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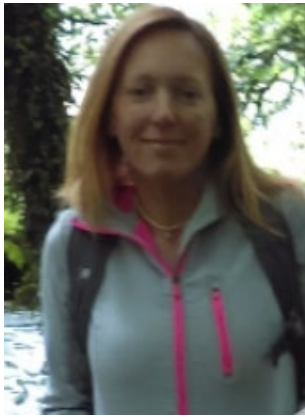
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**SOCIO-LEGAL RESEARCH:  
LOOKING BEYOND BLACK LETTER LAW IN  
THE CONTEXT OF BIRTH MOTHERS' RIGHTS  
IN ADOPTION PROCEEDINGS**

***Lisamarie Deblasio***<sup>1</sup>

**Abstract**

This article explores the experiences that birth mothers face in adoption proceedings within a socio-legal context. With analysis of data from interviews with 32 birth mothers synthesised with the relevant provisions of the Adoption and Children Act 2002, it is argued that ingrained unfairness and a lack of accountability exists in the legal and administrative system where birth mothers' rights are concerned. Analysis extends to the social problems of blame and stigmatising of birth mothers which originates from those agencies involved in the adoptions. It highlights the perspectives and voices of birth mothers, who are seldom the focus in leading discourses of professional practice in this area. This research moves some way towards equalising this disparity by acknowledging their experiences and arguing that what they have to say should be noted by professionals involved in adoption practice. The findings demonstrate the interrelationship between birth mothers and the law, with critical examination of the results in relation to previous research and jurisprudence from the family courts and the European Court of Human Rights, both of which demand fairness and proportionality in adoption proceedings.

**Keywords:** Adoption and Children Act 2002, Birth mothers, Adoption, Socio-Legal Research

**Introduction**

The title of my PhD thesis is 'I have never mattered less in this world than during my children's adoption'. These were the words of Rachel, one of the women I interviewed to explore the experiences that birth mothers<sup>2</sup> face in adoption proceedings. Rachel's statement encompassed the collective voice of the birth mothers who participated in the research; they articulated complete disempowerment and feelings of worthlessness once the decision had been made to place their children for adoption. The adoptions in this research were initiated by local authorities and ordered by the family courts, many without parental consent. They are

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<sup>2</sup> The term 'birth mother' is used throughout the study to identify the target population of the research.

adoptions of 'looked after'<sup>3</sup> children in whose best interests it was decided that permanent removal from their biological families was required.

The analysis of data from interviews with 32 women was synthesised with the relevant provisions of the Adoption and Children Act 2002 (ACA), the statute that governs adoption. As public bodies, local authorities and the courts must ensure their powers are exercised in accordance with the European Convention on Human Rights (ECHR). However, the findings determined that ingrained unfairness and a lack of state accountability exists in the legal and administrative system where birth mothers' rights are concerned. The need for fairness in adoption practice is an overreaching principle of jurisprudence of the European Court of Human Rights (ECtHR), with emphasis placed on proportionality under Article 8 of the Convention, right to privacy and family life.

Whilst unfairness was a significant factor in operational practice, there were additional social problems of blame and stigmatisation, both of which play a major role in the lives of birth mothers. This treatment originated primarily from agencies involved in adoption processes and was sustained within birth mothers' own communities. This forced many of them to deny the existence of their adopted children to avoid stigma, causing them to feel marginalised and isolated. This article presents just some of the findings, which include birth mothers' right to be notified of adoption plans, their consent to adoption and the court dispensing with their consent, final 'goodbye' contacts between mothers and their children, their involvement in the adoption process and post adoption contact. It concludes with a discussion on the weaknesses in the remedies available for birth mothers and suggestions for more considerate professional practice.

### ***A Socio-Legal Approach***

In some institutions, it is now acceptable for legal researchers to move into sociological research methodologies that support and enhance a study of the law – a socio-legal approach. In straightforward terms this is defined as

A sociological approach which seeks to gain empirical knowledge and an understanding of how the law and legal proceedings impact on the parties involved. It fills a gap in the understanding of 'law in action' found in black letter methodology perspective.<sup>4</sup>

This design was chosen because legal theory fails to paint a true picture of the social impact of adoption on birth mothers. It is argued that people who know very little about the law can educate us to the reality of a legal phenomenon through their own experiences. This research highlights the perspectives and voices of birth mothers who are seldom the focus in leading

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<sup>3</sup> This is the term used to describe children in the care of local authority Children's Services.

<sup>4</sup> British Library: An introduction to collections, *Socio Legal Studies Association (2018)*.

discourses of professional practice in this area. The thesis therefore moved some way towards equalising the disparity by prioritising birth mothers and arguing that what they have to say should be acknowledged by professionals involved in adoption practice. The findings demonstrate the interrelationship between birth mothers and the law, with critical examination of the data set in relation to previous research and jurisprudence from the family courts. Overall, it was found that there are deeply concerning inconsistencies between the benchmark legal requirements and birth mothers' experiences of adoption practice, with strong evidence of denial of legal entitlements and an absence of professional accountability that in some cases sailed dangerously close to breaches of Articles 6 (the right to a fair trial) and 8 of the ECHR.

## **1 What the Literature on Birth Mothers Revealed**

There is a lack of research that encompasses both legal and social approaches towards birth mothers' experiences. Previous studies by Winkler and Van Keppel, Boucher, Howe, Logan and Mason and Selman<sup>5</sup> investigated the psychological and social effect of adoption on birth mothers, but almost nothing is known about their experiences of the law. The law requires their involvement to some degree with local authorities, the courts and other agencies who are empowered under the ACA to work in adoption services, therefore more needed to be known about these interactions. Charlton's research into compulsory adoption found birth mothers' needs were ignored by such bodies and their views carried no credibility.<sup>6</sup> Similarly, Memarnia argued that birth mothers' emotional reactions to losing their children were treated as insignificant by professionals.<sup>7</sup> The lack of research into birth mothers is argued as a primary reason why their rights and entitlements are often overlooked by professionals. Alan Rushton highlights that the focus of adoption research is placed on adopted children and their adoptive families; this then reinforces the invisibility of birth mothers and permits a disregard of their needs.<sup>8</sup> Gaining knowledge about the circumstances of women in the periods leading

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<sup>5</sup> Winkler, R., Van Keppel, M., *Relinquishing Mothers in Adoption: Their Long-term Adjustment*, (1984). This Australian study influenced researchers in Scotland and Britain to carry out similar research. Bouchier, P., Lambert et al., *Parting with a Child for Adoption: the birth mothers perspective*, (1992) BAAF. This study carried out under a social work discipline and concerns women who parted with a child during the 1960s and early 1970s. Howe, D, Sawbridge, P, et al., *Half a Million Women: Mothers Who Lose Their Children by Adoption*, (1992). Logan, J., 'Birth Mothers and their Mental health: Unchartered Territory' (1996) 26 *British Journal of Social Work* 609. Mason, K, Selman, P., 'Birth Parents Experiences of Contested Adoption', (1997) 21 *The Journal of the Association of British Adoption and Fostering Agencies* 21-28.

<sup>6</sup> Charlton, L., Crank, M., et al., *Still Screaming: Birth Parents Compulsory Separated from their Children*, (1998), 5.

<sup>7</sup> Memarnia, N, Nolte, L., et al 'It felt like it was night all the time: listening to the experiences of birth mothers whose children have been taken into care or adopted' (2015) 39(4) *Adoption and Fostering: the journal of the Association of British Adoption and Fostering Agencies* 303 at p.305.

<sup>8</sup> Rushton, A., Social Care Institute for Excellence: *The Adoption of Looked After Children: A scoping review of research*, (2003), 34-35.

up to their children's adoption is crucial if intergenerational family problems are to be recognised and addressed.

## **2 Adoption: The Most Serious Interference in Family Life**

Adoption is a controversial and regularly debated topic.<sup>9</sup> Successive governments have been politically driven to increase adoption and 'fast track' the process to have children adopted as quickly as possible.<sup>10</sup> This policy has met with disquiet and calls to ensure adoption is always truly carried out in a child's best interests. This is primarily because an adoption order terminates the legal relationship between a child and his birth parents.<sup>11</sup> It is permanent and irrevocable. The adopters become the child's legal parents, as if the child had been born to them. This 'legal fiction'<sup>12</sup> has been challenged in recent times by leading academics<sup>13</sup> who express a preference for more open adoptions, which maintain links with the birth family by ongoing contact.<sup>14</sup> Traditional adoption sits uncomfortably alongside new open adoption concepts, but the severance of birth parents' rights is said to be a key issue in encouraging adopters to come forward.<sup>15</sup> Whenever a decision is being made concerning the adoption of a child, his or her welfare is the paramount consideration.<sup>16</sup> Parental consent to adoption<sup>17</sup> is a key requirement but it can be dispensed with if the child's welfare requires it.<sup>18</sup> This approach has generated a great deal of debate as to whether sufficient consideration has been afforded to the rights of birth parents.<sup>19</sup>

The substantive law governing adoption is found in the ACA. The ACA aligned adoption law with the overreaching aim of the Children Act 1989.<sup>20</sup> ACA sections 1(1) and 1(2) provide that 'whenever a court or adoption agency is coming to a decision, the child's welfare, throughout his life, is the paramount consideration'. This means the child's welfare will always override the rights and needs of birth families. The principle of paramountcy has the aim of deterring the courts from placing birth parents' rights over the making of an adoption order. The courts

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<sup>9</sup> For example, in 2014 the popular press reported on 'Adoption Week' with reports into all aspects of adoption policy and law. See Peach, D., Adoption Week: What it means to be an Adopted Child in 21<sup>st</sup> Century Britain, *The Independent*, 7 November 2014.

<sup>10</sup> Burns, J., David Cameron Bids to Speed up Adoption Process, *BBC News*, 2 Nov 2015.

<sup>11</sup> ACA s.46.

<sup>12</sup> Ryburn, M., 'The Effects of an Adversarial Process on Adoption Decisions', (1993) 17(3) *Adoption and Fostering* 20, 39.

<sup>13</sup> See Bainham, A. 'Arguments about Parentage' (2008) 67 *Cambridge Law Journal* 322, 349.

<sup>14</sup> This preference is only cited in accordance with the child's best interests.

<sup>15</sup> Harris-Short, S, Miles, J., et al., *Family Law: Text Cases and Materials*, (2015) 903.

<sup>16</sup> ACA ss.1(1) and 1(2).

<sup>17</sup> ACA s.19(1)(b).

<sup>18</sup> ACA s.52(1).

<sup>19</sup> Harris-Short *Family Law* 903.

<sup>20</sup> Children Act 1989 placed the welfare of the child as paramount on a statutory footing.

ensure the child's welfare is paramount by having regard to the welfare checklist in s1(4). Considerations include the child's wishes and feelings and the effect on him of ceasing to be a member of his original family, the harm or risk of harm to the child and the relationship of the child with relatives. When the Act was passed, the judiciary provided guidance on its purpose. In *Re F*<sup>21</sup> Wall LJ, said

It is not, I think, controversial to say that the 2002 Act had four main objectives. The first was to simplify the process. Second was to enable a crucial element of the decision-making process to be undertaken at an earlier stage. The third was to shift the emphasis to a concentration on the welfare of the child; and the fourth was to avoid delay.<sup>22</sup>

The domestic courts have consistently acknowledged the severe effect of adoption on family life. They have generally embraced the Strasbourg jurisprudence that stipulates adoption 'must be imperative or demanded rather than merely optional or desirable'.<sup>23</sup> In *Down Lisburn Health and Social Services Trust*<sup>24</sup> Lady Hale described adoption as 'the most draconian interference with family life possible. More recently, in *B (A Child)*<sup>25</sup> Lord Wilson observed ECtHR rulings, affirming that 'a high degree of justification is needed under article 8 if a decision is to be made that a child should be adopted against the wishes of the child's parents'.<sup>26</sup> In *Re B-S*<sup>27</sup>, the Court of Appeal clarified the law concerning non-consensual adoption. Munby P asserted that adoption must be a last resort, there must be consideration of Article 8 positive obligations on the state to try to keep families together, the least interventionist approach is preferable and although the child's interests are paramount, those interests may include being brought up by his natural family.<sup>28</sup>

The provisions in the primary legislation have little significance to birth mothers' rights, with the exception of parental consent and the welfare checklist. More relatable is the subordinate legislation in the form of the Adoption Agency Regulations 2005 (AAR), the Adoption Support Services Regulations 2005 (ASSR) and the Adoption National Minimum Standards 2014 (NMS). The regulations, along with the NMS, form the basis of the regulatory framework under the Care Standards Act 2000 for the conduct of adoption agencies and adoption support agencies. The introductory list of values state that 'Children, birth parents and families and adoptive parents and families will be valued and respected'. The NMS are issued by the Secretary of State and whilst they do not place legally enforceable obligations upon adoption

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<sup>21</sup> *Re F (Placement Order)* [2008] 2 FLR 550, para 72.

<sup>22</sup> *Ibid.*

<sup>23</sup> As per the Court of Appeal in *Re S* [2008] EWCA Civ 535 paras 91-101.

<sup>24</sup> *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36 at para 34.

<sup>25</sup> *B (A child)* (Care Proceedings: Appeal) [2013] UKSC 33.

<sup>26</sup> para 34.

<sup>27</sup> *Re B-S (Children) (Adoption: Leave to Oppose)* [2013] EWCA Civ 1146.

<sup>28</sup> Para 26.

agencies and local authorities; they are directive in that they can be used by children, birth parents and birth families as a guide to what they should expect as a minimum the agency to provide and to do. Accordingly, the research questions for birth mothers were primarily drawn from the requirements of the Regulations and NMS.

### **3 Methodology**

The aim was to carry out empirical<sup>29</sup> research by interviewing approximately 25 birth mothers. Beyond the strictly academic context, the thesis sought to empower birth mothers by researching adoption on their behalf and disseminating the results in the context of their personal experiences. The research design was qualitative because this method provides the potential for obtaining rich and detailed data.<sup>30</sup> This data, in the form of interview transcripts, informed the research about the lives of birth mothers. Traditional legal research methods concern a systematic exploration and explanation of legal doctrines. In contrast, qualitative research may begin with a lack of relatable theory. It holds the assumption that there is more than one correct form of knowledge, maintaining that there are many versions of reality. These are dependent upon, and relational to the context in which they are happening.<sup>31</sup> This approach could therefore focus on and accept the narratives of participants as accurate accounts of their experiences without the need to measure similarities or disparities between each piece of data. However, upon final analysis it was found that individual accounts of adoption correlated so strongly that it was possible to present birth mothers' 'collective experience of adoption'.

Research concerning human beings always requires ethical considerations. Seeking ethical approval provides the foundation to an ongoing process. This process demands that the researcher reflect continually throughout the study on their approaches to their methodology, their interactions with participants including their informed consent and rights to withdraw from the study, and crucially, the handling of collected data.<sup>32</sup> In order to recruit participants, the research was advertised on parent information forums,<sup>33</sup> inviting birth mothers to participate in an interview about their experiences of adoption. Upon enquiry, an information sheet was provided which outlined the aims of the study. Research of a sensitive nature must maintain

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<sup>29</sup> Empirical means that something (or its impact) is observable, see Punch, K, F., *Introduction to Social Research: Quantitative and Qualitative Approaches*, (2005) 27

<sup>30</sup> Braun, V., Clarke, V., *Successful Qualitative Research: A Practical Guide for Beginners*, (2013) 4.

<sup>31</sup> *Ibid.* 6.

<sup>32</sup> For a helpful guide on all aspects of ethics in qualitative research see Gilbert, N., *Researching Social Life*, (2008) 146, 196.

<sup>33</sup> Family Rights Group, Parent's Discussion Board, (May 11 2015), <https://goo.gl/t2V4tx> Coram, BAAF, Adoption, (2017) <https://goo.gl/JXGEfh> Match Mothers, Online E-zine, (August 2015), 7 <https://goo.gl/9RM9Pz>

confidentially, not just of participants' identities, but of information they may provide about other parties. Accordingly, participants' names were removed from the data and replaced with pseudonyms. These were confidentially linked to their real names only for the purpose of their right to withdraw. The interview schedule comprised of questions based on the legal process of adoption, and birth mothers' views on the way society responded to their birth mother identity. The interviews were 'semi structured',<sup>34</sup> focusing on a list of prepared questions, but with a flexible approach that would allow participants to respond to questions and elaborate on matters that were important to them.

#### **4 The Research Findings**

Interviewing was a protracted process. It took several months to build up a rapport with birth mothers because most were suspicious of academic research which they feared 'would paint them in a bad light'. Although there was a great deal of initial interest in the research, many of the respondents were extremely uncomfortable with the idea of talking about their child's adoption. Once a trusting relationship was achieved, the interviews generated a large amount of data, which then took a further four months to transcribe and analyse. The final data for analysis concerned the experiences of 32 women who identified as the sample population of birth mothers with children who were adopted following being looked after by a local authority. The adoptions occurred across 24 local authorities and were carried out under the ACA between 2005 and 2012 exclusively. Collectively the participants have 56 adopted children, 22 of which are boys and 34 of which are girls. The ages that the children were adopted range from the youngest being under the age of one to the eldest being ten. The birth mothers ranged in age from 22 to 46 at the time of their interviews in the spring and summer of 2015. The results of the interviews compared with the legal requirements of the legislation exposed flaws in the administrative practice and a lack of consideration for birth mothers in general.

##### ***The Legal Requirement to Notify of the Plan to Place Child for Adoption***

The AAR regulation 19(3) provides that the adoption agency must, if their whereabouts are known to the agency, notify in writing the parent or guardian. However, over half of the respondents were not formally notified. Of particular concern were nine birth mothers recalling the matter of adoption being raised informally or 'casually' during child contact sessions<sup>35</sup> and in two cases before babies were born. These findings are consistent with Proudman and Trevena who argue that there is a 'presumption of adoption as soon as care proceedings are

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<sup>34</sup> Braun *Successful Qualitative Research: A Practical Guide for Beginners* 78.

<sup>35</sup> Whilst care proceedings were ongoing before final care orders were made under the Children Act 1989.



first initiated by the removal of the child'.<sup>36</sup> Likewise, Charlton found that birth parents in her study suspected that there was 'a degree of collusion within adoption teams, parents felt they were not being told the full story. They believed that adopters were identified before care applications were made to the court.'<sup>37</sup> This concurs with a number of birth mothers' convictions in the current study. Some believed that the subject of adoption was casually mentioned by practitioners or contact facilitators because behind the scenes 'the plans were already in motion'. In some cases, this had the effect of convincing birth mothers they had no option other than to consent to their child being placed for adoption. Presumptions or suggestions of adoption early on in care proceedings contravene the 'no order principle' in s1(6) ACA, which provides that

The court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so.

This section means that an adoption agency and the court must consider all the available options starting with the least interventionist first. It follows that adoption is the most interventionist on a sliding scale with the least being no order at all, followed by residence orders, supervision and care orders and special guardianship orders.<sup>38</sup> Even if it transpired that adoption was 'mentioned' during contact or whilst a mother was still pregnant, because all other options had been considered and dismissed, the respondents were not aware of this. Adoption plans, however preliminary, which are not formally disclosed to birth parents are unfair, raising questions about compatibility with human rights requirements. In *G (Children)*<sup>39</sup> Munby J referred to the importance of impartiality,

Procedural fairness is mandated not merely by article 6 but also by article 8. Unfairness in the process may involve a violation of a parent's rights. Unfairness at any stage of the litigation may involve breaches of article 6 and 8. Local authorities must appreciate that the protection afforded by article 8 guarantees fairness in the decision making process at all stages of child protection.

It is therefore crucial that 'fairness in decision making' is applied to adoption plans that are transparent and in accordance with the law's requirement to avoid incompatibility with the Convention.

### ***Consent to Placement for Adoption***

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<sup>36</sup> Proudman, C and Trevena, F., 'Setting Parents up to Fail is Integral to Care Proceedings', (2012) *Family Law*, 987 at 989.

<sup>37</sup> Charlton, *Still Screaming*, 42.

<sup>38</sup> Bridge, C and Swindells, H., *Adoption: The Modern Law*, (2003) 140-141.

<sup>39</sup> *G (Children)* [2003] EWHC 551 (Fam).

Birth parents providing statutory consent to placement empowers a local authority or an adoption agency to place a child with adopters.<sup>40</sup> ACA section 19(1)(b) allows birth parents to provide general consent to placement without the involvement of the courts.<sup>41</sup> Section 52(5) states that "Consent" means consent given unconditionally and with full understanding of what is involved'. According to section 52(7) consent must be provided in accordance with government rules.<sup>42</sup> For consent to be effective, it must be witnessed by a Children and Family Court Advisory and Support Service (Cafcass) officer and the consequences of giving consent to placement<sup>43</sup> must be carefully and fully explained to birth parent(s) by both the local authority and Cafcass.

Six birth mothers consented to placement of their child without being offered the opportunity to decide whether to agree or not. There was also a notable absence of legal advice in all but one case. There is contention between this practice and the adoption consent form which directs that 'Before signing this form you are advised to seek legal advice about consenting to adoption and the effect on your parental rights. Publicly funded legal advice may be available from the Civil Legal Aid'.<sup>44</sup> None of the respondents who consented were provided with a copy of the form prior to being asked to sign, so they were unaware of this fundamental prerequisite. It is the responsibility of Cafcass officers to advise parents on the implications of giving consent.<sup>45</sup> Although Cafcass were the body obtaining consent in all cases, birth mothers felt the serious implications of giving consent were not explained to them. They spoke of feeling pressured to give consent raising concerns that it was not informed and given unconditionally.<sup>46</sup> Charlton found that birth parents who consented felt 'pressed, often on the advice of social workers or solicitors, the latter who were sometimes the party advising them that there was no point in fighting the adoption'.<sup>47</sup>

Consented-to-adoption has significant legal and factual consequences, yet it is rarely referred to in the literature beyond the assertion that adoption 'consent' flows from the wish to 'give up'

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<sup>40</sup> The aim of placement is to enable consent to adoption to be acquired at placement stage and birth parents can subsequently only apply for leave to oppose an adoption order if there has been a change of circumstances.

<sup>41</sup> Allen, N., *Making Sense of the New Adoption Law*, (2007) 79. It is important to note that the giving of consent does not prevent the local authority from applying to court for a placement order.

<sup>42</sup> The forms for s19 consent were published in 2005 as part of the Practice Direction supplementing the Family Procedure (Adoption Rules) 2005. Forms A100, A101, A102.

<sup>43</sup> These consequences are: the child continues to be 'looked after' but the status of any ongoing contact may change because any contact order made under the CA is terminated. Parental responsibility is shared with the local authority and if there are prospective adopters they also share parental responsibility.

<sup>44</sup> The Consent to Adoption Form, (A104).

<sup>45</sup> Bainham, A, *Children the Modern Law*, (2005) 287.

<sup>46</sup> This is the statutory requirement for consent in ACA 2002 s.52(7).

<sup>47</sup> Charlton, *Still Screaming*, 43.

a child for adoption.<sup>48</sup> Oakwater suggests that social workers and lawyers always ask birth mothers if they will consent to adoption 'as uncontested adoption is easier and cheaper for them, quicker to implement, speeding the child's journey through placement'.<sup>49</sup> According to Lord Nicholls if a birth mother consents to adoption there is no infringement of her ECHR Article 8 rights.<sup>50</sup> This means that in principle none of the consenting mothers had any protection under the Human Rights Act 1998 (HRA). Although this small number of birth mothers cannot be argued as representative, from their accounts the seriousness of giving up their legal rights to their child was somewhat downplayed by the professionals involved. This subsequently meant these women did not at the time appreciate the finality of their actions in respect of their relationships with their children.

### ***Dispensing with Consent: 'Forced Adoption'***

In circumstances where birth parents refuse or are unable to consent to their child's placement, the courts can make a placement order. Section 21(3) provides that,

The court may only make a placement order if the court is satisfied (a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or (b) that the parent's or guardian's consent should be dispensed with.<sup>51</sup>

Paramourcy<sup>52</sup> and the welfare checklist<sup>53</sup> are pertinent to the dispensing of consent. In *Re P*<sup>54</sup> the Court of Appeal held that cogent justification must exist before consent can be dispensed with and adoption must be a proportionate and legitimate response.<sup>55</sup> In *Re B*<sup>56</sup> Lord Neuberger asserted that the 'adoption of a child against her parents' wishes should only be contemplated as a last resort, when all else fails'.<sup>57</sup> Bridge argues that in extending the welfare principle to dispensing with parental consent 'the court is able to completely override a parent's wishes, even though they may be reasonable and notwithstanding that adoption involves irreversible legal separation of the child from his birth parents'.<sup>58</sup>

Twenty birth mothers had their consent dispensed with by the court. Those who were aware of the local authorities' application for placement opposed it from the time they knew of the

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<sup>48</sup> For helpful analysis on voluntary consent to adoption see, Allen Making Sense of the New Adoption Law 45-48.

<sup>49</sup> Oakwater, H., *Bubble Wrapped Children*, (2012) 8.

<sup>50</sup> *Re B (Adoption by One Natural Parent to the Exclusion of Other)* [2001] 1 FLR 589 para 29.

<sup>51</sup> The child's welfare requiring consent to be dispensed with is the statutory test under ACA s52(1)(b). Note: the word *requires* for the purposes of the Act carries the connotation of 'imperative'.

<sup>52</sup> ACA 2002 s.1(2).

<sup>53</sup> ACA 2002 s.1(4).

<sup>54</sup> *Re P (A Child)* [2008] EWCA Civ 535.

<sup>55</sup> Standley, K., *Family Law*, (2010) 441.

<sup>56</sup> *Re B (A Child) (Care Proceedings: Appeal)* [2013] UKSC 33.

<sup>57</sup> para 104.

<sup>58</sup> Bridge, *Adoption: The Modern Law*, 112.

plan for adoption. On further questioning they did not recall their solicitors or any other professional explaining consent to them and how it could be overridden, but in a number of cases they were 'encouraged' to consent by their solicitors.<sup>59</sup> Over half of the respondents spoke of being actively involved in opposing care orders and attempting to secure more frequent contact with their children at the time placement orders were made.<sup>60</sup> They failed to grasp the finality of the placement order, believing that the 'fight wasn't over until the adoption order',<sup>61</sup> but for many the placement order signified the end of their relationships with their children.

This lack of understanding of the legal process could explain why so many birth mothers used the term 'forced adoption' in their narrative. The dictionary defines 'forced' as 'obtained or imposed by coercion or physical power'.<sup>62</sup> For the birth mothers this corresponds with their personal perspectives of adoption. Respondents' narratives were notably similar and dominated by references to the involuntary and often violent nature of their experience of their children being removed and eventually adopted. Ryburn considers that forced adoption is not admissible in law but is exclusively based on moral principles,

Forced adoptions find moral justification in the view that the state has a duty to intervene on behalf of its citizens or its future citizens, where they would otherwise be at significant risk. The debate about compulsory adoption is a moral one. It centres on questions such as: what constitutes adequate parenting? What forms of family life should we support which should we reject?<sup>63</sup>

For Ryburn 'forced adoption' says more about the failings of parents than it does about children's welfare. It is certainly true that parents' deficiencies are forensically detailed throughout court reports. Parents who attend court must listen to graphic accounts of their neglectful behaviour, dysfunctional relationships and bad childcare decisions with only their counsel providing a medium for their defence.<sup>64</sup>

Because the only legal requirement for dispensing with parental consent is a determination of the child's welfare, it is probable that birth mothers' perspectives of forced adoption will remain for as long as the law maintains such a provision. Their perception of forced adoption is likely

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<sup>59</sup> This finding concurs with Lauren Devine's research where it was found that many lawyers seem do little more than 'urge compliance' once the evidence against parents has been collected. Devine, L, Parker, S., 'Public Family Law cases in the context of Miscarriages of Justice' (2015) *Argument & Critique*.

<sup>60</sup> Similar findings were made by Charlton, *Still Screaming*, 40.

<sup>61</sup> A comment made by Tracy BM32.

<sup>62</sup> The Oxford Dictionary.

<sup>63</sup> Ryburn, M., 'The Effects of an Adversarial Process on Adoption Decisions', (1993) 17:3, *Adoption and Fostering*, 39.

<sup>64</sup> Although birth parents' counsel are not 'defending' them as would occur in a criminal trial, the adversarial process left parents feeling that they needed a 'defence'.

to be a bi-product of the law intended to prevent the court prioritising the rights of birth parents over children needing permanence.

### ***The Importance of Saying Goodbye***

Before adoption birth families may be invited to a 'goodbye meeting' with their child. This is not a legal requirement, but it should not be considered as unimportant because of this,

The goodbye meeting' is a term for something that is inevitably distressing for a parent. These are important meetings and most birth parents find the strength to go through with them.<sup>65</sup>

The Government has produced guidance for local authorities on helping birth families prepare for the goodbye meeting which aims to support both parents and their children; the importance of this meeting to children's welfare is made evident,

The Social Worker reinforces the important role the parent has played in the child's life. Emphasize that because of the child's love for the parent, it is important for the parent to give the child "permission" to be happy and to love and trust another family.<sup>66</sup>

Six birth mothers said they were not offered the chance to say goodbye to their children before they were adopted. When asked if they knew why, three respondents thought their children had already been moved to another area some distance away. A further seven birth mothers were expecting a goodbye meeting which had been planned but this was cancelled due to concerns about the children's ability to cope with the meeting. Most birth mothers who had a goodbye meeting with their children found the experience intensely painful and unnatural. This was largely because they were told to behave as though they were happy and pleased for their child but in doing so feared their children might perceive this as rejection. The respondents were worried about their children's feelings during the goodbye meeting so suppressed their own emotional needs

It should not be neglected that effective management of such meetings is likely to be challenging for social workers also, particularly given their obligation to consider the child's needs first and foremost. However, most of the birth mothers felt that no specific support was offered to them before or during the last contact. In fact, the general view was that goodbye meetings were arranged reluctantly and this averseness to the event translated into an unsupportive and tense atmosphere where birth mothers were pressured to say goodbye to their children and leave. This meant that such an important meeting was a profoundly unpleasant and negative experience for some birth mothers and possibly for their children as well. By showing sensitivity professionals will create a far more positive environment which

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<sup>65</sup> Family Lives, *Support for parents of children with an adoption plan, placed for adoption or adopted.*

<sup>66</sup> Tip Sheet, *Preparing for the 'goodbye' visit*, <https://goo.gl/jEizS2>

may also promote better outcomes for the children they are placing with adopters. Birth mothers who were not offered the chance to say goodbye felt strongly that there was a lack of openness and no explanation why the meetings had not gone ahead. In something as important as saying goodbye to a child it is vital that birth mothers know where they stand with clear explanations provided if final contact are not facilitated.

Researchers argue that birth parents saying goodbye to a child is a vital component of adoption, to ensure the child 'gains a sense of their history'.<sup>67</sup> Julia Davis establishes that the elements of good practice with final contacts must involve a carefully thought out event requiring the involvement of the adoptive family (if there is one), the birth parents and social workers, each party will need to be supported and their own emotional needs must be acknowledged and not ignored. Davis emphasises that goodbye meetings should take as long as is necessary to ensure the child and his birth parents have adequate time together. Finally, birth mothers should not be left alone after the goodbye contact unless they specifically request it.<sup>68</sup> This concurs with Charlton's view that support is crucial for birth mothers following the final goodbye.<sup>69</sup> In the current study several respondents who were not supported at all recalled feeling suicidal, and in two cases attempted suicide in the days following the goodbye meetings. Those who were treated with kindness and compassion felt more able to grieve naturally and eventually focus on what remained in their life rather than solely on what they had lost.

### ***The Right to have a Voice in Adoption Proceedings***

Wherever possible birth parents should have a voice and be listened to during the process of their child's adoption. Boddy argues that 'birth families need to be engaged with the decision-making and care-planning process from the outset'.<sup>70</sup> The law requires that 'before a placement for adoption can occur a parent must be fully engaged in the decision-making process'.<sup>71</sup> When making an adoption order the court must apply the welfare checklist in section 1 ACA. Section 1(3)(f)(iii) provides that the court must consider the wishes and feelings of the child's relatives. According to para 12.8 of the NMS, the adoption agency must be active in its efforts to involve the birth family in the adoption planning.

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<sup>67</sup> Davis, J., *Preparing for Adoption*, (2014) 101-102.

<sup>68</sup> *Ibid.*

<sup>69</sup> Charlton, *Still Screaming*, 10.

<sup>70</sup> Boddy, J, Statham, J, et al., *Beyond Contact: Work with families of children placed away from home in four European countries*, *Centre for Innovation and Research in Childhood and Youth (CIRCY) School of Education and Social Work*, (2013).

<sup>71</sup> McFarlane, A, Reardon, M., *Child Care and Adoption Law*, (2010) 153.

Birth mothers' right to be involved in the process of adoption also has been confirmed as a requirement by the ECtHR. In *W v UK*<sup>72</sup> it was held that,

The decision making process must be as such to secure that the parents views and interests are taken into account by a local authority'[and] 'it must be determined if the parents have been involved in the decision making process to a degree sufficient to provide them with the requisite protection of their interests.<sup>73</sup>

Furthermore, in *Scott v UK*<sup>74</sup> it was held that once the child is in the care of the local authority and adoption is planned then the birth parents must be sufficiently involved in the planning process.

Twenty-six birth mothers felt that they were not involved in the planning process and they did not believe that their wishes and feelings were considered at any stage. Respondents were not offered support, and neither were they kept updated of their children's progress in placement. This corresponds with Charlton, who found that once adoption had been decided upon social workers were averse to discuss children at all with their birth parents;<sup>75</sup> indeed some social workers felt it 'was not therapeutic'<sup>76</sup> to have birth parents involved in the process at all. Mason and Selman found that birth parents were not only excluded but were not kept informed of the progress of their child's case<sup>77</sup> Charlton argues that 'there is no better test of the worth of any professional than how it treats those who are least able to exercise a say in the services that they want'.<sup>78</sup>

The courts have also observed the shortcomings of local authorities in this area. In *Re L*<sup>79</sup> Munby J said,

Too often in proceedings both the extent of a parent's involvement in the crucial phases of the out of court decision making process fall short not just of the domestic law requirements but also of the standards demanded by articles 6 and 8 of the Convention.<sup>80</sup>

It was held in *R and H v UK*<sup>81</sup> that where adoption is the outcome, there is an unavoidable duty upon local authorities to ensure parents' Article 8 rights are protected by their involvement in the decision making process and this is accounting for the widest margin of appreciation. Only in exceptional circumstances and if the child's welfare demands it, should parents be

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<sup>72</sup> *W v UK* (1987) 10 EHRR 29.

<sup>73</sup> paras 63-64.

<sup>74</sup> *Scott v United Kingdom* [2000] 1 FLR 958.

<sup>75</sup> Charlton, *Still Screaming*, 21.

<sup>76</sup> *Ibid.* 42.

<sup>77</sup> Mason, 'Birth Parents Experiences of Contested Adoption', 22.

<sup>78</sup> Charlton, *Still Screaming*, 3.

<sup>79</sup> *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 Fam.

<sup>80</sup> paras 149-151.

<sup>81</sup> *R and H v UK* 35348/06 [2011] ECHR 844.

excluded from the process. Unfortunately, the assertions of the courts sometimes fail to account for the reality of adoption practice where it is argued 'a human rights discourse in social work in relation to adoption is under developed'.<sup>82</sup>

Lindley studied adoption agency practice and found that there were few opportunities for birth parents to 'make direct representations to the (adoption) panel either in person or in writing on matters of importance to them'. This was primarily due to the agencies' anxiety about protecting adopters' identities and preserving the security of the placement.<sup>83</sup> It is not known whether the refusal to hear birth parents supports a legitimate aim to protect placements, but agencies' defensiveness and protectiveness of adopters simply reinforces the isolation felt by birth parents in both the short and long term.

### ***Post-Adoption Contact***

There has been a considerable amount of research into the phenomena of 'open adoption' in recent years,<sup>84</sup> although some commentators have argued that 'open adoption' lacks a definitive meaning.<sup>85</sup> In 1990 the *Adoption Law Review*<sup>86</sup> considered open adoption. One of the key topics to emerge from the review is that of maintaining links by ongoing contact between a child and his birth parents after adoption<sup>87</sup>. Triseliotis suggests this should be considered as 'adoption with contact'.<sup>88</sup> Sloan describes open adoption as 'the freer exchange of information between the parties to adoption as an alternative to secrecy'.<sup>89</sup> From a human rights perspective, adoption without consent may become more compliant with the Convention if some contact is permitted between the child and his birth parents.<sup>90</sup> The issue of contact with adopted children is a complex and controversial issue. There is little provision in the ACA for contact following adoption,<sup>91</sup> although s 46(6) provides that the court 'must consider' whether the child's welfare requires ongoing contact.<sup>92</sup> Although the ACA makes allowances

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<sup>82</sup> Featherstone, B., Gupta, A et al. 'The role of the social worker in adoption – ethics and human rights: An Enquiry', *The British Association of Social Workers*, (2018) 13.

<sup>83</sup> Lindley, B 'Partnership or Panic?' A Survey of Adoption Agency Practice on Working with Birth Families in the Adoption Process' (1998) *The Journal of the Association of British Adoption and Fostering Agencies* 21:4 at 31.

<sup>84</sup> For a helpful guide on the concepts of open adoption see Mullender, A., (ed.), *Open Adoption, The Philosophy and Practice*, (1991, BAAF).

<sup>85</sup> Lindley, 'Partnership or Panic?' 23.

<sup>86</sup> *Prime Ministers Review: Adoption* (July 2000), para 6.5, John Hutton MP, Hansard, (House of Commons), 26 March 2001, col 699.

<sup>87</sup> Allen *Making Sense of the New Adoption Law* 21.

<sup>88</sup> Triseliotis, J., 'Open Adoption', in Mullender, *Open Adoption*, 23.

<sup>89</sup> Sloan, B, 'Post-Adoption Contact Reform: Compounding the State-Ordered Termination of Parenthood?' (2014) 73 *The Cambridge Law Journal* 378 at 134.

<sup>90</sup> Hale, B., Fortin, J., *Legal Issues in the Care and Treatment of Children with Mental Health Problems*, in Rutter., (Ed) *Rutter's Child and Adolescent Psychiatry*, (2008) 102.

<sup>91</sup> McFarlane, *Child Care and Adoption Law*, 166.

<sup>92</sup> An application for post-adoption contact can be made under section 8 CA 1989 but the applicant must first secure the leave of the court.



for contact, there is no presumption for contact as there is in the CA 1989.<sup>93</sup> Following an adoption order, an application for post adoption contact can be made under section 8 of the CA, but the applicant must first secure the leave of the court.<sup>94</sup>

It is rare for the court to make an order for post-adoption contact *inter alia* due to the fear of deterring adopters.<sup>95</sup> It is more likely to be a written agreement which is legally unenforceable if contact does not occur or ceases. Allen notes that the legislation does not demand ongoing contact and thus 'agencies have been able to develop policies and approaches largely unrestrained by a legal straightjacket'.<sup>96</sup> This policy usually transpires as 'letterbox contact'<sup>97</sup> in which the courts play no part. As one adoption service notes 'currently the letterbox arrangements are morally, rather than legally binding, so they depend on the goodwill of all those concerned to keep them going'.<sup>98</sup> Letterbox contact is indirect and consists of periodic letters<sup>99</sup> passed between birth families and adoptive families via a local authority letterbox scheme.

All the contact between birth mothers and the adopting family/children was arranged by local authorities by way of various agreements. Three respondents were advised that the adoptive families had decided against allowing contact and none had attempted to challenge this. Twenty nine birth mothers were initially offered some level of post adoption contact, but it was clear from analysis of the data that theory on post adoption contact is discrete from the reality. Theoretically the literature offers an objective evaluation, leading one to infer that birth parents dutifully and impassively cooperate with reliable and regular post adoption contact.<sup>100</sup> In practice it is not that simple.

The findings showed an inconsistent and unreliable process that left birth mothers confused, concerned about their lack of rights, and powerless if agreements for contact were not kept. Only two birth mothers had received the anticipated number of letters post adoption. Ten had received no letters despite being party to an agreement for annual letterbox. Seven of those participants had spent a significant amount of time fruitlessly contacting local authorities

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<sup>93</sup> Standley, *Family Law* 441-442

<sup>94</sup> Since the adoptions in this thesis all occurred pre-2013 these provisions would have applied. However, the Children and Families Act 2014, section 9, has amended the Adoption and Children Act 2002, with the new insertion of section 51A and 51B. These new provisions now provide the court with a specific power to make an order for post-adoption contact when the court is making an adoption order or when an adoption order has been made.

<sup>95</sup> *Ibid.* 442.

<sup>96</sup> Allen, *Making Sense of the New Adoption Law* 21.

<sup>97</sup> Sloan, *Post-Adoption Contact Reform* 41.

<sup>98</sup> For example see, Oxfordshire County Council, *Guidelines for Using the Oxfordshire Letterbox Service*, <https://goo.gl/WU3Jor>

<sup>99</sup> Less often it may also include photos and gifts.

<sup>100</sup> See Standley *Family Law* 426.

querying why they had not received letters. None felt that their enquiries were taken seriously, and they were not resolved. General advice was given that local authorities were not involved in the agreement other than to pass letters on once the adoption was final.

In describing the long-term physical, mental and emotional effects of adoption on the lives of birth mothers, Mason identified adopted children's whereabouts and welfare as birth mothers predominate concern.<sup>101</sup> This is something that can never be redressed in an adoption where no form of contact has occurred. Theoretically, open adoption provides 'in virtually all adoptions there will be an expectation for some limited indirect contact to continue'.<sup>102</sup> This view is consistent with modern ideas about adoption, but the findings do not support this theory. For birth mothers who had contact agreements which failed to commence, these adoptions appear as 'closed adoptions'.

'Closed adoption' is where birth mothers are given no information about their child following placement.<sup>103</sup> Closed adoption reverts practice to before the 1975 Children Act, where the law promoted secrecy, as Polly Toynbee notes,

Once the adoption papers were signed a child was cut off for ever from his natural parents, an adoption order is the final and absolute utterance a court can make. It separates mother and child and guarantees that a child's origins can be kept secret.<sup>104</sup>

But the law has moved on, as Bridge makes clear 'statutory provisions aimed at eradicating birth parents from the child's life are pointless in the case of older children who have close emotional ties to their birth families. Seeking to deny the importance of these ties may well be inimical to the child's interests'.<sup>105</sup> Bainham criticises the practice which generally discourages parents from having any further interest in their children post adoption. He considers that the 'portrayal of this interest as interference is unduly negative and it reflects a cultural attitude to long term arrangements not shared by our European neighbours'.<sup>106</sup>

In the absence of any letterbox, respondents were tormented by the thoughts that their children had suffered with the sudden severance of contact. They were unconvinced that their children did not miss them and did not experience feelings of intense loss which they feared may not be acknowledged by adult carers. These concerns are justified. Lindley argues that complete termination of contact between children and their birth families can create long-term

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<sup>101</sup> Mason (1997), *Birth Parents' Experiences of Contested Adoption* 25.

<sup>102</sup> McFarlane *Child Care and Adoption Law* 166.

<sup>103</sup> Logan, *Birth Mothers and their Mental Health: Unchartered Territory* 611.

<sup>104</sup> Toynbee, P., *Lost Children: the story of adopted children searching for their mothers*, (1985) 13.

<sup>105</sup> Bridge, C., 'Changing the Nature of Adoption: Law Reform in England and New Zealand' (1993) 13 *Legal Studies* 81 at 81.

<sup>106</sup> Bainham, *Children: The Modern Law* 299-300.

problems because 'when earlier attachments are disregarded, the feelings do not go away but are simply driven underground'.<sup>107</sup>

The judiciary has deliberated extensively on the matter of post-adoption contact, sometimes reaching differing conclusions. In *Re KD*<sup>108</sup> the House of Lords indicated that post-adoption contact was not an automatic right for birth parents. Similarly, Macfarlane LJ has reflected that 'for 30 years or more the courts have accepted the principle that adoption with little or no contact with the natural family provides the best option for the child'.<sup>109</sup> In *SB v County Council*<sup>110</sup> Wall LJ noted 'historically, post adoption contact between children and their birth parents has been perceived as highly exceptional'. However, a more generous view was held by Ward LJ in *Re G*,<sup>111</sup>

[The benefit] of contact is the benefit that comes from children simply knowing who the natural parents are. It is to remove the sense of the ogre, as they reach adolescence and begin to search for their own identity. That is why the current research is in favour of some contact in adoption.

Despite extensive research promoting open adoption, Harris-Short notes that the courts remain indisposed because of the 'difficulty in reconciling a move towards openness with the traditional legal understanding of the nature of an adoption order'.<sup>112</sup> Sloan suggests that the perpetual debate on the benefits/detriments of open adoption probably centre on the fact that if adoption were the only solution to the child's long term needs then post adoption contact is unlikely to be appropriate.<sup>113</sup> Similarly, Ryburn argues that where adoption is non-consensual it causes circumstances where maintaining links is impossible due to 'the anxiety and fear it engenders in new carers and hostility provoked from the original family'.<sup>114</sup> These arguments place local authorities in a difficult position with regard to the promotion of contact and perhaps go some way to explain why contact after adoption does not always appear to be embraced by those empowered to facilitate it. Macfarlane LJ reflects that with the passing of the ACA there was an expectation by some judges<sup>115</sup> that contact 'which at most concerned modest letterbox [may mean] a possible sea change under the Act'. His Lordship subsequently considered that a decade later there 'has been no sea change'.<sup>116</sup>

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<sup>107</sup> Lindley, B., 'Open Adoption-Is the Door Ajar?' (1997) 9 *Child and Family Law Quarterly* 115, 117-118.

<sup>108</sup> *Re K D (A minor) (Ward: Termination of Access)* [1988] AC 806.

<sup>109</sup> Lord Justice MacFarlane, The Family Justice Council, The Bridget Lindley OBE Memorial Lecture 2017, *Holding the risk: The balance between child protection and the right to family life*, 21 at 24.

<sup>110</sup> *SB v County Council* [2008] EWCA Civ 535.

<sup>111</sup> *Re G (Adoption Contact)* [2003] 1FLR 270 at para 274.

<sup>112</sup> Harris-Short *Family Law* 1042.

<sup>113</sup> Sloan, Post-Adoption Contact Reform 389.

<sup>114</sup> Ryburn 'The Effects of an Adversarial Process on Adoption Decisions' 44.

<sup>115</sup> Notably Wall LJ in *Re P (A Child)* [2008] EWCA Civ 535.

<sup>116</sup> Lord Justice Macfarlane 10.

## **5 Remedies for Procedural Unfairness and Recommendations for Considerate Practice**

The findings showed that birth mothers felt powerless where unfairness and inadequate procedure occurred. This was primarily because they had little awareness of their rights, no knowledge of a complaints process and there was no accountability within the agencies concerned. Available remedies for birth mothers in the event of poor decision-making, procedural error or unfair practice are virtually non-existent. For example, judicial review is a court based remedy when an individual wishes to claim that a local authority has acted *ultra vires*, but it is rare for this to be utilised in public child law.<sup>117</sup> Judicial review is also only able to deal with procedural breaches and not problems within the system which is the primary problem in adoption processes.<sup>118</sup> Even if it were possible for an application for judicial review to be lodged, the time limits imposed are short and strictly regulated. Under Civil Procedure Rule Part 54.5(1) an individual must make an application for permission to apply for judicial review not later than three months after the grounds upon which the claim is based first arose. For the birth mothers involved in this research it was years and not months before they came to realise that they had been unfairly treated; further, the idea of yet another course of litigation was repugnant to them, many commented that they never wanted to attend court again following the trauma they had experienced during their child's care proceedings.

The same limitations apply to applications under s7 of the HRA 1998.<sup>119</sup> Although there are examples of parents bringing actions against local authorities who have infringed individuals' rights, such as in *C v Bury Metropolitan Borough Council*,<sup>120</sup> and more so recently in care proceedings,<sup>121</sup> there is no available data on s7 claims in administrative adoption procedure. Making claims against public bodies for breach of the HRA is a complex matter which has a number of implications. It has been argued that 'in most cases, pursuing an HRA application is simply not commercially viable',<sup>122</sup> if for example, an individual is funding their own court

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<sup>117</sup> As per Blair J in *A and S v Enfield London Borough Council* [2008] 2 FLR 1945. There is no case authority on judicial review of the administrative process of adoption but see *AB & Anor, R (on the application of) v The London Borough of Haringey* [2013] EWHC 416, where the court made a quashing order on a local authority's decision to undertake an enquiry pursuant to s.47 Children Act 1989 into whether a child was suffering from significant harm.

<sup>118</sup> Devine, L., *The limits of state power and private rights: exploring child protection and safeguarding referrals and assessments* (2017) 146.

<sup>119</sup> HRA s7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

<sup>120</sup> *C v Bury Metropolitan Borough Council* [2002] 2 FLR 868.

<sup>121</sup> Stather, J., 'The Rise and Rise of Damages in Human Rights Claims' *Family Law Week*, (2015), <https://goo.gl/oD51Vc>

<sup>122</sup> Child Protection Recourse, Human Rights Act 1998 (Oct 2014) <https://goo.gl/SDFBBY>

costs, any award of damages may be significantly less than the cost of court proceedings.<sup>123</sup> The publicly funded claimant in a HRA claim who is also publicly funded in associated or connected proceedings under s25 LASPO, is vulnerable to a claim for recoupment of the costs of proceedings by way of statutory charge from any award of HRA 1998 damages, including access to legal aid.<sup>124</sup>

It is essential that local authorities should be held accountable throughout the adoption process and birth mothers should be made aware of their legal rights and entitlements from the outset. Along with accountability, we are reminded of the state's obligation to respect human dignity as a core requirement under the human rights instruments and the common law. The judiciary consider these values to be crucial where the state is involved with vulnerable people whose freedom of choice has been inhibited.<sup>125</sup>

Birth mothers were for the most part unaware of their right to complain. The CA 1989 places a duty on all councils to establish and publicise a procedure for the consideration of complaints made to them.<sup>126</sup> The Children Act 1989 Representations Procedure (England) Regulations 2006 sets out the processes that must be followed by local authorities when they consider representations and complaints about the services they provide.<sup>127</sup> The Regulations provide that certain adoption-related functions may be the subject of a complaint, those relevant here are: the provision of adoption support services, placing children for adoption, including parental responsibility and contact issues, duties on receipt of a notice of intention to adopt and a local authority considering adoption for a child.<sup>128</sup>

The findings showed that only two respondents out of the 32 had made a formal complaint on the advice of their solicitors. The two complainants found the process complex, time consuming and impractical in terms of a redress. In most cases if a complaint against Children's Services is upheld, the complainant will receive a written apology from the relevant manager, along with information about what action the department will take to ensure that lessons have been learned. Whether this is satisfactory in the event of unfair treatment or

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<sup>123</sup> See *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 para 59.

<sup>124</sup> The publicly funded claimant in a HRA 1998 claim who is also publicly funded in associated or connected proceedings, see section 25 Legal Aid Sentencing and Punishment of Offenders Act 2012, is vulnerable to a claim for recoupment of the costs of proceedings by way of statutory charge from any award of HRA 1998 damages. Child Protection Resource, (2014), <https://goo.gl/7DFbJn>

<sup>125</sup> Mr Justice Munby, *Human Rights and Social Welfare Law: The Impact of Article 8*, 87.

<sup>126</sup> CA 1989 s26 and s24(d).

<sup>127</sup> Department for Education, *The Children Act 1989 Guidance and Regulations*, (October 2014) 88.

<sup>128</sup> Department for Education and Skills, *Getting the Best from Complaints Social Care Complaints and Representations for Children, Young People and Others*, 6. (April 2007).

erroneous procedure in adoption is questionable, Devine argues that the inadequacy of redress in public child law causes 'severe and long lasting harm to families'.<sup>129</sup>

The complaint process is designed for service users; therefore the procedure should be easy for individuals to access and understand. There should be adequate services available to assist the complainant in setting out clearly the issues they are unhappy with, this is of particular importance where the complainant has a special need or a disability. Given that this procedure may be the only avenue that can be taken by birth parents in the event of a complaint about administrative procedures, much more needs to be known about the accessibility and effectiveness of the process.

Devine argues that in public child law the balance of state power and the rights of the individual is weighted in favour of the state. This applies both to the state's powers under the CA 1989 and the ACA 2002. She argues further that the intention of the legislation was to create a regulatory framework to solve or avoid problems that would occur without the statute.<sup>130</sup> The overreaching aims of the ACA provisions designed for birth parents were to address the need for balance in child welfare decisions, because it was evident that paramountcy of the child's welfare risked compromising proportionality, particularly where contested adoption was concerned. The birth parents' Article 6 and Article 8 rights were primarily a cause for concern.<sup>131</sup> The policy drift<sup>132</sup> away from the intentions in the statute must therefore be addressed to restore the balance between the power of the state and the protection of parental rights.

There is significant disadvantage to birth mothers in the lack of mandatory requirements in the subordinate legislation. A stricter observance of the Adoption Regulations and the NMS is crucial when adoption is part of a child's care plan, at the very least the local authority should be compelled to ensure birth mothers are kept informed about their child's adoption plan provided it is in the child's interests to do so.<sup>133</sup> This involvement must include formal notification of the plan to adopt, because only with the knowledge of this can they seek legal advice. A transparent and fair process is imperative if birth mothers' human rights are to be protected. If consent to adoption is being sought, then before it is given, the consequences must be explicitly explained to birth mothers and witnessed, preferably in the event of her having sought legal advice. The law in the ACA and the Regulations is clear as regards the

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<sup>129</sup> Devine, *The limits of state power*, 1.

<sup>130</sup> Ibid 168.

<sup>131</sup> Choudhry, S., *The Adoption and Children Act 2002, The Welfare Principle and the Human Rights Act 1998- A Missed Opportunity?* *Child and Family Law Quarterly*, (2003) Vol 119 120.

<sup>132</sup> In the '*Limits of State Power*' 146. Devine argues that this has occurred with the CA 1989 but this drift is also evident with the ACA.

<sup>133</sup> As per Lord Justice McFarlane, 21.

requirements for consent. If the person seeking consent cannot be certain and free of doubt that the signatory is giving consent 'unconditionally and with full understanding of what is involved' then it should not be accepted. It is probable that this can only be completely unambiguous where there are at least two officials physically involved in obtaining consent as per the requirement of the law.<sup>134</sup> Adoption may be inevitable, but birth mothers still retain the right to contest it in court.

The current 'letterbox contact' system which encourages adopters to engage in the exchange of letters but then fails to monitor, facilitate or assist is inappropriate to such a crucial provision. In a time where open adoption is strongly evidenced as a benefit to many children, a more robust process is required that compels parties to maintain contact. If an agreement for contact cannot be honoured for good reason, then birth mothers should always be notified. It is simply unacceptable for women to remain uninformed when letters are of such profound importance to their wellbeing.

The narratives on court processes were intertwined with complaints about 'forced adoption'. Research carried out from the 1990s to the current day raises concerns about the trauma suffered by birth parents in public child law proceedings. This thesis' findings replicate previous results. The Family Justice System may have evolved, but for many birth mothers the process has remained static. Initiatives such as the FDAC<sup>135</sup> are one aspect of family justice which is improving outcomes for families both in and out of court, but there is a long way to go. Funding for the continuation of the FDAC continues to be uncertain and currently only parents with drug/alcohol problems are referred. A FDAC judge has stated that the model can and should be extended to families where addiction is not the primary cause of child protection interventions.<sup>136</sup> She believes that the success of the FDAC in helping parents overcome their problems and care for their children is partly down to the direct interaction with the judge, or as she put it 'I go beyond the barrier'. This is a compelling ideal that speaks not only of moving beyond the physical barrier of the bench but of the psychological barrier between parents and judges that has long existed in the adversarial courts. Research has already evidenced the success of the FDAC in keeping families together.<sup>137</sup> This existing

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<sup>134</sup> Consent must be signed and witnessed by someone other than the person obtaining the consent. 'Consent to Adoption' [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/687605/a104-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687605/a104-eng.pdf).

<sup>135</sup> Based on the principles of therapeutic jurisprudence or 'problem solving judges' the judge works personally with the parent rather than through counsels for the parties. Harwin, J, Alrouh, B, Ryan, M, Tunnard, J., Community Care: Embedding family drug and alcohol courts into family justice, 3 July 2014.

<sup>136</sup> Interview with FDAC judge, 3 January 2018.

<sup>137</sup> For a helpful evaluation of the FDAC see Harwin, J, Ryan, M., et al., *The Family Drug Alcohol Court (FDAC) Evaluation Project Final Report*, (2011) Brunel University.

knowledge could be enhanced with further research into the FDAC model which seeks to understand the crucial elements that motivate parents to overcome the problems which can lead to child care proceedings and eventual adoption.

The need for independent support during court proceedings is long overdue. The support should be separate from and different to any litigation friend or Makenzie friend. Often it is human and not additional legal support that is needed. The FDAC use 'parent mentors' to support parents. These are individuals who have themselves experienced addiction and child care proceedings, 'FDAC parent mentors provide a volunteer befriending service to parents throughout their involvement with the court'.<sup>138</sup> I would argue that a similar model could be introduced to support mothers during care and placement proceedings where empathic and non-judgmental support can make a significant difference to both the short and long-term wellbeing of birth mothers.

Birth mothers should have the opportunity to be involved in the adoption process as much as is feasible. Their views should be sought and if it is possible to uphold any wishes they express, then this should be honoured. The rush to have children adopted is likely to be a significant reason why birth mothers are excluded from the process. Therefore, as soon as adoption is planned for a child they should be consulted. Important factors such as advising them if their children have moved in with adopters, if they are settling in, potential dates for contact and letterbox arrangements should be communicated directly to them. Birth mothers did not mind if plans were changed but they objected to not being told anything from the time their children's final care orders were made. This increased their levels of distress significantly. The few birth mothers who were involved and informed coped far better with the process.

It must be acknowledged that birth mothers continue to be parents even if they are prevented from parenting their children, currently there is little evidence that this recognition exists within adoption services. Birth mothers have a role to play in their children's future and therefore openness should be mediated along a continuum. This includes being kept informed and having contact if this is in the child's best interests. Currently, birth mothers are all too often 'shut out' of their children's lives early on in care proceedings. Children should have access to information about their birth family's life either directly or through a third party. Support for birth must be provided independently from the statutory framework and involve practitioners with no access to the child protection records. This lessens the risk that birth mothers will be stigmatised and allows them the autonomy to disclose their own experiences. All support, whether before, during or after adoption should be designed to empower and help women

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<sup>138</sup> Maycock, J., FDAC parent mentors – a unique approach to supporting parents *Family Law* 21 August 2017.



make informed choices about their futures.<sup>139</sup> As Macfarlane LJ has suggested there are long-term benefits in ‘focussing for a time on the parent rather than exclusively on protecting the child’.<sup>140</sup> It is hoped important messages such as this from senior judges will eventually filter down to practitioners who work with birth mothers and their children.

These improvements to adoption practice would require what Martha Fineman terms as ‘a substantial reorientation of political culture, as well as adjustments to legal theory’.<sup>141</sup> This seems unlikely when the political and legal position on adoption has evolved to place the child’s welfare as paramount, with the rights of birth parents existing and solely surviving in relation to the child’s interests. It is therefore crucial that academic research continues to provide a voice for those who are silenced in adoption. This will ensure that evidence of the defects in the system is exposed.

## **Conclusion**

This article has investigated the subjective impact of adoption law by presenting findings that are contextualised within the legal framework of the ACA. The focus has been directed towards the respective views, perceptions and feelings of birth mothers. From their narratives, it is possible to appreciate a great deal about the operational law, though the eyes of the women who gave birth to children now adopted by way of the state and the family courts. These personal accounts have provided depth and meaning to a problematic and controversial area of the law. Overall, there has been the commitment to analyse and disseminate respondents’ stories through their own words to achieve the study’s key objective; to empower those women by giving them a voice.

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<sup>139</sup> This recommendation originally cited by Charlton, *Still Screaming*, 28-29. This research was the primary inspiration for the current research.

<sup>140</sup> Lord Justice Macfarlane, 11.

<sup>141</sup> Fineman, M, A., ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20:1 *Yale Journal of Law and Feminism* 9.