ADOPTION VS. ALTERNATIVE FORMS OF CARE

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Abstract

This chapter considers preference for adoption in some circumstances from a comparative law perspective, before comparing the treatment of adoption to that of other forms of care: parental care, kinship care, foster care, and institutional care. It argues that although adoption is the most satisfactory outcome for some children, it should not be considered a panacea.

Keywords: child protection, foster care, identity, parenthood, human rights, kinship

1. Introduction

In many countries, several options exist for children who cannot satisfactorily be cared for by their parents. These include kinship care, foster care and the Islamic concept of *Kafalah*.[1] Successive 21st-century UK Governments however, have emphasized adoption as a form of care for children whose parents have encountered difficulties in looking after them by. In that jurisdiction, as in some others,[2] adoption is a process whereby a child acquires new legal parents, usually in place of the previous ones.[3] This chapter will consider the preference for adoption in some circumstances from a comparative perspective, before comparing the treatment of adoption to that of other forms of care in English Law—namely, parental care, kinship care, foster care, and institutional care.[4] I will argue that adoption might provide the most satisfactory outcome for some children but should not be considered a panacea, because of rights-based and other concerns. While the chapter uses English Law to illustrate, this normative argument also applies to other jurisdictions.

2. The English Preference for Adoption in Comparative Perspective

The English Adoption and Children Act 2002 sought to bring about 'more adoptions, more quickly' from foster care.[5] The Conservative and Conservative-led Governments since 2010 have sought to increase the number and speed of adoptions from care still further, on the basis that it is 'the best permanent option for more children.'[6] Some local child welfare agencies (termed 'local authorities') have even admitted to having 'targets' for the number of children in care who become adopted[7] which could skew the agencies' decision-making about when to ask a court to consider adoption for a child. The pro-adoption policy appears to have met with some success: whereas 3,770 children were adopted from care in England in the year ending March 2005, this increased to 5,360 in 2015[8]--the highest number since the Government started measuring the figure in 1992.[9] It is also noteworthy that the average time between entry into care and adoption order reduced by 6 months between 2012 and 2017 to two years.[10] Subsequently to 2015, for reasons considered further below, judicial decisions and interpretation of them by practitioners appeared to cause a decline in the number of adoptions: the number of children adopted from care fell by 12% to 4,690 in the year ending March 2016,[11] and by a further 8% to 4,350 in the year ending March 2017.[12] The Adoption Leadership Board then claimed in December 2017 that the position had 'stabilised',[13] while also emphasizing the need to increase recruitment of suitable adoptive parents.

The Government's approach has caused controversy as a matter of principle, with one scholar contending that 'the need for a new adoption law to expedite the transfer from public care to private care…of those children requiring a permanent home following failed parenting,' such as that provided by the 2002 Act, 'would not have been so pressing if a greater investment had been made in family support services'.[14]

Most other countries have mechanisms for permitting adoption without parental consent, but according to Fenton-Glynn, few other European states do this to the same extent as England and Wales.[15] As the Supreme Court stated in *Re J (Children) (Brussels II Revised: Article 15)*, 'England and Wales is unusual in permitting parental consent to be dispensed with where the welfare of the child requires this…rather than on more precise grounds of parental absence or misconduct' and '[t]his country is also unusual in the speed and frequency with which it resorts to adoption as the way to provide a permanent home for children who for one reason or another cannot live with their families'.[16] As for comparisons outside Europe, Munro and Manful report that whereas '[i]n the US and England policy supports timely adoption for those who cannot safely return home [even if] the rising number of very young entrants places pressure on adoption services,' '[i]n Australia there is not a tradition of domestic adoption which may contribute to an increase in their "in care" population.'[17] It has nevertheless been claimed that '[a]n increase in adoptions from care [in New South Wales] is likely in upcoming years, given the Child Protection Legislation Amendment Act 2014 prioritises adoption over long-term foster care for non-Aboriginal children who cannot live safely with their families or kin'.[18]

3. Adoption vs. Parental Care

The use of adoption in England changed fundamentally in the later twentieth century.[19] While in the past many babies were relinquished in principle voluntarily (but often because of the stigma associated with parenthood outside marriage), today's adoptee is more likely to be older, to have experience of the foster care system and to have been adopted without parental consent. The Adoption and Children Act 2002 sought to reflect this changing profile.

The number of children adopted from care (considered in Section 2) represents a small portion of those who cease to be 'looked after' by the state, namely 14% in the year ending March 2017.[20] The most common reason for ceasing to be so looked after is returning home to parents or relatives who care for the child, accounting for 32% of those leaving care in the same period.[21] Other reasons were adoption and independent living (each 14%), special guardianship orders (12%), residence or child arrangement orders (4%) and other reasons (24%). Significantly, 23% of 'looked after' children in 2016-17 were cared for by the state through voluntary rather than compulsory intervention,[22] so some children ceased to be 'looked after' because their parents simply chose to resume caring for them.[23] Moreover, a significant number of children who are returned home re-enter the system at a later date.[24]

The Adoption and Children Act 2002 itself goes to some lengths to protect the parent-child relationship. It is not possible for a local authority to complete the entire adoption process without either gaining parental consent or satisfying a court that the child is likely to suffer significant harm if left in/returned to parental care.[25] The court must treat the child's welfare as the paramount consideration in deciding whether to make an adoption order,[26] and the law specifically directs courts to consider the effect throughout the child's life of ceasing to be a member of the birth family,[27] as well as the child's relationships with relatives (including their ability and willingness to meet the child's needs),[28] as aspects of the child's welfare. Courts also must comply with the requirements of the right to respect for private and family life under Article 8 of the European Convention on Human Rights, including as to proportionality. But parental consent to a preliminary placement order or a final adoption order can be dispensed with where the child's welfare 'requires' it,[29] and procedural restrictions are placed on parents' ability to withdraw their consent, halt the adoption process, and/or oppose the making of the final adoption order.[30] 'Parental' consent for these purposes means that of a parent who currently possesses `parental responsibility.'[31] Since fathers who

are not married to a child's mother do not automatically acquire such parental responsibility, this makes it possible (even if rare) for adoption to proceed without the involvement or even knowledge of such fathers.[32]

Adoption as understood in English Law involves a legal 'transplant', effectively giving the adoptive parents the same status as the birth parents once had and have now lost,[33] with all the stability that involves. In many situations, this is arguably best for the child (on which see Section 5 below). But there is some tension at least with particular recognized human rights (such as under Article 8 of the ECHR); some commentators find it difficult to square adoption with the human rights of those involved at all.[34] While the European Court of Human Rights has been convinced of the general compatibility of the 2002 Act with the Article 8 of the European Convention on Human Rights, it has also said that 'family ties may only be severed in very exceptional circumstances and…everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family'.[35] Certain requirements of the UN Convention on the Rights of the Child, which is not directly enforceable by individuals in English Law but is becoming increasingly influential,[36] are also potentially pertinent. Article 21 provides that 'States Parties that recognize and/or permit…adoption shall ensure that the best interests of the child shall be the paramount consideration,' but it also refers to the 'informed consent to the adoption' of relevant persons.[37] Other UNCRC obligations potentially protecting care within the family include protecting a child's right, 'as far as possible,…to know and be cared for by…her parents,'[38] respecting a child's right to her identity and 'family relations',[39] ensuring that 'a child shall not be separated from…her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child',[40] and rendering 'appropriate assistance to

parents and legal guardians',[41] who 'have the primary responsibility for the upbringing and development of the child',[42] 'in the performance of their child-rearing responsibilities.[43]

In *Re B (A Child) (Care Proceedings: Appeal)*,[44] Lord Neuberger considered the requirements of the UNCRC and my own work on it, and he advocated a restrictive approach to adoption. He asserted that 'adoption of a child against her parents' wishes should only be contemplated as a last resort—when all else fails',[45] meaning that 'before making an adoption order…the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support.'[46] On his analysis, '[a]lthough the child's interests in an adoption case are "paramount"…a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents, or at least one of them.'[47]

The legacy of *Re B* is demonstrated by *Re B-S (Children) (Adoption Order: Leave to Oppose)* and the case law it produced by imposing exacting standards regarding local authorities' evidence and judicial reasoning *inter alia*.[48] It is unclear whether the courts' recent approach has ultimately resulted in adoptions being refused where they would have been granted before *Re B*, and the Court of Appeal later 'emphasise[d], with as much force as possible, that *Re B-S* was not intended to change and has not changed the law' in response to fears (apparently borne out by the statistics discussed in Section 2 above) that local authorities were being deterred from seeking adoption of children in their care through misinterpretations of that case.[49] The Court of Appeal also confirmed that the courts' obligation to consider the range of options for a child holistically extends only to 'realistic' options.[50] Even where adoption is ultimately thought inappropriate, moreover, the threshold that must generally be met for non-consensual adoption means that a child who was seriously and legitimately considered suitable for it is unlikely simply to be returned to parental care without any form of supervision.[51]

Nevertheless, the value of rigour in the adoption process should not be underestimated for purposes of compliance with the UNCRC, even if its differing language and priorities cause difficulty. Moreover, in *Re B-S* the President of the Family Division specifically asserted that the state may not 'press for a more drastic form of order, least of all…adoption, because it is unable or unwilling to support a less interventionist form of order'.[52]

Because of the ageing profile of adopted children as compared to previous decades, the importance of maintaining some sort of relationship with birth parents has been recognized, and '[m]ost children now adopted in England and Wales are planned to have some form of contact with members of their birth family' even if this is indirect, 'letterbox' contact.[53] That said, both the Government and the courts are (perhaps overly) reluctant for contact to be *ordered* in the absence of agreement from the adoptive parents.[54] In Australia, New South Wales 'promotes direct face-to-face contact (unless unsafe) as a way of maintaining birth family ties and identity'.[55] While this is generally by agreement with the adoptive parents, prospective adopters in New South Wales are likely to be considered unsuitable if they are unwilling to support such arrangements.

4. Adoption vs. Kinship Care

If it is clear that a child cannot be looked after by his or her birth parents *per se*, the question then arises whether a placement within the wider family should be preferred to adoption by 'strangers.' It is possible for a 'kinship' placement to be accomplished *by* adoption.[56] Such a course of action could cause confusion and difficulty, however, since it could transform (for example) a grandparent into a parent and a parent into a sibling. An alternative mechanism for a kinship placement is a 'special guardianship order,' which provides security by allowing a special guardian to exercise parental responsibility to the exclusion of other holders, but without the fundamental change of status associated with

adoption.[57] There have been concerns that local authorities have been over-relying on special guardianship in the light of *Re B*, and it is certainly true that the number of children who ceased by virtue of such an order to be 'looked after' by the state increased by 78% between 2012 and 2016, though this represented only 12% of those who ceased to be looked after[58] and the figure declined slightly in 2017.[59] A Government review found evidence of rushed or poor quality assessments of prospective special guardians and '[p]otentially risky placements being made, for example, where the [special guardianship order] is awarded with a supervision order because there remains some doubt about the special guardian's ability to care for the child long-term.'[60] These findings should, however, be seen in the context of the Government's clear preference for adoption for many looked-after children.[61]

The courts have arguably struggled to articulate the level of weight to be given to family relationships when faced with the alternative of 'stranger' adoption. In *Re C (A Child) (Adoption: Duty of Local Authority)*, Arden LJ opined that the 2002 Act did not prioritise the birth family over the prospective adoptive family simply because of their status.[62] In *Re B*, Lord Neuberger noted and did not appear to disagree with my criticism of *Re C*'s insufficient consideration of biological relationships.[63] In *Re W (A Child) (Adoption: Approach to Long Term Welfare)*,[64] however, the Court of Appeal appeared to reaffirm the *Re C* principle. Two-year-old A had lived with prospective adopters for seventeen months at the time of the high court judgment concerned. Neither biological parent had played any real part in the care and placement proceedings, and the wider paternal family became aware of A's birth only when they became involved in caring for her younger siblings. When A's prospective adopters applied for a final adoption order, her paternal grandparents applied for a special guardianship order. The judge held that A should move to live with her grandparents, and the adoption application was dismissed. The Court of Appeal, however, held that the independent social worker and children's guardian (appointed to represent A's best interests in the

proceedings) had placed too much emphasis on the use of the phrase 'nothing else will do' in *Re B*. It had been wrongly interpreted to mean that when there was a viable family placement, that placement must be chosen instead of adoption. The evidence, and by extension the judgment founded upon it, had not duly considered the status quo argument, specifically that A had no relationship with the grandparents and conversely had a settled home with the prospective adopters for over two thirds of her life. This aspect of welfare, the Court of Appeal decided, must be given due weight at the final stage. McFarlane LJ emphasized that '[t]he phrase "nothing else will do" is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons.'[65] He also held that the phrase 'does not establish a presumption or right in favour of the natural family',[66] which chimes with Arden LJ's remarks in *Re C* but is not easy to square with those of the Supreme Court in *Re B*. A rehearing was ordered and the adoption order ultimately made.[67]

Responding extra-judicially to the confusion and concern amongst practitioners and academics caused by *Re W*, McFarlane LJ has said that '[t]he aim of the recent flurry of case law has not been to remove or devalue the option of adoption for [some] children', but 'to ensure that the all-important adoption decision is made…by affording paramount consideration to the child['s] welfare throughout her life, following a comprehensive balancing of the relevant welfare factors, and where adoption is seen to be both necessary and proportionate to the facts of the case.'[68] Recent legislative intervention on this matter specifically requires courts to consider a child's relationship with 'any person who is a prospective adopter with whom the child is placed.'[69] It remains to be seen whether the new provision will have any substantive impact on decision-making. Meanwhile, Masson has described *Re B-S* as a 'disruptive case' that 'has had (and continues to have) a marked impact

on adoption practice, decision-making in local authority children's departments, the work of the courts and the futures of some children subject to care proceedings'.[70]

A related issue to the appropriate balance between adoption and kinship care is the extent to which a local authority and/or court should consider a child's ethnic, religious, or cultural background when deciding between adoption and other options or between particular placements. When evaluating English adoption law and practice, the UN Committee on the Rights of the Child expressed concern that 'children of African descent and children of ethnic minorities sometimes face a long period waiting for adoption by a family of the same ethnic origin,'[71] and recommended that the state 'strengthen its efforts to facilitate a situation in which children, always in their best interests, be adopted as speedily as possible, taking in due account, inter alia, [of] their cultural background.'[72] The Government's response to this problem of delay, however, was to remove[73] the existing specific obligation (in what was section 1(5) of the 2002 Act) to 'give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background' in England.[74] There was concern that children were not being placed with (otherwise) perfectly appropriate adopters purely because of such factors,[75] which could risk racism or similar prejudice and echoes the concern leading to the US Multiethnic Placement Act of 1994. That said, the Explanatory Notes to the reforming English Act emphasize that a local authority 'will remain under a duty to have regard to the child's religious persuasion, racial origin and cultural and linguistic background, amongst other factors, where relevant,'[76] and that the reform is merely 'intended to avoid any suggestion that the current legislation places a child's religious persuasion, racial origin and cultural and linguistic background above the factors' listed elsewhere in the 2002 Act.[77]

The continuing relevance of heritage was potentially demonstrated in the dramatic case of *A and B v Rotherham Metropolitan Borough Council*.[78] The case involved a mixed-

race child whose black African father came forward only after the adoption application had been issued by 'perfect' (white) prospective adopters to whom the child had become significantly attached.[79] Very unusually, Holman J refused the adoption order and decided that the child should be placed with the father's sister. While he expressly noted that section 1(5) was not applicable, he also took into account the 'unquantifiable but potentially considerable advantage of a move to the aunt is the bridge to the paternal original family.'[80] The case was highly exceptional, however, and it was accepted by all parties that, had the father come forward at an earlier stage, the child would never have been placed with the prospective adopters in the first place. Of course, the prospective adopters also shared half of the child's ethnicity.

5. Adoption vs. Foster Care

Some people believe that even if a child cannot be looked after by parents or family members, being cared for by 'strangers' via a mechanism short of adoption might be preferable to adoption because of the fundamental change of status involved. A problem, however, is represented by the poor outcomes on average for children who remain in foster care, in terms of educational attainment and other measures.[81] One of the very reasons why the early twenty-first century Labour Government sought to increase the number and speed of adoptions was to find permanent homes for children who might otherwise 'drift' through foster care provided by the state.[82] Despite his strongly pro-adoption stance, however, a review of foster care recently co-authored by Sir Martin Narey for the Government has said that foster care has 'an undeservedly poor reputation' and is 'a success story'.[83]

As Harris-Short, Miles, and George put it, 'children adopted out of care…generally fare better than the most relevant comparator groups: similarly disadvantaged children who remain in institutional care or who are placed in long-term foster care,' though 'caution is

needed when considering adoption for older children with difficult challenging backgrounds'; '[a]doption will not provide a "happy ending" for every child'.[84] Evidence that adoption is less likely to break down in the case of younger children has suggested a need for quicker adoptions,[85] but haste might jeopardize individualized decision-making. Legitimate questions also remain over whether the state is justified in prioritising a fundamental change in children's legal status because of its own failure to secure better outcomes for those who remain in its care. The human rights considerations analysed above, specifically the need to keep the biological family intact when that is best for a child, provide normative reasons to be cautious about adoption whatever the empirical data on 'outcomes'.

The judiciary has shown considerable awareness of the shortcomings of long-term fostering when evaluating it as an alternative to adoption. In *Re V (Long-Term Fostering or Adoption)*,[86] the judge (before *Re B*) had made care orders but refused placement orders (preliminary to adoption), on the basis that the two children's interests were best served by long-term fostering with continuing parental contact. In the Court of Appeal, Black LJ held that the judge was wrong, noted that she had 'searched without success in the papers for any written analysis by local authority witnesses or the guardian of the arguments for and against adoption and long-term fostering,' and criticised the absence of such analysis.[87] The judge had failed to give adequate weight, *inter alia*, to the detrimental aspects of the children's contact with their mother and to the greater security of adoption relative to fostering. This view was later echoed by Pauffley J in *Re LRP (Care Proceedings: Placement Order)*.[88] The independent social worker in that case had said that, although she did not support it, long-term foster care was a 'means by which permanency can be achieved', and that 'a long term foster home can offer…commitment, security and stability within a new family'.[89] Pauffley J strikingly stated:

> I profoundly disagree with those contentions. Long-term foster care is an extraordinarily precarious legal framework for any child…Foster placements, long or short term, do not provide legal security...Children in long-term care may find themselves moved from one home to another sometimes for seemingly inexplicable reasons…Most importantly of all…, a long-term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted.[90]

The judge concluded that the only sensible options were a return to parental care or adoption. In *Re P, Q, R and S (Children)*, however, the court recognised that foster care would mean that a 14-year-old child 'would be less tested in terms of having to separate from his parents than if he were to be adopted,' and that 'the reality for [him] anyway is that he is of an age where there is no realistic chance of him being adopted'.[91]

Government policy is in any case to reduce distinctions between foster care and adoption, by preferring foster placements with caregivers interested in adopting and engaging in some form of `concurrent planning' to speed up any transition from one to the other. This echoes the approach in Australia to some extent, although de Bolger *et al* have contrasted the position in New South Wales, where 'children in foster care can only be adopted by their current foster carers,' with that in England, where 'children can be removed from the birth family and placed in foster care while they wait to be adopted by strangers'.[92]

The policy of more, speedier adoptions from state care in England was carried further in the Children and Families Act 2014 in the light of continued concerns that adoption is not proceeding quickly enough.[93] Section 2 of this Act imposes a duty on an English local authority considering adoption for a given child also to consider placing the child 'with a local authority foster parent who has been approved as a prospective adopter,'[94] albeit

ultimately only where the local authority decides that placement with a 'a relative, friend or other person connected with [the child]...who is also a local authority foster parent'[95] is 'not the most appropriate placement.'[96] This has become known as a 'fostering for adoption' placement,[97] and it effectively requires the local authority to consider placing the child with prospective adopters notwithstanding the very fact that the local authority do not 'yet have authorisation to place the child for adoption' from either the birth parents or a court.[98] Where the local authority is considering adoption, the Act also expressly disapplies[99] the local authority's statutory duty to give any further preference in foster placements to a foster parent who is also a 'relative, friend or other person connected with' the child.[100] In other words, the aim of securing pre-adoptive placements ultimately trumps the preference for kin. This is controversial to the extent that it proceeds more quickly from the original intervention of the state to the effective termination of the legal relationship between the child and the birth family (potentially making it more difficult for the natural parents to object and again jeopardizing individualized decision-making), but is of course consistent with the notion that adoption is more likely to succeed when the child is younger at the time of adoption. Though 'fostering for adoption' has not existed for long in England, Narey and Owers suggest that fostering is still less often successfully 'converted' to adoption in England than in the US.[101]

Despite its aim, the concept of 'fostering for adoption,' together with the need for the child welfare agency to show that the child in question is suffering or likely to suffer significant harm from parental care, the need for the court to be convinced that adoption is appropriate, and the average two-year period between entry into care and adoption, entails that a child is unlikely to be adopted non-consenually without some experience of the foster care system (even if the carers are the same). While evidence that another child has been harmed by the same parents can[102] and often will[103] be used to establish the 'threshold' in

relation to a second (perhaps newborn) child, this does not mean that the second child will *automatically* be adopted.[104]

6. Adoption vs. Institutional Care

In England, family-type care is preferred as a matter of both policy and empirical fact for children who are merely the subject of a care order (facilitating compulsory agency intervention short of adoption) even if permanence is not assured within one particular foster family placement.[105] Only 11% of 'looked after' children were placed in 'a secure unit, children's home or hostel' in the year ending March 2016, and while this was an increase on previous years it might have been due to improvements in reporting and data collection,[106] and the figure was the same in the year ending March 2017.[107] This reflects the preference of the UN Committee on the Rights of the Child for family-type care over institutional care.[108] In a recent Government-commissioned review of (institutional) residential care, Sir Martin Narey claimed that 'fostering is the right choice for most looked after children who cannot return home, enter special guardianship, or who are unsuitable for adoption,' though he also noted that 'particularly with adolescents, the possibility that residential care might be the better option and offer greater permanence – not least because some older children will steadfastly resist being fostered – must not be ignored'.[109] Thus, adoption and institutional care are generally used in different contexts in England; most children who end up in institutional care are considered entirely unsuited to adoption.

7. Conclusion

A range of options is available for children in England whose parents encounter difficulties in looking after them. Though it seems clear that the Government has a stronger preference for adoption than is the case in many other jurisdictions, and it is possible to be

suspicious about the reasons for that given that it is likely to be 'easier' than investing properly in foster care services and other forms of lesser intervention, the judiciary and other professionals work hard to balance the child's interests in remaining part of the birth family with other (perhaps more easily measurable) aspects of children's welfare. Whatever the human rights difficulties, for some children adoption is arguably the most effective way of securing their best interests. Concerns might arise, however, if pressure applied to decision-makers and mechanisms such as adoption targets and 'fostering for adoption' are allowed to jeopardize individualized welfare decisions.

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[1] See, eg, Shabnam Ishaque, 'Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to an Identity' (2008) 22 *International Journal of Law, Policy and the Family* 393.

[2] Cf 'simple adoption', a form of adoption available in France and some other civil law jurisdictions, which 'does not sever the relationship with the family of origin so that the adopted child is not entirely integrated into his or her adoptive family': Explanatory Report to the European Convention on the Adoption of Children (Revised) 2008, at [63].

[3] Adoption and Children Act 2002, s 67; cf the possibility that a child can be adopted by the partner of an existing legal parent without terminating the parenthood of that parent: s 46(3)(b).

[4] It should be noted that, as regards other parts of the United Kingdom, Scotland (Adoption and Children (Scotland) Act 2007; see further Brian Sloan, 'Primacy, Paramountcy and Adoption in England and Scotland' in E. Sutherland and L.A. Barnes-Macfarlane (eds), *Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* (Cambridge: Cambridge University Press, 2016)) and Northern Ireland (Adoption (Northern Ireland) Order 1987) each have their own adoption legislation.

Moreover, '[a]doption policy and functions of local authorities in relation to adoption are matters devolved to the Welsh Government' (Children and Families Act 2014 Explanatory Notes, para 41). This chapter therefore focuses on English Law *per se*.

[5] Sonia Harris-Short, 'New Legislation: The Adoption and Children Bill – A Fast Track to Failure?' [2001] *Child & Family Law Quarterly* 405, 407.

[6] Department for Education, *An Action Plan for Adoption: Tackling Delay* (2011), para 6.

[7] Luke Stevenson, 'Councils setting numerical targets for adoption', Community Care, 18 November 2016. http://www.communitycare.co.uk/2016/11/18/councils-setting-numerical-targets-adoption/.

[8] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2016* (Crown, 2016), 11.

[9] Department for Education, *Outcomes for Children Looked After by Local Authorities in England, as at 31 March 2013* (2013), 2.

[10] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2017* (Crown, 2017), 14.

[11] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2016*, 11.

[12] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2017*, 1.

[13] Adoption Leadership Board, *What does the data tell us about what is happening in the adoption system? The view of the Adoption Leadership Board* (2017), 1.

[14] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law Policy & Practice*, 3rd edn (Dordrecht: Springer, 2015), 111. See also Sonia Harris-Short, 'Holding onto the Past: Adoption, Birth Parents and the Law in the Twenty-First Century' in R.

Probert and C. Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Cambridge: Intersentia, 2012), 159 on the potentially ulterior motives of successive UK Governments in transferring responsibility for children "from the State back to the private sector".

[15] Claire Fenton-Glynn, *Adoption without Consent: Update 2016* (European Union, 2016), 34.

[16] *Re J (Children) (Brussels II Revised: Article 15)* [2016] UKSC 15, [2017] AC 167, para 3 (Lady Hale).

[17] Emily R. Munro and Esmerelda Manful, *Safeguarding children: a comparison of England's data with that of Australia, Norway and the United States* (Department for Education, 2012), 54.

[18] Andrea del Pozo de Bolger, Debra Dunstan & Melissa Kaltner, 'Descriptive Analysis of Foster Care Adoptions in New South Wales, Australia' (2017) 70 *Australia Social Work* 477, 478.

[19] See, eg, Doughty, 'Myths and misunderstanding in adoption law and policy'; Nigel Lowe, 'The changing face of adoption - the gift/donation model versus the contract/services model' [1997] *Child & Family Law Quarterly* 337.

[20] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2017*, 10.

[21] Ibid, 10.

[22] Ibid, 8.

[23] Children Act 1989, s 20(8).

[24] Sir Martin Narey and Mark Owers, *Foster Care in England: A Review for the Department for Education* (Crown, 2018), 14-15.

[25] Adoption and Children Act 2002, ss 19, 21, 47. The same standard applies to the decision to place a child in care: Children Act 1989, s 31.

[26] Adoption and Children Act 2002, s 1.

[27] Adoption and Children Act 2002, s 1(4)(c).

[28] Adoption and Children Act 2002, s 1(4)(f).

[29] Adoption and Children Act 2002, s 52(1)(b). Consent can also be dispensed with where 'the parent or guardian cannot be found or is incapable of giving consent': s. 52(1)(a).

[30] Adoption and Children Act 2002, s 52(4), s 47; see further Brian Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child' [2013] *Child & Family Law Quarterly* 40, 56-57.

[31] Adoption and Children Act 2002, s 52(6).

[32] *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54. For a detailed analysis, see Brian Sloan, '*Re C (A Child) (Adoption: Duty of Local Authority)* – Welfare and the Rights of the Birth Family in "Fast Track" Adoption Cases' [2009] *Child & Family Law Quarterly* 87.

[33] Adoption and Children Act 2002, s 67.

[34] See, eg, Andrew Bainham, 'Arguments about Parentage' [2008] *Cambridge Law Journal* 322, 350.

[35] [2012] 2 FLR 332, para [134] (judgment of the majority). See Claire Simmonds, 'Paramouncty and the ECHR: A Conflict Resolved?' [2012] *Cambridge Law Journal* 498 for analysis of the case.

[36] See, eg, *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449.

[37] UNCRC, Article 21(a).

[38] UNCRC, Article 7(1).

[39] UNCRC, Article 8(1).

[40] UNCRC, Article 9(1).

[41] UNCRC, Art 18(2).

[42] UNCRC, Art 18(1).

[43] UNCRC Art 18(2); see also UN General Assembly, *Guidelines for the Alternative Care of Children* (resolution A/RES/64/142, 24 February 2010), Annex, para [3]. See, generally, Sloan, 'Conflicting Rights: English Adoption Law and the Implementation of the UN Convention on the Rights of the Child'.

[44] [2013] UKSC 33, [2013] 1 WLR 1911. See, generally, Brian Sloan, 'Loving but Potentially Harmful Parents in the Supreme Court' [2014] *Cambridge Law Journal* 28.

[45] [2013] UKSC 33, para 104.

[46] Ibid, para 105.

[47] Ibid, para 104.

[48] [2013] EWCA Civ 1146, [2014] 1 WLR 563; see, eg, Brian Sloan, 'Adoption Decisions in England: *Re B (A Child) (Care Proceedings: Appeal)* and Beyond' (2015) 37 *Journal of Social Welfare and Family Law* 437.

[49] *Re R (A Child)* [2014] EWCA Civ 1625, [2015] 1 WLR 3273, para 44 (Sir James Munby).

[50] Ibid, para 59.

[51] Cf, eg, *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1.

[52] [2013] EWCA Civ 1146, para 29.

[53] Elsbeth Neil, 'Post-Adoption Contact and Openness in Adoptive Parents' Minds: Consequences for Children's Development' (2009) 39 *British Journal of Social Work* 5, 6.

[54] See, generally, B Sloan, 'Post-adoption Contact Reform: Compounding the State-ordered Termination of Parenthood?' [2014] *Cambridge Law Journal* 378.

[55] del Pozo de Bolger, Dunstan & Kaltner, 'Descriptive Analysis of Foster Care Adoptions in New South Wales, Australia', 480.

[56] See, eg, *N v B (Adoption by Grandmother)* [2013] EWHC 820 (Fam), [2014] 1 FLR 369; *Re T (A Child: Adoption or Special Guardianship)* [2017] EWCA Civ 1797.

[57] Children Act 1989, s 14C.

[58] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2016*, 10.

[59] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2017*, 12.

[60] Department for Education, *Special Guardianship Review: Report on Findings - Government Consultation Response* (2015), 5.

[61] See, eg, Alex Turner, 'Serious case review into girl's death finds "fragmented" family support services', Community Care, 19 April 2017. http://www.communitycare.co.uk/2017/04/19/serious-case-review-girls-death-finds-fragmented-family-support/.

[62] [2007] EWCA Civ 1206, para [15].

[63] [2013] UKSC 33, para [103].

[64] [2016] EWCA Civ 793, [2017] 1 WLR 889.

[65] Ibid, para 68.

[66] Ibid, para 73.

[67] *Re W (Adoption: Contact)* [2016] EWHC 3118 (Fam).

[68] Sir Andrew McFarlane, 'Nothing else will do' [2016] *Family Law* 1403, 1412.

[69] Adoption and Children Act 2002, s 1(4)(f), as amended by Children and Social Work Act 2017, s 9.

[70] Judith Masson, 'Disruptive Judgments' [2017] *Child & Family Law Quarterly* 401, 401.

[71] UN Committee on the Rights of the Child, 'Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland' (Third and Fourth Reports) (CRC/C/GBR/CO/4, 2008), para 46.

[72] Ibid, para [47].

[73] Children and Families Act 2014, s 3.

[74] Adoption and Children Act 2002, s 1(5).

[75] John Hayes & Peter Hayes, 'Adoption in England: The end of placements dictated by race, culture, religion and language' [2014] *Family Law* 1288.

[76] Explanatory Notes to the Children and Families Act 2014, para 56.

[77] Ibid, para 57.

[78] [2014] EWFC 47, [2015] 2 FLR 381.

[79] Ibid, para 4 (Holman J).

[80] Ibid, para 91.

[81] See, eg, Department for Education, *Outcomes for Children Looked After by Local Authorities in England, 31 March 2016* (2017).

[82] Secretary of State for Health, *Adoption: A New Approach*, Cm 5017 (TSO, 2000).

[83] Narey and Owers, *Foster Care in England: A Review for the Department for Education*, 9.

[84] Sonia Harris-Short, Joanna Miles & Rob George, *Family Law: Text, Cases and* Materials, 3rd edn (Oxford: Oxford University Press, 2015), 912-13.

[85] Martin Narey, 'The Narey Report: A Blueprint for the Nation's Lost Children', published in *The Times* (5 July 2011).

[86] [2013] EWCA Civ 913, [2014] 1 FLR 1009.

[87] Ibid, para 88.

[88] [2013] EWHC 3974 (Fam), [2014] 2 FLR 399.

[89] Ibid, para 39.

[90] Ibid.

[91] [2014] EWFC B166, para 124.

[92] del Pozo de Bolger, Dunstan & Kaltner, 'Descriptive Analysis of Foster Care Adoptions in New South Wales, Australia', 479.

[93] Department for Education, *An Action Plan for Adoption: Tackling Delay*. Cf the increases in the number of placements for adoption and adoptions before the relevant aspects of the Children and Families Act took effect: Department for Education, *Adoption Leadership Board (ALB): Headline Measures and Business Intelligence – Quarter 4 2013-14 Update* (2014). Cf also the concern, addressed by the Court of Appeal in *Re R (A Child) (Adoption)* [2014] EWCA Civ 1625 that its decision in *Re B-S* [2013] EWCA Civ 1146 (discussed above) caused a drop in the number of placement orders made.

[94] New s 22C(9B)(c) of the Children Act 1989, inserted by the Children and Families Act 2014, s 2(3). See also Children and Families Act, s 7.

[95] Children Act 1989, s 22C(6)(a).

[96] New s 22C(9B)(c) of the Children Act 1989, inserted by Children and Families Act 2014, s 2(3).

[97] Explanatory Notes to the Children and Families Act 2014, para 53. See generally Daniela Nickols, 'Fostering for Adoption: Progress or Unjustifiable "Fait Accompli" or Something

In-between? Part 1' [2014] *Family Law* 190; Daniela Nickols, 'Fostering for Adoption: Part 2: Policy and Potential Difficulties' [2014] *Family Law* 339.

[98] Explanatory Notes to the Children and Families Act 2014, para 54.

[99] Children Act 1989, s 22C(9B)(a).

[100] Children Act, s 22C(7)(a).

[101] Narey and Owers, *Foster Care in England: A Review for the Department for Education*, 96.

[102] See, generally *Re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9, [2013] 1 AC 680.

[103] Karen Broadhurst et al, 'Connecting Events in Time to Identify a Hidden Population: Birth Mothers and Their Children in Recurrent Care Proceedings in England' (2015) 45 *British Journal of Social Work* 2241.

[104] Cf the ability of a parent with parental responsibility to consent to placement for adoption and give advance consent to the adoption order itself: Adoption and Children Act 2002, ss 19, 20.

[105] Department for Education *Children looked after in England (including adoption and care leavers) year ending 31 March 2013* (2013), 4-5.

[106] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2016*, 8.

[107] Department for Education, *Children looked after in England (including adoption) year ending 31 March 2017*, 9.

[108] UN Committee on the Rights of the Child, 'Consideration of Reports submitted by State Parties under art 44 of the Convention – Concluding Observations: Belarus' (Third and

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[109] Sir Martin Narey, *Residential Care in England: Report of Sir Martin Narey's independent review of children's residential care* (Crown, 2016), 21.

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