THE POLITICS OF ADOPTION

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International Perspectives on Law, Policy & Practice

by

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A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN-10 1-4020-4153-5 (HB)
ISBN-13 978-1-4020-4153-2 (HB)
ISBN-10 1-4020-4154-3 (e-book)
ISBN-13 978-1-4020-4154-9 (e-book)

Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.
www.springer.com

Printed on acid-free paper

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Printed in the Netherlands.

To Molly
More in hope than expectation . . .

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ACKNOWLEDGEMENTS

That *The Politics of Adoption* made it into print owes a great deal to Professor Myles McGregor-Lowndes[1] and to my other colleagues at the Centre of Philanthropy and Nonprofit Studies. For their support and companionship, at a time when this was sorely needed, I remain extremely grateful.

Many academics, senior managers and others voluntarily undertook the task of reading and commenting on particular chapters. Their contributions have spared readers from encountering even more inaccuracies, gaps and inconsistencies. Those that may still be detected, together with all views expressed, are inescapably attributable to the author. While it is not possible to render a full account of the debt owed to so many it would be quite wrong not to acknowledge the particular contribution of a few.

Thanks are due to Deborah Cullen[2] who kindly read and commented on the chapter dealing with the adoption process in the UK, to Geoffrey Shannon[3] for his similar contribution in respect of the chapter on Ireland and to Greg Kelly for his observations in respect of current practice in both jurisdictions[4]. My concerns in relation to the Australian adoption process were allayed by the advice of John Dewar[5] who referred me to Patrick Parkinson[6] and Lee Ann Basser[7]. I'm grateful

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to the former for his suggested reading list and for putting me in touch with Justice Richard Chisholm[8] who was most helpful. To the latter I am grateful for her comments on draft material relating both to Australia and to the adoption experience among the Indigenous people. The chapter on adoption process in the US received much needed attention from Ann Estin[9] and Charles Putnam[10] both of whom made important improvements.

I am particularly grateful to John Triseliotis for his kind words of endorsement. My thanks also to Springer and in particular to Anne-Marie Blaney for their vote of confidence that resulted in the publishing of this book.

Thanks, Elizabeth, for tolerating this self indulgence.

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INTRODUCTION

Adoption has always had a political dimension. Its potential 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 and which arguably attracts the involvement of some countries for reasons of economic and political expediency.[5]

Adoption does not function in isolation. It plays a distinct role within the context of family law proceedings. The extent to which it is available as a resource for children in the public care system or as an adjunct to marriage proceedings is essentially politically determined. It is itself susceptible to political influence. In fact direct political leadership, exercised first by President Clinton[6] and then

[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, Chapter 9.

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

Kerry O'Halloran (ed.), The Politics of Adoption, 1–4.
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by Prime Minister Blair,[7] introduced fundamental change to the accepted role of adoption in the US and the UK. These changes are now the focus of political attention in countries like Ireland and Australia where adoption law reform is currently underway. They highlight the widening gap between the politically determined role of adoption in countries that share a common law heritage and others of a different tradition such as Denmark, Finland and Sweden.[8] All, however, are also challenged by the more open approach developed and sustained by the Aborigines in Australia, the Maori in New Zealand and the Inuit in Canada.[9]

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 through which to examine the presumption that within and between cultures there exists a common understanding of what is meant by adoption.

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 essential 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 facilitate a comparative evaluation of adoption processes in England & Wales

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*.

8 Adoption in these countries is endorsed by neither law, policy or practice as an option for addressing parental failure.

9 See, further, Chapter 10.

10 Adoption law reform concluded in the US with the Adoption and Safe Families Act 1997, in New South Wales, Australia with the Adoption Act 2000 and in England & Wales with the Adoption and Children Act 2002. Ongoing adoption law reviews were launched in Queensland, Australia in 2000, in Scotland in 2002 and in Ireland in 2003. In Northern Ireland, the Department of Health & Social Services and Public Safety published its report *Adopting: Best Care* in 2002 and a full review of the law is expected to commence shortly. In New Zealand the Law Commission published its report *Adoption and Its Alternatives: A Different Approach and a New Framework* in 2000.

and other common law countries, as differentiated from the processes of countries with a different legal tradition;
- 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 in the common law jurisdictions and their implications for the future.

The ten chapters of *The Politics of Adoption* divide into three parts throughout which attention is drawn to an inescapable political dimension in the role played by adoption within and between nations.

Part 1 'Adoption and Society' consists of two chapters which examine the nature of adoption. 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 Modern Adoption in the United Kingdom ' tracks changes to the role and function of adoption in the UK with a particular emphasis on developments in England & Wales.

Part 2 'Adoption and the Law', again consisting of two 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 3. Chapter 4 'International Benchmarks for Modern Adoption Law' considers the provisions and related case law of international Conventions and assesses their significance for adoption practice.

Part 3 'Contemporary Law' in the main 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 5, 6, 7 and 8 examine 'The Adoption Process' in England & Wales, Ireland, the US 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. Chapter 9 'Intercountry

Adoption' provides an account of this phenomenon and addresses the related issues. Finally, Chapter 10 '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.

Kerry O'Halloran
White Park Bay
Autumn 2005.

Part I

ADOPTION AND SOCIETY

Chapter 1

ADOPTION: CONCEPT, PRINCIPLES, AND SOCIAL CONSTRUCT

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.

Kerry O'Halloran (ed.), The Politics of Adoption, 7–38.
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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.

2.1. Legal definition

In legal terms, adoption has been defined as:

> . . . 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 . . . [1]

or, more bluntly:

> . . . providing homes for children who need them is its primarypurpose[2]

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 UK 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 with roles 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 but also matrimonial proceedings.

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

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

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

kinship relationships which are thereby entailed. As a corollary, the same 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.
- 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 Sharia law, adoption is prohibited but the practice of 'Kafalah', a form of long-term foster care, has long been used. Duncan explains the difference between adoption and Kafalah 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

[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.

[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.

> in respect of the new family. However, Kafalah 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 UK 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 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. 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.

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.

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

[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.

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.

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 UK, 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.

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

[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.

[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.

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

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 UK 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.

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

[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.
[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.

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 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.

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

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

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.

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 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.

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 560 AD 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).

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]:

> 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.

[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.

[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. 71–2.

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]

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]

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]:

[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 s 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.
[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*, Oxford, Clarendon Press, 1765.

> 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.

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.

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 s 1(1) of the Poor Law Act 1889,[35] subject to subsequent judicial confirmation, and the guardians could under s 3 be empowered to place the child for adoption.

[35] Continued by s 52 of the Poor Law Act 1930 and subsequently by s 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 s 52 resolution (*ibid.* para 29). This was later echoed by the Houghton Committee (para 153).

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.

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:

> . . . 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*.

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.

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 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

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

'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 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."

[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.

[39] 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, Oxford University Press, 2000.

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

- **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]

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 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

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*, London, Unwin Hyman, 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, 2000 at pp. 308–310.

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.

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.

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.

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

[49] See, 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 6 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, s 2(3)).
[54] See, *Report of the Departmental Committee on the Adoption of Children*, Cmnd 9248, London, HMSO, 1954.

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".

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'.

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.

[55] See, 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*, London, HMSO, 1972, Cmnd 5107, paras 33 and 34 and recommendation 2.
[59] See, *Report of the Departmental Committee on Adoption Societies and Agencies*, London, HMSO, 1937, Cmnd 5499, p. 4.
[60] See, *Report of the Departmental Committee on the Adoption of Children*, *op cit*, para 17.