

# Chapter 1

## Introduction

### 1.1 Introduction

The decision to use certain terms was made in the interests of clarity in distinguishing between the various rights and interests of those who might be most profoundly affected by origin deprivation or created forms of legal relatedness. The concept of ‘the triad’ may be a highly contentious one for anyone who regards themselves as having unwillingly lost a child to adoption; it is a useful term however, for example in relation to analysing the various rights hierarchies that can arise post-adoption or gamete donation. The use of the term ‘birth mother’ also often provokes hurt and anger amongst that community; it will be used here as sparingly as possible, again in the interests of clarity and generally in the context of case law and policy, to highlight for example the consequences of having one’s genetic connections vetoed.<sup>1</sup> Where any terms such as ‘real’, ‘natural’ or artificial’ are used in relation to parentage or conception these will be as quotations from cases or research on the issue of origin deprivation. The term ‘relinquished’ is used to represent the loss of genetic connection rather than to necessarily suggest that gently provided consents to adoption are necessarily the norm. Equally, the term ‘removed child’ appears at times, to acknowledge that substitute child care is often grounded in an acute need to achieve child protection and prevent abuse or neglect at the hands of natal family members.

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<sup>1</sup> As a sealed-records Quebec adoptee I would make the suggestion that the prefix ‘birth’ should not necessarily be omitted from rights discourses on adoption and gamete donation. Despite the argument that its usage may reduce the role of genetic mothers (and fathers) to that of narrowly defined, biological input, the term does sharply underscore the unique nature of the losses that can occur where the blood-tie is removed or relinquished in respect of severing the profound connection between child, original parent and denying their shared heritage. Arguably, the notion of the ‘*birthright*’ is made more poignant by virtue of the ‘birth’ prefix, perhaps carrying a bit more weight in terms of persuading decision-makers that, in cases involving genetic ancestry and heritage, they are often tasked with protecting more than just a basic set of rights.

The book's purpose is not to denigrate the practices of adoption or assistive reproduction (or the work done by social workers and the family law practitioners) but to highlight how some of the legal and social processes underpinning these created forms kinship have served to create and perpetuate discrimination and inequality of treatment, and in some cases, to violate basic human rights. It argues that a much more child-centric focus is needed at the level of domestic decision-making, to better embed the principle that the welfare of the child must be the paramount concern.<sup>2</sup> The book's central arguments focus mainly upon the situation of the genetically 'kinless' in terms of preventing harms, losses and rights-inequality, rather than on examining in great detail the interests or experiences of others involved in adoption or gamete donation processes. It aims primarily to establish that a 'law of blood-ties' is gradually emerging from amongst the various strands of jurisprudence and this may yet be of use in embedding a more justiciable right to genetic connection and biological identity at domestic level.

Access to ancestry should be a normative rather than exceptional feature of creating social kinship ties; permanent vetoes on accurate, identifying, birth information should only occur in exceptional circumstances, with child welfare paramountcy serving as the guiding principle. By the same token, where laws and policies have systematically protected the rights of one group over those of another then such a template merits scrutiny, and calls for reform.

Genetic connections, despite having much socio-cultural and psychological significance, remain almost weightless in terms of rights, laws and policies. No juridical right currently attaches for example to the psychological need, or sociological desire, to access biological identity, or repair natal bonds that have been legally severed during the processes of social 'kinning'.<sup>3</sup> The validity or otherwise of this assertion is evaluated here against the backdrop of both international and domestic law frameworks, and across a range of jurisdictions. The conflicting socio-cultural and psychological aspects of origin deprivation are examined in the opening chapters to highlight the wide range of harms that can flow from the loss of genetic kinship. The double-edged nature of the concept of relatedness, in respect of the laws and cultural norms which have grown up around it, is also discussed, with a view to contextualising the sometimes equivocal judicial discourses referred to in the later chapters on 'blood-tie jurisprudence'. Arguably, the ambivalence that can be found in some of the judgments echoes the tone of some of the 'fear or revere ancestry' tales of traditional folkloric warnings on 'kinless-ness'<sup>4</sup> not least in respect of the stigmatising effects of being regarded as 'other' to one's kinfolk, social or natal.

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<sup>2</sup> A key assumption of this monograph is that a significant number of origin-deprived persons will probably, at some stage in their life, attempt to seek out some level of basic information on their genetic ancestry. On searching see further Lifton (1990), pp. 85–92; Carp (1998); Triseliotis (1985), pp. 19–24.

<sup>3</sup> Howell (2003), pp. 465–484.

<sup>4</sup> See for example Bremmer (1999), pp. 1–20; Kenna (2001).

The suggestion will also be made that within some open records jurisdictions (i.e. where original birth certificates are not generally subject to permanent closure<sup>5</sup>) other factors may act to diminish the socio-legal significance of one's original blood-ties. Judicial bars on kin contact,<sup>6</sup> the practice of separating genetic siblings post-adoption,<sup>7</sup> or the granting of a very wide degree of discretion to social parents on issues such as information release or paternity testing<sup>8</sup> have frequently served to weaken the bonds of natal kinship, sometimes to the point where they essentially seem 'irrelevant' or perhaps incapable of being repaired. Many of the ethical issues surrounding promises of confidentiality made to 'triad adults'<sup>9</sup> have also, in some jurisdictions, translated into rigid legal frameworks of absolute secrecy.<sup>10</sup> These can easily 'orphanise' (and perhaps permanently infantilise) origin deprived persons. Arguably, the 'right' to identity within this context effectively becomes more of a non-right,<sup>11</sup> rendered void by the 'weightier' over-arching privacy rights of triad adults. The welfare paramountcy principle, in focussing on the 'best interests of the child'<sup>12</sup> also remains open to a wide variety of interpretations in such contexts; this may be further compounded by the presence of judicial 'balancing exercises' which might afford priority to parental interests.<sup>13</sup>

The case law selected for analysis in the later chapters does not focus solely on situations involving social kinship triads but looks also at those wider issues that

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<sup>5</sup> See for example the United Kingdom, via The Adoption Act 1976 (as amended by S 60 of the Adoption and Children Act 2002, enacted 30 December 2005) and Northern Ireland's equivalent legislation, Article 54 of The Adoption (NI) Order 1987. Note however the power of veto which vests in the inherent jurisdiction of the High Court, in respect of ordering the non-release of identifying information: see *R v Registrar-General ex p Smith* [1991] 2 QB 393 (Court of Appeal).

<sup>6</sup> See for example *Re K* [2002] NIFam 13; *Re H* [1981] 3 FLR 386.

<sup>7</sup> See *Webster (The Parents) v Norfolk County Council & Ors* (Rev 1) [2009] EWCA Civ 59.

<sup>8</sup> See for example *Re P (A Child)* [2008] EWCA Civ 499; *Re H & A (Children)* [2002] EWCA Civ 383.

<sup>9</sup> The triad refers here to the 'triangle of relationships' that exists or arises in respect of social kinship: genetic parents, social parents and adoptee or donor-gamete child. On the issue of using the term 'triad' see further <http://motherhooddeleted.blogspot.com/2009/08/myth> (accessed 01.02.12); <http://bastardette.blogspot.com/2007/10/ethics> (accessed 17.03.12); on 'Respectful Adoption Language' see further <http://www.originscanada.org> (accessed 02.02.11).

<sup>10</sup> See Baldassi (2004–2005), pp. 212–265.

<sup>11</sup> On the concept of rights versus 'no-rights' see further Hohfeld (1913), p. 16.

<sup>12</sup> See the United Nations Convention on the Rights of the Child (1989) Article 3 (1) which states 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 a primary consideration' available at <http://www2.ohchr.org/English/law/crc.html> (accessed 21.07.011). Domestic provisions [such as Article 1(4) of Adoption and Children Act 2002 in England and Wales] frame the best interests of the child as 'paramount' rather than 'primary' however—see [http://www.opsi.gov.uk/acts2002/ukpagea\\_20020038](http://www.opsi.gov.uk/acts2002/ukpagea_20020038) (accessed 29.07.11).

<sup>13</sup> On the balancing exercise see further Herring (2003).

may arise where a psycho-social need for blood-tied relatedness remains unmet.<sup>14</sup> Identity rights, best interests-led, child welfare paramountcy and the child's 'right to know' parentage are common themes within the jurisprudence.<sup>15</sup> As these blood-tie cases suggest, genetically displaced children seem at times to require a greater degree of long-term, psychological welfare protection than is currently provided for within some of the basic child welfare checklists found in domestic law or policy. If decision-makers do not accept that a longing to be genetically 'kinned with' others constitutes a key psychological need, then they will continue to frame this aspect of identity as a non-rights-bearing concept, perhaps classing it as mere curiosity on the part of the adoptee.<sup>16</sup> The concept of legal relatedness, especially where it has arisen via biological connectedness, can also be easily dispensed with via legal process. Domestic judiciaries therefore play a key role in interpreting and applying the various provisions that might yet confer a juridical right to knowable genetic ancestry.<sup>17</sup> By ordering the opening of closed records or the overturning of adoptive placements, granting or forbidding kin contact, or by delegating actual decisions on such issues to parents or social workers, domestic courts are responsible for a wide variety of outcomes. Many such decisions carry profound, long-term psychological and social consequences, not just for adoptees but for all members of the social kinship triad and possibly also for other genetic relatives outside of it, such as siblings or grandparents.

Chapter 2 asks why visible ties of kinship are so highly regarded in certain contexts yet so easily denied or disregarded in others. The pragmatic, functionalist nature of kinship (avoidance of danger, ensuring clan survival) was a theme common to many of the theorists cited here; the wider notion of clanship might arise not only through shared genealogical ancestry, but via a common social history or a shared sense of cultural identity.<sup>18</sup> It looks also to the socio-cultural consequences of being rendered genetically kinless and examines how the disparate notions of legal and biological relatedness might be regarded in differing contexts, suggesting that a wide range of social benefits depend on whether or not one has

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<sup>14</sup> The term 'social kinship' will be used here to refer to the non-genetic forms of relatedness, as created by law (e.g. adoption, Special Guardianship, marriage to a child's mother) custom (de facto 'indigenous' adoption, *kafalah*) or through assisted reproductive technologies (gamete donation or surrogacy).

<sup>15</sup> See for example *Odièvre v France* [2003] 1 FLR 621; *Frette v France* [2004] 38 EHRR 21 (42); *Re L* [2007] EWHC 1771 (Fam) (20 July 2007); *DeBoer v DeBoer* 509 US 1301 [1995]; *Baby Boy Richard v Kirchner* 513 US 1138 [1995].

<sup>16</sup> See further Nelkin and Lindee (1995): WH Freeman, on the socio-cultural significance of 'genetic essentialism'.

<sup>17</sup> Choudry (2003), p. 119.

<sup>18</sup> Strong bonds of 'clanship' may arise between individuals who otherwise lack commonal genetic ancestry. See Morgan (1871), Murdock (1949), and Pasternak (1976). See also however Carsten (2004).

been legally and visibly ‘kinned’ with non-stranger others.<sup>19</sup> It does not seek to frame the genetic mode of kinship as innately superior to that of social kinship, but focuses instead upon the question of why the concept of genetic kinship can often provoke a double-edged response of ‘fear or revere’. The seminal texts of several kinship anthropologists (Radcliffe-Brown,<sup>20</sup> Levi-Strauss<sup>21</sup> and Goody,<sup>22</sup> for example) provide a definitional starting point, asking whether biological connections can, on their own, give rise to a sense of relatedness.<sup>23</sup> Generally, the research also seems to frame the notion of relatedness as a non-discrete concept, arguing that it overlaps with many of the cultural notions of kinship, and with a wide range of other purposive ‘social realities’, such as the desire to protect one’s property, achieve psychological well-being, or avoid societal injustice. Some of the research discussed here seems to support the argument that self-perceived ‘otherness’ can affect not only the relationships between social and natal kinfolk, but also serve to influence the way in which a healthy sense of ‘self-hood’ might be achieved.

In other words, where original onomastic identity has been lost, hidden away or removed, it may be replaced by a profound need to search for authentic, identifiable ancestry, if only to avoid being deemed ‘other’.<sup>24</sup> By the same token, access to genetic truths and realities (such as accurate narratives or knowledge of ‘clan’ surnames) might be seen as enabling strong kinship links and a socio-cultural sense of belonging. Lepri’s work highlights for example the apparent dangers and perhaps unvoiced concerns associated with taking in unknown ‘outsiders’<sup>25</sup> whilst Miall’s study of adoptive parents found that many felt themselves at times to be regarded as socio-culturally inferior to genetic parents.<sup>26</sup> Conversely, the significance of the blood-tie may be completely superseded by the nurturing, protective effects of social ties. Hage for example stressed the value of feeding as a much better means of generating kinship than that of mere biology.<sup>27</sup> Ancestor reverence however could prevent the harms of origin deprivation by preserving or appeasing one’s ‘ancestral substance’.<sup>28</sup> Highly visible, elaborate graveside rituals<sup>29</sup> may preserve

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<sup>19</sup> A number of ‘kinning’ devices can be found within domestic property law in some common law regions (e.g. the ‘good conscience’ constructive trust based on good kinship behaviours, or promissory estoppel claims over familial legacies). See for example cases such as *Re Johnson* [2008] NI Ch 11; *Little (Junior) v Maguire* [2007] NI Ch 7; *McKernan v McKernan* [2006] NI Ch 6.

<sup>20</sup> Radcliffe-Brown (1952).

<sup>21</sup> Levi-Strauss (1949, 1963).

<sup>22</sup> Goody (1973).

<sup>23</sup> See also for example Evans-Pritchard (1951) and Aginsky (1935), pp. 450–457.

<sup>24</sup> See for example Ortner and Whitehead (1981).

<sup>25</sup> Lepri (2005), pp. 703–724.

<sup>26</sup> Miall (1987), pp. 34–39 at p. 34.

<sup>27</sup> Hage (1999), p. 67.

<sup>28</sup> Grace (2008), pp. 257–262 at p. 257. See also Grace et al. (2008), pp. 301–314.

<sup>29</sup> Roesch-Rhomberg (2004), p. 83.

order amongst the wider community or protect vulnerable outsiders from the inherent dangers of their own ‘otherness’. Other ceremonies may be used to reassure social parents fearful of having to defend themselves against the ‘prior claims’<sup>30</sup> of original parents or angry kinfolk.

Many of the *de facto*, informal modes of customary adoption emphasize the difficulties of created relatedness, in a way that formalised western adoption models have traditionally seemed unable, or perhaps reluctant, to do. Issues of loss, fear, ‘bereavement’ and the need to grieve for lost biological relatives, perhaps publicly and repeatedly, are acknowledged and addressed. Intricate rituals aimed at replacing, removing or mimicking the blood-tie, achieving purification or preventing stigma, promoting psychological healing or removing aggrieved or malign ‘hereditary ghosts’<sup>31</sup> may be carried out. A wide range of elaborate, perhaps fluid-based ceremonies exist to repair, replace or ward-off the genetic connection; these rituals may be akin to secular, legal or customary ceremonies that enable social kinship, such as birth record-sealing or the re-naming of adoptees.

Chapter 3 examines the psychological aspects of origin deprivation and broken attachments in a bid to better understand the emotional basis of our desire to ‘be related’ to others. Carp’s contention that genetic relatedness continues to occupy a position of ‘privilege’ is relevant here, not least in relation to gauging whether norms of strict secrecy were actively developed to protect triad members from their innate sense of dissimilarity and quietly discourage searches for biological kinfolk.<sup>32</sup> A number of academics highlight the ‘doomed quality’<sup>33</sup> that some adoptees tend to display.<sup>34</sup> Wegar’s research on the issue of sealed birth records in the United States lends support to the argument that adoptees have long been labelled as different, and perhaps at times somehow inferior to, those children who have been raised by their natal families. As such, the dominant model of adoption research appears to have largely been one of individualized pathologies.<sup>35</sup> Bowlby’s seminal work on the need for strong attachments in early childhood is also discussed here;<sup>36</sup> despite being initially regarded with a degree of ambivalence, it did serve to challenge the widely held view that abandoned or orphaned infants were incapable of grieving, due to their having ‘immature egos’ and that their need

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<sup>30</sup> Hargreaves (2006), pp. 261–283 at p. 279.

<sup>31</sup> Levy-Shiff (2001), pp. 97–104 at p. 103; see also Berg (2003), pp. 194–207; see further Morgan (1877).

<sup>32</sup> Carp (1998), p. viii.

<sup>33</sup> Carsten (2000), pp. 687–703 at p. 691.

<sup>34</sup> Some writers seem to express dislike for the term ‘adoptee’. See for example Trinder et al. (2004), p. 3 where it is suggested that the word tends to denote a ‘category rather than a person.’ If it is accepted that origin deprivation is a form of discriminatory treatment, the categorization of adopted persons as a uniquely disadvantaged group does not seem entirely inappropriate. The term also perhaps captures the degree of passivity that adopted persons might be subject to when entering the process, in terms of their not usually providing consent.

<sup>35</sup> Wegar (1997), pp. 97–118.

<sup>36</sup> Bowlby (1958), pp. 350–371.

for substitute care-giving was easily met, grounded as it was in a pragmatic need to simply receive nourishment. Reference is also made here to some of the earlier, controversial pieces of empirical research which tended to stress the ‘debilitating’ effects of illegitimate birth status. Such works are included to illustrate how biased social attitudes might serve to actively influence social policies and public perceptions.<sup>37</sup>

Other key texts referred to include: Frisk, on ‘genetic ego’<sup>38</sup>; Erikson, on ‘identity crisis’<sup>39</sup>; Sandler and Joffe, on the psychological benefits of physically resembling one’s parents<sup>40</sup>; Rogers, on the attainment of ‘personhood’<sup>41</sup> and Lifton, who described how the creation of an ‘artificial self’<sup>42</sup> might serve as a coping mechanism. The focus however is on asking whether social kinship processes must inevitably create a permanent ‘marker for difference.’<sup>43</sup> Theories on the ‘rehabilitative’ properties of created kinship, drawn from empirical research, seem to ask whether long-term stigma arising from an innate feeling of ‘otherness’ is an inevitable outcome, in societies where biological connection has been traditionally prized as a cultural norm. Arguably, the main ethical issues, such as promises of confidentiality to triad adults, have perhaps left law and policy makers with little option but to construct and enable frameworks of absolute secrecy, whether over birth or gamete donation.

As much of the qualitative research on international adoptions also perhaps suggests, many respondents do cite long term psychological difficulties: generally they associate their problems with having an ongoing sense of ‘discontinued identity.’<sup>44</sup> If it is accepted that origin deprived persons run the risk of suffering from some form of ‘genealogical bewilderment,’<sup>45</sup> then it perhaps follows that this can constitute a uniquely harmful form of social disenfranchisement. Genetic ‘non-origin’ may produce long term effects, not least a sense of having to cope throughout one’s lifetime with powerful ‘refusals of belonging’<sup>46</sup> As later chapters will seek to argue, origin deprived persons could be viewed in law and custom as a uniquely disadvantaged minority group, worthy of special legal protections, on the basis of the harms that they may be likely to suffer.

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<sup>37</sup> Goddard (1912). The text argued for the permanent institutionalization (rather than the adoption or fosterage) of illegitimate children within the United States. The subsequently discredited research apparently arose from Goddard’s ‘work’ with one of his female patients in the Training School for Backward and Feeble-Minded Children.

<sup>38</sup> Frisk (1964), p. 31.

<sup>39</sup> Erikson (1968).

<sup>40</sup> Sandler and Joffe (1969), pp. 585–595.

<sup>41</sup> Rogers (1961).

<sup>42</sup> Lifton (1990), pp. 85–92.

<sup>43</sup> Melosh (2002), p. 2.

<sup>44</sup> Ryburn (1995), pp. 41–64 at p. 42.

<sup>45</sup> Sants (1964), pp. 133–141.

<sup>46</sup> Yngvesson and Mahoney (2000), pp. 77–110 at p. 79.

As Antze and Lambeck have argued, memories remain crucial to the construction of personal identities and ‘selfhood’.<sup>47</sup> The psychopathologies of non-attachment often comprise of quantitative studies involving adoptees and abused children.<sup>48</sup> The negative effects of having insecure or broken ‘attachment’ bonds highlight how child welfare needs may differ significantly where origin deprivation is involved. Such research frames the child’s ‘need to know’ as a basic welfare entitlement, rather than as a personal desire to uncover ‘non-essential’ genealogical information. Much of the work also challenges early adoption policies and practices, which tended to advocate well-meaning, fictive options, such as telling adoptees that they had been orphaned, placing their Adoption Orders or original birth certificates in safe deposit boxes, or simply ‘not telling’ children that they had been adopted.<sup>49</sup>

Later studies on the need to access accurate information highlight more clearly the potential harms of genetic kinlessness, by stressing how problems can arise. As Wegar suggested, examination of ‘the structure of adoption as a social institution’ must be a central objective of any bid to redress the unique, recursive harms of origin deprivation. Blaming ‘individual shortcomings’<sup>50</sup> of triad children or expecting them to develop strong coping mechanisms, is unacceptable. The early policies of removing the ‘social flaws’<sup>51</sup> of illegitimate children (by placing them with new kinfolk and hiding their original background) contrast sharply with the more recent emphasis on ‘Positive Adoption Language’<sup>52</sup> and the child-protective aims of modern practice.<sup>53</sup> Such policies are primarily concerned with meeting the acute needs of highly vulnerable children, rather than serving to expand family units, ‘cure’ infertility, or hide illegitimacy. A brief outline of the various policy changes that have shaped legislative reforms in the open records jurisdictions referred to is also included, by way of suggesting a possible policy template for reforming practice in closed records or veto-bound systems.

Chapter 4 asks whether a juridical ‘right’ to genetic kinship (via knowable ancestry or meaningful contact) might yet be found to exist amongst international law provisions. It expands upon some of the questions raised by the previous chapters, such as whether a stable sense of national identity might be underpinned by collective kinship, or by common connection to place.<sup>54</sup> Smith, for example,

<sup>47</sup> Antze and Lambeck (1996).

<sup>48</sup> See for example Schechter (1960), p. 21.

<sup>49</sup> See for example Wellisch (1952), p. 41 who observed that identification with one’s relatives was often easier where there was some degree of physical resemblance. He suggested that, as a result, adoption might be better suited to orphans.

<sup>50</sup> Wegar (1997).

<sup>51</sup> See for example Kornitzer (1959), p. 102; Kellmer-Pringle (1967), p. 25.

<sup>52</sup> See for example Spencer (1979), p. 450 who argued that terms such as ‘natural mother’ seek to remove any recognition of relatedness between parent and adopted child. She advocated instead the use of ‘emotionally correct’ words.

<sup>53</sup> See Triseliotis (1973).

<sup>54</sup> Eriksen (2004), pp. 49–62 at p. 49.



argued that the strong bonds of ‘*ethnie*’ (ethnic community) are often based mainly upon shared folkloric wisdoms, customs, common memories, and identification with territorial heritage.<sup>55</sup> The ‘growing consciousness of a personal right to compose one’s identity’<sup>56</sup> in respect of nationality rights, could perhaps yet provide significant precedent in respect of preventing the loss of birthright heritage. The importance of finding ascertainable collective ethnonyms in enabling and maintaining group identity is especially clear where a displacement of cultural histories or the loss of shared ‘descent mythologies’<sup>57</sup> has occurred, as can happen in the worst examples of ‘assimilation’, where a child’s ethnicity might be deliberately hidden, for example in the wake of wars or conflicts, through illegal adoptions or via baby-trafficking.<sup>58</sup> Although there are no explicit protections for blood-tied kinship within international law, a number of significant entitlements to enjoy a sense of ‘relatedness’ might be inferred from some of the main provisions: the right to a name<sup>59</sup> or nationality,<sup>60</sup> the avoidance of degrading treatment<sup>61</sup> and the need for respect for ‘cultural integrity’,<sup>62</sup> are some examples. Wider principles on enabling equality and preventing discriminatory treatment are also relevant in respect of preventing harm amongst vulnerable persons, and will be referred to here and in later chapters.<sup>63</sup> Mainly however this chapter attempts to conceptualize the child’s ‘right’ to genetic identity as an important aspect of human rights law. To do so, it looks largely to the Committee Guidance (of the Children’s Convention)

<sup>55</sup> See Smith (1986, 1998, 1991).

<sup>56</sup> See Franck (1996), pp. 359–383 at p. 359.

<sup>57</sup> Smith (1986, 1998, 1991).

<sup>58</sup> On baby-trafficking see for example Meier and Zhang (2008–2009), pp. 87–130; see also Smolin (2009–2010), p. 441.

<sup>59</sup> See for example Articles 16 (1) (a) and 30 (1) of The Convention on Protection of Children and Co-Operation in Respect of Inter-Country Adoption (1993) (‘Hague Convention on Inter-Country Adoption’) available at <http://hcch.e-vision.nl/upload/outline33e.pdf> accessed 13.07.11.

<sup>60</sup> See for example The European Convention on Nationality (1997) (ETS No 166) (‘The Nationality Convention’) available at <http://conventions.coe.int/Treaty/en/Treaties/Word/166.doc> accessed 20.07.11.

<sup>61</sup> See for example Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘ECHR’) available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm#FN1> accessed 01.06.11.

<sup>62</sup> See Article 27 of The International Covenant on Civil and Political Rights (1966) (‘ICCPR’) available at <http://www2.ohchr.org/english/law/ccpr.htm> accessed 30.07.11. On the issue of international legal and customary norms of non-discrimination and the duty upon states to protect the ‘cultural integrity’ of individuals and groups see also Anaya (2000), pp. 97–103.

<sup>63</sup> See for example Article 2 of the Universal Declaration on Human Rights (1948) which states that ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ See also Article 25 (2) which stresses that ‘Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.’ Available at <http://www.un.org/en/documents/udhr/index.shtml> accessed 10.07.11.

contained in Concluding Observations and Country Reports.<sup>64</sup> A key factor here is that of domestic interpretation of the best interests principle, not least in relation to how signatory states actually seek to implement meaningfully the principle of child welfare paramountcy at the level of domestic proceedings.<sup>65</sup> It will be argued that national courts could at times allow themselves to be more fully persuaded by the ‘identity rights’ provisions of such instruments as the Children’s Convention, especially given its focus on life-long protection of child welfare.

Arguably, the ‘rights-based approach’ of the Children’s Convention has at least encouraged a ‘decisive shift’<sup>66</sup> in respect of domestic judicial attitudes towards the rights of children, not least where court decisions involve issues of psychological welfare. The chapter also includes a brief examination of how identity and family life rights (and, arguably, the best interests principle itself) may be entirely overruled by the presence of a domestic veto, even in the face of regionally enacted human rights charters aimed at embedding human rights principles.<sup>67</sup> It also makes the tentative suggestion that the notion of genetic identity kinship has to date been generally aligned with ‘second generation’, socio-economic and cultural property rights, rather than framed as a stronger, civil, political entitlement.<sup>68</sup> As such, any rights that might be found to attach to the concepts of genetic kinship and original identity may run the risk of being classed as largely non-juridical, or subject to the problems of overcoming wide margins of appreciation, and gradual, aspirational modes of domestic implementation.<sup>69</sup>

Chapter 5 examines ‘blood-tie’ case law from The European Court of Human Rights, for example, in connection with the rights enshrined in Articles 8 (and, to a lesser extent, Article 6) of the European Convention on Human Rights. The various

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<sup>64</sup> See Article 3 (1) of The United Nations Conventions on the Rights of the Child (1989) (‘The Children’s Convention’) which states 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 a primary consideration.*’ Available at <http://www2.ohchr.org/English/law/crc.html> accessed 21.07.11.

<sup>65</sup> See Sinclair and Franklin (2000), Sinclair (2004), pp. 106–118, and Kirby and Bryson (2002).

<sup>66</sup> McCarthy (2004), pp. 1–32 at p. 1.

<sup>67</sup> See Baldassi (2004–2005), pp. 212–265; see also *Kelly v Superintendent of Child Welfare and Williams* (1980) 23 BCLR 299 (SC); *Re Adoption of BA* (1980) 17 RFL (2d) 140 (Man Co Ct) where ‘identity issues’ were insufficient to open sealed birth records. See however by way of contrast *Ross v PEI* (Supreme Court, Family Division, Registrar) (1985) 56 Nfld & PEIR 248 [1985] PEIJ No 1 (PEISC) (QL).

<sup>68</sup> Similarly, if a positive obligation to prevent origin deprivation were found to exist in human rights law, possibly as a type of cultural property right (e.g. in preventing cultural assimilation) then arguably such a duty could, in theory at least, be framed as perhaps akin to those peremptory norms that attach to the protection of Native status and title. See further Merry (1997), p. 31; Samson (2001), pp. 226–248.

<sup>69</sup> See also Alston (1984), pp. 607–615. See also The International Declaration on Human Genetic Data (2003) Article 3 which states that ‘*Each individual has a characteristic genetic make-up. Nevertheless, a person’s identity should not be reduced to genetic characteristics, since it involves complex educational, environmental and personal factors and emotional, social, spiritual and cultural bonds with others and implies a dimension of freedom.*’

A Law of Blood-ties - The 'Right' to Access Genetic  
Ancestry

Diver, A.

2014, XIII, 306 p., Hardcover

ISBN: 978-3-319-01070-0