Kinship Adoption; Relatedness and Ambiguous Identity : Limits to The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption "

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"Of charity, what kin are you to me ? What country? What name ? What parentage?" Sebastian to his lost sister, Viola (aka Cesario) in Shakespeare's 'Twelfth Night', Act 5, scene 1.

Mistaken identity forms much of the fabric of Shakespeare's comedies. In 'Twelfth Night', twins are separated by a storm at sea. Each believes the other drowned. Years later, far from their native Messaline, they meet in Illyria, the sister ,Viola, disguised as a man, Cesario. The recognition of Sebastian and Viola as brother and sister is the final revelation of kinship identity that has befogged a drama where the players have been confused by multiple tricks as to identity.

Shakespeare manipulates mistaken identity often as a comic device. Four hundred years later, professional and literary opinion, world wide, is that concealed genetic identity in legal adoption is tragic [i]. Concealment aside, the fact remains that a new birth certificate issues. This social assertion of a 'genetic' identity is the building block for all subsequent legal identity documents. Algorithmic codes such as DNA and fingerprints are more specific identifiers but are not , yet, components of a birth certificate.

Child adoption implies that initial legal identity can be socially constructed by way of a documentary fiction as to genetic descent. Yet, there remains an ambiguity in this social domination. Genetics is judged socially appropriate to re-surface in the statutory rules regarding incest, consanguinity and affinity of adoptees with their genetic siblings and parents although ART (Assisted Reproductive

Technology) conceived children do not appear subject to these same rules in New Zealand . There is also ambiguity in case law treatment of access and paternity , parallel with or consequent to adoption orders. [ii]

A new legal identity is a consequence of an adoption order but there is a greater sense of identity which has been an inchoate motivation of the proceedings. This is the hoped-for personal identity of the child, coloured and shaped by culture or ethnos, which, potentially, will flower under the aegis of the adoptive parents [iii]. It comes through that self-actualisation recorded in philosophy, ethnography and literature [iv]. It is this type of personal identity, a hope for the growing child , which is the *telos* toward which activating concepts of 'best interest' of the child operate [v].

The relationship of best interests to this personal identity is a proportionality identified by Aristotle [vi] and Illich [vii] and which is necessarily indeterminate until identified within the specific embodiment of the case before the Court – the facts, time, place and parties before the Court [viii]

The right to an identity is repeated throughout The United Nations Convention on the Rights of the Child 1989 ('**UNCRC**') as a fundamental right . The Hague Convention on Co-operation between States on Protection of Children and Co-operation in respect of Intercountry Adoption 1993 ('**The Convention'**) refers to the principles in UNCRC in its Principles and Objects.

At Article 7 of UNCRC ,it is stated that " a child shall be registered immediately after birth and shall have the right to a name , to acquire a nationality and as far as possible the right to know and be cared for by his or her parents. " At Article 8, it is stated, "Parties undertake to respect the right of the child to preserve his or her

identity including nationality , name and family relations … . Where a child is illegally deprived of some or all of the elements of his or her identity , parties shall provide appropriate assistance and protection …" . These statements all imply the importance of the relatedness of the child with another or others.

While identity is a right of a child under Arts 7 [ix] and 8 [x] of the UNCRC, the normative environment within which The Convention operates, this is not defined [xi]. Nor is identity defined in the New Zealand child adoption legislation [xii]. Aside from components such as appear on the birth certificate (name, date and country of birth, parentage), identity has been the subject of considerable discourse in literature, philosophy, ethnology and has been described in ways ranging from a quality of gender, sexuality, race, culture or ethnos, belief, occupation ;the experience of self in relation to the other as described by Foucault [xiii] ; the I- Thou relation as described by Illich [xiv] ; the experience of 'becoming' as described by the deaf-mute Helen Keller;

"Before my teacher came to me , I did not know that I am. I lived in a world that was a no-world. I cannot hope to describe adequately that unconscious yet conscious time of nothingness. I did not know that I knew aught , or that I lived or acted or desired. I had neither will nor intellect. I was carried along to objects and acts by a certain blind natural impetus. I had a mind which caused me to feel anger, satisfaction, desire. These two facts those about me to suppose that I willed and thought. I can remember all this not because I knew that it was so but because I have tactile memory. It enables me to remember that never contracted my forehead in the art of thinking. I never viewed anything beforehand or chose it . I also recall tactually that never in the start of a body or a heartbeat did I feel that I loved or cared for anything. My inner life, then, was a blank without past, present or future., without hope or anticipation without wonder, joy or faith. " . [xv]

From Helen Keller's autobiographical discovery how she became someone through the medium of her teacher , Anne Sullivan, to other disciplined enquiries comes the quality of relatedness in identity. The concepts of legal identity and personal identity are thus distinct but connected . In child adoption, both legal and personal identity of the child appear fundamental issues to the adoptive parents choice of love [xvi].

The legal reasons that support an adoption order , both kinship and stranger-baby , can be summarised as : availability for adoption and best interests of the child. The reasons which compel the formal kinship adoption application often relate to an administrative refusal to recognise a pre-existing kinship relatedness which has resulted in a informal fostering or a legal foreign adoption.order .[xvii]

Kinship fostering implies an existing relatedness which complies with the principles of best interests, family and identity in UNCRC and The Convention. Both of these international treaties were aimed at protecting children from exploitation and postulate norms of safe family life and identity for children. The Convention, under the normative umbrella of the UNCRC [xviii], establishes working protocols for achieving intercountry adoption . To the extent that domestic Courts treat these protocols as rules , they become as much of an institution as the physical orphanages which are sought to be eclipsed.

It is argued that a clearer understanding of a number of competing factors will show that the Courts have the power to acknowledge kinship relatedness using protocols as guidelines. These factors include :

(1) 'Best interests of the child' - as an enquiry into a comparative chance of achievement of a personal identity with the adoptive parents.

(2) An acceptance of the propriety of complex family identity in kinship adoptions which is in keeping with the emphasis on identity in UNCRC and The Convention.

(3) An appropriate discretion in the administrative and judicial authorities to recognise kinship relatedness which arises through their juridical powers and a purposive interpretation of The Convention.

Best Interests and Identity as Relatedness

Internationally, there is discourse on the propriety of a check list of components of 'best interests' [xix]. While concepts of 'welfare', 'best interests' and 'identity' are axiomatic in adoption discourse, there is no definition of these in The New Zealand Adoption Act 1955, The New Zealand Adoption (Intercountry) Act 1997 , UNCRC or The Convention.

The UK Children Act 1989 (s.3 (1))does provide a list as factors to be considered in deciding on a child's welfare but this is non-exclusive [xx]. The New Zealand High Court in *Barton-Prescott v D-G of Social Welfare* [xxi] , has confirmed a non-exclusive list of components of a child's welfare [xxii]. That case was a contest by a grandmother of her daughters decision to place her baby , outside the Maori whanau (extended family), for adoption . The issue was whether the child should go to her maternal grandmother by way of guardianship or whether the adoption application should continue. The contested nature of the adoption application is emphasized. This was not an issue between an applicant and an institution which wanted compliance with a procedure as was the

case in two recent Family Court decisions where the ex parte applications were delayed for compliance with the Hague Convention procedure [xxiii]

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This was a challenge by an embodied person - the grandmother of the child – to the prospective Adopters. These proceedings were not ex parte at this stage.

In deciding in the adoptive Applicants favour – that the adoption process should continue to the detriment of grandmothers application , the High Court enunciated best interests as follows –

> "The strength of existing and future bonding, parenting attitudes and ability, availability for and commitment to quality time with a child, support for continued relationships with other parties, security and stability of the home environment, availability and suitability of role models, positive or negative effects of a wider family group, provision for physical care and help, material welfare, stimulation and new experiences, educational opportunities and the wishes of the child."

The Court decided that the extended birth family represented by grandmother was not a placement in this child's best interests.

This High Court statement specifies in greater detail 'best interests' than does the checklist in the UK Children Act 1989 . All of the Barton-Prescott indicators accentuate relatedness and although ethnographic/family roots do not appear in the list, the actual issue of placement within the Maori extended family was a major issue in the welfare decision. In deciding that the existing family relatedness was not in the child's interests, there was an implication of a historical pattern of abuse in that family.

The conflict between cultural or ethnographic propriety and the universality of the UNCRC norms remains the prime concern in the international discourse on 'best interests' [xxiv]. Professor Freeman describes the reconciliation of universal and cultural propriety as the issue between the universal and the particular – while some cultural practices can be reconciled with universal rights yet others fall outside any margin of appreciation-such as child slavery, child apartheid , child prostitution, child female genital mutilation, child marriage, (and child soldiery, presumably). The way to accommodate competing communities claiming that they provide the appropriate framework for judging what are children's rights is to engage in dialogue to facilitate a shared common sense and create a dialogue which "seriously engages local perspectives" [xxv].

The intercountry adoption process involves these issues in a live embodied way before the Court. As intercountry adoption seeks generally to relocate children from a particular cultural milieu into the modernist world of the universal 'human' [1]rights , the issue of reconciliation of the universal with the particular is sought to be resolved practically, in favour of the universal – i.e, the modernist world of western values and standardised consumption living .

Thus, as far as the practicality of intercountry adoption is concerned, the checklist probably reconstitutes itself as a variable exercise which The Convention social workers (from both sending and receiving countries) attempt to complete in their administrative process of reporting on availability for adoption and best interests. How far this report exercise incorporates local perspectives within the universal norms postulated by UNCRC probably varies each time. However, the process does enter the

[1] Ivan Illich, ' Gender' , 1968 , Marion Boyars ascribes the loss of the separate identities and worlds of gender and transmogrification of 'man ' and 'woman' into 'human' as part of modernization.

Court decision by way of the mandatory reports by the sending and receiving countries.

For an intercountry adoption Court which relies on the reports there is no mandated legal checklist. In intercountry adoption, 'best interests' of a child amounts to a general norm – the advent of a suitable family for a child who has no available family. Chantal Saclier, the Programme Manager at International Social Services in Geneva [xxvi] endorses this but at a level of necessary generality which is not capable of further reduction until it comes to an individual case;

> "Adoption can offer a permanent and appropriate family to children who have been definitively deprived of their family environment or cannot in their own best interests be allowed to remain in it." [xxvii]

Saclier goes on to a severe critique of the physical institutionalisation of abandoned and orphaned children in the Third World although she poses a number of preferred alternatives to intercountry adoption which she sees as a limited answer. However, it is implicit in Saclier's alternatives to physical institutionalisation, that the child should be in a relation with another person. A child cannot have a personal relationship with an institution.

This accent on relatedness as a component of identity arises again in the New Zealand Law Commission Reports of 2000 and 2004. The Law Commission Report Number 65 of 2000 , 'Adoption and its Alternatives' states at Chapter 1 that, "The family as a social unit is the foundation of our society . It provides a sense of identity for the child and is the natural environment for the growth and wellbeing of all its members particularly children." . [xxviii] The Report later states " … for many years adoptions were conducted in

secret. The previous identity of the adopted child was inaccessible and the birth parents were not given access to the new identity of the child…. Some adoptees have reported problems in establishing a sense of identity." [xxix]

In 2004, The New Zealand Law Commission in its preliminary paper 54 'New Issues in Legal Parenthood' stated , " For Maori , genetic parents have no exclusive rights to possession of their children. They hold them in trust for the whanau and wider hapu and iwi. A Maori child's knowledge of their whakapapa is critical to their sense of identity and place in the world. Though they may not live with their genetic parents, they will know who they are and will usually have contact with them. Their whakapapa enables them to understand how they are connected to their ancestors and members of their living whanau, hapu and iwi." [xxx] (note- *Whanau* = wider family, *Whakapapa* = oral history, *Hapu* = sub-tribe, *Iwi* = tribe)

At Chapter 5, 'Children and Identity', however, the Commission goes on to state, "There is a growing body of research and information which indicates that many children need to know their genetic background to complete their sense of identity and to be able to adjust and function fully." [xxxi]

The work of thinkers such as Foucault [xxxii] , Illich [xxxiii] and international kinship studies in social anthropology [xxxiv] supports The Commission's implication that personal identity is something more than genetic descent or the mapped human genome.

Historically, identity within the legal adoption context is variously described as connected with naming and inheritance /ancestor rituals [xxxv] in ancient times. In 16th Century Europe, Sebastian and Viola did not have to worry about passports when they washed up on the shores of Illyria, their assertions of identity to third

persons were a lived, embodied experience for all concerned. Today, formal legal identity is a documentary , scientific and disembodied process.

Identity is defined in the OED as "individuality, personality". The alienation and destruction of individuality and personality as an effect of the 'de-humanising' legal process is well known through the work of Kafka and George Orwell. Shakespeare shows us that the confrontations between the players in Twelfth Night are those of embodied persons surprised by their own relatedness.

Identity as something fixed and stable has been rejected by a number of theorists [xxxvi]. The paradoxical nature of the concept as outlined by Foucault is described thus;

> "Identity is what is naturally given and is therefore considered a possession , yet it is also that which possesses the individual. If on the one hand, identity is constituted by personal experience and an individual history , it is also and inevitably a product of otherness of cultural, social and linguistic determinants." [xxxvii]

This concept of identity has been articulated in the international legal forum in a similar way.

"The Peruvian jurist Fernandez Sessarego defines personal identity as 'The assemblage of attributes and characteristics that distinguish an individual in society. Personal identity is what makes each one 'himself' and not someone else'. It includes various parameters among which the distinction has been made between static and dynamic identity. The former consists , along with other elements, of biological data, that is the procreation of the child, (fn2 it has been considered that static identity corresponds to a narrow interpretation of

'identification' (fingerprints, date and place of birth, parents names, etc.) The latter represents the persons history, his existential biography, his family and social relationships." [xxxviii]

Identity , in a limited formal sense , may comprise name, parentage and nationality [xxxix]. Shakespeare can laugh at mistakes in identity in this sense because this identity is the outward trapping only. In legal language , this is a legal, static, genetic or documentary identity. Identity in a full sense of 'becoming' is something more. 'Best interests' has to be seen as a road on which one has a chance of achieving ones personal identity through relatedness – the experience of self with others.

Complex Embodied Identity in Kinship Adoptions

This concept of identity as a relatedness – the personal experience of otherness of cultural , social and linguistic determinants is supported by the substantial body of judicially acknowledged customs of Maori whangaii as well as international research on kinship adoption in traditional societies. The 2004 New Zealand Law Commission [xl] has implied that there are multiple identity cloaks that a child can wear comfortably. This phenomenon has been documented widely in ethnographic studies.

Thus , in Suau in Southern Papua-New Guinea, Melissa Demian says, "Nearly every household in both of the Suau villages in which I have worked have adopted a person into or out of one of their generations."[xli] These adoptions are open and acknowledged. It is possible for a child to return home earlier or later in life.

"In parts of West Africa, including the East Camerons, the mobility of children is high: 30% of the children between 10 and 14 do not live with their biological mother. This high percentage of foster children indicates that the upbringing of children is not only a task

of the biological parents but is shared with many other educators." [xlii]

In the Torres Straits Islands, common customary adoption practices were at odds with rule of law features of documentary descent system such as birth certificates and inheritance. [xliii]

From the European Association of Social Anthropology, Fiona Bowie summarises the issue of anthropological identity in adoption thus,

> "Western discourses of the individual and of individual families have an essentialising and reductive quality. Our identities and individuality are thought of as bounded but not static … We should be comfortable with our race … class … gender , and so on. With a slight shift of focus we can see identity as both more relational and more contextual. Marilyn Strathern argues that in Melanesia social persons are conceived as the plural and composite site of the relations that produced them …Questions of secrecy or openness in adoption are often linked to identity with the assumption that you can't know who you are or where you are going if you don't know where you come from. This attitude could be a corrective to years of secrecy and often shame surrounding adoption and the circumstances leading up to it in Euro-American cultures rather than a universal assumption." [xliv]

Traditionally , children have been passed around in pre-industrial and pre-market societies [xlv]. Only where that child transfer has been associated with primogeniture land inheritance issues and ancestor rites, has an adoption been formalised, recorded or

documented. Thus, in 5th Century BC Attica, and 4th Century AD Athens, adoption could be formalised by a public introduction to the 'phatry' (administrative region in Ancient Greece) and a litigation process; during the 14-15th Century England when the Black Death was rife, there were 'ad opus' adoptions recorded on the manorial rolls by medieval peasants whose male heirs had died, to avoid forfeiture of their usufructs to the Manor. [xlvi]

In the ethnographic and informal adoption forum, the concept of embodied relatedness is emphasized. The child is the "plural and composite site of the relations which produced her or him" – this embodied context is what is missing from a document recoding linear descent.

The Applicants to adopt in an intercountry kinship adoption originate from this traditional kinship time and space. They depose as to their existing relatedness of this child to them. They often depose as to a kinship or other crisis (an infertility or a death) which has led to this choice to adopt. They depose that this child is free for adoption and that they are the preferred kin. This deposition is a statement that UNCRC and The Convention aims are met.

However, in practice in New Zealand ,this deposition, regardless of corroborating documentary evidence, is often disregarded and the Applicants are required to answer to The Convention standards as if they were child traffickers [xlvii]. This attitude instead of fostering kinship relatedness, destroys it. The enquiry by a Court should be , not whether the rules of The Convention have been rigidly followed but whether the Applicants are credible in their assertion of kinship relatedness which is a genuine state-of-being and not a purely immigration device. This enquiry is also an embodied [xlviii] experience for the Court who has the particular Applicants in front of it and may ascertain the child's wishes.

In New Zealand , Family Court hearings are directed to be without unnecessary formality ; fairly ,simply and consistent with justice , and the Court may admit any evidence [xlix] . It is the function of the Court to make findings of fact on the basis of that unique embodiment and then to ascertain whether those facts are subsumed within the generalised normative rules. There is a danger of the decisionmaker losing a grasp on this power though an over-reliance by all parties on the institutional process of obtaining a report from the sending country. Such a report does not present the same issue as in Barton-Prescott where the adoption by the non-family applicants was contested by a particular person. .

It is the Court which will hear the dialogue between the parties and be seized of the unique embodiment of the parties and the power to decide the facts is in its hands alone. In Barton–Prescott , the Court decision preferred a relatedness outside the family on the basis of the evidence before it . In Twelfth Night Sebastian and Viola meet and exchange family history which they alone know. Their mutual recognition is witnessed by the other players.

Sebastian " … I had a sister whom the blind waves devoured. Of charity , what kin are you to me? What countryman, what name, what parentage?"
Viola "Of Messaline. Sebastian was my father , Such Sebastian was my brother too… So went he suited to his watery tomb .."
Sebastian " Were you a woman … I should my tears let fall upon your cheek And say 'Thrice welcome ,drowned Viola' "
Viola "My father had a mole upon his brow"
Sebastian "And so had mine"
Viola " And died that day when Viola from her birth had numbered thirteen years"

Sebastian " Oh that record is lively in my soul. ! He finished indeed his mortal act
That day that made my sister thirteen years." [l]

The relatedness affirmed in this embodied dialogue is to be contrasted with the detached institutional process of Hague procedure in the ex parte intercountry adoption application. .

Institutional Control of the Child and Family

Foucault maintains that Bentham's Panopticon (the system of constant surveillance of the prisoners in the surrounding ring of cells, by the central tower) is the model of our society. Foucault states -

> "Panopticism is a form of power that rests not on the inquiry but on something completely different which I will call the 'examination'. The inquiry was a procedure by which in judicial practice, people tried to find out what had happened. It was a matter of re-actualising a past event through testimony … With Panopticism, something altogether different would come into being; there would not longer be inquiry but supervision [surveillance] and examination. It was no longer a matter of reconstituting an event but something – or rather someone - who needed total uninterrupted supervision." [li]

Foucault's analysis is supported impliedly by other subsequent writers in international adoption so that this examination and surveillance is what the adoption enquiry has become if we conceive of The Convention as a rigid formula which must be followed at all costs. In two recent new Zealand Family decisions, the intercounrry kinship adoption process was delayed for Convention procedures to be followed [lii]

Signe Howell writes -

> "The shift in control over children – from the family to public authorities – that took place in Europe during the second half of the nineteenth century and was consolidated throughout the twentieth century in legislation is now happening on a global scale. Global law about children (in the form of international conventions) seeks to ensure the "best interests of the child" by transferring authority not only from the family to the state but also from the state to the international level. This is very explicit in the case if transnational adoption.
>
> The UN Convention on the Rights of the Child and the more specialised Hague Convention on Intercountry Adoption both spring out of the UN Declaration of Human Rights (UNDHR) of 1948 and their prime aims are to safeguard the "best interests of the child" .
>
> The initiative for both Conventions was taken in Europe and the principles and values upon which they are formulated derive their impetus from Western values as these are expressed in child, family and adoption laws. Thus local Western notions of childhood have subsequently been globalised or they are actively sought to become so. … There is thus, an intentionality built into the globalisation of (Western) rationality and morality that is perhaps more explicit than in the case of economic and technological manifestations of globalisation." [liii]

Charles Taylor analyses Illichs exposure of the substitution of rules for relatedness in his comments on Ivan Illichs 'Rivers North of the Future'

" Illich argues that Western modernity finds its original impetus in a mutation of Latin Christendom … Corruption occurs when the Church begins to respond to the failure and inadequacy of a motivation grounded in a sense of mutual belonging by erecting a system. This system incorporates a code or set of rules, a set of disciplines to make us internalise these rules and a system of rationally constructed organisations – private and public bureaucracies- to make sure we carry out what the rules demand. All these become second nature to us. We grow accustomed to decentring ourselves from our lived embodied experience to become disciplined, rational, disengaged subjects…." [liv]

Strict adherence to Hague procedure in kinship adoptions requires a substitution of rules for relatedness and a deference to the institutionalisation imposed by the process . Decisions made according to standard policy and practice by Immigration [lv]can involve a huge cost in getting documentary compliance with the Convention –whether this is a new adoption application in New Zealand or whether a foreign adoption needs recognition through the High Court declaration process under s. 17 of the Adoption Act. If a new adoption application in New Zealand has to be made then this may be considered intercountry even though the child may reside in New Zealand. The Adoption Unit of the Ministry of Social Welfare has a standard policy (and generally agreed to by Family Courts [lvi]) that although an intercountry adoption is a kinship adoption (or is outside the Convention) yet Convention protocols will still be followed. before it can be said that a s.10 Adoption Report can be adequately made. This means, for example, getting a child study done in the country of origin to

certify availability and best interests. This is often the case, even though the child is actually resident in New Zealand. [lvii]

This need for information from the Central Authority of the 'sending' country to the Central Authority of the 'receiving country' is an excessively slow, institutional control of the investigation under The Convention which entails a co-relative destruction of kinship 'relatedness'; an oppressive delay which negates best interests of the child ; a palpable counter-productivity in the aims of The Convention .

The protocols of the Hague Convention itself, are as much an institution as the physical orphanages in which some abandoned children find themselves. The research done on kinship adoption is so extensive (as earlier indicated) that the rationale for further certification under The Convention protocols is unclear. A comparison of the space /time of these traditional worlds with modern times shows the monopoly of institutions which now control adoption. The society of institutional surveillance and control first identified by Foucault in the forums of criminal law and mental health now has extended to overwhelm the kinship decisions which were originally within the domain of the family.

As far as kinship adoptions are concerned, it is argued that they are outside the Hague Convention historically , ethnographically and legally.

The Purpose of The Convention

The current view of statutory interpretation is that a purposive interpretation should be adopted. Professor Burrows devotes a chapter to this in his text, 'Statute Law in New Zealand' [lviii]. This text provides a critical up to date evaluation of the purposive 5(1)

Acts Interpretation Act 1999. S 5 (1) states *"The meaning of an enactment must be ascertained from its text and in the light of its purpose*".

Burrows elucidates a long line of cases from Heydons Case to recent Australian and New Zealand cases which indicate that the purposive rule of interpretation now dominates statutory interpretation.

The purpose of The Convention was to prevent, as much as possible, the sale of and traffic in children from the Third World while trying to guarantee a family environment for the upbringing of children. Family environment expresses the quality of relatedness, of self and other, from which identity grows, as expounded in this article.

The concept of 'family' as the desirable environment for a childs' upbringing reverberates throughout the general principles of The Convention (and UNCROC) which are stated in the Preamble [lix] ;

PUT INTO END NOTES

> *"The States signatory to the present Convention, recognizing that the child , for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding .*
>
> *Recalling 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.*
>
> *Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a*

suitable family cannot be found in his or her Sate if origin.

Convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect to his or her fundamental rights and to prevent the abduction , the sale of or traffic in children.

Desiring to establish common provisions to this effect taking into account the principles set forth in international instruments in particular the United Nations Convention on the Rights of the Child of November 1989 and 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 (General Assembly Resolution 41/85 of 1st December 1986)."

STOP ENDNOTE

It is clear that the aims of The Convention (under the umbrella of UNCRC) are to allow for a family environment for children who do not have that family while preventing the growth of an economic market in children for adoption. Further weight for this can be seen from the stated objects of The Convention in Chapter 1, Article 1 where it is stated,

" The objects of the present Convention are –

- *to establish 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 recognized in international law*

- *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*

- *to secure the recognition in Contracting States of adoptions made in accordance with The Convention*

Emphasis can be placed on the key terms, 'safeguards', 'best interests', 'fundamental rights of the child', 'prevent abduction, sale and traffic in children'. These terms tend to take kinship transnational adoptions out of the ambit of The Convention . There is also contemporaneous commentary which supports this construction.

Professor William Duncan, a member of the Drafting Committee for The Convention [lx] emphasizes that The Convention rules are meant as guidelines .

Professor Duncan states in his chapter [lxi] that ,

> *"It will be obvious from the foregoing that the Convention is not intended to provide a comprehensive code for the regulation of intercountry adoption. It sets out minimum standards and provides a basic procedural framework for co-operation between states of origin and the receiving state. It is not designed to replace national systems of adoption and each state contemplating bringing the Convention into force will have to consider how best to mesh the Convention principles into its national laws , what modifications in national laws are needed and how to give further*

substance to those Convention principles which are stated only in broad terms."

Other contemporaneous commentary which exposes the possible exemption from the Convention for kinship adoptions is available in 'Cross-Cultural Approaches to Adoption" [lxii] where Barbara Yngvesson discusses the questions considered by the delegates to the Hague Conference on Protection of Children and Co-operation in respect of Intercountry Adoption , at p 215 ,

"A central question for delegates to the Hague Conference on Protection of Children and Co-operation in respect of Intercountry adoption in the early 1990s was whether the increasing flow of Third World children to the overdeveloped world from the late 1950s to the 1990s was in the children's best interest .... What tilted the balance of opinion at the Conference in favour of Intercountry Adoption over such local alternatives was the discourse on the child's right to (need for) a family. As Carlson noted, "The Conference was not only an opportunity to develop confidence building rules, it was also a forum for mutual education about the situation of children without families and the virtues of adoption." Especially important in this mutual education process was the capacity to reach agreement on a final version of the Convention which rejected arguments that preference for local placement should be absolute by not requiring local authorities make exhaustive and time consuming investigation of all local adoption alternatives before an intercountry adoption is allowed. ... A critique of this position is necessarily complicated. Most child welfare advocates agree that institutional care is detrimental to a childs development and thus a

process for seeking local placement that is unduly time consuming places a child at increasing risk." [lxiii]

The opinion of both Duncan and Yngvesson make it a sensible approach to exempt kinship adoptions from the Convention. Again the averment of the kin relatedness and of the family decision that the child's available family is that of the Applicants takes this type of proceedings outside the guidelines and purpose of The Convention.

Judicial Discretion - New Zealand and English Authority Balancing Kinship Relatedness Against Adherence to Hague Convention Procedures

The resistance to a purely immigration motivation to adoption ,first outlined in the English decision of Re H (a minor) (adoption non-patrial) [lxiv] was taken up in New Zealand in 1984 and still remains good law cited in t 2007 – 2008 Family Court decisions [lxv] .

Adoption proceedings are filed ex parte and facts verified to some extent by the fairly immediate independent social work report from the receiving country – being the place of filing. On this basis, the Courts power to decide facts and law . There is a pattern of decisions in New Zealand and abroad which show that the courts are ready to interpret Adoption legislation consistent with the purpose of the legislation in order to give effect to adoptions in which a kinship relatedness is demonstrated [lxvi]. To the extent that the decisions do show the Courts willingness to exercise adjudicative power in recognition of a genuine relatedness in the case before them, it can be said that there is no need to change the New Zealand Adoption legislation.

Recognition of the propriety of an adoption outside the Convention can be seen in the following cases;

In the 2003 decision of *Re Application by L* [lxvii] there arose the issue of 'habitual residence' within intercountry adoption. That was a case of kinship -surrogacy and the new born baby, born in Australia was held to have habitual residence in New Zealand by virtue of the fact that this was the intention of all the parties to the agreement. This construction of the facts took the case out of the Convention and avoided the need for Hague protocol .

In *Re Application by H (adoption)*[lxviii] (2001) 21 FRNZ 208 (FC), the Burmese aunt of two Burmese boys adopted them under Burmese law. The aunt and her husband had to reapply to adopt in this country as the order was not recognisable in New Zealand. CYFA opposed the adoption on the basis that no Burmese study could be obtained at that time and thus the adoption was not made according to the procedure required by the Hague Convention. Despite this opposition, a Burmese homestudy report was not required. The Court made the adoption order – the implication being that either The Convention procedure was not binding or that the boys were habitually resident here and The Convention did not apply.

Similar reasoning was followed in the English case of Re C (Foreign Adoption: Natural Mothers consent : Service) [lxix]

Here , the Court deemed a birth mothers consent, to a twelve year old Papua-New Guinea adoption to be a consent to the UK adoption and dispensed with service on mother of the later English proceedings. The fact that the 12 year old had lived all her life with her adoptive parents meant that the progress of the English adoption should not be impeded by technical problems of being unable now to locate mother. This is a clear recognition of a relatedness , although not a kinship adoption.

This same point is expressly recognised in *Re Adoption of P* [lxx] at para 13 where the New Zealand Family Court noted that Counsel had agreed that the philosophy of The Convention will be applied where the there is no legal jurisdiction for the rules and protocols of The Convention.

The response to this in *Re Adoption of P*, was the practical reality of the non-availability of a report. The Central Authority in the State of Origin (India) had refused to provide a report. Thus, even if the Court had followed the Convention requirements of seeking a report certifying as to the availability of a the child for adoption and the need of child for a home, the Court was not going to get that report. In that case, the child was able to speak to the social workers and indicate her desire to be adopted. The application was assisted by the fact the child was presenting New Zealand. This helped also to establish there was a genuine parent-child relationship in existence. The Court made a final adoption order in the first instance on the basis it was a domestic adoption. The Court adverted to the immigration component at para 3 and 43 and indicated that it did not negate the essential nature of the parent-child relationship. [lxxi] While other New Zealand cases have gone the other way, deferring progress until Convention standards can be satisfied, the reasoning and results are more attractive. [lxxii]

Reliance is placed also on the case of *Singh v Entry Clearance Officer, New Delhi* [lxxiii] This : was a UK case decided after the UK ratified [lxxiv] the Hague Convention on Co-operation in respect of Intercountry Adoption.

This was a case where a child had been gifted intra-family to the UK couple. There was an adoption order made in India yet the New Delhi immigration officer refused to recognise the adoption and grant the child immigration status to the UK.

The case was appealed on the basis of a breach of human rights – the right to family life under the UK Human Rights Act 1998. The issue was whether a family life had been established between the adoptive parents and the child in India.

The English Court of Appeal held that the adoption should be recognised even although it did not comply with international provisions.

The Court decided that the kinship adoption in substance conformed to the criteria of the child's best interests and the defects were procedural than substantive. A distinction was drawn between the dangers of child trafficking which The Convention was designed to eliminate and a kinship adoption. Kinship adoptions often reflected humane cultural and religious practices and this should be encouraged rather than subjected to excessive zeal for administrative procedures.

At para 33, Dyson LJ states, *" As a matter of principle, I do not see why the fact that an adoption does meet the requirements of relevant international instruments should invariably be a reason for according little weight to it in determining whether family life exists or not. Such a rigid and formulaic approach is, in my view not justified*. "

The Justice went on to consider the aims of the 1968 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with special reference to foster placements and adoptions Nationally and Internationally as well as the Hague Convention on Intercountry Adoption 1993. At para 35, he distinguishes commercial trade in adoption from kinship adoption. He implies that the international instruments are designed to protect child welfare in stranger adoptions.

At paras 35-37, Dyson LJ also proceeds to endorse the legal recognition of the substance of the kinship adoption as a family response to a situation where custom, religion or grace place a child in the arms of relatives. He refers to other authorities in support.

Munby LJ, at para 87 and 88, also emphasises the aims of international instruments – such as the 2000 ' Recommendation of the Parliamentary Assembly of the Council of Europe – International Adoption : Respecting Children's Rights '– as distinct from this instant kinship adoption. He refers to the statutory guard against the 'rescue ' of children from poor countries by adoptive strangers from wealthy countries who can give them materially better life. He then distinguishes the kinship from this modern danger. At para 90 he refers to the kinship adoption as " an adoption … intended to bring about and which as a matter of fact has in a large measure already achieved, the 'creation of the psychological relationship of parent and child' .

In MN(India) v Entry Clearance Officer [lxxv] a different result was reached on similar facts.

Conclusion

Adoption of a child brings the child and parents into a new formal relatedness which creates a new static identity.

In the adoption of a child by kin, the Court is faced with a request to acknowledge an existing relatedness . The 'Best Interests' test is a technique to assist in the recognition of a potential for safe relatedness , the one –to-one relation of child to parent. This is the family life which UNCRC and The Convention, Court decisions

and adoption researchers advocate as the essential crucible for the child's 'becoming' or dynamic identity.
A child's potential identity is ambiguous. This is always the nature of personal dynamic identity. Acceptance of the uncertain is a quality of wisdom which is desirable in judicial thinking.

In New Zealand ,Tikanga Maori (Maori culture) via the Treaty of Waitangi has been the conceptual tool with which a whangaii child's complex identity cloaks has been recognised in the formality of Pakeha common law adoption process. The Family Court has jurisdiction to adjudicate on best interests and relatedness under the Adoption Act 1955 and under the Family Courts Rules. The Family Court has demonstrated clearly ,by decisions made , that it is able to adjudicate effectively to bring individual justice to bear on the quality of the embodied relationship before them.

Any requirement that transnational kinship adoptions be further subject to The Convention protocols (by way of the Adoption (Intercountry) Act 1997 is contestable. The Courts have demonstrated in previous decisions that an application which demonstrates a quality of relatedness which achieves the family life ideal can be either outside ambit of The Convention or that the Convention procedure can be waived. Excessive deference to the Convention procedure creates an institution of the procedure equally as confining as a physical institution.

The New Zealand Family Courts Rules 2002 announce the importance of informality, simplicity and speed as is consistent with justice. This recognises that delay for children can be injurious. As Feste the Clown in Twelfth Night sings ,

" What is love ? 'Tis not hereafter
Present mirth hath present laughter.
What's to come is still unsure.

In delay there lies no plenty.

Then come kiss me sweet and twenty.

Youth's a stuff will not endure." [lxxvi]

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FOOTNOTES

[i] M. Iwanek ,"*Adoption in New Zealand - ,Past Present and Future*" in Proceedings of the International Conference on Adoption and Healing 1997; NZ Law Commission Report No 65 'Adoption and its ' Alternatives' September 2000; J. Modell ,'A Sealed and Secret Kinship'2002 Berghahn Books reports tragedy as characteristic of law -based adoption ; open adoption and fostering in non-industrial societies is contrasted as a happy event. See adoption in the novel, a series of essays, M. Novy Ed. "Imagining Adoption. Essays in Literature and Culture' 2001 Uni Michigan Press . See also Odievre v France [2003] 1FCR 621 a case before the European Court of Human Rights contesting the French rule of anonymous births. Odievre was unsuccessful in attempting to get her birth mothers identity revealed. Criticism, of the decision is in article "Case Commentary -Odievere v France – Desperately Seeking Mother – anonymous births in the European Court of Human Rights " by Eva Steiner (2003) Child and Fam Law Quarterly, 425-448.

[ii] S.16(2) (b) Adoption Act 1955 provides that the genetic parents remain parents of the child for the purposes of incest offences under s. 130 Crimes Act 1961 and for the purposes of consanguinity and affiliation in s. 15 and the Second Schedule to The Marriage Act 1955. See also A. Horne, "Consanguinity and the Marriage of Adopted Relatives" (1992) FLB 67 – 70, 80 -81 . See also J.Feast, 'Adoption and Identity',June [2000] Fam Law 387 -ART conceived children should have a right to trace their genetic parents ; However, ART conceived children do not seem to enter the incest /consanguinity prohibitions. The Human Assisted Reproductive Technology Act 2004 (NZ) calls such children 'donor offspring' and is silent on their status vis-a -vis incest and consanguinity. For refusal to make an access (contact) order alongside an adoption order see Re T (an adoption) [1996] NZLR 368(HC) but contrast a paternity order could be made against a birth father, after adoption , under the Status of Children Act – Y v H [2003] NZFLR 1009 (HC)

[iii] For an examination of best interests in different cultural milieus, see P. Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights "in 'Children's Rights ' Vol II , M. Freeman Ed. 2004 Ashgate, at p 183 -207. See also M.Freeman 'A Commentary on the United Nations Convention on the Rights of the Child ,Article 3 The Best Interests of the Child',2007 Martinus Nijhoff, at p 27, and 33. The issue of rights and best interests is not examined here.

[iv] Helen Keller, ' The World I Live In ' ,1908 , Hodder & Stoughton p

[v] The issue of universality of best interests versus claims of cultural identity or diversity, Professor M Freeman has discussed in his Commentary on UNCRC Article 3 .See fn 12 and 17 herein.

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[viii] Aristotle, 'Nicomachean Ethics' Book V, Para 1131(a) (30) and Para 1131(b) – enumerates distributive justice as a proportionality -.University of Chicago ,1952 . See also Ivan Illich, 'Gender' 1983 House of Ananse and also D. Cayley, 'Rivers North of the Future. The Testament of Ivan Illich as told to David Cayley '2005 House of Ananse Chapter 9, 'Proportionality' 132 - 138

[ix]UN Convention on the Rights of the Child , Article 7 (1) "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible the right to know and be cared for by his or her parents." (2)" States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

[x] UN Convention on the Rights of the Child , Article 8 (1) "States Parties undertake to respect the right of the child to preserve his or her identity including nationality, name and family relations as recognised by law without unlawful interference." (2) " Where a child is illegally deprived of some or all of the elements of his or her identity , States Parties shall provide appropriate assistance and protection , with a view to speedily re-establishing his or her identity."

[xi] J.Doek 'A Commentary on the United Nations Convention on the Rights of the Child. Article 8 The Right to Preservation of Identity' 2006 Martinus Nijhoff . The author states, " The Convention does not define identity and one could doubt whether such a definition is possible. Erikson defines identity as the subjective feeling of continuously being the same person and there seems to be a consensus that identity is a concept that develops in the course of the child's development and that there are different age-related stages in that development. It goes beyond the scope of this commentary to elaborate in detail the psychological concept of identity" at p 10-11. Doek goes on to say at p 11 that it is "not acceptable and not feasible for a State to force parents by law to provide this information " (as to adoption) to a child but that it is desirable for a child to have right to the information as a certain age on the basis that no-one wants to be deceived as to their genetic origin. As far as ART conceived children are concerned, no clear view is expressed at p 12 13. Doek regards Art 8 as primarily related to prevent disappearance of children in politically oppressive situations – see p 8.

[xii] New Zealand adoption proceedings require a precise attestation of a child's legal identity. See R 8(2) Adoption Regulations 1959 (NZ) and R 245 Family Court Rules 2002 (NZ) although on sufficient grounds , there is room for the Court to excuse compliance with this and to allow identification by affidavit.

[xiii] See fn

[xiv]

[xv] See fn 21,22 and 23 herein.

[xvi] This is the experience of the writer as Counsel in adoption applications. The Applicants are also seeking a new legal and personal identity – as parents of this particular child, the one they have chosen.

[xvii] S.17 of the Adoption Act 1955, as amended, allow for recognition of foreign adoptions which are not covered by The Convention. Immigration can recognise these administratively or they can require High Court declarations. As to recognition. See T v District Court at North Shore No 1 [2004] NZFLR721 and T v District Court at North Shore No 2 [2004] NZFLR 769 . There are a number of unreported cases.

[xviii] M.Freeman , 'A Commentary on the United Nations Rights of the Child , Article 3 The Best Interests of the Child' 2007 , op cit at pp 31, 30 states that 'best interests' in the CRC is a normative statement.

[xix] M.Freeman, ibid at p 36,40. ; and see J. Sloth-Nielson, Book review of M.Freemans 'Commentary on the UN Convention on the Rights of the Child. Article 3, The Best Interests of the Child' ,16(208) Int Jo Children's Rights 153 – 157 at p 155

[xx] S (1) (3) list can be summarised as (in relation to the Courts determination of a childs welfare) , inter alia, ' the ascertainable wishes and feelings of the child (in the light of his age and understanding), his physical emotional and educational needs, the likely effect on him of change in circumstances, his age, sex, background and relevant characteristics, any harm suffered or is at risk of suffering, capacity of persons to meet his needs … ' . See also Southwood LBC v B [1993] 2 FLR559,573 where it is described as an aide-memoire ; cited in Freeman supra at p 31 . See also Re C (Residence Order) [2008] 1 FLR 211 (CA) at p 213 -214 where it is described as a great help in the balancing exercise as to a child's welfare.

[xxi] [1997]3 NZLR 179

[xxii] I treat 'welfare' and 'best interests' as synonymous. Welfare and interests were treated interchangeably in the decision.

[xxiii] Re Adoption Application by KGC and TGC [2007] NZFLR 851 (FC) and An Adoption Application by SFH and MEM [2008] NZFLR 887 (FC)

[xxiv] M. Freeman, 'A Commentary on the United Nations Convention on the Rights of the Child , Article 3 The Best Interests of the Child' 2007 Martinus Nijhoff at p 33 -40.

[xxv] Ibid at pp ,37,35, 39.

[xxvi] In 2000 and apparently still in 2008 from an internet check.

[xxvii] C. Saclier, "In the Best Interests of the Child ?" in P.Salman ed, 'Intercountry Adoption' 2000 British Agencies for Adoption and Fostering p 53- 65., at p 54 Saclier opposes the growing western ideology of a 'right to a child' for First World childless couples.

[xxviii] Law Commission Report 65 'Adoption and its Alternatives . A Different Approach and a New Framework', Chapter 1, 'Overview' , p 2.

[xxix] Ibid, Chapter 4,'The Need for Change' para 73 et seq.

[xxx] Law Commission Discussion Paper Number 54, 'New Issue sin Legal Parenthood', March 2004, p 3.

[xxxi] Ibid , Chapter 5, pp 58-60

[xxxii] Michel Foucault, 'The Hermeneutics of the Subject . Lectures at the College de France 1981-1982 ' 2005, Palgrave Macmillan ; "About the Concept of The 'Dangerous Individual' in 19th Century Legal Psychiatry' , (1978) 1 Int Jo Law and Psychiatry 1-18; "The Political Technology of Individuals" from 'The Technologies of the Self' ,1988 ,Uni Massachusetts Press. Foucault avoids the use of the term 'identity'. He uses the term 'self' which seems to the writer to be , at times, the 'soul'.

[xxxiii] "The contemporary genderless possessive individual, the subject of the economy , lives by decisions based on considerations of marginal utility. Every economic decision is embedded in a sense of scarcity and thus tends toward a kind of envy unknown to the past ". Ivan Illich, 'Gender'.1983, Marion Boyars ,p12, fn 6 . Illich, like Foucault, avoids the use of the term 'identity'. The work Illich has done on the loss of gender (seen by some as a component of identity) is extended into the history of the female body by Barbara Duden, 'Disembodying Women' Professor Duden records the loss of the ability of modern women to experience their own bodies directly , instead, perceiving their bodies through the keyhole of medical statistics and prognosis. All this suggests a further identity of the genderless consuming , individual as one who is also dis-embodied .

[xxxiv] F. Bowie ed, 'Cross-Cultural Approaches to Adoption'. Also see fn 13.

[xxxv] J. Bargach, 'Orphans of Islam. Family Abandonment and Secret Adoption in Morocco' 2002, Rowman and Littlefield at Chapter 4, 'Of Rituals, Names , Affiliation and Identity' p 104. She cites Jack Goody , Comparative Studies in Kinship 1969. See also , M.Peterson, ' Korean Adoption and

Inheritance ' 1996, Cornell East Asia Series. pp 107 -191: J. Goody,"Adoption in Cross-Cultural Perspective", (1969) 11 Comparative Studies in Society and History 55- 77

[xxxvi] J. Bargach 'Orphans of Islam. Family , Abandonment and Adoption in Morocco' 2002 Rowman & Littlefield, at p 105. See also L Brook ed ,'Alternative Identities. The Self in Literature, History and Theory' ,1995, Garland Publishing NY.

[xxxvii] K. Racevskis ,"Michel Foucault, Rameau's Nephew and the Question of Identity" in J.Bernauer and D.Rasmussen ed. 'The Final Foucault' 1988 MIT Press, p 21-33 at p 21.

[xxxviii] C.Grossman and M.Herrera, "The Right to Ones Identity in Recent Judicial Decisions on Filiation and Adoption" in A.Bainham and B.Rweaura ed 'The International Survey of Family Law', 2005 at p24.

[xxxix] For legal writing on children's surnames as identity issue , see N. Gosden," Children's Surnames – How satisfactory is the current law ?" March [2003]Fam Law 186-190

[xl] Supra fn 24

[xli] M..Demian, "Transaction in rights, transactions in children, A view of adoption from Papua New Guinea", in F Bowie ed. 'Cross-Cultural Approaches to Adoption', 2004, Routledge , pp 97-110 , at p98

[xlii] C. Notermans, "Fosterage and The Politics of Marriage and Kinship in East Cameroon", in F. Bowie ed, Cross-cultural Approaches to Adoption, op cit. pp 48-63, at p 48. Notermans examines a practice of child exchange between brother and sister. This combines matrilineal and patrilineal descent \systems. She also describes common place false entries of fathers on birth certificates.

[xliii] P. Ban, "Customary Adoption in Torres Straits Islands – Towards Legal Recognition", vol3, no66, Aboriginal Law Bulletin, 9-9.

[xliv] F. Bowie 'Adoption and the Circulation of Children' , in Bowie ed, 'Cross –Cultural Approaches to Adoption. Op cit pp 3-20, at 12-13.Bowie cites examples from Africa and Papua New Guinea where children are not told of their biological origins.

[xlv] Various studies attest to this and noted at Fn 17- 20.

[xlvi] F.Herrick , 'The Attic Law of Status, Family Relations and Succession'. 1890 Middleditch & Co, at pp50-53.. See also L. Rubenstein, ' Adoption in 4th Century Athens 1993 Uni Copenhagen Press - both of these studies examine records of adoption from ancient Attica and Greece; C. Howell "Peasant Inheritance Customs in the Midlands 1280-1700" in 'Family and Inheritance - Rural Society in Western Europe 1200-1800' Edited Goody ,Thirsk, Thompson,at p 1112 . At pp 125-126 Howell examines 'ad opus' adoptions in the Black Death – a technique of entry on the Manorial roll ,by which peasants could pass on their usufructs to adopted sons in the absence of an heir.

[xlvii] The writers experience in advocating intercountry kinship adoption before the New Zealand Family Courts . There is a paradox in that a refusal to recognise an existing informal adoption or foreign adoption results in an Immigration request for a formal order and this appears to expose the Applicants to danger of losing the Adoption application because of the necessity to record the Immigration requesting the affidavit . A predominantly Immigration motivation is an unacceptable reason for an Adoption Order. In New Zealand . See also Application to adopt C[2000] NZFLR 685 (FC0 citizenship an advantage to the children ;Adoption Application by V [2001] NZFLR 241 (FC) adoption declined because of immigration motivation predominance; Re Application by A [2004] NZFLR 865(FC) - Adoption declined ;Application by ZF to adopt SA [2006] NZFLR 337 (FC) – Adoption declined .Re An Application by DT and VT to Adopt M [2007] NZFLR 865 (FC) Adoption granted.

[xlviii] D.Cayley, 'Rivers North of the Future' supra, at p 205 – 221 ch 19 'Embodiment and Disembodiment".

[xlix] S. 10 Family Courts Act 1980, R. 3 Family Courts Rules 2002, S. 164 Family Proceedings Act 1980

[l] Twelfth Night Act 5, sc 1

[li] M.Foucault, 'Power, the Essential Works 3.' Ed
[lii] See fn above

[liii] S.Howell, 'The Kinning of Foreigners. Transnational Adoption in a Global Perspective' 2006, Berghan Books, at p 160

[liv] C. Taylor Foreword to Ivan Illich, 'Rivers North of the Future, 2005 House of Anansi , p x, xii
[lv] In UK, see N..Finch "Family and Immigration Cases: Implications for Practice" August 2007 Fam Law 716 .Art 8 of the European Convention (right to Family life) is often resorted to. See FN In New Zealand, it is established law that immigration motivation which is subsidiary to a primary genuine parent-child relationship will not taint proceedings to deny an adoption order.

[lvi] In Re Adoption of C [2005] NZFLR 865 FC at para 13. is an exception. Although Counsel for all parties agreed the Hague protocols should be followed, in fact the Court found they need not be followed where the Convention did not apply. .

[lvii] Re Adoption Application by KGC and TGC [2007] NZFLR 851 (FC)

[lviii] JF Burrows, 'Statute Law in New Zealand ' 2003 LexisNexis at p 135 et seq
[lix] Insert text here

[lx] Professor of Law and Jurisprudence Trinity College , University of Dublin.

[lxi] "The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption 1993 – Some issues of special importance to sending countries", in 'Intercountry Adoptions, Laws and Perspectives of 'Sending ' countries' ed. Eliezer Jaffe , pub Martinus Nijhoff 1995 at p 217, 226

[lxii] Cross-Cultural Approaches to Adoption', ed Fiona Bowie, Routledge 2004

[lxiii] B. Yngvesson ,'Completing Families and International Adoption' in Cross Cultural Approaches to Adoption , ed Bowie,op cit at p 211 , 215 et seq.

[lxiv] [1982] 3 All ER 84
[lxv]

[lxvi] See In the Matter of C[Adoption] [2008] NZFLR 141 (FC) and Adoption Application by T [2008]NZFLR 185 (FC) are two particularly good examples of the vigorous recognition of the embodied relatedness of the family situation before the Court. In C, a de facto couple were deemed to be married and in T, a single gay male adopted his nephew.

[lxvii] [2003] NZFLR 529 – Appendix

[lxviii] (2001) 21 FRNZ 208 (FC) – Appendix
[lxix] [2006] 1 FLR 318 (Fam)

[lxx] [2005] NZFLR 865 FC

[lxxi] This should be contrasted with Adoption Application by V [2001] NZFLR 241 FC where the primary motivation was immigration compliance. That application was declined. However, this element is capable of great convulsion. If Immigration refuse to recognise a genuine related fostering then Applicants are obliged to apply to the Court. This is the catalyst for the Application but the attitude of an Immigration official should not be substituted for that of the Court by saying that if Immigration attitudes have impelled the application then the Courts won't recognise it..
[lxxii]

[lxxiii] [2005] 1 FLR 308 (CA) – Appendix

[lxxiv] UK ratified the Hague Convention on 27th Feb 2003. See the Appendix for the list of 69 States who have ratified or acceded to the Convention from www.hcch.net . The USA is the exception.

[lxxv] [2008]2 FLR 87 (CA)

[lxxvi] Shakespeare , 'Twelfth Night' Act 2, Sc 3