative to their western counterparts, contribute little in the way of specialist expertise to that process.

13.4.2.2 Adoption Agencies

The statutory introduction of 'special' adoption brought with it an increased involvement of state sponsored and independent voluntary agencies in the adoption process. There are now approximately 20 private adoption agencies, all of which require to be registered (see, further, above). However, there are virtually no mandatory statutory requirements binding on all agencies and parties involved nor any system for coordinating their various roles. The process itself is not legally defined as such, the professional input is minimal and often discretionary in marked contrast to that of other developed nations.

13.4.2.3 Children's Homes

Most children in the public care system in Japan are accommodated in private children's homes, run on a for-profit basis like any other commercial business. The public child care system thus contains a built-in disincentive for proactively managing the transfer of abused and neglected children into the adoption process.

13.4.3 Role of the Determining Body

The Family Court has, since it was established, been the sole authorised body with the power and duty to approve the adoption of minors. It must also approve all 'ordinary' adoptions where the child is not a lineal descendant of the prospective adopters. In both sets of circumstances, the prospective adoptive parents must lodge their petition in the Family Court with jurisdiction over the child's place of residence. The hearing which, in the context of 'special' adoptions, takes place at the end of a trial six-month period, is open to the criticism that it fails to give adequate cognizance to the Convention on the Rights of the Child.[36]

The City Office cannot legally register the adoption decree until the Family Court has heard and determined the application, waited two weeks for the parent/s to challenge the decision and then given its approval to the adoption. In cases where the 'ordinary' adoption involves a minor who is a descendant of one of the adoptive

[36] See, Committee on the Rights of the Child, *op. cit.*, which states that:

> "The Committee notes with concern that although the Convention on the Rights of the Child has precedence over domestic legislation and can be invoked before domestic courts, in practice courts in their rulings usually do not directly apply international human rights treaties in general and the Convention on the Rights of the Child in particular" at para 7.

parents, the City Office may register a regular adoption without any necessity for prior approval by the Family Court.

13.5 Thresholds for Entering the Adoption Process: Eligibility and Suitability Criteria

The criteria for entering the adoption process in Japan are complicated. This is to be expected in a jurisdiction where: the purpose of adoption can be for reasons other than to secure the welfare of a child; the law recognizes two different types of adoption; provision is made for the adoption of both adults and children; and where parents are permitted considerable discretion to make private adoption arrangements. There is no statutory provision for an 'adoption service', in the sense of a comprehensive and integrated programme of services provided by professionals to all parties involved, as is the case in the U.K.

13.5.1 The Adoptee

In Japan the person to be adopted need not be a child, though must be younger than their adopter.

13.5.1.1 Adult Adoptee

Most usually, adults are adopted to provide descendants for a childless family or for business purposes. In such circumstances the traditional requirement for 'ordinary' adoptions that the adopters be older than the adoptee, but that the age difference need only be one day,[37] continues to apply.

13.5.1.2 Child Adoptee

In Japan, unlike other modern developed nations, a comparatively high proportion of the children adopted are babies. A child eligible for 'special' adoption is a 'child who requires protection'. This is further defined under the Civil Code,[38] but in general the child concerned is most often either:

- A non-marital child
- An abandoned infant
- A child whose parent(s) has/have died or disappeared
- A child whose parents are incapable of providing support or
- An abused child

[37] Civil Code, Articles 792 and 793.

[38] Civil Code, Article 817-7.

The CGC is the only body authorized to confirm the status of such a child and will do so by issuing a certificate to that effect where the child is in the public child care system, following recourse to the Family Court, but not where he or she is the subject of a private placement.

The Civil Code requires a child adoptee to be less than six years of age at the time an application is made for his or her 'special' adoption. An exception is allowed for applicants of a child up to the age of eight who has been in the continuous care and custody of the prospective adoptive parents since before the child's sixth birthday.[39] Where the procedure is for an 'ordinary' adoption then the child concerned must be less than 20 years of age and advance notice must be served on the appropriate authorities, if less than 15 then the consent of a legal representative (usually a parent with full parental rights) is required.[40]

13.5.2 The Birth Parent/s

In Japan, the birth parent/s may play a more prominent and discretionary role in the adoption process than would be available to their counterparts in the U.K.

13.5.2.1 Unmarried Mother

By far the majority of Japanese adoptions result from the consensual relinquishment of babies by their young and unmarried mothers shortly after birth of the child. The social stigma associated with such mothers and the taint of 'illegitimacy' that attaches to their children is very similar to that which prevailed in the U.K. in the 1960s. The proportion of children born outside marriage is very low and the social pressure for their consensual adoption is high.[41]

Where the relinquishing mother is aged under 20 years she is in law a minor and therefore the consent required is that of her parent or guardian.[42] Where she is 20 years of age or older then her consent must be obtained unless the necessity for it can be judicially dispensed with.

13.5.2.2 Unmarried Father

Where the putative father is known, has acknowledged his child and to some degree has exercised his parental responsibilities and his whereabouts can be ascertained, then his consent must also be obtained unless grounds exist for it to be judicially dispensed with.

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[39] Civil Code, Article 817, 5.

[40] Civil Code, Article 797.

[41] Interestingly, in Japan, of live births in 2005, the proportion born to unmarried mothers was approx 2%, compared with approx 40–43% in the U.K.

[42] Civil Code, Article 797-2.

13.5.3 The Adopters

The legal requirements governing applications from prospective adopters vary according to whether the procedure is for a 'special' or 'ordinary' adoption but in either case are less stringent than would be the case in common law countries.

13.5.3.1 Eligibility Criteria

In 'special' adoptions the Civil Code requires that adopters:

- Must be a married couple.
- Both must jointly adopt unless one is a birth parent and the other a step-parent.[43]
- One must be aged 25 years or more and the other be at least 20 years old.[44]
- They must have provided direct care for the adoptee for at least six months immediately prior to making their application to adopt.[45]

In 'ordinary' adoption, the status requirements are more relaxed:[46] adopters are usually married but may, occasionally, be a single applicant; if a relation (e.g. grandparent or stepparent) then recourse to the courts is unnecessary. There is also a residency requirement: at least one of the joint applicants must have acquired the status of a long-term resident in Japan.

13.5.3.2 Suitability Criteria

In Japan, the adoption law makes no provision for suitability criteria: the statutory emphasis given in common law nations to matters of health and income etc. are not addressed. However the CGC, through which all 'special' adoptions are arranged, does undertake an approval assessment of prospective adopters, which deals specifically with these matters and the suitability of their home, though the approval and matching process otherwise differs in some important respects from that of U.K. adoption agencies.

Applicants are assessed in the first instance as foster carers, a process which usually takes about three months. A home study report consisting largely of factual information, obtained objectively with little intrusive exploratory questioning (rarely, for example, checking on the possibility of criminal convictions), compiled in a standardized format, is then completed and submitted to the Child Welfare Council. This body, which is not equivalent to the U.K. Adoption Panel and does not conduct a professional scrutiny, tends constituting give the report a routine endorsement.

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[43] Civil Code, Article 817, 3.

[44] Civil Code, Article 817, 4.

[45] Civil Code, Article 817, 8.

[46] Civil Code, Article 795.

13.6 Pre-placement Counselling

There is no legislative requirement that adoption agencies provide pre-placement counselling for birth parent/s who may be considering voluntarily relinquishing their child for adoption, though many do so.

13.7 Placement Rights and Responsibilities

The legal requirements relating to the placing of a child for adoption depend on whether the prospective adopters intend to proceed in accordance with the 'ordinary' or the 'special' adoption process.

13.7.1 Placement Decision

In the case of an 'ordinary' adoption, the placement may involve a consensually relinquished baby and be made informally in the traditional manner, either directly by the birth parent/s or authorised relative, or by an intermediary such as a doctor, lawyer, nurse etc., or an independent private adoption agency, acting on behalf of the birth parent/s. In the latter case, the arrangement to place a child is subject to statutory provisions and cannot commence until the prospective adopters are first registered as foster carers. Once so registered, the couple can either make application to a private adoption agency or to the CGC. In both cases the parent/s may exercise considerable influence over, and in the former will often determine, placement selection.

In 'special' adoptions, the selection of an appropriate child from the public care system, most usually from an orphanage, and the matching of child with approved foster carers is a process completed by staff of the CGC and orphanage. As Hayes and Habu explain, this selection and matching process tends to invert the approach developed in common law countries as "the Child Guidance Centres typically select a child for the parents first and then invite the potential parents to choose whether or not they would like to adopt the child"[47] which they are entitled to reject without prejudicing an entitlement to further offers. The level of information shared with the prospective parents about the child to be placed and his or her family background, varies considerably with some private agencies operating a policy of divulging virtually no information (including health status) regarding the child in advance of placement and treating enquiries as to the 'type' of child available as inferring implicit conditions and therefore to a contra indicator for any placement.

[47] *Op. cit*. at p. 44.

Only after the decision-making process, in the case of a 'special' adoption, are the foster carers then invited to meet the selected child, followed by a placement decision and appropriate arrangements for a six-week phased introduction if all seems propitious. The placement is accompanied by financial support in accordance with national payment rates for foster carers.

13.7.2 Placement Supervision

During the six month trial period, from placement to application, the guardianship rights of a child voluntarily relinquished remain with the birth parent/s. A social worker from the placing agency (usually a CGC social worker) will visit the home of the prospective adopters on average about three times, observing the interaction between the applicants and the child. At the end of that period, and in the absence of any contra-indications, the social worker will advise the couple to make application to the Family Court and will submit a report to the court assessing the quality of family relationships and recommending accordingly.[48]

From application to court hearing will add several more months to the total placement period during which a court appointed official visits on two or three occasions to confirm that everything is in order.

13.8 The Hearing

In Japan, under the 2004 Act, the Family Courts have exclusive jurisdiction in respect of adoption matters. They maintain an overview and inspectoral role in relation to the adoption process. In practice about 1,500 'ordinary' and 400–500 'special' adoption applications are brought before the courts every year. The adoption process, culminating in a judicial hearing, may be in respect of adult or child and in the latter case results either in an order that closely resembles its U.K. counterpart, differs fundamentally from it or concludes with a custody order.

13.8.1 Where Consent Is Available

Under Japanese law, consent for the adoption of a child must be available from either its sole surviving parent, a legal guardian, both parents (if both parents are living and remain married), by the natural mother (in the case of a non-marital child), or from the institution that has custody of the child. However, when the parents of the child to be adopted are not married, either because they never were,

[48] Civil Code, Article 817, para 8.

or because of divorce, the permission of the non-custodial natural parent (neither *shinken* nor *kangouken*) is not required for the child to be adopted by either a new spouse or relatives of the custodial parent. This is clearly problematic.[49]

The relevant provisions of the Civil Code are formulated on the basis that normally the child to be adopted is one for whom consent is not an issue as either this is readily available from a voluntarily relinquishing unmarried mother, or the child is presumed to be abandoned, orphaned or for other reasons is without a family. Where one or both birth parents of a child to be adopted are alive then the Civil Code requires that their consent be sought and obtained unless grounds exist for this to be dispensed with. Where the child to be adopted is 15 years of age or older, then his or her consent must also be sought.

13.8.1.1 Timing/Validity

The principle that any consent must be informed and given in circumstances free from duress, is without statutory endorsement in this jurisdiction and can be open to abuse. The practice that some agencies have developed, of requiring a mother to sign a 'contract' agreeing to an adoption placement, within 36–72 hours of the birth of the child (often in circumstances where agency payment of costs for the hospital accommodation of mother and child are at least implicitly conditional upon contract completion), is legally invalid but would also be construed as improper in common law countries.[50]

13.8.2 Where Consent Is Not Available

Contested adoption applications are a rarity in Japan. The Civil Code provides that the need for parental consent may be judicially dispensed with in circumstances where the parent or parents either: lack mental capacity to give informed consent; or where the Family Court rules they have abused the child to be adopted; have abandoned that child; or have otherwise been responsible for matters "seriously harmful to the benefits of the person to be adopted".[51] Where the child has been 'abandoned' then custody is vested in the Director of the local CGC who can give consent to a placement with registered foster carers 'with a view to adoption' pending the decision of Family Court proceedings. The judge will then determine whether the need for parental consent to the adoption of their child can and should be dispensed with. Where the parent is 'missing' then, typically, if after three years there has been no contact the court is usually prepared to dispense with the need for consent.

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[49] See, further, Japan—Children's Rights Network at http://www.crnjapan.com/issues/en/adoptions_no_parental_consent.html

[50] See, Hayes, P. and Habu, T., *op. cit*. at Chapter 5, pp. 56–68.

[51] Civil Code, Article 817, para 6.

13.8.3 Application to the Family Court

All applications for 'special' adoptions must be made to the local Family Court and most 'ordinary' adoptions must be approved there. In the latter case, if the child concerned is a not a lineal descendant of the adoptive parents, the Family Court must adjudicate the adoption but if he or she is a descendant of one of the adoptive parents, then the City Office may register a regular adoption without prior Family Court approval. The hearing before the judge must be attended by the child, the prospective adopters and the court-appointed investigator.

13.8.3.1 Supporting Documents

The Family Court will require an adoption application to be accompanied by the following documentation:

- The usual identifying certificates e.g. birth certificates, passports etc.
- Current marital status documents e.g. marriage, divorce, and death certificates (where applicable)
- Current health status documents e.g. medical certificates
- Certificate of good conduct/no criminal record for each adoptive parent, issued by their home city or state police department
- Certificate of legal address, employment, and income
- Copies of any property ownership deeds and/or bank statements
- Statement of consent to adopt by the child's natural parent(s) or guardian
- Statement of prospective parent(s) intent to adopt the identified child; and character references

In addition, the court will always receive a Home Study report completed by an authorized and licensed adoption agency.

13.9 Thresholds for Exiting the Adoption Process

The legislative intent behind the introduction of the 'special' adoption procedure was to provide a formal, professionally managed adoption process, equivalent to that of other modern developed nations, which would become the accepted route to adoption for most if not all future adoptions. This has not happened. The 'special' route, while important for many of Japan's vulnerable children and offering a secure legal basis for their future welfare, has not displaced 'ordinary' adoption which continues to be the preferred route for most applicants.

13.9.1 Welfare Interests

The primary criterion applied by the Family Court when considering any adoption application is whether the order if made would promote the welfare interests of the child concerned and some adoptions have, in fact, been stopped because of the adoptive parents' motives. However, the principle that an applicant's success in the Japanese adoption process is dependant upon the proposed adoption being compatible with the subject's welfare interests does not in practice amount to a uniformly applicable threshold for exiting that process. As mentioned above, 'welfare' may be legitimately interpreted as material advantage; an interpretation more likely to be made in 'ordinary' adoptions, most obviously where the subject is an adult. Moreover, many 'ordinary' adoptions do not come before the court so the welfare test is not necessarily applied; this is particularly the case where the adopters are related to the child.

The limitations of the welfare principle as a threshold for successfully exiting this process are very evident in relation to the 'special' adoption of a child in the public care system. Despite provision in the Civil Code for the judiciary to dispense with the need for parental consent in such cases, thereby applying the welfare criterion, there is little evidence of a willingness to do so. The respect traditionally given to the rights of birth parents tends to prevail over the welfare interests of an abused or neglected child to the detriment of prospective adopters. In the words of Hayes and Habu "this has meant that unless the parents cooperate, the function of special adoption as a way of protecting children from abuse within the family has remained latent".[52]

13.9.2 Representing the Child's Welfare Interests

If the child concerned is under 15 years of age, then a legal representative is appointed to protect their interests, though the family court may hear opinions of the minor at its discretion.

13.10 The Outcome of the Adoption Process

There is more variance in the outcome of adoption applications in Japan than in most other modern developed nations. This is the inevitable consequence of having an exit to an adoption process that is not uniformly subject to scrutiny by the same gatekeeper applying the same criteria to the same type of subject. In 2006, for

[52] Hayes, P., and Habu, T., *Adoption in Japan: Comparing Policies for Children in Need*, Routledge, London/New York, 2006 at p. 5.

example, judicial statistics reveal that of the 1,533 'ordinary' adoption applications to the Family Court in respect of minors, 1,077 were approved, 44 rejected and 478 withdrew (others 6) while of the 410 'special' adoption applications, 314 were approved, 27 rejected and 83 withdrew (others 6).[53]

13.10.1 Adoption Orders

Unlike a special adoption, the making of an 'ordinary' adoption order does not necessarily sever the child's legal ties, rights, and privileges with regard to the birth parent/s. The main residual legal tie remaining with the child in relation to the birth parent/s is the right of inheritance.

13.10.1.1 Adoption with Contact

In practice 'special' adoption is judicially viewed as incompatible with post-adoption contact arrangements. Where it is envisaged that ongoing contact with members of the birth family would be in the welfare interests of the child then the Family Court is likely to consider that an 'ordinary' adoption would be more appropriate.

13.10.2 Other Orders

The Family Court may reject an application for a 'special' adoption. In that event it cannot order the child to be returned to the birth parent/s but it may instead consider an application for an 'ordinary' adoption.

13.10.3 No Order

A surprisingly large proportion of adoption applications are rejected. Should the Family Court decide to reject an adoption application without making an alternative order, the CGC may well decide to simply continue the foster care status and responsibilities of the applicants in respect of the child.

13.11 The Effect of an Adoption Order

In this jurisdiction, the outcome of an adoption is very much dependent upon whether the adoptee has been the subject of an 'ordinary' or a 'special' adoption process and in the former case whether that subject was an adult or child. In either case,

[53] The author is indebted to Satoshi Minamikata for this information.

finalizing an adoption triggers the rules of consanguinity to proscribe sexual relations between the adoptee and the adopters or other family members within the prohibited degrees of relationship.

13.11.1 The Child/Adoptee

As in a common law context, the primary legal effect of a 'special' adoption on the child concerned is to 'legitimate' him or her and thereby place that child in the same legal relationship with their adopters as if born to them and of their marriage. In an 'ordinary' adoption, the child is not wholly legally severed from his or her birth family and may, for example, retain rights of inheritance in relation to that family.

Where the adoptee is an adult then again the primary effect is to place him or her, and invariably the adult is a male, in the same legal relationship with their adopters as if born to them and of their marriage.

13.11.2 Effect on the Birth Parent/s

An 'ordinary' adoption relieves the birth parent/s of their rights and duties in respect of custody and guardianship. It does not wholly and permanently sever the legal links between a child and his or her birth parent/s and such links may be maintained, for example, through the child's inheritance rights. The consequences of a 'special' adoption for the birth parent/s, however, are very similar to those in common law nations: all legal incidences of parental responsibility, including any affected by court orders relating to the child in question, are permanently and irrevocably extinguished.

13.11.3 Effect on the Adopters

In 'ordinary' adoption, the legal rights vesting in the adopters are essentially those of custody and guardianship, it does not vest parental responsibilities permanently and absolutely in the adoptive parents as such an adoption can be readily dissolved with the mutual consent of the parties.

13.11.4 Dissolution of an Adoption Order

Whether or not an adoption order can be revoked depends on the circumstances and on whether it was an 'ordinary' or a 'special' adoption.

13.11.4.1 'Ordinary' Adoption

Such an adoption can be readily dissolved with the mutual consent of the parties. If, after the death of either adopter, the surviving party desires a dissolution then this may be achieved with leave of the Family Court.

13.11.4.2 'Special' Adoption

A 'special' adoption conforms closely to the common law model; it vests all parental rights and duties exclusively, permanently and irrevocably in the adopters. The child retains no inheritance rights with regard to the biological parents and the adoption is virtually indissoluble except in exceptional circumstances as permitted under Article 834 of the Civil Code.[54]

13.12 Post-adoption Support Services

The financial support provided by the state to adopters offers an inducement for the latter to choose the statutory 'special' adoption process rather than the traditional 'ordinary' route which does not attract any entitlement to financial support.

13.13 Information Disclosure, Tracing and Re-unification Services

There is no counterpart to the voluntary and statutory services available in the developed western nations, particularly the U.S. and the U.K., which facilitate arrangements for contact, tracing and re-unification between adoptee and members of their family of birth. It is probable that there are deeply rooted cultural disincentives for services that probe the ancestry of those known to belong by birth to different and therefore suspect bloodlines. On the other hand, the official registry where family records are kept is open to inspection by those who can show good reason for accessing the information. So, for any adult parties to an adoption, acquiring the information necessary to establish contact between them is not very difficult.

13.13.1 Information Disclosure

While the subject of a 'special' adoption has a legal right to access identifying information held in official records, no other party has a corresponding right to

[54] If either parent abuses parental power or is guilty of gross misconduct, the Family Court may, on the application of any of the child's relatives or of a public procurator, abrogate parental rights.

access that information. Otherwise, the principle is that any person with legitimate reason is entitled to access the *koseki* system.

13.13.1.1 Registration

A successful application to the Family Court for an 'ordinary' adoption results in the issue of a certificate allowing "Permission to adopt" (*yoshi to suru koto o kyoka-suru*). A similar outcome in respect of a 'special' adoption application concludes with the Family Court issuing a final adoption decree (*tokubetsu yoshito-suru*). These outcomes from the Family Court have the same binding legal effect. In both cases, once the judge gives his decision, the court waits two weeks to allow the birth mother or interested third parties a chance to make any last plea before issuing the adoption decree. The adoptive parents must then take the evidence of court approval and register the facts relating to the adoption at the City or Ward Office. In those 'ordinary' adoptions which are not brought before the court, the parties simply bring the facts and related documentation to the City or ward Office for registration. If the natural parents or any interested parties do not object within two weeks of the registration, the adoption is considered final.

13.13.1.2 The *Koseki*[55]

The *koseki* is an official government file, held by the City Office, or Ward Office that provides a consolidated record of the legal status of each and every citizen including dates of birth, marriage, death and other milestones. For a nation which places great value on the public standing of families and individuals, the *koseki* has tremendous importance. Traditionally, divorce and adoption were seen as tarnishing these records, and, by extension, the identity and public standing not just of the individuals concerned but of entire families and the honour of their ancestors.

An entry in the *koseki* serves as proof of a valid adoption. The Family Registration Law requires that the full names of the birth father and mother must be stated in the *koseki*. In a 'special' adoption, the *koseki* will show only the name of the adoptive parents, as if they were the birth parents, whereas for an 'ordinary'

[55] See, Matsushima, Y., 'Japan: What Has Made Family Law Reform Go Astray?' *The International Survey of Family Law*, ISFL, Martinus Nijhoff Publishers, The Hague, 1999, pp. 193–206 where this explanation is offered:

> "The *Koseki* is a registration system under which every family is registered with the government. It is said that the *Koseki* system was established as far back as the seventh century and its current form came into being after the Meiji Restoration. The Family Registration Law of 1871 designated all citizens as belonging to a unit for registration, classifying people into either head of the family or family members. Births, marriages, divorces and deaths are recorded. The *Koseki* system acts as an identifier for Japanese people in relation to such matters as whether they are of Japanese nationality or not, and it has carried great legal and social significance" at p. 197.

adoption both the birth and adoptive parents' names are shown. If paternity has been admitted, the father's name and the fact of admitting paternity will also be stated as this is required under the provisions of Article 35 of the Enforcement Regulations of the Family Registration Law.

13.13.1.3 Child's Right to Information

Any adopted child, wishing to identify his or her birth parents, has a right of access to the *koseki* of their birth parents from which his or her name had been removed. Birth mothers are usually anxious to ensure that no reference to the adopted child appears on their *koseki* and this possibility is provided for in the 'special' adoption procedure. An 'illegitimate' child may also be able to identify his or her father where he has admitted paternity as this will have been recorded.

13.13.1.4 Birth Parent/s Right to Information

There is no explicit legal right, specific to birth parent/s, that entitles them to identifying information regarding the name and whereabouts of their adopted child, nor is there any provision for a contact register in which they might enter a request for contact.

13.13.2 Tracing and Re-unification Services

There is no Japanese counterpart to the statutory services and processes in common law jurisdictions, that carefully differentiate and regulate the rights of parties to an adoption, in circumstances where one or more wish to locate and make direct contact with others.

13.14 Conclusion

The comment on the characteristics of adoption in Japan, made by Morris more than a century ago, seems just as relevant today:[56]

> It is a combination of old and new, of native and foreign, oriental and occidental customs and principles; all have been employed by Japanese jurists in erecting their present institution. Their old time conception of the relationship was, without question, unique, and the incorporation of western ideas into their system, has not rendered it less peculiar but has rather tended to emphasise its peculiarity.

[56] *Op. cit*. at p. 149.

Chapter 14
Intraculture Adoption

14.1 Introduction

Some modern western nations include within their borders distinct indigenous cultural groups, each established over many centuries and maintained in accordance with traditional customs, that have survived relatively intact into the 21st century. This is the case, for example, with indigenous people in Australia, New Zealand, Africa, and North and South America. These groups are each, to a varying degree, coherent entities founded on their own distinct rules and traditions governing relations within and between families and applying to the functioning of their particular social system as a whole. They co-exist alongside and in an uneasy relationship with the prevailing western culture; sharing time, territory and the necessities of life but often very little in the way of values, knowledge and social infrastructure.

The differences between indigenous and non-indigenous cultures are readily apparent in the respective sets of laws and customs governing the family. In particular the practice of adoption, which offers a fragmentary but revealing insight into the life of any culture, indicates the nature of differences in the value systems that now separate modern western society from its many and varied indigenous counterparts. This can be seen in the legal functions of adoption which in indigenous cultures are not quite the same as those of modern western societies. However, the latter—having developed their present relatively recent, sophisticated, highly regulated and expensive models of adoption—are steadily assuming some of the characteristics of customary adoption. There is every reason to believe that this trend towards convergence will continue.

This chapter examines the distinctive characteristics of customary adoption, as illustrated by the quite different indigenous communities in Australia, New Zealand and Canada, and its links with the statutory process. Its purpose is to identify the differences between the legal functions of both systems and to consider their significance in terms of law, policy and practice. As both systems now operate within the larger frame of reference provided by an ever-growing body of international law, the chapter begins by outlining and considering the bearing of such law on the

K. O'Halloran (ed.) *The Politics of Adoption,*

culture, family life and the practice of adoption in indigenous communities. It then proceeds by examining in turn the experience of adoption among the Indigenous People of Australia, the Maori of New Zealand and the Inuit of Canada.

14.2 Indigenous People and International Law

Customary adoption not only operates in tandem with national statutory laws of adoption but also falls to be measured, and increasingly so, against the provisions of international law. The Aboriginal communities, the Maori and the Inuit who are the subject of study in this chapter are citizens of Australia, New Zealand and Canada, respectively. All three of these nations are subject to certain international laws which bring implications for their indigenous citizens.[1]

In particular, the parameters of U.N. Conventions and the principles forged through human rights jurisprudence apply, at least in theory, not just to the more affluent in modern developed nations but equally to their fellow citizens in indigenous communities who live alongside them but often in third world conditions. In addition, an overlay of indigenous specific provisions is being gradually superimposed in recognition of inherent vulnerabilities common to such communities, which seeks to identify and address their particular agenda of needs. While the legislative intent is to afford protection for the distinctive culture and customs of our most ancient and now barely surviving communities, there has to be some concern that the outcome of this leavening influence might in fact be an acceleration of their erosion as autonomous entities.

14.2.1 Provisions with Generic Application

The principles of international law, particularly those concerned with fundamental human rights, apply uniformly across nations and equally to all their citizens including those in indigenous communities. Despite being most obviously in need

[1] Australia, for example, is a signatory to: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; the International Convention on the Elimination of All Forms of Discrimination Against Women; The Hague Convention on the Civil Aspects of International Child Abduction; and the International Convention on the Rights of the Child. New Zealand is a signatory to: the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; and the International Covenant on Economic Social and Cultural Rights. The Canadian Bill of Rights 1960 followed by the Canadian Human Rights Act 1985 gave rise to provincial and territorial human rights legislation that prohibits, among other things, discrimination because of race, religion or creed, colour, nationality, ancestry, and place of origin.

of their protection, however, there is little evidence of such provisions being deployed to the benefit of indigenous people.

14.2.1.1 Fundamental Human Rights

The Universal Declaration of Human Rights, as ratified by the General Assembly of the United Nations in 1948, which together with its two Optional Protocols[2] constitutes the International Bill of Human Rights, attained the status of international law in 1976. Australia, Canada and New Zealand are among the countries to have ratified it and all three have subsequently introduced domestic human rights legislation.

14.2.1.2 The U.N. Convention on the Rights of the Child

This Convention which acquired the force of law on 2nd September 1990, has now been ratified by 191 countries including the three—Australia, New Zealand and Canada—that are considered in this chapter in respect of their indigenous populations. Its Preamble includes a reference to "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".[3]

14.2.1.3 The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993

This Convention, which entered into force on 1st May 1995, has now been endorsed by some 75 contracting states, again including Australia, New Zealand and Canada.[4] Its Preamble declares that "each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin."

14.2.2 Provisions Specific to Indigenous People

That there is a growing body of international provisions relating specifically to the needs of indigenous people is largely due to work progressed under the auspices of the United Nations. Again, to-date there is little evidence of action taken on foot of these provisions and none with a specific bearing on adoption.

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[2] The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

[3] See, also, Articles 5, 20 (particularly 20.3) and 30.

[4] Australia signed and ratified on 25 September 1998. Canada signed on 12 April 1994 and ratified on 19 December 1996. New Zealand ratified on 18 October 1998.

14.2.2.1 The U.N. Permanent Forum on Indigenous Issues

This is an advisory body to the Economic and Social Council with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights. It has its origins in the Working Group on Indigenous Populations, established by the Council in 1982, to develop a set of minimum standards that would protect indigenous peoples.

The Working Group submitted a first draft declaration on the rights of indigenous peoples to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was later approved in 1994. It was intended that this declaration would be adopted by the General Assembly within the International Decade of the World's Indigenous People (1995–2004). Unforeseen delays required the mandate of the Working Group to be extended by the U.N. Commission on Human Rights into the Second International Decade of the World's Indigenous Peoples (2005–2015).[5]

14.2.2.2 The United Nations Declaration on the Rights of Indigenous Peoples

On 13 September 2007, after some 25 years of negotiations, the Declaration was eventually adopted by the General Assembly. For the purposes of this book, it is interesting to note that while 143 nations were able to endorse the declaration only four, the largest and most developed of those with an indigenous population to protect—Australia, the US, Canada and New Zealand—voted against it. The Declaration comprehensively addresses issues such as collective rights, cultural rights, and identity in addition to rights to education, health, employment, land and language among others. It emphasizes the right of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in accordance with their aspirations and needs. Provisions with particular relevance for family life and customary adoption include the following:

- **Article 7**

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

- **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

[5] At the 11th session of the Working Group 2005/06, the Chairperson Mr. Luis-Enrique Chavez (Peru) prepared a compilation of proposals submitted and discussed during the 10th session, which formed the basis of negotiations. The Declaration, adopted by the U.N. Human Rights Council in June 2006 is the exact version proposed by Chairperson Chavez.

- **Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

- **Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Although as yet without the force of law, the Declaration together with the processes and participants that brought it to fruition, serves to prepare the ground for the next stage in a continuum leading, hopefully, towards an international agreement of the terms on which indigenous and non-indigenous people may cohabit with mutual respect for differences in cultural legacy and aspiration.

14.3 Australia: The Indigenous or Aboriginal People

14.3.1 Background

The 'Aboriginal people of Australia' is an umbrella term that refers to the original inhabitants who had lived in Australia for at least 40,000 years before its discovery in 1788 by white Caucasians. At the time of its 'discovery' Australia was *terra nullius* according to its 'discoverers', meaning that it was either uninhabited or occupied only by nomadic people without any organised social systems. It was therefore available to be taken into the possession of the Crown.[6] The 'Aboriginal people of Australia', now greatly eroded in number and cultural cohesion, is comprised of approximately 500 distinct communities from quite diverse cultural groups.

14.3.1.1 Definitional Matters

The working definition[7] of an 'Aboriginal person' is one who:

(a) Is either:

(i) An Aboriginal person, meaning a person of the Aboriginal race of Australia or

[6] In the 18th century, Captain Cook considered he was entitled to take possession of the continent and all its creatures and resources in the name of the British Crown. The full ownership of the continent remained vested in Great Britain until transferred to the government of Australia when the latter acquired Dominion status. For an interesting account of the consequences for the indigenous population see Linqvist, *S., Terra Nullius*, Granta Books, London, 2007.

[7] See, Department of Aboriginal Affairs, 1981. 'Aboriginal' or 'Indigenous' incorporates three distinct elements: descent, self-identification and community acceptance.

(ii) A Torres Strait Islander, meaning a descendant of an indigenous inhabitant of the Torres Strait Islands

and

(b) Identifies as an Aboriginal person or a Torres Strait Islander and
(c) Is recognised or accepted by an Aboriginal or Torres Strait Island community as a member of that community

In particular a distinction can be made between the Torres Strait Island community and all other Aboriginal people[8] (indeed, every indigenous community must be seen as separate and distinct from all others, each with their own independent culture, traditions and values). In general terms, the population of the Torres Strait Islands differs from the Aboriginal population as a whole by having a more coherent community and culture, perhaps partially due to the extent to which they have subscribed to Christian principles while retaining traditional customs. According to the 1996 Census, Australia's Aboriginal and Torres Strait Islander population was then estimated to be 386,049, of which about 11% were of Torres Strait Islander origin, representing 2.1% of the total Australian population.

14.3.2 Adoption as an Imposed System

There are not many national examples of non-consensual[9] adoption being imposed as a matter of state policy upon the membership of an entire minority culture. This occurred in Australia where an invidious state policy, resulting in the trauma now referred to as the 'stolen generation', was applied by statute law to the Aboriginal people for a large part of the 20th century.

14.3.2.1 The Policy

This government programme was designed to accelerate racial assimilation by requiring the placement of all (except very dark skinned) Aboriginal children with non-Aboriginal families; no attempt was made to place children with Aboriginal families. It was explicitly intended that the children placed would lose their Aboriginal identity, assume the culture of their adopters and 'pass as white'. As has been explained:[10]

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[8] Prior to 1971, Torres Strait Islanders were often classified as Polynesian or Pacific Islanders and counted as such in official counts. The Commonwealth working definition was extended to include Torres Strait Islanders in 1972 but it was not until the 1996 Census that individuals could identify as both Aboriginal and Torres Strait Islander.

[9] There can be little doubt that very few Indigenous natural parents, even if some did sign certain papers, gave what would now be recognised as a full and informed consent.

[10] See, Bird, C., *The Stolen Children; Their Stories*, Random House, Australia, 1998 at p. 1.

> This was part of a long-term government plan to assimilate Indigenous people into the dominant white community by removing the children from their families at as young an age as possible, preferably at birth, cutting them off from their own place, language and customs and thereby somehow bleaching aboriginality from Australian society.

It was a deliberate attempt to use adoption to engineer the long-term absorption of one racial group by another. Such a policy was prohibited by the International Convention on the Prevention and Punishment of the Crime of Genocide 1948 which includes within its definition of genocide "the forceful transferring of children of a group to another group".[11]

14.3.2.2 The Law and Practice

The programme began in the Northern Territories with the Aboriginals Ordinance 1918 and continued until the legislative power to remove Aboriginal children was terminated in 1969; though the practice continued for some time on an informal basis. It was enforced by the Aborigines Protection Board which was established in every state and territory. In New South Wales, for example, the Board was empowered by the Aborigines Protection Act 1909 at first only to remove children who were neglected but by 1919 additional powers enabled the Board to pursue a policy of assimilation. As described by Behrendt:[12]

> The colour of a child's skin determined how the state would determine that child's future (highlighting the racist aspects of this policy). Fairer-skinned Indigenous children were more likely to be adopted into white families. Darker-skinned children were more likely to be institutionalised or sent out to work. Fairer-skinned children also tended to be removed at younger ages than darker-skinned children.

This practice was repeated across Australia.

14.3.2.3 The Outcomes

The enforced removal of countless children, from Aboriginal parents by the Child Welfare Department and their subsequent placement with approved white Caucasian foster parents or into institutional care was a disaster for the many thousands of Aboriginal families and the communities involved. The very high incidence of placement breakdown in this context, when the children reached adolescence, testifies to the level of stress generated by transracial placements resulting from misguided motivation.[13]

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[11] This Convention was ratified by Australia in 1951.

[12] See, Behrendt, L., *Achieving Social Justice*, The Federation Press, Sydney, 2003 at p. 68.

[13] See, for example, the report of the South Australian Aboriginal Child Care Agency which estimated that 95% of all ACCA adoption cases broke down and that:

> "…this is reflected throughout the country… 65% of these breakdowns occurred in the adopted child's teenage years when their adoptive parents were unable to cope with their problems of alcohol abuse, offending behaviour, drug abuse, depression, self-destructive behaviour, emotional stress and identity crisis".

As cited in Marshall and McDonald, *op. cit*. at p. 155.

As has since become evident from the close statistical correlation between placements and subsequent rates of suicide, imprisonment etc., the programme was particularly disastrous for the children concerned. The severance of a generation of children from their community and cultural roots, coupled with their indoctrination into non-Aboriginal cultural norms, caused serious dislocation to the continuance of traditional Aboriginal values and community cohesion.

14.3.2.4 The Bringing Them Home Report

An objective account of this policy and its long-term effects in terms of the incidences of suicide, mental illness and family breakdown etc. are documented in the *Bringing Them Home* report by the Human Rights and Equal Opportunity Commission.[14] The government's response to the report was dismissive: refuting the claim that an entire generation was affected; and consigning the entire matter to history with the assertion that the policy had to be judged in accordance with the value context that prevailed at that time.[15] However, this policy of forcibly removing children from their Aboriginal parents has, in recent years, resulted in court cases[16] where applicants have claimed damages for the trauma they suffered. In 2008, the government finally acknowledged the damage caused by this policy and offered a formal apology to the Aboriginal people for the suffering it had caused.[17]

14.3.3 Contemporary Adoption Law and the Aboriginal People

For many Aboriginal communities the concept of adoption is itself rejected.[18] Such communities and Aboriginal agencies hold the view that children are 'free spirits'

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[14] See, The Human Rights and Equal Opportunity Commission, *Bringing Them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Australian Government Publishing Service, 1997 (http://www. austlii.edu.au/au/special/rsjlibrary/hreoc/stolen/). The factual basis of this report was memorably illustrated in the film *Rabbit Proof Fence*.

[15] See, the Federal Government submission to the Senate Legal and Constitutional References Committee on the *Inquiry into the Stolen Generation*, 1997.

[16] See, for example, *Kruger v. Commonwealth* (1997) 190 CLR 1 and *Cubillo v. Commonwealth* (2000) 174 ALR 97.

[17] Mr. Rudd, Prime Minister, offered the apology to Australia's Indigenous Peoples before a full House of Representatives in Canberra on Wednesday, 13 February 2008.

[18] See, Queensland Government, *The Adoption Legislation Review: Public Consultation*, Department of Families, 2003 which notes that:

> "A key theme in the consultation forums with Aboriginal and Torres Strait Islander peoples throughout the State was that adoption, as conceived in the Adoption of Children Act 1964, is not a culturally appropriate care option for Aboriginal and Torres Strait Islander children" at p. 3.

and cannot be 'owned' by anyone. For government legislators a legacy of 'the stolen generation' debacle is that it has become taboo to consider extending the statutory adoption process equally to aboriginal children; the earlier misguided political use of mandatory adoption for social engineering purposes undermines the political possibility of now utilising it as a public service. Instead, although many Aboriginal children require permanent alternative care[19] they are now mainly accommodated in foster care arrangements, very few are adopted within the statutory process. In 2005/06, for example, only 5 Indigenous children were adopted in Australia and only 85 in the last 15 years. For some Aboriginal children, alternative permanent care arrangements continue to be provided through the practice of customary adoption.

14.3.3.1 The Statutory Adoption Framework and the Aboriginal People

The different legislatures of Australia in their respective laws now pointedly recognise the place that customary adoption holds within Aboriginal culture. The level of recognition includes the following—[20]

- **New South Wales**

The New South Wales Adoption Act 1965, which allows Aboriginal children to be adopted by Aboriginal couples living in customary marriage, otherwise makes no specific provision for the adoptive placement of Aboriginal children.

- **Victoria**

The Victorian Adoption Act 1984 recognises Aboriginal rights to self-management and self-determination. It states that: in consensual adoption, a birth parent has the right to declare a wish that their child be adopted within the Aboriginal community; in a non-consensual adoption, provisions approximating those of the Aboriginal and Torres Strait Islander Child Placement Principle must be applied. It also makes an adoption order conditional upon counselling by an Aboriginal agency being provided or offered and refused.

- **South Australia**

The Adoption Act 1988 makes an adoption order in respect of an Aboriginal child conditional upon there being no preferable order available to the court. It states a presumption that adoption within the child's Aboriginal community is in the child's best interests and where this is not possible provides a hierarchy of preferred placements. It permits a placement outside the Aboriginal community only in exceptional

[19] Aboriginal children are over represented in the public child care system. In June 1998, for example, 14.2 Aboriginal children per 1,000 aged between 0–17 years were in care; this was five times the rate for other children.

[20] See, further, The Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Framework*, Wellington, 2000 at paras H7–H18. Also, see, Ban, P., 'Slow Progress: The Legal Recognition of Torres Strait Islander Customary Adoption Practice', 4(7) *Indigenous Law Bulletin* 11, 1997.

circumstances and when appropriate arrangements have been made to safeguard the child's Aboriginal identity.

- **Australian Capital Territory**

The Australian Capital Territory Adoption Act 1993 makes an adoption order conditional upon the court being satisfied that consideration has been given to the preference for Aboriginal adopters and to the importance of preserving contact between the child and the birth parents.

- **Northern Territory**

The Adoption of Children Act 1995 allows adoption by couples living in an Aboriginal customary marriage for more than two years. It makes an adoption order conditional upon the court first being satisfied that every effort has been made to place the child within his or her extended family or with other suitable Aboriginal persons. Failing that, placement should be in geographical proximity to the child's birth family and should be in keeping with parental wishes in relation to maintaining contact and cultural identity.

(a) The Child Placement Principle

In broad terms, statutory child care in an Aboriginal context[21] is now underpinned by a fundamental principle that governs the relationship between the state and the family on such matters. The Aboriginal and Torres Strait Islander Child Placement Principle, formulated at the time of the Human Rights and Equal Opportunity Commission inquiry into the 'stolen generation' controversy, was a response to the associated public concern regarding the interventionist policies of an earlier era. It was endorsed in the Council of Social Welfare Ministers' National Minimum Principles in Adoption 1993 and by 1997 all states and territories had confirmed their adherence to it.[22] This Principle states that when an Aboriginal child needs an alternative to parental care then the preferred placement is, in the following order of priority:

- Within the child's extended family
- Within the child's Aboriginal community and, failing that
- With other Aboriginal people

The resulting practice is that the local Aboriginal community, organisations, and Aboriginal professionals in adoption agencies are now engaged when the issue of non-parental care for an Aboriginal child arises. In 2005/06, for example, of the five Indigenous children adopted—three were adopted by Indigenous parents in accordance with the Aboriginal Child Placement Principle, and two by non-Indigenous adoptive parents.

[21] By the late 1970s, Aboriginal and Islander Child Care Agencies were established throughout most of Australia to control child care services for Aboriginal people.

[22] The Principle has received specific legislative endorsement in the Australian Capital Territory, South Australia and in Victoria. Note the resonance with U.S. law: the Indian Child Welfare Act 1978 limits placement to the child's family, members of the tribe or other Native American families.

The net effect is that a more 'closed' form of culture specific adoption for the Aboriginal and Torres Strait Islander communities is now largely in place throughout Australia. However, while the Principle is informing practice everywhere in Australia it is most influential where given effect by legislation.[23]

(b) Aboriginal Placement

In Queensland's recent adoption law review[24] the Aboriginal respondents to the government's discussion document acknowledged that circumstances could arise requiring the permanent placement of an Aboriginal child in accordance with the provisions of the statutory adoption process. In such circumstances it suggested that the assessment of Aboriginal prospective adopters should be undertaken by or with Aboriginal assessors and should address matters such as:[25]

- The prospective adoptive parents' links with the particular child's community and where this has not been established, the parents' links with another Aboriginal or Torres Strait Islander community.
- Prospective adoptive parents' capacity to assist a child develop or maintain his or her cultural identity.

Thereafter, during the course of the placement, the continued involvement of representatives from the relevant Aboriginal community and agencies would ensure that the child's links with his or her culture are maintained.

(c) Non-aboriginal Placement

In the above adoption law review the Aboriginal respondents accepted that there may be occasions when an Aboriginal child will have to be placed for adoption with a non-Aboriginal family. In such circumstances it was suggested that an Aboriginal counselling service should be offered to the birth parent/s before and after placement. It was further suggested that Aboriginal agencies should be required to approve any such placement and that an adoption plan should be drawn up to protect the cultural identity of the child and maintain links with his or her community of origin. This plan should include:

- A genealogical chart of the child's tribes/clans (mother and father) and
- All relevant cultural information such as kin names, clan groups, dreamings and stories[26]

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[23] The Report of the New South Wales Law Reform Commission (1997) examined the effectiveness of the Principle in placing Aboriginal children with Aboriginal people for foster care and adoption in all states and territories. It concluded that the Principle most strongly influences practice where it is incorporated into statute law.

[24] See, Queensland Government, *The Report: Public Consultation on the Review of the Adoption of Children Act 1964,* Department of Families, 2003.

[25] *Ibid*. at pp. 19–20.

[26] *Ibid*. at p. 17.

14.3.3.2 Customary Adoption

The Aboriginal People view child rearing as a communal responsibility with no particular rights or duties reserved to birth parents. There is thus no natural cultural context for the practice of adoption. Customary adoption involves the placement of a child within the extended family group; only in exceptional circumstances is the child placed with 'strangers' or non-relatives. The birth parents maintain ongoing contact with their child and with the adopters throughout the placement. All information in relation to the adoption is openly shared among the parties and among the extended family circle. This form of adoption tends to be bloodline specific and serves to strengthen and differentiate the kinship structures of tribal groups.

(a) The Torres Strait Island Community

The Torres Strait Islanders have developed a somewhat different variation of customary adoption which resembles the foster care practice of western nations. The placement is often short-term and made with another related family, it may or may not extend for the duration of childhood and the child may return intermittently to the birth parents.

This practice, known as 'Kupai Omasker', has been explained in the *Bringing Them Home* report as a permanent transfer of parenting responsibilities which "serves to entrench reciprocal obligations within families thereby contributing to social stability".[27] It bears a strong similarity to some forms of adoption traditionally practiced in countries with homogenous cultures such as Ireland (see, further, Chap. 1). It is usually confined to kinship (i.e. determined by blood-link) but in recent years has extended to include relatives by marriage and even close family friends. It lies outside the legislative framework, is a form of customary adoption and is not recognised in Australian statutory law.

The difference between adoption as practiced by Torres Strait Islanders and statutory adoption as practiced elsewhere in Australia is explained in the report by the New South Wales Law Reform Commission:[28]

> Adoption in Torres Strait Islander communities involves the permanent transfer of parental rights to adoptive parents. Further, there is a reluctance to tell children of their adoptive status. In contrast to Australian adoption law, however, adoption is almost always within the same bloodlines, with members of the extended family or otherwise with close friends. Adoptive parents may be single or married, and may already have children of their own. Torres Strait Islander adoption also differs from Australian adoption in that, while there is a permanent transfer of rights, the adoption is characterized by notions of reciprocity and obligation.

The difference between customary adoption as practiced by Aboriginal People and by Torres Strait Islanders has been summarised by Marshall and McDonald as follows:[29]

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[27] See, The Human Rights and Equal Opportunity Commission, *Bringing Them Home*, *op. cit*.

[28] See, New South Wales Law Reform Commission, *Research Report 81*, 1997 at Chap 9.

[29] See, Marshall and McDonald, *op. cit*. at p. 148.

> Customary adoption is accepted within Torres Strait Islander communities, and often arranged within families to preserve the blood line and family heritage and customs. It is similar to western adoption practice in its permanency but is almost always within the extended family. Customary adoption is not usually arranged by them outside their own culture. For Aboriginal peoples, however, adoption is a foreign and altogether alien concept. It would not have been conceived of in a functioning Aboriginal community.

By and large, Aboriginal communities are generally no longer independent and self-sustaining entities. The contemporary partial subjection of customary practice to the statutory adoption process is only one small part of the cultural concessions made by a race that had managed its own affairs for tens of thousands of years before the arrival of white Caucasians.

14.4 New Zealand: The Maori

14.4.1 Background

The Maori are the indigenous people of New Zealand. When Europeans first arrived they found a fully established society, developed over a thousand years, in possession of the islands. Initially, the 'newly discovered' New Zealand territory was administered by the colonial authorities in the Australian Colony of New South Wales. From the late 18th century, the Maori experienced the impact of successive but transient groups of Europeans who brought different kinds of influences. Not until the late 1830s did the islands become more permanently settled by non-indigenous people, mostly originating from the British Isles.

14.4.1.1 The Treaty of Waitangi

This Treaty was the mechanism by which the British asserted sovereignty over New Zealand. It was signed on 6 February 1840 by Captain Hobson, the Lieutenant-Governor, and by many of the Maori chiefs before being taken around the country for successive signings over several months.[30] The Treaty and the introduction of British rule was followed by settlers forcefully acquiring Maori land resulting in armed conflict especially in the 1860s, leading to generations of grievances, agitation, negotiations, inquiries and some settlements, and ultimately to the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal. The Tribunal hears claims by Maori that they have been prejudicially affected by conduct on the part of the Crown which was inconsistent with the principles of the Waitangi Treaty.

[30] A retranslation of the Maori text of the whole Treaty can be found in the judgment of Cooke P in *New Zealand Maori Council v. Attorney General* [1987] 1 NZLR 641, 662–3. The author is grateful to Khylee Quince for her advice in relation to the Treaty.

The Treaty of Waitangi is the founding constitutional document in New Zealand with its status as a compact between the Crown and Maori. It provided that:

- Maori ceded governorship to the Crown (Article 1) whilst retaining sovereignty over their lands, homes and all treasured things—including their laws and customs (Article 2)
- All rights of British citizenship were also extended to Maori (Article 3 and the Preamble)

The Treaty and the Constitution are best viewed as a composite set of basic principles that direct how all New Zealanders, Maori and non-Maori, are to be governed. However, as has been said: "the failure to acknowledge Maori status as tangata whenua, once the Treaty of Waitangi was signed is perhaps at the root of subsequent conflict and misunderstandings".[31]

14.4.1.2 The Maori Population

The Maori currently total some 523,000 persons constituting approximately 15% of the population of New Zealand and are expected to represent nearly 20% of the population by the year 2031. The median age for Maori is around 22 years and 55% of the population is under 25 years compared with only 34.6% of non-Maori. More than half of all Maori live in the northern part of North Island, mostly around Auckland (46%). In general, they have lower incomes and larger households than non-Maori and are more likely to be living in one-parent households. Relative to the non-Maori, they are disadvantaged by age, geographical distribution, by low standards of education and skills and by levels of unemployment.[32]

As a consequence of their status as Treaty signatories, and ongoing Maori resistance to assimilation, this indigenous group has been able to preserve its cultural identity and coherence while, in recent years, it has exercised considerable influence over government policy in relation to issues affecting Maori interests.

14.4.1.3 The Maori Culture

The indigenous people of New Zealand have a well-developed communal culture. The critical organisational construct is the tribe, an extended kinship organisation comprising sub-tribes and extended family groups. The tribal identity was and is the iwi. The tribal institutions of whanau (extended family or kin group), hapu (sub-tribe), hui (meeting of the iwi) and marae (ceremonial centre) remain key features of contemporary Maori culture. Maori belong to diverse communities: some identify with a particular iwi, hapu and whanau irrespective of where they

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[31] See, Law Commission, Report 53, *Justice—the Experience of Maori Women*, Wellington, 1999; 'tangata whenua' literally means 'people of the land'.

[32] See, Statistics of New Zealand, *Census of Population and Dwellings*, Wellington, 1996.

reside; others identify with their tribal connections but do not know their ancestry or whakapapa; while others prefer to identify simply as Maori.

14.4.1.4 Customary Adoption or Whangai

For many centuries the Maori have had a practice known as whangai or atawhai[33] or customary adoption whereby a collective decision is taken, usually as a result of ongoing consultation between all members of the extended families or communities involved, that a particular child would be given to relatives for them to raise.

Whangai has few of the legal characteristics of adoption in western societies, is not recognised within the statutory adoption framework of New Zealand[34] but is nonetheless still in use by the Maori.

Generally, a whangai placement was practiced within a hapu or iwi as a means of strengthening relations and had the advantage of ensuring that land rights were consolidated within the tribe; though placements were sometimes made with relatives by marriage. Because the severing of blood-ties was regarded as a betrayal of origins, a child from outside the whanau, hapu and iwi would seldom be adopted. Adoption by 'strangers', the foundation stone of practice in western societies, has been deliberately avoided in Maori culture.

14.4.2 Legislative History

Initially, placements for the purpose of adoption were made informally, without recourse to law, by both Maori and non-Maori. Adoption in New Zealand, as a formal statutory process, commenced with the Adoption of Children Act 1895.

14.4.2.1 The Adoption of Children Act 1895

This legislation introduced a process whereby any person in New Zealand could apply for an adoption order. The Maori were not required to use this statutory proceeding and did not do so, preferring instead to rely on whangai placements which were judicially recognised at the turn of the 19th century:[35]

> The right of the Maori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

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[33] See, for example, Durie-Hall, D. and Metge, D.J., 'Kua Tutu Te Puehu, Kia Mau Maori Aspirations and Family Law', in Henaghan, M. and Atkin, W. (eds.), *Family Law Policy in New Zealand*, Oxford University Press, Oxford, 1992, pp. 54–82.

[34] Indeed, as Khylee Quince has pointed out to the author, "it was explicitly excluded by section 19 of the Adoption Act 1955."

[35] See, *Hineiti Rirerire Arani v. Public Trustee* (1919) NZPCCI, *per* Phillimore LJ.

However, the Maori approach to the statutory adoption process changed somewhat with the introduction of the Native Land Claims Adjustment and Laws Amendment Act in 1901. This directed that where Maori land disputes involved the claims of an adopted person then that person would have to produce evidence of their adoption in the form of a recorded entry in the register of the Native Land Court. Whangai placements, often made to secure or consolidate title to land, frequently led to court disputes. Adoption legislation provided a means for registering an adoption and gave the Maori an incentive to seek formal recognition of a whangai placement in case of a later necessity to produce such evidence in any land dispute proceedings.

14.4.2.2 The Native Land Act 1909

Maori compliance with the statutory adoption process was later enforced by the 1909 Act which sought to prohibit the use of whangai. The policy driving this legislation was quite explicit:[36]

> By this Bill, adoption by Native custom is abolished, and adoption by order of the Native Land Court is substituted.

Adoption orders were to be made by the Native Land Court in respect of Maori children while the same orders were made in Magistrates' courts (now the District court or the Family court) in respect of non-Maori children. The proceedings, however, were different: in the Native Land Court the hearing took place in open court and the proceedings were published; in the Magistrates' court the hearing was in camera and the proceedings were not published. Since 1962 all statutory adoption proceedings, in respect of Maori and non-Maori children, have been held in Magistrates' courts. This policy was revised in 1927, when recognition was given to customary adoptions made before 1902, but only to be reinstated in 1931. From 1932 onwards a child subject to a whangai placement was denied recognition in law as an adopted child; the politics of the 1909 Act prevailed to displace customary adoption by the statutory process.

14.4.2.3 The Adoption Act 1955

The policy of proscribing customary adoptions was consolidated by the 1955 Act which continues to state the law in New Zealand. In the words of the Law Commission:[37]

> The present Adoption Act confirms that Maori customary adoptions made after the introduction of the Native Land Act 1909 have no legal effect beyond the recognition accorded to such placements by Te Ture Whenua Maori Act 1993.

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[36] Sir John Salmond's notes on the Bill as cited in the Law Commission report, *op. cit*. at para 185.

[37] See, the Law Commission report, *op. cit*. at para 190. See, also, *Whittaker v. Maori Land Court* [1996] NZ FLR 163.

This approach reflected the assimilationist policies of the period by largely ignoring the Maori culture and value system. Legislation such as the Marriage Act 1955, the Adoption Act 1955, the Guardianship Act 1968 and the Matrimonial Property Act 1976 all directly or indirectly ignored Maori values relating to the structure and constitution of the family.[38]

14.4.3 Contemporary Adoption Law and the Maori

In New Zealand, the current statutory framework for adoption is intended for use equally by Maori and non-Maori applicants, though guardianship has always been more acceptable to the former. Alongside this statutory process, quite separate and independent from it, the Maori practice of whangai or customary adoption continues to operate.

14.4.3.1 The Statutory Adoption Framework and the Maori

The statutory adoption process, provided by the Adoption Act 1955 and the Adult Information Act 1985, is supplemented by certain national obligations arising under international Conventions. It occurs within a statutory child care context governed by the Children Young Persons and Their Families Act 1989 which incorporates the family group conference as a decision-making mechanism for determining appropriate care arrangements (decisions can be challenged by the Children Young Persons and Their Families Service, a statutory body, but this seldom occurs). This legal framework has allowed New Zealand to pioneer the most 'open' adoption practice in the western world.[39] There is every reason to believe that this development, within the modern statutory processes of the jurisdictions studied, is directly linked to the lessons learned from exposure to the age-old Maori practice of customary adoption.

(a) Maori Placement

The 1989 Act rests on the assumption that children are best raised within their own cultural context and with their own people. It allows tribal elders to take an active leadership role in family group discussions and requires professional workers to

[38] See, Durie-Hall, D. and Metge, D.J., 'Kua Tutu Te Puehu, Kia Mau Maori Aspirations and Family Law', *op. cit*., pp. 54 and 59.

[39] See, for example, Ryburn, M. who has described New Zealand as "leading western practice with respect to openness" (1994).

observe—or at least not to ignore—cultural preferences and custom.[40] In recent years judicial notice has been taken of the importance of the Maori cultural context when determining issues of placement. For example, in the course of hearing an appeal by a grandmother against a decision by the Family Court to refuse her custody of her granddaughter, the court held that:[41]

> The welfare of the child can never be considered in isolation. The cultural background of a child is significant and the special position of a child within a Maori whanau, importing as it does not only cultural concepts but also concepts which are spiritual and which relate to the ancestral relationships and position of the child, must be kept in the forefront of the mind of those persons charged with the obligation of making decisions as to the future of the child.

However, the court added:

> … the child's interests will not be subordinated to the interests of any member of the family or whanau, nor will the interests of the child be subordinated to those of the whanau as a whole.

This decision is open to the criticism that "it demonstrates the reifying of the western notion of individualised human rights over collective cultural rights (i.e. the child comes ahead of the collective whanau, hapu or iwi)".[42] Arguably, this is a challenging point of view with implications for the policies that preference third party agency adoption to kinship care and facilitate intercountry adoption which now characterise much contemporary statutory law in the jurisdictions studied.

The placement of a Maori child with Maori prospective adopters is facilitated by a Maori community representative appointed under the Maori Community Development Act 1962.

(b) Non-Maori Placement

Section 321 of the Children Young Persons and Their Families Act 1989 requires the court to have regard to the principle that, where practicable, the relationship between the child or young person and his or her family, whanau, hapu, iwi, family groups and community group must be maintained and strengthened.

14.4.3.2 Legal Effects of Statutory Adoption

The issue of an adoption order has the same legal effect regardless of race: the child assumes the name of the adoptive parents; he or she inherits from the estate of an intestate adopter; and all legal ties to the birth parents are abolished. Access to identifying information is controlled by the provisions of the Adult Adoption Information Act 1985.

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[40] See, Law Commission, Report 53, *Justice—the Experience of Maori Women*, *op. cit*. at para 90. Also, see, Ernst, 'Whanau Knows Best: Kinship Care in New Zealand', in Hegar, R.L. and Scannapieco, M. (eds.), *Kinship Foster Care: Policy, Practice and Research*, Oxford University Press, New York, 1999.

[41] See, *B v. Director-General of Social Welfare*, [1997] NZFLR 642, *per* Gallen J and Goddard J.

[42] Khylee Quince, in note to author (25.06.008).

14.4.3.3 Whangai or Customary Adoption

Whangai is characterised by openness, placement within the family and whakapapa (identity within the context of family and culture) and whanaungatanga (the centrality of relationships to the Maori way of life). It does not require any particular formalities, is a matter of public knowledge and is made with the express or tacit approval of the whanau or hapu (family or community group). As has been explained:[43]

> Maori customary adoption does not involve secrecy … The child has two sets of parents and recognises his or her relationship to them both. The child is aware of its birth parents and other family members and usually maintains contact with them. Once a child is accepted in this way, the adopter and child will frequently regard each other as parent and child for all significant purposes, as will the other members of the whanau … placements are not necessarily permanent and it is not uncommon for such a child to later return to the birth parents.

14.4.3.4 Legal Effects of Whangai

Under section 3 of the Te Ture Whenua Maori Act 1993 a "whangai" is a person adopted in accordance with Maori law (this incorporates custom, values, traditional behaviour and philosophy).[44]

The blood link is important to Maori culture and legal relationships, such as whangai, are not allowed to terminate or hide blood relationships or obscure cultural identity.

(a) Parental Rights

In Maori culture a child is not viewed as the possession of parents but rather as the taonga (treasure) of the whanau, hapu and iwi.[45] Maori customary adoption does not, therefore, subscribe to the proposition, central to statutory adoption law in western societies, that the adopted child is legally severed from his or her birth parents and thereafter is to be treated in law as though born to them 'in lawful wedlock'. As the Law Commission has pointed out:[46]

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[43] See, Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Framework*, Wellington, 2000 at para 180.

[44] See, *In re Tukua and Maketu C2B Block* (10th March 2000, 116 Otorohanga MB 81) Carter J for a determination of whangai status.

[45] See, Durie-Hall and Metge, 'Kua Tutu Te Puehu, Kia Mau, Maori Aspirations and Family Law', in Henaghen and Atkin (eds.), *Family Law Policy in New Zealand*, Oxford University Press, Auckland, 1992.

[46] See, Law Commission, Report 53, *Justice—The Experiences of Maori Women*, Wellington, 1999 at para 83 citing Griffith, K.C., *New Zealand Adoption History and Practice, Social and Legal 1840–1996* at para 9.

> The fundamental difference in the way which the law, on the one hand, and Maori on the other, regarded adoption was that the law's adoption policy focused on the relationships which were created and the perceived advantages for members of the new family. No attention was given to the relationship between child and birth parent which was destroyed and the impact upon the child.

Again, this approach is one which resonates with the views of those who regard with some disquiet the present emphasis upon improving the processes of intercountry adoption rather than the circumstances giving rise to it.

(b) Succession Rights

Maori customary law varies as to whether whangai children may inherit from their adopters. Some iwi allow a whangai child to inherit only if the child is a blood relative. As Khylee Quince has noted:[47]

> Often the decision was made by the whanau collectively, having regard to the reason for the placement. For example, if a child was given to their grandparents, on the assumption that he or she would eventually care for them in their old age, then an assessment of that deal would be made at the time of dealing with the estate. Generally a whangai would not succeed to both sets of parents, he or she being primarily the responsibility of the adoptive parents. However, some token provision might be made for them from a birth parent's estate in order to ensure recognition of their whakapapa (birthline) and maintenance of that relationship.

Whangai children can only succeed under the will of their adopting parent or by court order in the case of intestacy. The Maori Land Court is able to make provision for a whangai child when distributing an estate under Te Ture Whenua Maori Act 1993 and may determine whether a person is to be recognised as the whangai of a deceased landowner. When it decides in favour of such recognition the Court may order that the whangai's entitlement should be the same as if he or she was the birth child of the deceased. Where it decides against then it may order that the whangai either has no such entitlement or is entitled to a lesser extent that would have been the case if the deceased had been their birth parent.

Interestingly, there is provision for a European whangai adopted by Maoris to inherit Maori land.

14.5 Canada: The Inuit

14.5.1 Background

The Inuit are the indigenous people of Nunavut (though are not exclusive to it, as much of their traditional territory covers what has recently been recognised as Nunavut), a newly created territory in Canada. The total population of Canada is now almost 39 million, including a number of different indigenous groups. Nunavut, a territory of

[47] Note to author (25.06.008).

some two million square kilometers occupying almost one-fifth of the land mass of Canada, has a population of a mere 26,745 of which 82% are Inuit living in 28 villages.[48] In 1867, the confederation process initiated under the British North American Act made "Indians and Lands reserved for Indians" a federal responsibility within the new Dominion of Canada. This process included treaties with the Aboriginal peoples and led to the Indian Act 1876[49] under which all Aboriginal people,—defined as "Indian, Inuit or Metis"—were made wards of the federal government.

In keeping with the experience of indigenous people in Canada and elsewhere, the history of the Inuit also records abuse suffered at the hands of the non-indigenous population.[50] Government policies of assimilation or integration were often strategically directed towards children. Currently, the Stolen Generations project is researching the intergenerational effects of removing children from their ancestral homes, families and communities originating from the residential school experiences and the eventual removals of subsequent generations by the child protection laws that followed.[51]

14.5.1.1 Residential Schools, Adoption, and the Aboriginal People of Canada

In Canada, the first residential school for Aboriginal children was established in 1620 and the last closed in 1986. Throughout the intervening centuries, the collaboration between government and church saw residential school provision gradually extending across Canada. As has been noted:[52]

> What distinguishes the residential schools for Aboriginal children is that they were part of a policy of assimilation that was sustained for many decades.

This policy was consolidated by the Indian Act 1876, as amended, which provided authority for the removal of many thousands of Aboriginal children from their homes, communities and culture to residential educational institutions. Non-attendance at school justified committal to one of the 54 boarding schools and 20 industrial schools that constituted residential school provision for some 5,347 Aboriginal children by the mid-20th century.[53] This was accompanied by other government strategies similarly directed towards racial assimilation. In

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[48] See, Census statistics for 2001: the population of Nunavut has increased by 8.1% since the last census in 1996; a growth rate which is twice the national average.

[49] An Act to amend and consolidate the laws respecting Indians, S.C. 1876, c 18; amended to make attendance compulsory.

[50] See, for example, the *Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, Ottawa, 1996.

[51] See, *Stolen Generations*, a local Aboriginal non-profit group, which in 2002 began a project dealing with the adoption process affecting Aboriginal people across Canada. The project is being funded by the Aboriginal Healing Foundation and sponsored by the Ma Mawi WI Chi Itata Centre Inc.

[52] See, the Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, 2000 at p. 51.

[53] *Ibid*.

particular, the Stolen Generations project now addresses one of the most significant issues arising in the aftermath of residential schools, namely the policy and practice of the adoption of Aboriginal children outside their inherent cultural groups.

As noted in the report by the *Aboriginal Justice Inquiry:*[54]

> … between 1971 and 1981 alone, over 3,400 Aboriginal children were shipped away to adoptive parents in other societies, and sometimes in other countries.

14.5.1.2 Nunavut

Nunavut came into being on April 1, 1999, through the division of the Northwest Territories, as a result of two agreements: the Nunavut political accord, and the Nunavut land claims agreement. The first laid the foundation for the Nunavut Act 1999, the federal law that serves as Nunavut's constitution. The Inuit in Nunavut control their own legislative assembly through a form of self-government under which non-Inuit residents are also guaranteed the right to participate in elections for the Nunavut legislative assembly and for Nunavut's 26 municipal governments. Although concentrated in Nunavut, the Inuit are by no means confined to that territory but in fact are spread over large areas of northern Canada.

14.5.2 Contemporary Adoption Law and the Inuit

There are three types of adoption in Nunavut: customary, private, and departmental. Although these parallel systems are in place, customary adoption currently predominates in Nunavut due to the continuing strength of this traditional practice among the Inuit. The prevalence of customary adoption is among the features that distinguishes Nunavut from the rest of Canada.

14.5.2.1 Adoption

Adoption in Nunavut occurs when birth parents transfer all parental rights to adoptive parents through a permanent adoption order. Guardianship is transferred through adoption and, when finalisation occurs, the child becomes the legal child of the adoptive family and the child's birth and surname may be changed.

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[54] See, *Aboriginal Justice Inquiry*, 1999 at Chap. 14. The report also notes that "between 1971 and 1981, 70–80% of Manitoba's Aboriginal adoptions were in non-Aboriginal homes" at Chap. 14. See, also, the Law Commission report, *op. cit*. and Miller, J.R., *Shingwauk's Vision: A History of Native Residential Schools*, University of Toronto Press, Toronto, 1996.

(a) Customary Adoption

This is an arrangement for the care of a child between the birth parent(s) and the adoptive parent(s) who are usually relatives or members of the same community. Adoption is deemed to have taken place at the time of placement. Under the Aboriginal Custom Adoption Recognition Act 1994,[55] customary adoptions are processed by Adoption Commissioners in the various northern communities. As stated in the Preamble, this legislation "without changing aboriginal customary law respecting adoptions" sets out "a simple procedure by which a custom adoption may be respected and recognised and a certificate recognising the adoption will be issued". One or both birth parents and the adopting parents must be of Inuit, Dene or Metis descent and must be a resident of Nunavut or have some legitimate connection to the territory. Adoption certificates are completed by Commissioners and forwarded to the Supreme Court of Nunavut where they are certified by the Supreme Court Clerk.

(b) Private Adoption

This is regulated by the Adoption Act 1998 to protect the interests of all parties and to ensure the protection and well-being of the child. A private adoption occurs where the child to be adopted is not the subject of a care order. It can be arranged by birth parent(s) and adopting parent(s) as long as the requirements of the 1998 Act and the regulations have been met.

(c) Departmental Adoption

Departmental adoption placements are wholly governed by the legislative procedures, regulations, standards and policies relating to the Adoption Act 1998. They occur either on a consensual basis following parental relinquishment or on a compulsory basis following permanent care and custody of the child being vested in the Director of social services. When birth parent(s) consent to an adoption, 10 days must elapse after the day the child is surrendered before the parental consent is signed. When the parent(s) has signed a Voluntary Support Agreement form, the child is placed in an approved adoptive home and the placement is managed and supervised by appointed adoption workers. When a child is placed with a family prior to a court order, a pre-adoption acknowledgement is made with the approved adoptive parents, taking the best interests of the child and the possible risks into consideration. Prospective adoptive parents sign an acknowledgement that they understand that the child can be removed during a 30 day appeal period and that they are willing to accept a child under these conditions pending the making of a permanent adoption order.

[55] The Aboriginal Custom Adoption Recognition Act 1994, which came into effect on 30.09.95, was promulgated for the Northwest Territories.

14.5.2.2 The Statutory Adoption Framework and the Inuit

The current statutory framework governing adoption by Inuit and non-Inuit is provided by the Adoption Act 1998[56] which has a general application throughout the province and requires adoption proceedings to be commenced in court.

(a) Inuit Placement

Before an aboriginal child can be placed for adoption, one of the three Inuit organizations in Nunavut (Kitikmeot Inuit Association, Kivalliq Inuit Association and Qikiqtani Inuit Association) must be informed. An exception is made for circumstances where the child is at least 12 years old or where one birth parent objects to any such involvement.

In considering the "best interests" of the child, due regard must be given to the aboriginal heritage of the child; his or her cultural, racial and religious background must be taken into account. An adoption order cannot affect any aboriginal or treaty rights of the child, nor can it affect any entitlement the child may have under the Indian Act.

(b) Non-Inuit Placement

Adoption within the Inuit culture, as elsewhere, often occurs within the context of the prevailing statutory child care framework. In such cases, there is a statutory duty to try to place aboriginal children with members of their extended family or within their communities, if they must be placed in foster care. However, given the shortage of aboriginal foster parents, aboriginal children are often placed with non-aboriginal foster parents. There is then a requirement that kinship ties and the cultural identity of aboriginal children should be preserved, that aboriginal people should be involved in planning and delivering services to aboriginal children and families, and that the community should be involved in planning and providing services, in ways that are sensitive to the culture, racial and religious heritage of the families receiving them.

(c) Legal Effects of Statutory Adoption

Under the statutory process, an adoption becomes final when a permanent adoption order certificate is granted to the adoptive parents, whereas under the customary process this occurs when the evidence that an adoption has occurred is registered in the Supreme Court. In both types of adoption, the legal consequences are final and the birth parents relinquish their legal rights and responsibilities towards the child.

[56] c.9. In force November 1, 1998. SI-016-98.

14.5.2.3 Customary Adoption

In Canada, customary adoption is an integral part of the life of all aboriginal societies, is common among the Inuit and is specifically recognised under the Indian Act. In addition to legislative recognition, customary adoption constitutes an aboriginal right within the meaning of section 35 of the Constitution Act 1982 once it is established to be an integral part of the distinct culture of the aboriginal community.[57] The Aboriginal Custom Adoption Recognition Act 1994[58] formally recognised customary adoption in Nunavut[59] and now provides a statutory framework for it with an accompanying level of administration that was not formerly a part of customary adoption among the Inuit. It has now acquired a legal and institutional character.

(a) Characteristics of Customary Adoption

Contemporary customary adoption among the Inuit is a non-judicial process which has traditionally been viewed by them as essentially a family or community affair. It does have some formal administrative characteristics: the local customary adoption commissioner will record the parties intentions and keep information on file; there is no requirement that the commissioner be satisfied as to the merits of the adoption. The adoption is then registered in the Supreme Court and the commissioner will apply for an amended birth certificate in respect of the child. The features that distinguish customary from statutory adoption are:

- They are invariably open adoptions where everyone concerned, often the whole community, knows the exact nature of the relationships between the parties[60]
- Most (but not all) customary adoptions occur between relatives
- They only occur between Inuit
- Mostly it is those who are relinquishing the child who initiate the process by approaching a relative or a friend who often lives in another Inuit community

Customary adoption is an 'open' form of adoption. This is considered desirable because:

- The child generally knows he or she has been adopted
- The child knows their birth parent/s
- Open adoption enables the aboriginal child to maintain access with his or her family and aboriginal community

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[57] See, *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (C.A.).

[58] See, *Aboriginal Custom Adoption Recognition Act, S.K.K. v. J.S.* in which a maternal grandmother who had adopted her granddaughter sought child support from the birth father.

[59] Since 1996: some 2000 customary adoptions have been formalised by the courts; approximately 40 departmental adoptions; and perhaps 35 private adoptions to non-Inuit.

[60] The term 'qiturngaqati' ('having the same child') refers to the fact that both birth parent and adopter share the same relationship with the child.

The Inuit practice allows for relationships to develop between the adopted child and the natural families throughout the child's life; originally the purpose was for the adopted child to return to the birth family, with which they had maintained a relationship, in the event of the death of their adoptive parents. Occasionally, in customary adoptions, a child occasionally returns to their family of origin and may be again placed for adoption with new adopters.

(b) The Practice

Each aboriginal community has its own process for giving effect to customary adoption. This differs in the three regions of Nunavut, and even within regions. In its most basic form, customary adoption among the Inuit simply rests on an agreement, usually verbal, whereby one family gives a child to be raised by another family. Evidence of an adoption properly executed by aboriginal custom would normally include the following:[61]

- The consent of the natural and adopting parents
- The child's voluntary placement with the adopting parents
- The adopting parents' aboriginal heritage or entitlement to rely on aboriginal custom and
- The presence of a rationale for aboriginal custom adoption

In addition, the relationship created by custom must have been intended to create fundamentally the same relationship as that resulting from an adoption order under the Adoption Act 1998. Where such evidence is presented, the court will then register the adoption without any requirement for a homestudy report.

The practice has given rise to problems. During the course of the recent inquiries conducted by the Nunavut Law Review Commission, or Maligarnit Qimirrujiit, into customary adoption the following issues were identified:

- Agreement given during pregnancy but subsequently withdrawn by birth mother
- Adopters fears, sometimes well-founded, that birth parents will reclaim their child
- Concerns that birth fathers were not consulted prior to adoption
- All information regarding birth fathers' should be recorded for every birth and that information should be available to an adopted child
- Concerns about people over the age of 65 adopting babies
- Concerns that the traditional use of customary adoption, to assist infertile couples or to provide a home for an orphaned child, was now being seen more as a means of dealing with unwanted pregnancies

(c) The Child

For the purposes of adoption, a 'child' is a minor (less than 19 years) and the definition includes a child adopted in accordance with custom and amendments to the

[61] See, *Re: Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.).

Indian Act which extended the entitlement of Indian status to children who are adopted by custom. An Inuit adopted child is known as "tiguaq".

(d) Legal Effects of Customary Adoption

Under the Aboriginal Custom Adoption Recognition Act 1994, customary adoptions become legal when the adoptive parents assume responsibility for the child. A court order is unnecessary. Biological parents normally relinquish their rights and responsibilities towards a child when the government adoption certificate is issued and the adoptive parents assume full rights and responsibilities as legal parents of the child.

(e) The Registrar

Application is made to the Registrar for a certificate of the registration of an adoption. Where this has been conducted in accordance with customary adoption then the Registrar responds by determining whether the eligibility criteria have been met. Affidavits from the natural parents, the adoptive parents, the band council, and elders usually accompany such an application. The affidavits state the particular form of customary adoption that was used and confirm that the applicant was adopted in accordance with that custom. Other supporting documentation may be required.

14.6 Conclusion

The adoption processes traditionally and currently used by the Indigenous people of Australia, the Maori in New Zealand and the Inuit in Canada are illustrative of the type of customary practice to be found among indigenous cultural groups in other countries such as those of South America and Africa. The primary purpose served by adoption in an indigenous context is not fundamentally different from that in modern western nations. In both, adoption is essentially the most extreme means for giving effect to the common intention that total care responsibility for a child is transferred from the birth parent/s to approved other persons until such time as the child reaches adulthood. The goals address similar factors such as parental death, absence, relinquishment or abandonment, failed parenting, infertility, the need for an heir and the tidying up of re-formed family units. The legal functions, however, reflect significant differences in law, policy and practice.

Adoption within indigenous cultures is invariably a consensual process, governed more by practice than by policy or law. It has always been treated as a transparent and ongoing transaction between the parties, often following discussions involving the extended family, which require and receive the support of the com-

munity. It at least favours transactions that respect and maintain blood-link relationships. It emphasises the importance of ensuring that an adopted child is never in any doubt as to the identity of birth parents and members of their family of origin, with whom contact is maintained. It offers an assurance that the child will be reminded of their particular background, heritage etc and in general will be provided with all information necessary to form identity and maintain a sense of belonging to family and community. Insofar as there is a policy in this context, it could be said to be one of facilitating the harmonious reordering of parenting responsibilities in accordance with the wishes and needs of all concerned. The legal functions of adoption, redundant in terms of asserting or defending the rights of individuals, are appropriately minimal and non-interventionist serving mainly to endorse arrangements freely and openly entered into.

The politics of adoption can achieve a crude but revealing salience in the context of relations between indigenous people and their host society. As a non-consensual process, adoption is often imposed on indigenous cultures. This tends to occur in circumstances where indigenous parenting is judged to infringe standards required by the public child welfare law of modern western society. At its most extreme this can take the form of a discriminatory policy to use non-consensual adoption, perhaps in conjunction with institutional residential schooling, as a means to enforce the assimilation of indigenous children into non-indigenous society. Most usually, it occurs as a consequence of the non-discriminatory application of child welfare law that inevitably results in some indigenous children being drawn into the child care system and then entering the non-consensual adoption process. Non-consensual adoption in an indigenous context would seem to have the following implications for the law, policy and practice of modern western societies:

- Involvement of parent/s, significant relatives, friends and/or community representatives in placement decision-making
- First preference for long-term foster care, where permanency is required, if this better enables the child to maintain relationships with family/community/culture of origin and revert to them on attaining adulthood
- Second preference for kinship placement, where adoption is necessary, to authenticate identity and maintain sense of belonging and
- Placement with ‘strangers’ or non-relatives only in exceptional circumstances, where adoption is necessary, and then to be in geographical proximity to the child’s birth family, in keeping with parental wishes in relation to contact and accompanied by appropriate arrangements to safeguard the child’s identity

The hallmarks of secrecy, complete severance with birth family, agency mediation, total assimilation of identity and formal judicial endorsement that have always characterised adoption in modern western societies are now being increasingly challenged by the alternative approach of indigenous communities. Increasingly, western professionals are becoming attentive to the resonance of the indigenous experience as they review the appropriateness of established legal functions for contemporary adoption practice.

Conclusions

From the perspective of recent fundamental change to the law, policy and practice of adoption in the U.K., this book examined that of other common law jurisdictions and contrasted this with the experience of countries with quite different cultural traditions. Beginning with an historical account of the social role and emerging formative principles of adoption in England & Wales, the book identified the nature and effect of pressures for change and traced the path that led to the Adoption and Children Act 2002. It then used a template of legal functions to conduct a comparative analysis of the adoption processes in the common law nations of England & Wales, Ireland, the U.S. and Australia. It considered the impact of international developments on national law, policy and practice by focusing on the influence of ECtHR case law and the phenomenon of intercountry adoption as largely regulated by the Hague Convention.

This edition, unlike the first, then applied the template to conduct a similar assessment in respect of the civil law nations France and Sweden, and of the adoption process in both Japanese and Islamic contexts. The imperfect fit of common law legal functions to the adoption experience in countries with a different legal tradition served to highlight significant national differences in the social role served by adoption. The nature of the differences seemed to indicate that adoption remains to some extent a culturally determined phenomenon. This is in marked contrast to the globalization effect of intercountry adoption, as regulated by the Hague Convention, which is gradually developing into a parallel adoption process fulfilling a distinct social role with its own set of uniform legal functions. The study also noted that alternative models of adoption, as practiced over many centuries within indigenous cultures, now offer useful guidance for the future development of domestic and, to some extent, intercountry adoption, in the above-mentioned nations.

This closing section briefly summarises the characteristic features of the common law adoption process which it contrasts with those typical of the other jurisdictions studied. It does so under the same headings of ‘law’, ‘policy’ and ‘practice’ used in the earlier edition and then concludes with some broad reflections on the politics of adoption.

K. O’Halloran (ed.) *The Politics of Adoption,*

1 The Law

Adoption, evolving within countries sharing the common law tradition and drawing from the same pool of case law, would seem to have broadly retained much the same set of characteristics in each country. This, of course, is hardly surprising as the countries concerned shared the same colonial experience, taking the values, laws, institutions and many of the children from the heart of the British Empire to its constituent parts. These characteristics resonate with the concerns of Victorian England to maintain a structured society with a distinct value system as evidenced by a careful attention to matters of status. There is also a broader resonance, shared not only with the civil law nations but to a varying degree with the other jurisdictions studied, which has its origins in the definition of adoption as construed in Roman times. The Emperor Justinian, in the Codex Iustinianius 8.47.10.1a–g,[1] gave specific recognition to a legal distinction between 'full' and 'simple' forms of adoption accompanied by clearly defined differences in their corresponding social roles. The Justinian taxonomy echoes down the millennia, across many different cultures and is still very much in evidence in the legal traditions represented by the jurisdictions that were the subject of this study.

This book used the characteristics of adoption in a common law context to construct a template of typical legal functions which it applied to identify and compare the contemporary legal functions of adoption in certain common law and other jurisdictions. The main conclusions to be drawn from that exercise may be grouped as follows.

1.1 A Sophisticated Regulatory Environment

Adoption, in all common law jurisdictions studied, had evolved from being largely concerned with third party or 'stranger' adoption into several distinct types (child care, step-parent, intercountry, kinship etc.) each with associated bodies of regulations and involving a different mix of agencies and specialist professionals. Scope for independent decision-making by birth parents and voluntary bodies, characteristic of all adoption processes at an earlier stage, has virtually disappeared except in the U.S. The adoption process is invariably governed by statute and, with the notable exception of Ireland, the outcome is determined by a court. Among the common law nations, the U.K. now has the most centralised, professional, bureaucratic and government agency controlled system. It seeks to thoroughly and comprehensively regulate practice according to specified standards.

This approach is in sharp contrast to that practiced in the other jurisdictions studied. Except insofar as they are bound as signatory states to the Hague

[1] Justinian's reform of the law relating to adoption, and to the family more generally, were undertaken in AD 529. See, further, Borkowski, A., *Textbook on Roman Law*, London, Blackstone, 1994, p. 138.

Convention, and/or are subject to the rulings of the ECtHR, there is considerable variation in the regulatory regime applicable in the non-common law jurisdictions and none seek to control the process through statutory law, standards and procedures to the same extent as in the U.K.

1.2 Statutory Definition of the Parties Rights

In the common law jurisdictions, statutory provisions define the eligibility of parties to enter the process, the terms on which they may engage in it and their post-adoption rights. The eligibility of some potential applicants, such as same gender couples, varies between jurisdictions but the rights of the parties, including those of an unmarried father, are similar. In the U.S., however, the birth parent/s in many states retain the statutory right to make or arrange a direct placement with a non-relative. In all those jurisdictions, there is an absence of statutory provision for the independent assertion of children's rights as opposed to protection of their welfare interests. The rights and responsibilities of marital parents are accorded singular recognition in Ireland. Post-adoption financial and other support services are usually statutorily available but not yet in Ireland.

In other jurisdictions, the rights of the parties varies according to whether or not the adoption is 'full' or 'simple'. What Hollinger refers to as the 'as if' adoption model[2] (designed to ensure the outcome places all parties as close as possible to the legal position they would have been in had the child been born to the adopters), typifies the traditional common law approach but is not so central to the purpose of adoption elsewhere. The weight given to the right of a birth mother to anonymity is particularly strong in France.

1.3 Determined by the Welfare of the Child Principle

In all common law jurisdictions the legislation states the principle that the welfare interests of the child is the paramount concern in the adoption process. In the U.S. and in England & Wales this principle determines a child's entry to the process from the public child care system and is the statutory determinant of adoption proceedings. In Australia and now in England & Wales the principle raises a statutory presumption that alternative orders will be more appropriate in the context of adoption applications by step-parents or relatives. In Ireland, this principle has less influence than in any other common law jurisdiction on the decision as to either whether a child is available for adoption and if so whether he or she should be adopted. Professional representation of this principle is given greatest effect in the courts of the U.K. and least in

[2] See, Hollinger, J.F., 'Overview of Contemporary Challenges to State Adoption Laws', *Adoption Law*, 1993.

Ireland. The right of a mature minor to consent or withhold consent to their adoption is most evident in U.S. law and is statutorily endorsed in Scotland.

The civil law jurisdictions studied, being as bound by the decisions of the ECtHR as Ireland and England & Wales, give an equal legal weighting to this principle as the determinant of proceedings. However, neither they nor any other jurisdiction apply the principle as the criterion for transferring a child from the public child care system to the adoption process. Sweden, in particular, interprets the principle as imposing an obligation to give first preference to rehabilitating an abused or neglected child within their family of origin rather than substituting adopters for failing parents.

1.4 The Stages of the Adoption Process

The sequence of stages from pre-placement counselling to post-adoption information access is essentially the same in all common law jurisdictions, though there is considerable variation as regards statutory underpinning. In the U.K. all stages exist, are governed by statute, controlled by government bodies and are the subject of mandatory supervision in accordance with specific rules, regulations and standards. The U.S. differs in that it permits the involvement of independent adoption agencies that may operate on a commercial basis. In Ireland there is no statutory provision for pre and post adoption services but these may be available from voluntary bodies. Australia is closer to Ireland than to the U.S. or the U.K. in this respect.

In non-common law jurisdictions, the adoption process does not exist as a carefully sequenced set of formal proceedings, each separately governed by statute, with designated agencies and professionals, subject to a central government regulatory authority. In Japan there is some evidence that the process can in effect be managed entirely at the discretion of the medical professionals involved with birth mothers. In an Islamic context, the equivalent process is very flexible and often without any counterpart to certain stages such as pre-placement counselling, post-adoption government support and agency tracing services.

1.5 The Order Made

In all common law jurisdictions, an adoption order, invariably defined as ‘full’, is the most likely outcome of adoption proceedings. Although the traditional hallmarks associated with that order (exclusive, unqualified and confidential) are fading, it still retains many traces of its private family law origins. The legal effect of the order is similar in those jurisdictions and the consequences for the parties in terms of a redistribution of rights, responsibilities and legal status are statutorily stated and clarified by a body of common case law. In Ireland there is least opportunity

for an alternative private family order to be made and unlike the other jurisdictions there is no possibility of an adoption order being made subject to contact conditions. In England & Wales and in Australia alternative private family law orders are available together with a statutory requirement that they be used when appropriate instead of adoption. In the U.S. the public law alternatives to adoption are discouraged.

In the other jurisdictions studied, an adoption order is not necessarily defined as 'full' and in both France and Japan 'simple' adoption is also available. In an Islamic context, the equivalent order of *kafala* is distinctly different from adoption. The legal effects of these orders vary accordingly but nowhere, except in Sweden, are they as absolute and as stringently delineated as in the common law jurisdictions.

1.6 Post-adoption Information Rights

In all common law jurisdictions, the privacy rights of birth parents make the issue of an adopted person's right of access to identifying information contentious. Such statutory information rights are strongest in England & Wales, non-existent in Ireland and most hotly debated in the U.S. Where they exist, statutory rights are balanced by contact veto rights of varying rigour.

In the non-common law jurisdictions the law is less concerned with post-adoption information rights; except that in France, if a birth mother claims anonymity, access to identifying information is protected by law. In Sweden and Japan, the rule is generally one of open access to public registers.

1.7 Subject to International Conventions

All common law jurisdictions studied subscribe at least to the United Nations Convention on the Rights of the Child 1989 (signed but not yet ratified or implemented by the U.S.) and to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. It is anticipated that the European Convention on the Adoption of Children (revised in 2008) will attract widespread support when it opens for signing in November 2008. All except the U.S. have incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 into national legislation. The case law associated in particular with Article 8 of the European Convention, together with the UNCRC principles, are steadily introducing a uniformity of approach in relation to adoption practice while the Hague Convention is having the same effect as regards intercountry adoption. The case law also serves to benchmark standards against which national laws can be seen to be deficient. This would be the case, for example, in Ireland in relation to the non-availability for adoption of children from marital parents and in the U.S. in relation to post-adoption information rights.

The civil law jurisdictions of Sweden and France are signatories to the above Conventions. Japan is not a signatory to the Hague Convention but has ratified the Convention on the Rights of the Child.

1.8 Implications for Family Law

Calibrating the fit between adoption law and other proceedings within a nation's body of family law and between that and the principles of Convention law is clearly a complex matter. The judiciary in common law jurisdictions, perhaps uniquely, have a proven capacity to use their discretionary powers to re-interpret principles and precedents in the light of changing social need. While this has facilitated the updating of domestic legal practice to ensure Convention compliance it has thereby accelerated and compounded tensions in the legislative balance traditionally held between private and public family law in each jurisdiction. The broadening use of adoption for private law purposes has displaced, if not absorbed, the functions once assigned to guardianship and wardship while fast becoming an optional extra following matrimonial proceedings. In public law the mainstreaming of adoption into child care provision threatens to transform the independent role of the state from 'guardian of last resort' to adoption agency, facilitating private family care arrangements.

England & Wales and Australia would seem to have achieved the preferable legislative reconfiguration of family law. Within an infrastructure of family oriented legislation, courts and proceedings they have strategically repositioned adoption closer to public law, provided more balance between adoption and alternative private law proceedings while allowing the permeation of Convention principles to maintain overall coherence within the body of family law. In the U.S., adoption law would seem to have become essentially divided into two blocks, one dealing with proceedings relating to the public child care system and the other dealing with all other forms of adoption. This is in keeping with sharper divisions between the public and private, with a clearer emphasis on the rights of the individual, in U.S. family law. Ireland is at present stuck, being unable to resolve the tensions between Constitution constraints and Convention requirements, with a body of family law that coheres around the central construct of the marital family unit.

In the non-Common law jurisdictions studied, there is much more national variation in family law. In an Islamic context, family law is construed theologically.

2 The Policy

The law reform processes, currently underway or just concluded in all the jurisdictions studied, reflect a general awareness of the need to rethink adoption policy in the light of the pressures forcing rapid change in adoption practice. *The Politics of*

Adoption identified and considered the pressures, their effect and the legislative response. The policies informing adoption law reform, outlined in preceding reports and discussion papers, were found to concern much the same matters, though the legislative response often differed.

2.1 Child Care Adoption

The U.S. initiative to expedite the flow of children from the public care system into the adoption process, by substituting the welfare principle for the parental right to withhold consent, has been followed in England & Wales, but not in the other jurisdictions studied and has been largely rejected in Australia and Ireland. It would seem to be predicated on a belief that safe permanent care for a child is more readily achieved by investing public resources in supporting alternative care arrangements than in supporting failing parental care. It is a policy that will have to be carefully managed if it is to avoid resulting in cases that breach the right to privacy of family life as protected by Article 8(2) of the European Convention. The latter requires evidence that support services or an alternative order would not be a more proportionate response and obviate the need to make such a draconian intervention as a non-consensual adoption order.

The non-common law jurisdictions take a different approach. There are no non-consensual adoptions from the public care system in either France or Sweden and the latter regards with some skepticism the policy in the U.K. and U.S. of moving children who have often been for some years in satisfactory foster care to adoption placements with 'strangers'. Again, both Japanese and Islamic adoption policy prefers to rely on well-resourced institutional care and long-term foster placements than to emulate the approach pioneered by the U.S. and the U.K.

2.2 Adoption of Children with Special Needs

The term 'special needs' is used differently in the jurisdictions studied; in the U.S. it would seem to be synonymous with child care adoption. However, in Ireland and elsewhere among some modern western societies the term is used specifically in reference to children suffering from severe health and/or social care problems. Arguably, this sub-set of adoptable children should be differentiated from the broader class because the particular difficulties in facilitating their adoption require a correspondingly distinct policy emphasis. In the U.K. and Australia, unlike Ireland, such children are the focus of specialist and successful policies to establish appropriate adoption services.

In Japan, as in the civil law countries studied, children with special needs would very seldom enter the adoption process and there is no government policy that aims to encourage this. As in an Islamic context, such children are generally cared for in

an institutional setting; though in Sweden government policy is to provide the support necessary to retain children with special needs in their families of origin.

2.3 Step-Adoption

As Menozzi and Mirkin have recently noted, "data compiled by the United Nations Population Division indicate that adoptions by step-parents are fairly widespread and account for approximately one-third of domestic adoptions in countries with relevant data".[3] The fact that such a large proportion of all adoptions is in fact simply comprised of parents and their spouses adopting the former's children, where there is no real 'welfare' component and indeed usually no change at all to the circumstances of the children involved, is an interesting phenomenon and one that requires analysis. The little attention given to this aspect of adoption is usually restricted to deploring the legal effect it has on the relationships between the child concerned and their other birth parent and associated relatives. It is widely considered to debase the adoption 'currency'. However, it clearly serves a social function that for many years and in many different countries has persistently been considered sufficiently important to attract such a large proportion of all adoption applicants. The pros and cons of step-adoptions deserve to be examined and debated more fully than has yet been the case.

In England & Wales, adoption policy has finally taken a stand against the previous fairly automatic granting of orders to step-parents. They are now required to show why adoption, rather than any other order, would be a better means of promoting the welfare of the child concerned. The fact that the law has been simplified by the removal of the legal anomaly requiring such an applicant to apply jointly with the birth parent, thereby permitting sole step-parent applications, is beside the point. Alternative permanency orders, including access to parental responsibility by agreement or court order, have been made available specifically for step-parents. In Australia the policy is similar, step-parents are required to show good reason why any other order or none would not better serve the welfare interests of the child. This is quite contrary to the approach in the U.S. and in Ireland. It remains to be seen whether this political adjustment will succeed or whether, as in the past, the judiciary will undermine legislative intent by refraining from challenging the appropriateness of step-adoptions.

In France and Sweden there is a long-standing policy to allow consensual step-adoptions, though in both they are restricted to adoption in its 'simple' form; step-adoptions are viewed as a distinctly inferior form of adoption and one not to be encouraged. The blood-link ethos, so central to Japanese and Islamic cultures, has always militated against use of this form of family adoption in those jurisdictions because of its capacity to obscure bloodlines.

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[3] See, Menozzi, C. and Mirkin, B., 'Child Adoption: A Path to Parenthood?', 2007, p. 5 at http://paa2007.princeton.edu/download.aspx?submissionId = 70610

2.4 Kinship Adoption

In the U.S., a policy of definite support for kinship adoption has recently emerged. This significant policy development, again led by the U.S., presents a challenge to established practice elsewhere. It contrasts with present policy in Australia, which favours diverting relatives towards alternative orders. In England & Wales kinship adoption placements are now encouraged in a child care context, while in Ireland the traditional policy of facilitating adoption by family members continues.

In all the non-common law jurisdictions studied, kinship adoptions are a respected and valued function of the adoption process. In an Islamic context, for reasons to do with the duty to honour bloodlines, this is the most socially acceptable form of adoption.

2.5 Intercountry Adoption

This now appears to be an unstoppable phenomenon for all modern western nations, both common law and civil law, including those that were the subject of this study. It is accompanied by a shared policy of acceptance coupled with a resolve to ensure that the welfare interests of children should be afforded no less protection in intercountry adoption than in domestic adoption processes. This policy is demonstrated by the fact that all jurisdictions had subscribed to The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993. However, the policy has not extended to the point of prohibiting bilateral agreements between signatory states and non-Convention compliant countries (let alone such arrangements between sending and receiving countries that continue entirely outside the Convention), which undermines the Convention and seriously questions the commitment of some nations to it. Nor does it effectively regulate the involvement of independent commercial agencies and it fails to grapple with the complexities of transracial placements and Convention requirements regarding the preservation of identity and culture. The policy deficit allows a continuation of practice that at times comes close to condoning 'trafficking in children' and where uncertainty regarding parental consent can give rise to concerns for the basic human rights of the birth parents and children involved.

In Japan and in an Islamic context, there is very little involvement in intercountry adoption and official government policy would be to discourage it. Sweden and France, closely followed by Ireland, and in marked contrast to England & Wales, have developed a high rate of dependency on this form of adoption.

2.6 Availability of Alternatives to Adoption

Clearly a revealing indicator of a nation's policy in relation to adoption is the extent to which it makes available, or facilitates access to, alternative options for securing

permanent care arrangements for children. Whether, if available, these are public or private family law options and what if any allowance is made for judicial choice, provides further clarification. *The Politics of Adoption* found significant jurisdictional differences in this area.

In public family law, the official U.S. policy of discouraging the use of long-term foster care for children in respect of whom parental rights have been terminated has been followed in England & Wales and reinforced in both jurisdictions by a statutory entitlement to post-adoption allowances. In both, however, the introduction of guardianship orders is intended to provide a private law alternative to adoption for some foster parents. In Australia the policy of prioritising rehabilitation as the preferred option for children in the public care system has resulted in the development of specialist foster care services. In Ireland, the policy commitment to prioritising the use of long-term foster care in preference to adoption may at present be largely a forced choice, given constitutional constraints, but is reinforced by the absence of any statutory entitlement to post-adoption financial support.

In private family law, the absence of any specific alternative for step-parents in the U.S. (a permanent legal guardianship order is intended for use by foster parents) reinforces the policy of at least not obstructing their continued access to adoption. This would also seem to be the case in Ireland. In Australia, as in England & Wales, the weight given to the alternative policy of discouraging step-adoptions is underpinned by the availability of a range of private law orders coupled with a requirement that such applicants show good reason as to why an adoption order would be more appropriate.

In France and Sweden, government policy does not support adoption from the public child care system so there is a heavy reliance upon foster care and institutional care which are better resourced than equivalent services in the U.K. and the U.S. In contrast, adoption as a private family law procedure is accepted and supported which lessens the need for intermediate orders such as guardianship. In Japan, like France, a 'simple' form of adoption can substitute for a 'full' order in private law proceedings. In an Islamic context, wherever there is an officially stated policy this is in favour of guardianship as opposed to adoption.

2.7 Post-adoption Rights and Services

Post-adoption support services are very largely viewed as specific to child care adoptions and policies regarding their statutory availability are thus pre-set by the priority given to that public family law option. In jurisdictions where the approach is to mainstream adoption into child care provision, a policy is emerging of extending the availability of post-adoption support services to all parties in all types of adoption, public and private including intercountry. In England & Wales this policy is now given effect by provisions in the 2002 Act. Where there is no such policy, as is the case in Ireland, the civil law countries, Japan and in an Islamic context, there

is a corresponding lack of government interest in providing post-adoption resources.

In all common law jurisdictions studied, the policies relating to post-adoption rights of access to identifying information reflect a struggle to balance the rights of the parties involved. Although recent ECtHR case law has been somewhat equivocal, it is probable that the combined effect of Articles 8 and 14 of the European Convention together with clear statements of similar principles in the U.N. and Hague Conventions will shape a future common policy. To ensure Convention compliance, such a policy will need to guarantee that an adopted person has access to sufficient information about his or her family background and cultural heritage to maintain or develop their cultural identity.

Sweden and France are equally subject to the above Conventions and rulings of the ECtHR. However, whilst the former would not seem to have experienced any difficulty in facilitating post-adoption access to identifying information, the latter has a long established policy of acceding to the request of birth mothers by denying such access. Japan, like Sweden, has a policy of not obstructing adoptee access to identifying information while in an Islamic context the issue generally does not arise as a policy matter.

3 The Practice

The Politics of Adoption highlighted the fact that reform of adoption law and revision of adoption policy has been driven by the range and pace of change taking place in adoption practice. The momentum generated by some aspects of this change process will continue into the foreseeable future. The experience of indigenous communities may then usefully inform adoption practice in more developed societies.

3.1 Aspects of Change

Any attempt to predict the likely drivers and direction of future change would be dangerously speculative. It is possible, however, to identify some features of contemporary practice that in all probability will be among those with a continuing significance for the adoption process.

- **Parenting as a responsible choice**

Developments in medical knowledge and skill in recent years have greatly enhanced the extent to which parenting is now a matter of choice, exercised largely by women. The law and policy of modern western nations have variously struggled to accommodate these developments. Some changes, such as in relation to the availability of effective contraception, methods of birth control and abortion, have

clearly reduced the numbers of children available for adoption. Other changes, such as improved techniques for assisting conception and for improving survival rates for babies born prematurely and/or with complex health problems are reducing the number of potential adopters. So also is the availability of state subsldised IVF treatment which, as annual adoptions continue their steady decline, is increasing exponentially the annual number of wanted children in some jurisdictions but not in others.[4] Advances in medical skill, enabling surrogacy to be based on full embryo transplant, are now extending the range of parents by choice to include opportunities for same gender couples. Increased recourse to intercountry adoption will undoubtedly also increase the number of such parents.

An emerging trend with quite the opposite effect is the lowering of tolerance levels in some western countries for irresponsible parenting. Certainly in the U.K. and the U.S., the prospects for failing parents are now more likely than previously to include a high risk of proceedings resulting in their child being compulsorily removed and placed with state approved responsible parents. However, in Sweden and to a lesser extent in Ireland, state intervention in circumstances of failing parenting is much more likely to be with the intention to invest the professional and other resources necessary to restore and sustain 'good enough' parenting.

- **The Conventions**

Case law developments under the European Convention are a considerable force for change in practice. It is probably only a matter of time before the ECtHR requires an adoption order to be conditional upon the prior consent of the child concerned unless good reason can be shown for this to be dispensed with. There are also strong indications that rights will be extended to non-custodial parents, grandparents, foster parents and indeed to any carer who can show the existence of a meaningful relationship with a child. Certain key principles emerging from European Convention case law will serve to benchmark future practice. These include the paramount welfare interests of the child, proportionality in state intervention in family affairs and the right to access information necessary for identity. Others will undoubtedly emerge. The principles established by the United Nations Convention on the Rights of the Child are also a force for raising standards.

The Hague Convention is an important regulatory instrument for intercountry adoption. It is gradually requiring adherence to uniform standards of good practice and that momentum will increase now that the U.S. has become a signatory. The European Convention on the Adoption of Children 2008 is introducing significant new requirements including provisions to strengthen the rights of children and non-custodial fathers while also broadening the categories of persons entitled to apply to adopt.

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[4] In the U.K., the annual report of the Human Fertilisation and Embryology Authority, 2008, announced that in 2006 some 12, 596 babies were born to mothers following successful IVF treatment, a 13% increase on the previous year. This lends a sense of perspective to the 4,764 adoption orders issued in the same year..

- **Mediating role of the agencies and professionals**

A significant practice development in recent years has been the expansion of agency involvement in the adoption process accompanied by the broadening role of the professional. Pre and post adoption counselling, support services, intercountry assessments, tracing and reunion services etc. have all added to the powerful position of the professional in modern adoption practice. It may be confidently predicted that the various adoption law reforms, coupled with the requirements of various Conventions, will see this trend continue and result in future practice being burdened with a greater weight of regulatory procedures. The distribution of responsibilities between agencies and the extent to which in each country they are government bodies, voluntary organisations or commercial companies will be revealing.

However, while professional and agency mediation is being increased and refined in countries from a common law or civil law tradition it remains relatively undeveloped in a Japanese and Islamic context.

3.2 Indigenous Culture and Open Adoption

Indigenous communities have as varied a cultural heritage as is represented by the common law, civil law and other jurisdictions studied. Each has developed its own practice, which may be analogous to the western concept and practice of adoption, but is of course contextually grounded in the particular norms and values of the culture in question. It would be a mistake to assume that there is a single, uniformly applicable indigenous model of adoption.[5]

That said, there are certain characteristics of a more 'open' or simple form of adoption, which are associated with many indigenous communities such as those considered in this book. These typical characteristics, practiced for centuries within indigenous communities in accordance with established custom, are now finding their way into the adoption processes of modern western nations. This has had the effect of rapidly eroding several traditional hallmarks of the more 'closed' model developed in those jurisdictions.

- **Anonymity and confidentiality**

Even if desired, these can no longer be guaranteed in any of the jurisdictions studied (though in France and some states in the U.S. the birth parent veto continues to block policy initiatives to introduce greater openness). The ready acceptance that ongoing contact arrangements were legally possible and often beneficial in both child care and family adoptions paved the way for acceptance of further compromise. While post-adoption contact arrangements are now more likely than not, pre-adoption information is also considered essential and contact at that stage is quite common. Increasingly, the birth parent/s are involved in the process of selecting

[5] The author acknowledges the helpful advice offered by Khylee Quince on this matter.

adopters. This 'openness' is also apparent in the introduction of legislation facilitating access to information held by adoption agencies etc. and the provision of tracing and re-unification services.

To some extent, the rapid increase in recent years in recourse to intercountry adoption may also indicate the successful erosion of these traditional private law characteristics. It is, perhaps, precisely because the comfort zone of anonymity and confidentiality is no longer available in domestic adoption that some adopters are choosing the intercountry route.

- **Eligibility and suitability**

Such criteria, defined by legislation and applied by agency professionals respectively, are unknown in indigenous communities and are beginning to be questioned in developed societies. As adoption by grandparents, single persons and same gender couples becomes more common so the usefulness of accepted strictures relating to adopters' age, health, residence, convictions, relationship status, income and infertility is now being queried. Once broad minimum criteria relating to motivation and capacity are satisfied, seeking further information may need advance justification in terms of its possible bearing on a specific welfare related issue. Similarly, the relevance of an upper age limit in relation to the subject of adoption is open to question. The rationale for age limits as a factor in consensual adoptions, whether by persons with appropriate motivation and capacity or of persons with dependency needs, may require further analysis.

- **Kinship adoption**

Long practiced and often preferred among indigenous people, this is now emerging as a valued option for children in the public child care system. Its perceived strengths, of maintaining family relationships and sense of continuity with home environment, are valued in an Islamic context but have previously been viewed in western societies as weaknesses. In the U.S., the recent increased reliance on kinship care and a higher tolerance for step-adoption would seem to indicate a greater readiness to use adoption to facilitate permanency through family care than has been evident in the U.K.

- **Cultural identity**

This has always been a much-prized feature of upbringing in indigenous communities. Great importance is attached to ensuring that as children mature they retain a sense of where they belong, an awareness of their cultural heritage and geographic locality. This has long been understood and respected in Japan and in an Islamic context. The value of such links for a child, in promoting an authentic sense of personal identity through developing an orientation to their particular culture, is now strongly endorsed for use in the adoption processes of developed societies by the provisions of international Conventions and national legislation. Such recognition, however, is at variance with current practice in the context of intercountry adoption.

- **Community knowledge and support**

Again, this has long been a key feature of adoption among indigenous people. It is now becoming accepted in the developed nations as adoption sheds its private law characteristics. Adoption orders are increasingly accompanied by financial assistance, the ongoing involvement of a range of different professions and various forms of service provision.

The challenge presented by the characteristics of 'open' adoption in indigenous communities is evident not only in the erosion of the above traditional hallmarks. It also raises some more fundamental questions regarding the more 'closed' model of the adoption process in western societies with its abiding concern for incidences of status.

- **A highly legalistic and regulated process**

The statute based, professionally administered and judicially determined adoption process typical of western society, stands in complete contrast to that still practiced within indigenous cultures in accordance with traditional customs rather than prescriptive laws. While a regulated approach is clearly necessary in relation to non-consensual and intercountry applications and in any set of circumstances giving rise to particular concerns for the welfare of a child, it is open to question whether this is equally applicable to all other adoptions. A professional filter, in terms of a completed home study report addressing motivation and capacity, confirming consents and identifying any welfare related matters, will often provide all information necessary for assessment. In the absence of legal issues, it may that a body similar to the Adoption Panel in the U.K. could then satisfy itself as to the capacity of the parties and determine whether or not adoption would be in the best interests of the child concerned. Such a body would be broadly constituted and representative, as in indigenous communities, but would include some professionals with relevant specialist expertise. It would hear directly from the principal parties and from anyone else who wished to be heard. Approval by that body would be subject to formal authorisation and registration by the Registrar on submission of appropriate documents. Arguably, most adoptions could be processed in that way.

- **Adoption as option of last resort**

In indigenous communities, formal adoption is viewed as an extreme option. Other, if possible informal, care arrangements that help a child to retain his or her sense of place in terms of relationships, culture and locality are preferred. This option of least intervention also has firm Convention endorsement. Where safe reunification with parents or relatives is not feasible, there is much to be said for consolidating the care arrangement that maintains most links with family and environment of origin. If this can be achieved through long-term foster care and/or by guardianship or by any other public/private family law orders, then perhaps good reason needs to be shown before preference is instead given to adoption.

- **Adoption as a stand alone process**

Finally, and intimately linked to the above, there is the fact that it is no longer possible nor desirable to continue viewing adoption as it has been for most of its statutory existence in western societies. It has long ceased to be the most private, discrete and detached of all the family law proceedings. For some decades it has largely functioned as an adjunct to matrimonial proceedings and, particularly in the U.S. and the U.K., it is increasingly doing so in relation to child care proceedings. Now positioned at the interface of private and public law proceedings, there is a sense in which adoption has slipped into a role as a safety valve for both.

In indigenous communities, where the private/public distinction and incidences of status are less relevant, adoption avoided the degree of preciousness it acquired in western societies. As the concept of 'family' becomes more fluid and indeterminate in those societies, with serial parenting arrangements and ever more intrusive public service intervention (benign and coercive), so it is losing its insularity and assuming the more flexible characteristics associated with indigenous communities. It is highly probable that the functions of the adoption process in western societies will adapt accordingly, will continue to develop features of 'openness' and will find a more central place in family law.

4 Politics and Adoption

On a domestic and an international basis, regulating the adoption process has definite political dimensions. While the management of that process is governed by law—administered by authorized agencies and personnel in accordance with legislation, legal procedures, rules and regulations—how it is defined, its purpose, constituent parts, access to it, the outcomes to be derived from it and the availability of alternatives, are essentially all matters that fall to politics. Political decisions, taken from a basis of particular cultural values and in accordance with tradition, determine the social role of adoption on a domestic basis. Political decisions, taken by negotiating a consensus on objectives, processes and standards, determine that role on an intercountry basis.

4.1 Redefining Adoption

In a common law context, adoption has traditionally meant the absolute, permanent and consensual legal transfer of a child from birth family and kinship network to third party adopters so that the child assumed an identity and role with the latter, their extended family and society in general, equivalent to that of a child born to the adopters and of their marriage. This has always been its primary social function; in the past to ensure continuance of the adopters family line but more recently to satisfy nuclear family parenting needs. However, it is now clear that not only in a common

law context but also in civil law countries and in Japan and Islamic cultures, this form of domestic adoption has been steadily decreasing for decades as the supply of voluntarily relinquished healthy children in the developed world dries up. Adoption as originally defined, as a social construct and as a legal mechanism, is dying out.

The other strand of domestic adoption is 'family adoption'. Serving the expedient social function of legally consolidating newly configured family units, these have been growing as a proportion of all annual adoption orders.[6] If, however, other countries follow the lead given by England & Wales and Australia and, crucially, if the judiciary give effect to the legislative intent and divert step-applicants to other private law orders, this strand will also rapidly decline. However, given that currently in the U.S. more than half of all annual adoptions are by step-parents,[7] it is unlikely that this jurisdiction is poised to take such a step. Kinship adoptions, though greatly outnumbered by step-applicants, are increasing in some countries but again the widespread political decision to make guardianship available may well put a brake on further growth.

The final strand in domestic adoptions is constituted by the throughput of children from the public care system. In all of the jurisdictions studied, the adoption of such children by third parties in circumstances where parental consent was available or the children are orphans was well established and likely to continue. A small minority of those jurisdictions also provided for third party adoption in circumstances where parental rights had been judicially removed; invariably relatively few children were involved. The social function of this strand is most clearly focused on finding homes for children in need.

Intercountry adoption is usurping the social role initially filled by the traditional model of domestic third party adoption. It is mainly used for reasons of meeting the psycho-social parenting needs of infertile couples (rather than providing an heir), is most likely to involve healthy babies and the welfare of children in need is also a consideration. Driven by an ever-rising demand for adoptable children, this social function can only become more prominent as fertility rates fall in the developed nations coupled with such other factors such as delayed marriage and deferred childbirth due to pressures of employment, better childcare and other support services for single parents and the wider acceptance of new family forms.

4.2 Broadening the Right of Access to Adoption

The right of access to an adoption process is a critical political issue. There is considerable variation within the common law nations and between them and all others

[6] See, Menozzi, C. and Mirkin, B., 'Child Adoption: A Path to Parenthood?', *United Nations Population Division*, 2007 at p. 6.

[7] See, Hollinger, J.H., *Adoption Law and Practice* (vol. 1), Matthew Bender/Lexis-Nexis, New York, 1988–2005 (2005 update).

as to how this is addressed. The potential parties to whom such a right could be available are an adoptee, birth parent/s, adopters and the state.

- **Adoptees**

For potential adoptees the critical political question is—should the welfare principle be the determinant of accessing as well as exiting the adoption process? If answered in the affirmative, then most forms of domestic adoption would automatically cease except for children in the public care system, intercountry adoption would flourish and there would be a sharp focus on admitting the destitute double orphans of sub-Saharan Africa. The question—Why are disabled children not adopted?—would then pose a real challenge to the public child care systems of many countries where such children live out their childhoods despite, in many cases, with parental consent for adoption being available.

If need, objectively verifiable, was a necessary pre-condition for admission then perhaps certain legal status considerations would become relatively less important. Need, however, is not always essential and may not even be relevant. At present, for example, the differing *locus standi* of children as 'legitimate' or 'illegitimate', while reflecting the values of very different cultures, also offers an example of inequity in the eligibility criteria for accessing the adoption process in Japan, Sweden, Ireland and in an Islamic context.

In circumstances where welfare is the primary entry criterion the ancillary question arises—Should adoptee eligibility be restricted by considerations such as age, health, marital status of parent/s, lack of parental consent etc.? Would it not be sufficient to establish that the individual has specific needs, not suitably addressed by any other form of order, and his/her consent is available and/or that of any other party with relevant rights?

- **Birth parents**

For birth parents the political issues are mainly in relation to any rights they should have in addition to simply that of relinquishing their child (in Ireland and in an Islamic context, a married parent would not have such a right). Retaining a right to permanent anonymity, exercising a right in general terms or quite specifically to choose the adopters, and the capacity to attach conditions regarding contact and/or religious upbringing are important issues as is the ability of a non-custodial birth parent to effectively contest an adoption. Then there is the thorny issue of the birth parent right to adopt, jointly with a spouse, their own child. In an intercountry context, there are questions to be asked about the politics of denying any form of monetary compensation to impoverished birth parents but, as in Sweden, providing an automatic financial grant to the (by definition) financially secure adopters.

- **Adopters**

For potential adopters, the issues relating to their applicant status have caused considerable political controversy. While the ECtHR has stated and reiterated that there

can be no right to adopt, nevertheless the prevailing inequity between classes of applicant places some in a stronger position than others to pursue that objective. Most recently this issue has arisen in relation to the eligibility of same sex couples to adopt but before that similar controversy surrounded the eligibility of unmarried couples, single applicants etc. Criteria applied by professionals in their assessment of third party adopter suitability have often triggered political controversy with attention focusing on matters such as lifestyle, racial and/or religious matching with adoptee, etc. The comparatively lower threshold applied to step-parent adopters, who are generally not subject to professional assessment, has also proved contentious.

Then there are the many issues that arise in relation to adopter access to intercountry adoption. Questions, for example, have to be asked in relation to money as a factor in determining access, racial congruity with prospective adoptee and the adopters potential capacity for promoting adoptee's cultural identity. Motivation may well also require critical analysis.

- **The state**

The big political questions, however, are reserved for the role of the state. The extent to which the state simply sets up the regulatory framework to ensure propriety for the process and to safeguard the rights of the parties, or involves itself in the process itself, is politically very revealing. In all countries studied, governments are presiding over a rapidly shrinking adoption process, in a demographic context which guarantees that demand will continue to outstrip supply, in an economic climate that requires the privatization of more public service provision and where human rights awareness (except in an Islamic context) dictates that values of equality, equity and non-discrimination must be demonstrated in the use of such services as remain in the public sector. In such circumstances it is unsurprising to find that the state is generally altering its role in relation to adoption.

The political dimension currently arises most forcefully where the state has decided to give preference to resourcing child protection rather than preserving family unity and then introduces provisions for the non-consensual adoption of the rapidly increasing numbers of children in its over-burdened public child care system (there are, for example, 20 times more children in compulsory care in Sweden than in Japan). The state, in effect, then adapts the adoption process to suit its child care policy and becomes a party in its own cause. The same issue is present also in the proportion of domestic third party adoptions that involve children with a disability and in the balance struck between domestic and intercountry third party adoptions and in the grounds for first party adoptions. The lengths the state will go to facilitate the retention of an adopted child's sense of cultural identity is an important political matter as is the availability of post-adoption allowances and other forms of support. The political decisions taken in respect of matters that condition the use of adoption also play a crucial role: whether to support services that reduce the supply of unplanned babies (contraceptives, thresholds for abortion etc.) or

reduce the demand for them (assisted reproduction treatments, surrogacy etc.) are obviously important. Again, the degree to which the state makes available targeted public services and alternative family law orders affects the need to have recourse to domestic adoption, while investment in the childcare infrastructure of 'sending' countries similarly affects recourse to intercountry adoption. Clearly, also, the fact that many 'receiving' countries are simultaneously signatories to both the Hague Convention and to bilateral agreements with 'sending' countries reveals a low level of political commitment to the Convention.

The political role of the state in this context can be heavily influenced by religion. In theocracies, as is the case in many Islamic countries and as was the case in Ireland, the cultural heritage of a nation is in effect displaced by religious values.

4.3 Adjusting the Outcomes of Adoption

This study has drawn attention to considerable jurisdictional differences in the outcomes of an adoption process. Most obviously this is evident in the legal distinction between 'full' and 'simple' adoption, the availability of alternative orders and the presumption that they may be more appropriate, and the availability of adoption orders compromised by contact conditions. It is apparent also in the jurisdictional variation in birth parent rights to continued anonymity.

However, as the principle that the welfare interests of the child is the paramount consideration in adoption displaces the importance previously attached to parental rights and becomes established as the governing determinant of all decisions taken in the course of an adoption process including choice of outcome so, arguably, all the above mentioned social roles of adoption should fall in behind that principle. This would eliminate social expediency as a sufficient reason for first party adoptions, challenge some aspects of current practice in Japan, increase third party adoptions in an Islamic context, and would raise questions in relation to any practice that resulted in children being moved from safe long-term foster care or good quality residential care to third party adopters as a matter of policy. It would also, of course, necessitate an adoption order being compromised in favour of birth family rights to the extent necessary to meet the particular needs of each adoptee.

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