

**Reconciling Adoptees' Identity Rights and Biological Parents' Privacy in International  
Law**

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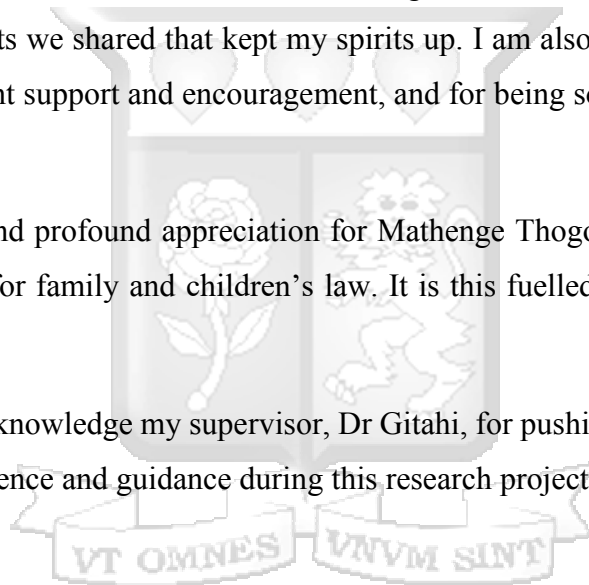
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## DECLARATION

I, **WAKORI NEEMA WANGONYO**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referenced are accordingly acknowledged.

Signed: 

Dated: 04/04/2025

This dissertation has been submitted for examination with my approval as university supervisor.

Signed: Dr. Jennifer Gitahi 

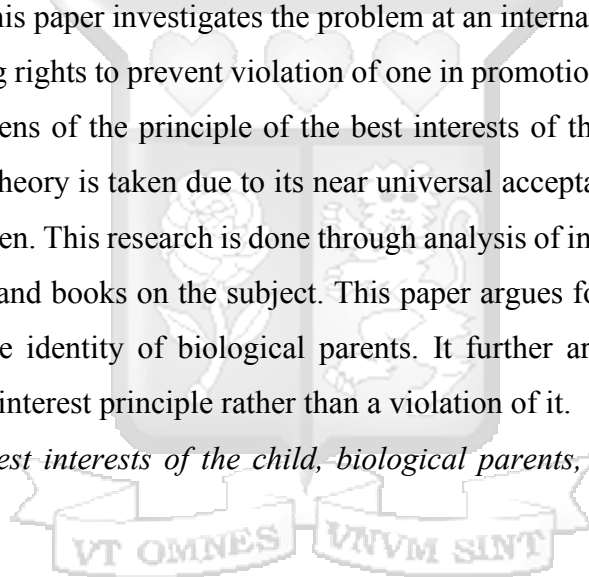
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## ABSTRACT

Traditionally, adoption has characteristically maintained the confidentiality and anonymity of biological parents and upheld the importance and permanence of the new family. Not only was information about biological parents seen as unimportant, but as a hindrance to the stability of the new family. Over the years, international laws on children's rights have been interpreted in favour of opening up sealed adoption records. It is argued that a child has a right to identity which includes the right to know of one's genetic origins. In advocating for this argument, there is a move to violating privacy rights of biological parents who consciously and deliberately sought anonymity in the name of promoting their child's best interests. This new move completely neglects the rights of both biological and adoptive parents and threatens the stability and structure of the adoption process as we know it. This paper investigates the problem at an international level with a view of reconciling the competing rights to prevent violation of one in promotion of another. The problem is analysed through the lens of the principle of the best interests of the child. This approach to employ the best interest theory is taken due to its near universal acceptance and application in all matters concerning children. This research is done through analysis of international legislation and cases, as well as articles and books on the subject. This paper argues for maintenance of privacy and confidentiality of the identity of biological parents. It further argues that the result is in accordance with the best interest principle rather than a violation of it.

**Key words:** *adoption, best interests of the child, biological parents, right to identity, right to privacy*



## List of Abbreviations

BIC - Best interests of the child

CRC - Committee on the Rights of the Child

ECHR - European Convention of Human Rights

ECtHR - European Court of Human Rights

GN - Global North

GS - Global South

Hague Adoption Convention - Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

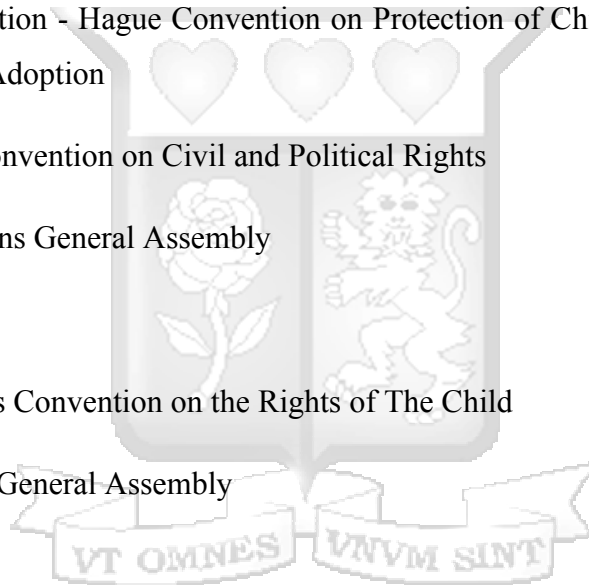
ICCPR - International Convention on Civil and Political Rights

LNGA - League of Nations General Assembly

UN - United Nations

UNCRC - United Nations Convention on the Rights of The Child

UNGA - United Nations General Assembly



## List of Cases

*Godelli v Italy*, ECtHR Judgement of 25 September 2012.

*Jäggi v Switzerland*, ECtHR Judgement of 13 October 2006.

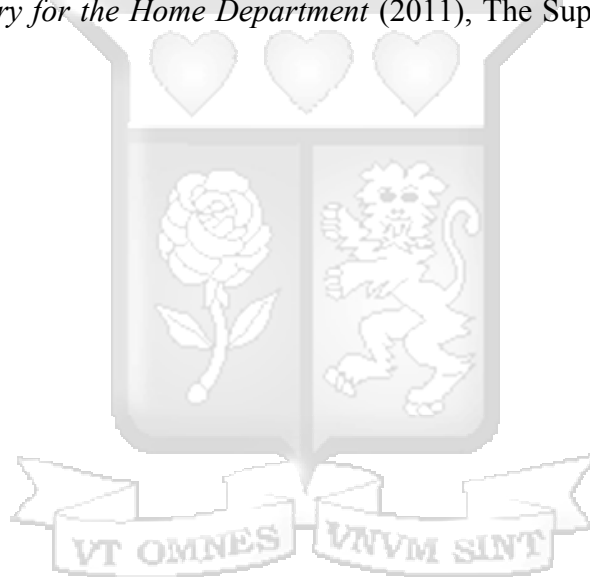
*Kearns v France*, ECtHR Judgement of 10 January 2008.

*Lebbink v Netherlands*, ECtHR Judgement of 1 June 2004.

*Mikulić v Croatia*, ECtHR Judgement of 7 February 2002.

*Odièvre v France*, ECtHR Judgement of 13 February 2003.

*ZH (Tanzania) v Secretary for the Home Department* (2011), The Supreme Court of the United Kingdom.



## **List of Legal Instruments**

*Adoption (Northern Ireland) Order (1987).*

*Children Act (Act No 29 of 2022)(Kenya).*

*Convention on consent to marriage, minimum age for marriage and registration of marriages, 7 November 1962, 973 UNTS 7525.*

*CRC General comment no 5 on the general measures of implementation of the convention on the rights of the child, 2003.*

*CRC General comment no 12 on the right of the child to be heard, 2009.*

*CRC General comment no 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013.*

*ECAC, 24 April 1967, 634 UNTS 9067.*

*ECAC (Revised), 27 November 2008, CoETS 202.*

*ECHR, 4 November 1950, 213 UNTS 2889.*

*English Children Act (1989).*

*Hague Adoption Convention, 29 May 1993, 1906 UNTS 31922.*

*ICCPR, 16 December 1966, 999 UNTS 14668.*

*Legislative history of the convention on the rights of the child, UN Office of the High Commissioner for Human Rights (OHCHR) Vol I, 2007.*

*LNGA, Geneva Declaration of the Rights of the Child, 26 September 1924.*

*Norwegian Act relating to Children and Parents (1981).*

*Norwegian Act relating to adoption (2018).*

*Scotland Adoption of Children Act (1930).*

*UNCRC, 20 November 1989, 1577 UNTS 27531.*

UNGA, *Declaration on the rights of the child*, UN A/Res/1386(XIV), 20 November 1959.

UNGA, *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, UN A/Res 41/85 3 December 1986.

World Summit for Children, *World declaration on the survival, protection and development of children*, 30 September 1990.



## CHAPTER 1: INTRODUCTION

### 1.1 BACKGROUND

The word 'adopt' means to take something on as if it were your own.<sup>1</sup> Similarly, adoption of children refers to the process by which a person permanently assumes the parental responsibility and rights over a child who is not naturally theirs.<sup>2</sup> The child may be referred to as an adoptee, the new parents as adoptive parents or adopters, and the natural parents as biological or birth parents - these are the parties to an adoption process. Different countries and cultures have different practices and conceptions of the adoption process. For instance, in Hawaii and Tahiti, adoption is not founded on need (either of the child or of the adoptive parents) but is conducted so as to strengthen ties between chiefs of the communities.<sup>3</sup> Need may arise in other situations. Circumstances such as death, temperamental unfitnes, poverty, or other sources of inability to provide for children - such providence can be in many spheres - of or by biological parents, are some examples.<sup>4</sup>

Where there is free access and flow of information between the parties to the process without restriction, such an adoption is deemed to be open; while where confidentiality of the parties is maintained, we say it is closed. Traditionally, adoptions were closed in order for the child to be brought up as the adoptive parents' own without any interference from the biological parents, or reminder that the child is not naturally their own.<sup>5</sup> Historically, Roman law recognised the significance of adoption as ensuring the perpetuance of family inheritance and thus it needed to imitate nature as much as possible.<sup>6</sup> It would even be common practice to match adoptive parents with children who bear similar physiological characteristics.<sup>7</sup> In ancient Babylon, it was a criminally sanctioned offence for adoptees to claim not to have been born of the adoptive parents, or to search for their biological parents.<sup>8</sup> Over time, there was increasing recognition that adoption

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<sup>1</sup> Black's Law Dictionary, 6th ed.

<sup>2</sup> Black's Law Dictionary, 6th ed.

<sup>3</sup> Terrell J, Modell J, 'Anthropology and adoption' 96 *American Anthropologist* 1, 1994, 156.

<sup>4</sup> Post S, 'Adoption theologically considered' 25 *The Journal of Religious Ethics* 1, 1997, 152.

<sup>5</sup> Bueren G, 'Children's access to adoption records: state discretion or an enforceable international right?' 58 *The Modern Law Review* 1, 1995, 41.

<sup>6</sup> Bueren G, 'Children's access to adoption records', 39.

<sup>7</sup> Post S, 'Adoption theologically considered', 150.

<sup>8</sup> Bueren G, 'Children's access to adoption records', 39.

is not solely beneficial to adoptive parents, as it was formerly designed.<sup>9</sup> With a turn to serving the welfare of the neglected and dependent child,<sup>10</sup> the best interest of the child came into focus.<sup>11</sup>

There is ongoing debate as to whether adoptees should have the right to access information about their genetic origins, even where such records were sealed. It is propounded that closed adoptions served single women who wished to escape the stigma associated with having children out of wedlock.<sup>12</sup> This agreement of confidentiality had the bonus of serving other parties to the adoption. The adoptees escaped the stigma of illegitimacy, while the adoptive parents saw in the process a solution to their infertility.<sup>13</sup> Changes in societal attitudes, however, led to a shift in a demand for more open adoptions. The sexual revolution contributed in part to this shift as earlier taboos were challenged.<sup>14</sup> Secrecy due to shame of illegitimate births is thus no longer seen as a cogent reason for maintaining confidentiality.<sup>15</sup> Additionally, the adoption of the United Nations Convention on the Rights of the Child (UNCRC) led to an increasing concern for the interests of the child, and increased recognition for the importance of genetic ties for adopted children as well.<sup>16</sup> With the increase in children's rights, and civil rights movements in areas such as the US, the matter of access to genetic records was framed as a rights issue.<sup>17</sup> The argument for open records is grounded on a child's right to identity enshrined in the UNCRC.<sup>18</sup>

This growing move to remove confidentiality from the process seems to be at odds with the biological parents' right to privacy recognised in the International Convention on Civil and Political Rights (ICCPR).<sup>19</sup> The dilemma as to whose rights are preeminent is one with legal and

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<sup>9</sup> Sokoloff B, 'Antecedents of American adoption' 3 *The Future of Children* 1, 1993, 17.

<sup>10</sup> Post S, 'Adoption theologically considered', 151.

<sup>11</sup> Sokoloff B, 'Antecedents of American adoption', 17.

<sup>12</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement: a historical perspective' 36 *Law & Society Review* 2, 2002, 434.

<sup>13</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 434.

<sup>14</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 442.

<sup>15</sup> Callus T, 'Tempered hope? A qualified right to know one's genetic origin: *Odièvre v France*' 67 *The Modern Law Review* 4, 2004, 663.

<sup>16</sup> Terrell J, Modell J, 'Anthropology and adoption', 156.

<sup>17</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 441.

<sup>18</sup> Articles 7 and 8, *UNCRC*, 20 November 1989, 1577 UNTS 27531.

Article 7 provides that, "The child shall have ... as far as possible, the right to know ... his or her parents."

Article 8 states that, "State Parties undertake to respect the right of the child to preserve his or her identity, including ... family relations as recognised by law without unlawful interference."

<sup>19</sup> Article 17, *ICCPR*, 16 December 1966, 999 UNTS 14668. It provides, "No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

ethical ramifications. This is more so given that the records aimed to be open are those of birth parents who were promised confidentiality and privacy.<sup>20</sup> In spite of the shift to open records, it is still argued that protecting the privacy of both the biological and adoptive parents encourages adoption and thus promotes the best interest of the child.<sup>21</sup> Further, contrary to the argument that adoptees have an innate desire to know their genetic origins, statistics show that the majority of them do not search for this information.<sup>22</sup> This is inconsistent with the view that recognition of a child's identity right is dependent on knowing one's biological history.

There are several international laws that speak to the child's right to identity and the parents' right to privacy, yet none seem to reconcile the conflict. Which right should prevail over the other is of great importance in ensuring a just adoption. Contemporary discussions advocate for open access to information based on the principle of best interests of a child. However, is it simply by slapping the title 'child's best interests' on a practice that we make it so in fact?<sup>23</sup> Is simply conceding to a child's wishes, in the name of respecting their participation rights, equivalent to doing what is in the child's best interest?<sup>24</sup> While it is important to know about one's origin, it is also important to acknowledge that it is not always in the child's best interest to have this information revealed, and thus the term 'best interest' cannot be univocally employed. The focus of the study is on balancing these competing interests and the basis for prioritising one right over the other.

## **1.2 STATEMENT OF THE PROBLEM**

The conflict between a child's right to identity and a biological parent's right to confidentiality is a significant challenge in the adoption process. While adoption is fundamentally geared towards serving the best interests of the child, the tension between these two rights makes for an intricate legal and ethical landscape. On one hand, adoptees increasingly assert their right to know their biological origins, citing psychological, emotional, and cultural benefits. On the other hand, biological parents often seek to maintain their privacy, fearing the potential consequences of

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<sup>20</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 435.

<sup>21</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 445.

<sup>22</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 450.

<sup>23</sup> Walton R, 'The best interests of the child' 6 *The British Journal of Social Work* 3, 1976, 308.

<sup>24</sup> Walton R, 'The best interests of the child', 309.

disclosure on their lives and relationships. These competing interests create a complex legal dilemma.

This research seeks to reconcile the right to identity with the right to confidentiality in adoption, through examination of the best interest of the child. While international human rights frameworks recognize both rights, their implementation in the adoption process sparks great controversy. This study proposes that maintaining the confidentiality of biological parents neither undermines a child's right to identity nor contravenes the best interests of a child.

### **1.3 RESEARCH OBJECTIVES**

- a. To outline the 'best interest of the child' principle as the theoretical framework of the study.
- b. To analyse the legal foundations of the child's right to identity in the adoption process as established in international laws through the lens of international legal instruments and decided cases.
- c. To determine the optimal application of the best interest theory in reconciling the right to identity and right to privacy in adoption.

### **1.4 RESEARCH QUESTIONS**

1. How does the 'best interest of the child' principle provide a theoretical framework in adoption law?
2. What are the legal frameworks governing a child's right to identity in adoption, and how has this right been interpreted?
3. What is the most equitable practice in balancing a child's right to identity and a biological parent's right to privacy in adoption as informed by the best interest theory?

### **1.5 HYPOTHESIS**

The existing legal framework on adoption fails to offer clear guidance on how to balance a child's right to identity and a biological parent's right to confidentiality. This research hypothesises that the right to identity can be protected without compromising the privacy and autonomy of biological parents. Further, this study contends that closed adoptions better serve the best interests of the child by fostering a stable environment free from potential interference by biological parents. Closed adoptions also offer critical protection against the risk posed by unsafe or unfit biological

parents, ensuring the child's well-being. Confidentiality also promotes adoptions more generally as more biological parents and adoptive parents are willing to opt for this framework. This serves the interests of dependent children.

## 1.6 THEORETICAL FRAMEWORK

In making decisions, creating legislation, and in other matters that concern children, it is widely agreed upon that the focal point is the principle of the best interest of the child.<sup>25</sup> The best interest theory serves as a good foundation because it makes the object of all decisions, that is the child, the key consideration. This is an important factor in adoption as the child often doesn't have a say in the original adoption agreement.<sup>26</sup> It is also suitable due to its broad acceptance. This principle is enshrined in the UNCRC, the most universally ratified international agreement –

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration.”<sup>27</sup>

Of the several spheres in which this principle is applied, adoption is very notable. It is used to determine whether a child should be placed for adoption, who is fit to adopt a child and other laws regulating the adoption process. There lies a challenge in determining what particularly constitutes a child's best interest due to lack of set criteria that are universally acceptable and applicable.<sup>28</sup> Different individuals, cultures and jurisdictions have varying conceptions on what is ideal for a child or children in general, and no conception can be deemed superior to the other.<sup>29</sup> Further, children have numerous needs, be they physical, emotional, spiritual, psychological or otherwise, and such needs may be assigned different priority at different times by different people.<sup>30</sup> Additionally, determining a child's best interest often relies on the discretion of the decision maker.<sup>31</sup> Fortunately, some professionals, jurisdictional laws and scholars provide guidelines as to what to consider when making decisions regarding children in order to help simplify an otherwise

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<sup>25</sup> Skivenes M, 'Judging the child's best interests: rational reasoning or subjective presumptions?' 53 *Acta Sociologica* 4, 2010, 339.

<sup>26</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 436.

<sup>27</sup> Article 3(1), *UNCRC*.

<sup>28</sup> Walton R, 'The best interests of the child', 310.

<sup>29</sup> Walton R, 'The best interests of the child', 310.

<sup>30</sup> Walton R, 'The best interests of the child', 310.

<sup>31</sup> Skivenes M, 'Judging the child's best interests', 339.

complex endeavour.<sup>32</sup> Chapter 2 will offer a more comprehensive breakdown of the best interest theory whereas Chapter 4 will apply it to the specific dilemma of balancing identity and privacy rights in the adoption process.

## 1.7 LITERATURE REVIEW

Katherine Vandergrift notes that the best interests of the child principle is mentioned eight times in the UNCRC and deals with many matters concerning children, including adoption.<sup>33</sup> The reason for giving importance to the principle and giving children priority is due to their vulnerability.<sup>34</sup> It is asserted that the best interest principle is a maximising principle.<sup>35</sup> It does not set out minimum requirements but the highest standard to be attained. Unfortunately, there exists a challenge in implementing the principle due to the existence of a variety of interpretations.<sup>36</sup> It is critiqued as being a vague principle. This creates an alibi for exercise of power over children through family control and arbitrary decisions by judges and others.<sup>37</sup>

Vandergrift recognises four approaches to interpreting the best interest principle that could lead to different outcomes.<sup>38</sup> The first is parental autonomy which allows parents to make decisions for the family unit without state interference.<sup>39</sup> It is based on the rebuttable presumption that parents will make decisions that are in their children's best interest.<sup>40</sup> The other approach is liberal paternalism which tries to give equal attention to nurturance by parents and the self determination of children.<sup>41</sup> Dynamic self-determination, the third approach, advocates not just for children to be heard, but for their participation in the actual making of decisions.<sup>42</sup> Lastly, utilitarianism aims to use the common interests of a majority of children as the test.

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<sup>32</sup> Skivenes M, 'Judging the child's best interests', 340; Walton R, 'The best interests of the child', 309.

<sup>33</sup> Vandergrift K, 'The best interests and human rights of children: an ethical philosophical framework based on Martha Nussbaum's capabilities framework and Alan Gewirth's community of rights' Published MA Thesis, Canada's University, Ottawa, 2009, 29.

<sup>34</sup> Vandergrift K, 'The best interests and human rights of children', 34.

<sup>35</sup> Vandergrift K, 'The best interests and human rights of children', 33.

<sup>36</sup> Vandergrift K, 'The best interests and human rights of children', 30.

<sup>37</sup> Vandergrift K, 'The best interests and human rights of children', 36.

<sup>38</sup> Vandergrift K, 'The best interests and human rights of children', 31.

<sup>39</sup> Vandergrift K, 'The best interests and human rights of children', 36.

<sup>40</sup> Vandergrift K, 'The best interests and human rights of children', 38.

<sup>41</sup> Vandergrift K, 'The best interests and human rights of children', 41.

<sup>42</sup> Vandergrift K, 'The best interests and human rights of children', 44.

The question often is as to who has the right to determine the best interests of a child.<sup>43</sup> Arguments in support of open adoptions lean mostly towards dynamic self-determinism as the guide. They propose that children are best placed to make decisions concerning their well-being and have the right to participate in said decision-making. Strong advocates for closed adoptions take the approach of family autonomy. In cases where children are only allowed to access records with the consent of their adoptive parents, what is observed is liberal paternalism. The utilitarian approach can yield both opposing outcomes depending on the interest focused on.

Giroux and De Lorenzi, in their article, propose that there are two parts of identity, one that is static, and another dynamic.<sup>44</sup> The static, which they are more concerned with, includes name, sex, physical features, parenthood, and genetic image.<sup>45</sup> It is their argument that for the right to identity provided for in the UNCRC to be fully protected, the right to know one's genetic origins must also be recognised.<sup>46</sup> They further state that it is in a child's best interest to have their right to identity recognised.<sup>47</sup> They note that several international instruments recognise this right, citing the Resolution on a European Charter of Rights of the Child enacted by the Council of Europe.<sup>48</sup>

They delve into an interpretation of Article 7 of the UNCRC that supports their views. Article 7 provides for the right of the child to know and be cared for by his or her parents, as far as possible. They interpret 'parents' to include progenitors, that is, the biological parents, in reference to the right to know.<sup>49</sup> With regards to the right to be cared for, 'parents' are understood as being adoptive parents only. The impossibility that would hinder the realisation of the right to know one's progenitors should only be factual, and not legal.<sup>50</sup> They further state that States have a responsibility under the UNCRC to facilitate the effective realisation of the recognised rights.<sup>51</sup>

In addressing the conflict that exists between the rights of the adoptee to identity and that of the biological parent to privacy, they support the child's position. It is their view that when the interests

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<sup>43</sup> Vandergrift K, 'The best interests and human rights of children', 36.

<sup>44</sup> Giroux M, De Lorenzi M, "Putting the child first": a necessary step in recognition of the right to identity' 27 *Canadian Journal of Family Law* 1, 2011, 60.

<sup>45</sup> Giroux M, De Lorenzi M, "Putting the child first", 60.

<sup>46</sup> Giroux M, De Lorenzi M, "Putting the child first", 61.

<sup>47</sup> Giroux M, De Lorenzi M, "Putting the child first", 71.

<sup>48</sup> Giroux M, De Lorenzi M, "Putting the child first", 67.

<sup>49</sup> Giroux M, De Lorenzi M, "Putting the child first", 72.

<sup>50</sup> Giroux M, De Lorenzi M, "Putting the child first", 74.

<sup>51</sup> Giroux M, De Lorenzi M, "Putting the child first", 86.

of children are in conflict with those of others, those of the child are considered paramount and this should not be an exception.<sup>52</sup> They propose establishing a registry that shall contain all the information that a child may desire as realisation of the right requires creation, preservation and subsequent disclosure of information.<sup>53</sup>

This paper has a few weaknesses, the first being their interpretation of the word ‘parents’ in Article 7 of the UNCRC. Early in the paper they emphasise the difference between the term ‘parent’ and ‘progenitor’ yet refuse to adhere to their own distinction in interpretation. Further, they note that the qualification of the right by the phrase ‘as far as possible’ was to guarantee State sovereignty in making their national legislation. Specifically, it was to assure States that their laws allowing secret adoptions, anonymous in vitro fertilisation with donors and genetic engineering experiments were in conformity with the UNCRC.<sup>54</sup> They then fail to adequately explain why this historic position should be abandoned.<sup>55</sup> Another weakness of the paper lies in its failure to elaborate why it is in a child’s best interest to know their genetic origins.

Colin-Greene articulates what is commonly agreed - that all parties to an adoption face shame and stigma. For biological parents, especially mothers, the source of shame is immoral or embarrassing circumstances. For adoptive parents, their shame stems from issues of infertility, and for adoptees from early abandonment.<sup>56</sup> With this in mind, it is noted that in some jurisdictions, adoption records were initially open, but later sealed due to the stigmatisation of adoption.<sup>57</sup> Worth noting is that the adoption triad still had open access to the records; the closure was against the public.<sup>58</sup> The paper posits that full confidentiality came after World War II when more women bore children out of wedlock and sought protection from cultural prejudices.<sup>59</sup> The author believes that social workers began interpreting the best interests of the child to mean the full separation between

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<sup>52</sup> Giroux M, De Lorenzi M, “Putting the child first”, 72.

<sup>53</sup> Giroux M, De Lorenzi M, “Putting the child first”, 89.

<sup>54</sup> Giroux M, De Lorenzi M, “Putting the child first”, 75.

<sup>55</sup> Giroux M, De Lorenzi M, “Putting the child first”, 78. They proffer that the provisions of the UNCRC should be interpreted in light of the development of the legal systems of the countries concerned but do not explain what developments have led to their new interpretation.

<sup>56</sup> Colin-Greene J, ‘Identity and personhood: advocating for the abolishment of closed adoption records laws’ 49 *Connecticut Law Review* 4, 2017, 1273.

<sup>57</sup> Colin-Greene J, ‘Identity and personhood’, 1275.

<sup>58</sup> Colin-Greene J, ‘Identity and personhood’, 1275.

<sup>59</sup> Colin-Greene J, ‘Identity and personhood’, 1276.

adoptees and their biological parents.<sup>60</sup> Fortunately, this also favoured ashamed adoptive parents, as producing offspring was viewed as a symbol of marital success.<sup>61</sup>

Colin-Greene attributes the shift back to the desire for open adoptions to change in cultural perspectives regarding sex, single parenthood and gender roles. Despite the shift, biological parents may still file denial of consent, a contact veto or a request for non-disclosure in some jurisdictions.<sup>62</sup> It is stated that the psychological interests of adoptees are better served where there is unfettered access to records.<sup>63</sup> They are likely to feel deep grief, rejection, a sense of not belonging and an absence of personal identity without knowledge of their genetic origins. Additionally, it is in the public interest to allow disclosure so as to prevent the detrimental effects of sealing records on adoptees as a class.<sup>64</sup>

In making the argument for disclosure, Colin-Greene's paper asserts that the right granted to parents to control the upbringing of their children is characterised by the treatment of children as chattels.<sup>65</sup> This assertion is made in objection to adoptive parents' denying adoptees access to their biological parents' records. It also objects to biological parents making the decision to seal their records as adoptees have no say. Unfortunately, this argument fails to consider the vulnerability of children that necessitates mature adults to make decisions on their behalf. Thus, while making a good case for protection of the psychological interests of the child, the paper fails to consider other interests that parents and the State(s) may be protecting in denying disclosure.

Turkمندag writes about how decisions by the ECtHR have fuelled the support for openness in the adoption process. This is because Article 8 of the ECHR, which provides for the right to privacy and family life, has been interpreted to incorporate the concept of personal identity. This is said to include the right to obtain information about a biological parent.<sup>66</sup> The author argues that genetic information is the most basic information that pertains to the right to access information for

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<sup>60</sup> Colin-Greene J, 'Identity and personhood', 1276.

<sup>61</sup> Colin-Greene J, 'Identity and personhood', 1276.

<sup>62</sup> Colin-Greene J, 'Identity and personhood', 1278.

<sup>63</sup> Colin-Greene J, 'Identity and personhood', 1283.

<sup>64</sup> Colin-Greene J, 'Identity and personhood', 1290.

<sup>65</sup> Colin-Greene J, 'Identity and personhood', 1291.

<sup>66</sup> Turkمندag I, 'The donor-conceived child's 'right to personal identity': the public debate on donor anonymity in the United Kingdom' 39 *Journal of Law and Society* 1, 2012, 63.

understanding one's identity.<sup>67</sup> The support for this position is backed by studies of adopted children that have found that knowledge of a child's background is crucial to positive and non-confused self-identity.<sup>68</sup> Another argument for prioritising the right to identity states that it is morally wrong to deceive children and deprive them of knowledge about who they are.<sup>69</sup> This trend towards biological truth holds that lack of the sought after information causes damage and suffering to the child.<sup>70</sup> It is thus argued that it is in an adoptee's best interest to be informed of their genetic heritage. This view, and others that posit that an adoptee's identity is incomplete without genetic information fail to account for the many more content adoptees who do not seek this information. Additionally, Turkmendag argues for open access of information because global attitudes towards information and rights to information have changed.<sup>71</sup> While I concede that consensus is a good foundation for law and policy, it cannot be used as the sole or best yardstick for what is proper and just, or in this case, as the criteria for what a child's best interest is.

On the other hand, Marshall argues against unsealing closed adoption records. In addressing the best interests of the child, it is stated that, from the onset, biological parents may choose to relinquish their children in order to protect them from abuse, for example.<sup>72</sup> She proffers that absent the option for concealment of identity, many mothers would opt either to abort or deliver in unsafe conditions that jeopardise both their healths.<sup>73</sup> Further, it is advanced that where parents relinquish their children freely, what is in fact in the best interest of the child is to have them enjoy stable emotional relations with a new family as soon as possible.<sup>74</sup> This is in keeping with the view of adoption as an equal substitute to the natural family. Where the information about biological parents is revealed, the stability of the new family environment is likely to be disrupted.<sup>75</sup>

Marshall relies on the self-determining nature of human beings to make a strong argument against revealing confidential information. This is done in two prongs: Firstly, biological parents should

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<sup>67</sup> Turkmendag I, 'The donor-conceived child's 'right to personal identity'', 63.

<sup>68</sup> Turkmendag I, 'The donor-conceived child's 'right to personal identity'', 71.

<sup>69</sup> Turkmendag I, 'The donor-conceived child's 'right to personal identity'', 65.

<sup>70</sup> Thompson M, *Me*, 1 ed, Routledge, New York, 2014, 91-92.

<sup>71</sup> Turkmendag I, 'The donor-conceived child's 'right to personal identity'', 66.

<sup>72</sup> Marshall J, 'Concealed births, adoption and human rights law: being wary of seeking to open windows into people's souls' 71 *The Cambridge Law Journal* 2, 2012, 332.

<sup>73</sup> Marshall J, 'Concealed births, adoption and human rights law', 336.

<sup>74</sup> Marshall J, 'Concealed births, adoption and human rights law', 331.

<sup>75</sup> Marshall J, 'Concealed births, adoption and human rights law', 336.

be free to choose whether or not to relinquish their children, and whether to have their information divulged. Forcing them to reveal information is a form of coercion that goes against free human nature and contravenes human rights laws.<sup>76</sup> Secondly, development of one's personality and identity doesn't need to be rooted in genetics for we are free to decide who we are.<sup>77</sup> The weakness of this argument is in recognising that while adoptees have the capacity to determine who they are (their identity), they may choose not to exercise it and still suffer psychological distress.

This paper makes the argument that protecting the best interests of the child does not equate to violating the privacy of biological parents. The breadth of the best interest principle is multifaceted, encompassing several needs of children that are simultaneously in play. The failure of literature on the topic is in not recognising the various interests and proportionally deciding what characterises the best interests of the child as regards sealed adoption records. This paper analyses the various interests. These include the need to have their views heard, the importance of family relations, psychological and emotional needs, and the need for stability and safety. By adopting a more nuanced approach, this paper evaluates which legal frameworks most effectively uphold the best interests of the child, while ensuring the rights of biological parents are not unjustly compromised.

### **1.8 SIGNIFICANCE OF THE STUDY**

This study examines the delicate interplay between a child's right to identity and a biological parent's right to confidentiality, two fundamental rights enshrined in international human rights law. The tension between these rights presents a profound legal challenge in the adoption context. This is because adoptees seek to uncover their heritage, while biological parents may desire to safeguard their anonymity.

The study also advances the principle of the best interest of the child as the basis for reconciling the competing interests of adoptees and biological parents. In doing so, the gap in proportionally weighing different interests of the adoptee in determining what amounts to their best interest is addressed.

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<sup>76</sup> Marshall J, 'Concealed births, adoption and human rights law', 350.

<sup>77</sup> Marshall J, 'Concealed births, adoption and human rights law', 350, 352.

The study's significance extends to advancing justice and promoting human rights in adoption practices. This reinforces the role of law in addressing complex social issues. This research aims to inform international policies and practices that respect both parties' rights while ensuring the child's best interest is upheld. In so doing, municipal and regional law, which mirrors the international sphere, will also be better shaped.

### **1.9 SCOPE OF THE STUDY**

This study focuses on the legal tension between the right of adoptees to know their biological origins, and the right of biological parents to maintain their confidentiality. Focus is on adoptees who are voluntarily relinquished by their biological parents and thus the study does not discuss children separated from their parents through State intervention. The jurisdiction analysed is international rather than domestic. Therefore, the legal instruments and cases studied are of an international character. Any regional or domestic law referred to is used to contextualise international standards, practices and interpretations.

### **1.10 RESEARCH METHODOLOGY**

This paper uses the doctrinal legal research method, employing both primary and secondary sources. The primary sources include international conventions and declarations as well as international case law. Secondary sources include journal articles, books, research papers, and reports. These sources are used to analyse the right to identity that each child has, and the right to privacy that biological parents of adopted children may choose to employ. This analysis is then used to determine how these rights can be harmonised in a manner that promotes the best interest of the child without undermining the confidentiality rights of the biological parents.

### **1.11 LIMITATIONS OF THE STUDY**

**Interdisciplinary Challenges:** While legal analysis is central to this study, the issue also involves psychological, social, and cultural dimensions that may not be fully addressed within a legal framework.

**Limited Data:** Due to confidentiality laws, accessing data on adoption cases is difficult, thus restricting the study's ability to draw on real-life examples.

**Evolving Social Norms:** Perspectives on adoption, identity, and privacy continue to evolve - there is a shift from emphasis on privacy to growing emphasis on identity, and an increase in technological advancements that limit privacy, rendering the findings of the study subject to evolving social attitudes and technological developments.

## **1.12 CHAPTER BREAKDOWN**

Chapter 1 serves as an introductory chapter providing a background to the topic, the hypothesis of this research paper, research questions and objectives, as well as a review of the existing literature. It also states the significance of the study while providing limitations of the same.

Chapter 2 is an analysis of the theoretical framework as is related to the study, that is, the principle of the best interest of the child that crowns all legal frameworks on the rights of the child.

Chapter 3 breaks down and analyses the legal framework governing a child's right to identity and a biological parent's right to confidentiality in adoption, using international instruments and cases decided by international bodies as the basis of analysis.

Chapter 4 essentially applies the best interest theory to determine whether to conceal or reveal information about biological parents.

Chapter 5 is a conclusionary chapter that summarises the findings of the earlier chapters as well as providing recommendations on how to balance the two competing rights based on said chapters.

## CHAPTER 2: THEORETICAL FRAMEWORK

### 2.1 INTRODUCTION

All matters and decisions concerning children are expected to be made in the best interest of the child. This principle is thus the best framework to determine a law or policy on whether adopted children should have access to their biological parents' identifying information. This chapter outlines the legal instruments that provide for the best interests of the child (BIC) principle. It further harmonises the various interpretations of the principle considering comments of the CRC, interpretations by distinguished scholars in children matters, and a few national legislations.

### 2.2 LEGAL FRAMEWORK OF THE BIC PRINCIPLE

Children are in a particularly vulnerable position as they are unable to be the sole authors of their lives.<sup>78</sup> Most decisions concerning children are made on their behalf,<sup>79</sup> and it is thus important to put them squarely in the middle of the considerations. This is why the principle of the BIC is of great significance. This principle is grounded in several international instruments which are discussed herein.

#### 2.2.1 International Declarations

The BIC was first introduced as a principle in the Declaration of the Rights of the Child of 1959.<sup>80</sup> The Declaration stipulated as follows –

“The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in the conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.”<sup>81</sup>

Even prior, the 1924 Geneva Declaration recognised that “mankind owes to the child the best that it has to give.”<sup>82</sup> This statement is also acknowledged within the Preamble of the 1959

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<sup>78</sup> Taylor R, ‘Putting children first: children’s interests as primary considerations in public law’ 28 *Children and Family Law Quarterly*, 2016, 45.

<sup>79</sup> Taylor R, ‘Putting children first’, 47.

<sup>80</sup> Zermatten J, ‘The best interests of the child principle: literal analysis and function’ 18 *International Journal of Children’s Rights* 4, 2010, 484.

<sup>81</sup> Principle 2, UNGA, *Declaration on the rights of the child*, UN A/Res/1386(XIV), 20 November 1959.

<sup>82</sup> Preamble, LPGA, *Geneva Declaration of the Rights of the Child*, 26 September 1924.

Declaration.<sup>83</sup> Despite this early recognition of the principle, there was still a need to develop a binding legal framework as declarations have no legal force.<sup>84</sup> Hence, the UNCRC was drafted.

### 2.2.2 UNCRC

The principle of the best interests of the child is enshrined in Article 3(1) of the UNCRC as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>85</sup>

The importance of the BIC is highlighted by its repetition throughout the provisions of the UNCRC.<sup>86</sup> The principle of the BIC is applicable not only to decisions by state actors, but also to those in a domestic setting.<sup>87</sup> This is emphasised in Article 18 that mandates parents to have the BIC as their basic concern in the upbringing and development of their children.<sup>88</sup>

The principle is not further explained within the Convention. This has left the provision open to multiple interpretations,<sup>89</sup> and criticisms for its vagueness.<sup>90</sup> The State delegates that participated in the drafting of the UNCRC have received reproach for failing to provide clarity on the principle when they had the opportunity.<sup>91</sup> This is particularly so because the BIC was not a novel concept at the point of drafting the UNCRC. It is however hypothesised that because the BIC was already an established and accepted norm, state delegates were willing to accept it without a second thought.<sup>92</sup> Interestingly, during the drafting process, some delegates viewed the principle’s open-

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<sup>83</sup> Preamble, UNGA, *Declaration on the rights of the child*.

<sup>84</sup> Chapdelaine-Feliciati C, ‘Translating the meaning-intention behind the “best interests of the child” principle in the Convention on the Rights of the Child’ in Petrilli S and Ji M (eds) *Intersemiotic perspectives on emotions: translating across signs, bodies and values* ed, Routledge, Oxon, New York, 2023, 121.

<sup>85</sup> Article 3(1), *UNCRC*.

<sup>86</sup> Zermatten J, ‘The best interests of the child principle’, 491-492.

<sup>87</sup> *CRC General comment no 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, 8.

<sup>88</sup> Article 18(1), *UNCRC*.

<sup>89</sup> Walton R, ‘The best interests of the child’, 310.

<sup>90</sup> Skivenes M, ‘Judging the child’s best interests’, 339.

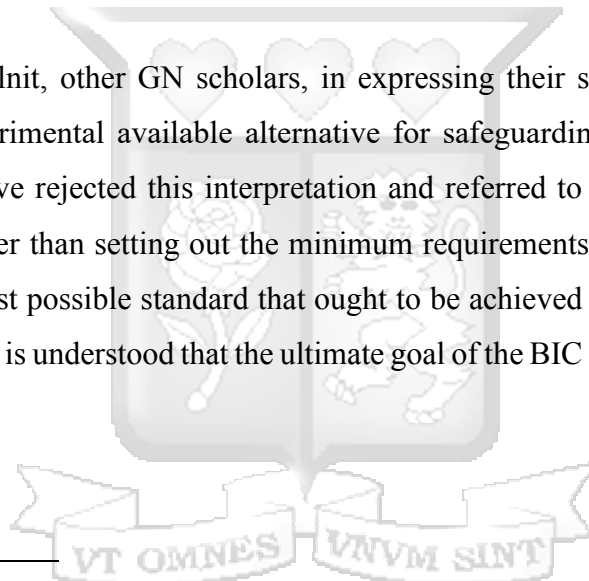
<sup>91</sup> Chapdelaine-Feliciati C, ‘Translating the meaning-intention behind the “best interests of the child” principle’, 126.

<sup>92</sup> Chapdelaine-Feliciati C, ‘Translating the meaning-intention behind the “best interests of the child” principle’, 122.

endedness positively as it meant state sovereignty could be recognised and respected through nationally developed definitions.<sup>93</sup>

Venezuela is the only state that is recorded to have raised concerns about the potential dangerous subjectivity of the BIC, however, she later withdrew her propositions.<sup>94</sup> It is postulated that the withdrawal was because Venezuela received exclusive dissenting opinions.<sup>95</sup> Additionally, the state was a representative of the Global South (GS) which has comparatively less political power than Global North (GN) countries.<sup>96</sup> Moreover, the Global North has more scholars who have developed the concept of the BIC to aid in its interpretation.<sup>97</sup> John Eekelaar is considered one of the renowned GN scholars who has made great contributions to the field of family law and specifically on the BIC.<sup>98</sup>

Goldstein, Freud and Solnit, other GN scholars, in expressing their suspicion of the principle, define it as the least detrimental available alternative for safeguarding the child's growth and development.<sup>99</sup> Some have rejected this interpretation and referred to the BIC as a maximising principle.<sup>100</sup> That is, rather than setting out the minimum requirements that, when met, fulfil the BIC, it sets out the highest possible standard that ought to be achieved in order for the BIC to be satisfied. Consensually, it is understood that the ultimate goal of the BIC is the welfare or wellbeing



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<sup>93</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 122.

<sup>94</sup> *Legislative history of the convention on the rights of the child*, UN Office of the High Commissioner for Human Rights (OHCHR) Vol I, 2007, 345.

<sup>95</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 124.

<sup>96</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 124.

<sup>97</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 124.

<sup>98</sup> See Eekelaar J, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' 8 *International Journal of Law, Policy and Family* 1, 1994; Eekelaar J, 'The role of the best interests principle in decisions affecting children and decisions about children' 23 *International Journal of Children's Rights* 1, 2015; Eekelaar J, 'Two dimensions of the best interests principle: decisions about children and decisions affecting children' in Sutherland E and Macfarlane L (eds) *Implementing article 3 of the UNCRC: Best interests, welfare and well-being*, Cambridge University Press, Cambridge, 2016; Eekelaar J, Tobin J, 'Art 3 the best interests of the child' in Tobin J (ed) *The UNCRC: A Commentary*, Oxford University Press, Oxford, 2019.

<sup>99</sup> Walton R, 'The best interests of the child', 307.

<sup>100</sup> Vandergrift K, 'The best interests and human rights of children', 33.

of the child.<sup>101</sup> There is an imposition of a positive obligation to protect and care for the child rather than a mere negative mandate to refrain from harm.<sup>102</sup>

### **2.2.3 Committee on the Rights of the Child (CRC)**

The Committee on the Rights of the Child (CRC) makes reference to the BIC in all its general comments.<sup>103</sup> This is because it is considered one of the general principles of the UNCRC.<sup>104</sup> However, it was not until 2013 that the CRC developed a comprehensive interpretation of the BIC through a General Comment.<sup>105</sup>

The CRC has interpreted the BIC as covering three dimensions: a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.<sup>106</sup> As a substantive right, Article 3(1) of the UNCRC creates an obligation on States to identify, consider and implement the interests of a child.<sup>107</sup> As an interpretive tool, the BIC is used to resolve ambiguities in legal provisions so as to yield a result that most effectively serves the child's best interest.<sup>108</sup> As a procedural right, decision-making processes must involve steps aimed at considering the possible impacts of decisions on the children concerned and giving such considerations due importance.<sup>109</sup>

The BIC performs two main functions, that is, the control criterion and the solution criterion.<sup>110</sup> The former is to ensure that the child is fully able to exercise their rights, and that all obligations towards children are fulfilled. The latter is to help decision makers render the most appropriate decisions, with the most positive or least negative impact. The phrase "in all actions concerning children" in Article 3(1) refers to both active and inactive interventions, such as decisions not to

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<sup>101</sup> Zermatten J, 'The best interests of the child principle', 489.

<sup>102</sup> Zermatten J, 'The best interests of the child principle', 490.

<sup>103</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 119.

<sup>104</sup> *CRC General comment no 5 on the general measures of implementation of the convention on the rights of the child*, 2003, 3-4.

<sup>105</sup> *CRC General comment no 14*.

<sup>106</sup> *CRC General comment no 14*, 4.

<sup>107</sup> *CRC General comment 14*, 4.

<sup>108</sup> Taylor R, 'Putting children first', 47.

<sup>109</sup> Zermatten J, 'The best interests of the child principle', 485.

<sup>110</sup> Zermatten J, 'The best interests of the child principle', 492-493.

intervene.<sup>111</sup> This is evident where states respect the responsible exercise of parental authority and autonomy and only intervene in cases of neglect or abuse.<sup>112</sup>

In applying the BIC, the CRC advocated for individualisation.<sup>113</sup> This is a case by case analysis of the applicability and weight of each element, in recognition of the uniqueness of each child and his/her circumstances.<sup>114</sup> The weakness of such an approach is that it obscures considerations and guidelines developed and may result in the very subjectivism being avoided.<sup>115</sup> However, it must be accepted that a level of subjectivism is inherent in the determination of the BIC. There exists a collective subjectivity, that is, the determination of a given society on what constitutes a child's best interests.<sup>116</sup> This is evident in jurisdictions that develop their own list of factors to consider in determining the BIC. There is also personal subjectivity at three levels: the parents or caregivers, the child(ren), and the judge or decision maker.<sup>117</sup> Each of them is called upon to make a judgement call as to what constitutes the BIC.

### **2.3 FACTORS TO CONSIDER IN DETERMINING THE BIC**

Some jurisdictions, in light of the ambiguity of the principle, have provided statutory guidelines as to what constitutes the BIC.<sup>118</sup> The English Children Act is an example which instructs the court to have regard to factors including the wishes of the child, the physical, emotional and educational needs of the child, the age, sex and background of the child, and any harm which he has, or is at risk of suffering.<sup>119</sup> The Kenyan Children Act similarly provides considerations that comprise the best interests of a child.<sup>120</sup> These include the age and maturity of the child,<sup>121</sup> the preference of the child,<sup>122</sup> distinct special needs of the child,<sup>123</sup> the motivation of the parties involved,<sup>124</sup> the stability

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<sup>111</sup> Zermatten J, 'The best interests of the child principle', 487.

<sup>112</sup> Walton R, 'The best interests of the child', 310.

<sup>113</sup> *CRC General comment 14*, 17.

<sup>114</sup> Zermatten J, 'The best interests of the child principle', 495.

<sup>115</sup> Thomson M, 'A capabilities approach to best interests assessments' 41 *Legal Studies* 2, 2021, 281.

<sup>116</sup> Zermatten J, 'The best interests of the child principle', 494.

<sup>117</sup> Zermatten J, 'The best interests of the child principle', 494.

<sup>118</sup> Skivenes M, 'Judging the child's best interests', 340.

<sup>119</sup> Section 1(3), *English Children Act*, 1989.

<sup>120</sup> Section 8(1) and First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>121</sup> Paragraph 1, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>122</sup> Paragraph 4, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>123</sup> Paragraph 2, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>124</sup> Paragraph 7, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

of living arrangements,<sup>125</sup> and other circumstances that may lead to the harm of the child.<sup>126</sup> Norway provides for consideration of the safety and health of the child,<sup>127</sup> the biological principle,<sup>128</sup> and respect for the views of the child.<sup>129</sup> However, these are considerations developed domestically and have no binding international effect. In fact, even a glance at the aforementioned jurisdictions, while exhibiting similarities, will also reveal differences. For example, some considerations are present in one legislation and absent in another.<sup>130</sup>

The CRC also provides elements to be taken into consideration when assessing the BIC in its General Comment 14. These include the views of the child,<sup>131</sup> the child's identity,<sup>132</sup> preservation of the family environment and maintaining relations,<sup>133</sup> care, protection and safety of the child,<sup>134</sup> situation of vulnerability,<sup>135</sup> the child's right to health,<sup>136</sup> and the child's right to education.<sup>137</sup> Scholars have also made attempts to provide elements to consider when determining the BIC. What stands out in all interpretations of the BIC is the need to take account of the child's views.<sup>138</sup> Another common consideration is the particular needs of the child, be they physical, emotional, spiritual, mental or psychological.<sup>139</sup> Additionally, the importance of family and family ties has been emphasised.<sup>140</sup> Lastly, safety and protection of the child from harm is imperative.<sup>141</sup> In balancing these elements, the purpose of the principle, that is, ensuring the full and effective

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<sup>125</sup> Paragraph 6, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>126</sup> Paragraphs 13,14,16 and 18, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya).

<sup>127</sup> Section 48, *Norwegian Act relating to Children and Parents*, 1981.

<sup>128</sup> Section 42, *Norwegian Act relating to Children and Parents*. This principle states that it is in a child's best interest to grow up with his/her biological parents.

<sup>129</sup> Section 65, *Norwegian Act relating to Children and Parents*.

<sup>130</sup> Paragraph 11, First Schedule, *Children Act* (Act No 29 of 2022)(Kenya) includes "methods for assisting parental and/or guardian cooperation and resolving disputes and each parent's/guardian's willingness to use those methods" as a consideration.

<sup>131</sup> *CRC General comment 14*, 13.

<sup>132</sup> *CRC General comment 14*, 13.

<sup>133</sup> *CRC General comment 14*, 14.

<sup>134</sup> *CRC General comment 14*, 15.

<sup>135</sup> *CRC General comment 14*, 16.

<sup>136</sup> *CRC General comment 14*, 16.

<sup>137</sup> *CRC General comment 14*, 17.

<sup>138</sup> Taylor R, 'Putting children first', 58.

<sup>139</sup> Walton R, 'The best interests of the child', 310.

<sup>140</sup> Walton R, 'The best interests of the child', 310.

<sup>141</sup> Bailey A, 'Prioritizing child safety as the prime best-interest factor' 47 *Family Law Quarterly* 1, 2013, 35.

enjoyment of the rights of the child, and the holistic development of the child, ought to be underscored.<sup>142</sup>

## 2.4 BIC THRESHOLD

The early conception of the BIC in the Declaration on the Rights of the Child made it the paramount consideration in matters concerning children, whereas the UNCRC downscaled its priority by having it as a primary consideration. The implications of the two words differ fundamentally. The latter implies that the interests of the child are only one among other possibly competing interests to be considered.<sup>143</sup> Essentially, it is conceivable that a situation can arise in which, whereas the interests of a child have been identified, interests of another or others may prevail.<sup>144</sup> In those matters only indirectly affecting children, the BIC is only a primary consideration.<sup>145</sup> For instance, decisions on where either or both the parents are to live, can be considered as indirectly affecting the child.<sup>146</sup> This includes cases of deportation of a parent.<sup>147</sup>

Primacy of the BIC has been interpreted as necessitating the identification of the interests of the child first before considering other interests that could otherwise outweigh those of the child.<sup>148</sup> This view on primacy is to prevent the child's interests from being overlooked within a multi-faceted inquiry.<sup>149</sup> It is thought that the reason for the lower threshold under the UNCRC than under the Declaration was to make other principles, such as participation rights of the child, weightier.<sup>150</sup> The decision to relegate the interests of children to be one consideration among others effectively weakened the BIC within the UNCRC.<sup>151</sup>

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<sup>142</sup> *CRC General comment 14*, 17.

<sup>143</sup> Zermatten J, 'The best interests of the child principle', 489.

<sup>144</sup> Zermatten J, 'The best interests of the child principle', 489.

<sup>145</sup> Eekelaar J, 'The role of the best interest principle in decisions affecting children and decisions about children' 23 *International Journal of Children's Rights* 1, 2015, 4-5.

<sup>146</sup> Eekelaar J, 'The role of the best interest principle in decisions affecting children and decisions about children', 4.

<sup>147</sup> Eekelaar J, 'The role of the best interest principle in decisions affecting children and decisions about children', 16,18.

<sup>148</sup> Taylor R, 'Putting children first', 62.

<sup>149</sup> Taylor R, 'Putting children first', 63.

<sup>150</sup> Vandergrift K, 'The best interests and human rights of children', 35.

<sup>151</sup> Chapdelaine-Feliciati C, 'Translating the meaning-intention behind the "best interests of the child" principle', 125.

Paramountcy, on the other hand, makes the BIC the determining factor.<sup>152</sup> In such a case, the child is individualised to the extreme.<sup>153</sup> Decisions whose impact on a child are major, such as those concerning the upbringing of a child, require this greater level of protection.<sup>154</sup> Therefore, in spite of the BIC merely being a primary consideration in other matters, the UNCRC raises the standard required in adoption matters. Article 21 concerning adoption raises the bar by providing as follows:

“State Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration ...”<sup>155</sup>

Though only domestic jurisprudence, in the case of *ZH (Tanzania) v Secretary for the Home Department*,<sup>156</sup> the BIC was held to be the determining factor in matters related to a child’s upbringing. Similarly, Article 21 of the UNCRC is interpreted to mean that in all matters concerning adoption, which is directly related to a child’s upbringing, the interests of the child shall be the prevailing consideration, even in the face of other competing interests. There are a number of decisions involved in an adoption process such as suitability of adoption for the child, fitness of the adoptive parents, how to conduct adoption checks on the adoptive family, and whether to allow contact with the biological parents post-adoption. The paramountcy of the BIC is to be upheld throughout the entire process, in each and every one of these decisions.

## **2.5 BEST INTEREST AND THE VIEWS OF THE CHILD**

Children’s limited participation in decision making processes also points to how important it is to give them a voice. Previously, children were regarded merely as objects of protection. With the promulgation of the UNCRC, children were also granted the status of right holders - as subjects of rights.<sup>157</sup> This new legal status can only be properly upheld if the BIC is considered alongside another principle of the UNCRC.<sup>158</sup> This other principle, respect for the views of the child, is provided within Article 12 as follows:

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<sup>152</sup> Taylor R, ‘Putting children first’, 62.

<sup>153</sup> Zermatten J, ‘The best interests of the child principle’, 489.

<sup>154</sup> Taylor R, ‘Putting children first’, 47.

<sup>155</sup> Article 21, *UNCRC*.

<sup>156</sup> *ZH (Tanzania) v Secretary for the Home Department* (2011), The Supreme Court of the United Kingdom.

<sup>157</sup> Zermatten J, ‘The best interests of the child principle’, 483.

<sup>158</sup> Zermatten J, ‘The best interests of the child principle’, 484.

- “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”<sup>159</sup>

In accordance with the BIC being a rule of procedure, the manner in which a decision concerning a child is made is just as important as the decision itself. Whereas Article 3(1) represents the ideal sought, that is the wellbeing of the child, Article 12 provides a crucial step in determining the BIC.<sup>160</sup> The different approaches to determining the BIC are heavily based on how the decision is arrived at. Where the views of adults, that is parents and professionals, is the determining factor, we consider the approach paternalistic.<sup>161</sup> Where significantly more weight is given to the views of the child with little to no input from adults, the view is self-determinism.<sup>162</sup> A third approach that balances the two, giving due importance both to the opinions of parents and experts, and the views of a mature child, is preferable. This is liberal paternalism.<sup>163</sup> Children must be recognised as simultaneously in the process of being and becoming.<sup>164</sup> A stance on either polar extreme denies one of these facts.

The BIC and participation rights seem irreconcilable at first. This is because the BIC is often viewed through a paternalistic lens, where only the opinion of adults is relevant in making a decision.<sup>165</sup> On the other hand, participation rights call for the views of a child as opposed to simply applying what we adults would consider best.<sup>166</sup> However, reference to a child’s opinions does not make their view authoritative, but rather consultative.<sup>167</sup> The weakness of the paternalistic

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<sup>159</sup> Article 12, *UNCRC*.

<sup>160</sup> Zermatten J, ‘The best interests of the child principle’, 496.

<sup>161</sup> Archard D, Skivenes M, ‘Balancing a child’s best interests and a child’s views’ 17 *International Journal of Children’s Rights* 1, 2009, 2.

<sup>162</sup> Vandergrift K, ‘The best interests and human rights of children’, 40.

<sup>163</sup> Vandergrift K, ‘The best interests and human rights of children’, 40,44.

<sup>164</sup> Thomson M, ‘A capabilities approach to best interests assessments’, 285.

<sup>165</sup> Archard D, Skivenes M, ‘Balancing a child’s best interests and a child’s views’, 2.

<sup>166</sup> Archard D, Skivenes M, ‘Balancing a child’s best interests and a child’s views’, 2.

<sup>167</sup> Archard D, Skivenes M, ‘Balancing a child’s best interests and a child’s views’, 15.

approach is that decisions by parents and other decision makers may be self-serving.<sup>168</sup> Paternalism is seen to undermine the concept of children as right holders which is the very essence of the UNCRC.<sup>169</sup> It is thus important to give children a voice so that decision makers may be conscious of instances in which their perceptions of the BIC conflict with those of the child.<sup>170</sup> The BIC aims to limit the power of adults over children and recognises that adults are only granted decision-making powers on behalf of children because the latter lack some experience and judgement.<sup>171</sup> The views of the child thus help decision makers to decipher what the child values.<sup>172</sup> Moreover, where a decision that contradicts the child's views is implemented, it helps the decision maker assess the cost of the decision, such as resentment and resistance.<sup>173</sup> Self-determinism, the other extreme, fails in its equating of protection with oppression.<sup>174</sup>

Reference in Article 12 of the UNCRC to considering the age and maturity of a child when weighing their views alludes to the concept of evolving capacities:

“State Parties shall respect the responsibilities, rights and duties of ... persons legally responsible for the child, to develop, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.”<sup>175</sup>

This notion that appreciates a child's incremental development is expressed differently in different jurisdictions. In Norway, for example, a child over seven years of age is entitled to be heard, and the opinion of one of twelve years of age must be given significant weight.<sup>176</sup> England doesn't specify any age but requires a child's wishes to be ascertained and considered in light of their age and understanding.<sup>177</sup> This requires decision makers to determine if the threshold for rationality has been met.<sup>178</sup> Factors that ought to be considered in ascertaining if the threshold has been met include the consistency with which the opinion is expressed, the reasons given for holding the

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<sup>168</sup> Taylor R, 'Putting children first', 46.

<sup>169</sup> Thomson M, 'A capabilities approach to best interests assessments', 279.

<sup>170</sup> Taylor R, 'Putting children first', 48.

<sup>171</sup> Zermatten J, 'The best interests of the child principle', 485.

<sup>172</sup> Archard D, Skivenes M, 'Balancing a child's best interests and a child's views', 15.

<sup>173</sup> Archard D, Skivenes M, 'Balancing a child's best interests and a child's views', 15.

<sup>174</sup> Vandergrift K, 'The best interests and human rights of children', 41.

<sup>175</sup> Article 5, *UNCRC*.

<sup>176</sup> Section 31, *Norwegian Act relating to Children and Parents*.

<sup>177</sup> Section 1(3)(a), *English Children's Act*.

<sup>178</sup> Archard D, Skivenes M, 'Balancing a child's best interests and a child's views', 4.

opinion, and an appreciation of the consequences if their view is adopted.<sup>179</sup> Age is thus just a general guideline as to development and competence, as children have varying degrees of ability.<sup>180</sup>

The concept of evolving capacities can be better supported by the capabilities approach developed by Martha Nussbaum, Amartya Sen and others.<sup>181</sup> The capabilities approach rests upon the development of one's agency, freedom and self-determination.<sup>182</sup> This approach is compatible with acknowledging that children are persons in themselves, with their own dignity and thus with an element of autonomy.<sup>183</sup> The approach also recognises that children are vulnerable and dependent,<sup>184</sup> and thus bringing out the need for protection and aid during their development. The capabilities approach posits that welfare is best advanced when individual freedom is promoted.<sup>185</sup> This means, for adults as well as children, the need to be included in decision making.<sup>186</sup>

Respect for the agency of the child is known as the children's autonomy principle - this states that children should choose how they are involved in decision making, as well as the outcome, unless it is likely to cause significant harm to the child.<sup>187</sup> The capabilities approach helps to determine the appropriate age to allow for the self-determination of a child for different activities.<sup>188</sup> Reference is had to what is known as a capabilities list, such as one developed by Nussbaum.<sup>189</sup> It includes life, health, bodily integrity, sense, thought and imagination, emotions, practical reason, affiliation, play and control over one's environment. Where a child is not mature enough to form an opinion, John Rawls opines that we should choose for them what they would choose for themselves if they were at the age of reason and able to decide rationally.<sup>190</sup> This list also helps to ascertain what capabilities need to be developed as meeting those needs fulfills the BIC.<sup>191</sup>

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<sup>179</sup> Archard D, Skivenes M, 'Balancing a child's best interests and a child's views', 12, 14.

<sup>180</sup> Archard D, Skivenes M, 'Balancing a child's best interests and a child's views', 14.

<sup>181</sup> Thomson M, 'A capabilities approach to best interests assessments', 277, 284.

<sup>182</sup> Thomson M, 'A capabilities approach to best interests assessments', 283.

<sup>183</sup> Zermatten J, 'The best interests of the child principle', 483.

<sup>184</sup> Article 2, World Summit for Children, *World declaration on the survival, protection and development of children*, 30 September 1990.

<sup>185</sup> Thomson M, 'A capabilities approach to best interests assessments', 291.

<sup>186</sup> Thomson M, 'A capabilities approach to best interests assessments', 292.

<sup>187</sup> Thomson M, 'A capabilities approach to best interests assessments', 292.

<sup>188</sup> Vandergrift K, 'The best interests and human rights of children', 52.

<sup>189</sup> Vandergrift K, 'The best interests and human rights of children', 50.

<sup>190</sup> Vandergrift K, 'The best interests and human rights of children', 42.

<sup>191</sup> Thomson M, 'A capabilities approach to best interests assessments', 292.

## 2.6 CONCLUSION

In applying the BIC, regard ought to be had to the views of the child while considering the evolving capacities of the child, and the needs of the child. It is also important to preserve family relationships and the child's identity. Fundamentally, the individual circumstances of the child must also be accounted for as the principle does not apply blanketly. Each of these will be analysed in greater detail, with their specific relevance to adoptees, in Chapter 4.



## CHAPTER 3: THE RIGHT TO IDENTITY

### 3.1 INTRODUCTION

A child's right to know their genetic origins cannot be equivocally found in any international rights instrument. Claims to access information about an adoptee's biological origins are usually based on the right to identity which is generally better guaranteed. The purpose of this chapter is thus to determine whether the right to identity includes a right to know one's genetic origins, and further, whether adoptees are covered within the scope of the right.

### 3.2 LEGAL FRAMEWORK IN INTERNATIONAL INSTRUMENTS

Even before the drafting of the UNCRC, the right of adopted children to know about their background was recognised within the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.<sup>192</sup> However, as with every declaration, it is merely soft law and not legally binding. Since the promulgation of the UNCRC, the conversation on adoption records has revolved around a reading of Articles 7 and 8 of its provisions. The former provides a child the right to know and be cared for by his or her parents as far as possible.<sup>193</sup> Specifically, the right to know one's parents is highlighted. Article 8 subsequently outlines the child's right to preserve his or her identity, including family relations as recognised by law without unlawful interference.<sup>194</sup> These provisions of the UNCRC are not specific as to whether they also govern adoptees.

It is important to take into account that the original Polish draft of the UNCRC did not have the provisions referenced in arguments for open adoption. It is thus imperative to discuss in what context Articles 7 and 8 arose and what the drafters intended them to mean.

#### *Article 7*

This provision grants children the right to know (and be cared for by) his or her parents. The Islamic States are responsible for the inclusion of the clause in Article 7 on the right to know (and be cared for by) one's parents.<sup>195</sup> Algeria, Egypt, Iraq, Jordan, Kuwait, Libya, Morocco, Tunisia,

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<sup>192</sup> Article 9, UNGA, *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally*, UN A/Res 41/85 3 December 1986.

<sup>193</sup> Article 7(1), *UNCRC*.

<sup>194</sup> Article 8(1), *UNCRC*.

<sup>195</sup> Blauwhoff R, 'Foundational facts, relative truths', 50.

Oman and Pakistan proposed the amendment to this effect.<sup>196</sup> They reasoned that the psychological stability of the child, linked to children's relationship with their parents, is equally important to their physical and mental growth.<sup>197</sup> This was not readily accepted by states that had laws allowing for secret adoptions.<sup>198</sup> Germany, USA and the Soviet Union posited that in such cases, the child could not have this right to know their natural parents.<sup>199</sup> Strikingly, Islamic faith forbids the complete absorption of a child into the adoptive family, and thus opposes the deceit it considers secret adoptions.<sup>200</sup> This belief accounts for the proposal by the aforementioned Islamic States to protect the right to know one's (natural) parents, even in adoption. It should be noted that agreements during the drafting of the UNCRC were to be arrived at through consensus, thus there was a need to draft a provision that every state would be agreeable to.<sup>201</sup> It was for this reason that the phrase "as far as possible" was inserted.<sup>202</sup>

#### *Article 8*

The UNCRC, under this provision, guarantees a child's right to have his or her identity preserved. During the dictatorship under Jorge Rafael Videla, between 1975 and 1983, several Argentinian children were kidnapped by the authorities. Others were born to imprisoned mothers and then separated from each other. Only 41 of these children were traced and reunited with their families.<sup>203</sup> It is thus no surprise that the Argentinian delegate proposed adding another article emphasising the need of children to have their identity preserved.<sup>204</sup> Norway was doubtful as to whether the provision was in fact necessary given that the right was implied by other provisions.<sup>205</sup> However, Argentina was emphatic that there was a need to avoid a legal void.<sup>206</sup> The initial proposal protected the right to preserve "family identity".<sup>207</sup> This was rejected as the phrase was

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<sup>196</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 377-378.

<sup>197</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 378.

<sup>198</sup> Blauwhoff R, 'Foundational facts, relative truths', 51.

<sup>199</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 378.

<sup>200</sup> Seymore M, 'Separation and connectedness: global norms of open versus closed adoption' in Breger M (ed) *Exploring norms and family laws across the globe*, Lexington Books, 2022, 112.

<sup>201</sup> Blauwhoff R, 'Foundational facts, relative truths', 44.

<sup>202</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 379.

<sup>203</sup> Blauwhoff R, 'Foundational facts, relative truths', 52-53.

<sup>204</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 383.

<sup>205</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 388. Norway made reference to the present Article 7, as read with Article 9 on non-separation of children from their parents unless it is in the child's best interest. According to Norway, this already guaranteed the preservation of a child's identity.

<sup>206</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 388.

<sup>207</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 385.

considered unfamiliar to several jurisdictions. It was thus substituted by “family relations” and the phrase “as recognised by law” was introduced.<sup>208</sup>

A reading of the *travaux préparatoires* leads to a summary conclusion that Articles 7 and 8 were not envisioned as being applicable to adoptees to have a right to know their biological parents. In fact, given the objections tendered by States to the provisions, an inference can be drawn that States initially wanted adoptees of secret or closed adoptions to fall within the exception to the rule. However, different theories of interpretation may yield different approaches to applicability of the rights to adoptees. Textualism argues that laws should be interpreted strictly according to their original meanings.<sup>209</sup> This would mean that the original intention of limiting protection of the right to identity and to know one’s parents to adoptees should always prevail. Dynamic interpretation, which is often favoured, views the law as a living instrument that ought to be interpreted in light of the present-day conditions.<sup>210</sup> Prevailing circumstances may require an interpretation that includes adoptees of secret adoptions within the scope of Articles 7 and 8. These circumstances include the rise of technology that makes genetic testing easier, the increase in demand for open adoptions by adoptees, and the move by several States to allow the unsealing of closed records. Therefore, the phrase “as far as possible” should not be interpreted as granting states the liberty to abdicate their responsibilities under the Convention.<sup>211</sup>

The right is also underscored in the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Adoption Convention). This is a treaty in the realm of Private International Law that was established to ensure that intercountry adoptions are in the best interests of the child and respect the child’s fundamental rights, and to prevent the abduction, the sale of, or traffic in children.<sup>212</sup> It states that information concerning a child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is to be preserved.<sup>213</sup> However, the Convention qualifies this by providing that the receiving State shall take care not to reveal the identity of the biological parents if those identities may not be

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<sup>208</sup> *Legislative history of the convention on the rights of the child*, OHCHR, 385.

<sup>209</sup> Alstine M, ‘Dynamic treaty interpretation’ 146 *University of Pennsylvania Law Review* 3, 1998, 668.

<sup>210</sup> Alstine M, ‘Dynamic treaty interpretation’, 668.

<sup>211</sup> Blauwhoff R, ‘Foundational facts, relative truths’, 54.

<sup>212</sup> Preamble, *Hague Adoption Convention*, 29 May 1993, 1906 UNTS 31922.

<sup>213</sup> Article 30, *Hague Adoption Convention*.

disclosed in the State of Origin.<sup>214</sup> Therefore, the Hague Convention finds it permissible to grant biological parents anonymity rights. Where the laws of the State of Origin allow for anonymity, the decision on whether to reveal biological information to adoptees ultimately lies with the biological parents. What can be observed, thus, is the primacy that the Hague Convention places on the privacy right of the birth parents over that of the child to biological information.<sup>215</sup>

Children's rights are also subject to regional instruments such as the African Charter on the Rights and Welfare of the Child, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights. Within the discussion of adoptees' right to identity, the ECHR is heavily referenced on the matter. Discussions are hinged upon the provision on the right to respect for privacy and family life.<sup>216</sup> The right to identity is encompassed in private life.<sup>217</sup> Additionally, the Revised European Convention on the Adoption of Children (ECAC (Revised)) states that adoptees shall have access to information concerning their origins.<sup>218</sup> Where biological parents have the right to confidentiality, a competent authority shall determine whether to override the right and disclose identifying information having regard to the circumstances as well as the rights of the child and biological parents.<sup>219</sup> This is a shift from the 1967 ECAC that allowed adoptees to obtain only certain information without revealing the identity of the biological parents.<sup>220</sup> European law thus stipulates that it is possible to set aside the wishes and rights of the parents and promote those of the child.

### 3.3 COURT JURISPRUDENCE

In outlining the cases relevant to the right to identity, focus shall be on those decided by the ECtHR for a number of reasons. First, the UNCRC together with the General Comments of the CRC are generally used as references for children's rights even in regional Human Rights instruments like

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<sup>214</sup> Article 16, *Hague Convention*.

<sup>215</sup> Blauwhoff R, 'Foundational facts, relative truths: a comparative law study on children's right to know their genetic origins', 25 *European Family Law*, 2009, 52.

<sup>216</sup> Article 8, *ECHR*, 4 November 1950, 213 UNTS 2889.

<sup>217</sup> Wedel-Domaradzka A, 'Family life and identity-related rights of the child' in Raisz A (ed) *Children's rights in regional human rights systems*, Central European Academic Publishing, 2024, 153.

<sup>218</sup> Article 22(3), *ECAC (Revised)*, 27 November 2008, CoETS 202.

<sup>219</sup> Article 22(3), *ECAC (Revised)*.

<sup>220</sup> Article 20(3), *ECAC*, 24 April 1967, 634 UNTS 9067.

the ECHR.<sup>221</sup> Further, as a court, its decisions are legally binding, in contrast with recommendations by the CRC and other committees and commissions. Also of importance is that the ECtHR has produced a number of landmark cases commonly referenced in the debate surrounding open and closed adoptions. This brings the cases well within the ambit of our discussions.

It is argued that adoptees are more likely than other children to experience issues connected with their identity, especially where the similarities with the adoptive family are distinct.<sup>222</sup> It is no wonder, then, that all applications before the ECtHR relating to knowledge of biological origins cite a violation of their right to identity. The facts and determinations of these cases are outlined and applied to the question on the right to identity.

### 3.3.1 *Mikulić v Croatia (2002)*

Ms Lorena Mukulić (the applicant) was born out of wedlock on 25 November 1996.<sup>223</sup> On 30 January 1997, her mother filed a civil suit against H.P before the municipal court to establish paternity.<sup>224</sup> The court entered judgement against the defendant and he appealed.<sup>225</sup> The appellant repeatedly failed to appear for DNA tests ordered by appellate court.<sup>226</sup> The court eventually made an adverse inference to his refusal to submit to a DNA test as evidence of his paternity.<sup>227</sup> He appealed further and the court quashed the first-instance judgement and ordered for the case to be retried.<sup>228</sup> The retrial in the court of first instance was concluded on the 19<sup>th</sup> of November 2001 and established H.P's paternity.<sup>229</sup> The claim brought by the applicant to the ECtHR alleged that the proceedings concerning her paternity claim had failed to meet the reasonable time requirement and thus that her right to privacy and family life had been violated.<sup>230</sup>

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<sup>221</sup> Luhamaa K, O'Mahony C, 'International human rights law governing national adoption from care' in Pösö T, Skivenes M and Thoburn J (eds), *Adoption from care*, Bristol University Press, 2021, 180.

<sup>222</sup> Blauwhoff R, 'Foundational facts, relative truths', 7.

<sup>223</sup> *Mikulić v Croatia*, ECtHR Judgement of 7 February 2002, para 8.

<sup>224</sup> *Mikulić v Croatia*, ECtHR, 8.

<sup>225</sup> *Mikulić v Croatia*, ECtHR, 9.

<sup>226</sup> *Mikulić v Croatia*, ECtHR, 16.

<sup>227</sup> *Mikulić v Croatia*, ECtHR, 25.

<sup>228</sup> *Mikulić v Croatia*, ECtHR, 26.

<sup>229</sup> *Mikulić v Croatia*, ECtHR, 30.

<sup>230</sup> *Mikulić v Croatia*, ECtHR, 3.

The Court held the view that private life includes aspects of an individual's physical and social identity.<sup>231</sup> In echoing an earlier judgement, the Court held that respect for private life thus requires each person to have the ability to establish details of their identity, and recognised each individual is entitled to any pertinent information because it has formative implications on his or her personality.<sup>232</sup> In recognising that the applicant's rights had been violated, the Court stated that "persons in the applicant's position have a vital interest ... in receiving information necessary to uncover the truth about an important aspect of their personal identity."<sup>233</sup> This case is important as the Court not only recognised the right to access information about one's parentage,<sup>234</sup> but also recognised that access to genetic information is related to an individual's sense of identity.<sup>235</sup>

### 3.3.2 *Odièvre v France (2003)*

Pope Innocent II introduced foundling wheels in the 12<sup>th</sup> century as a way to prevent babies from being killed and left in the River Tiber.<sup>236</sup> Variations of the practice came to be recognised in various European countries. In France, the practice of allowing anonymous births dates back to St Vincent de Paul's introduction of a revolving crib system on the outside wall of a nursing home. A mother could leave her baby in the crib and rotate it, and in so doing, deliver her baby to the care of nurses while remaining completely anonymous.<sup>237</sup> In 1793, French law allowed mothers to give birth in maternity wards without leaving their information, and the baby would be *née sous X*, that is, born to an unidentified mother.<sup>238</sup> This practice is still observed in France and other countries, including Luxembourg, Italy, Germany and Austria.<sup>239</sup>

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<sup>231</sup> *Mikulić v Croatia*, ECtHR, 53.

<sup>232</sup> *Mikulić v Croatia*, ECtHR, 54.

<sup>233</sup> *Mikulić v Croatia*, ECtHR, 64.

<sup>234</sup> Blauwhoff R, 'Foundational facts, relative truths', 77.

<sup>235</sup> Blauwhoff R, 'Foundational facts, relative truths', 78.

<sup>236</sup> Simmonds C, 'An unbalanced scale: anonymous birth and the European court of human rights' 72 *Cambridge Law Journal* 2, 2013, 263. Foundling wheels are cylinder sets in the outer wall of a building where mothers could place their children, turn the cylinder so that the baby is inside the building, and then ring a bell to alert the caretakers.

<sup>237</sup> Feast J, Howe D, 'Open adoption records, the human rights of adopted people, and discrimination: the case of *Odièvre v France 2003*' 7 *European Journal of Social Work* 1, 2004, 26.

<sup>238</sup> Feast J, Howe D, 'Open adoption records, the human rights of adopted people, and discrimination', 26.

<sup>239</sup> Feast J, Howe D, 'Open adoption records, the human rights of adopted people, and discrimination', 31.

Pascale Odièvre (the applicant) was born on the 23<sup>rd</sup> of March 1965 to a mother who requested that the birth be kept secret in accordance with French law.<sup>240</sup> A full adoption was made on the 10<sup>th</sup> of January 1969 in favour of Mr and Mrs Odièvre.<sup>241</sup> In 1990, the applicant obtained non-identifying information about her natural family from her Children's Welfare Service's file.<sup>242</sup> In 1998 she applied to receive more information about her birth and the siblings that she discovered she has.<sup>243</sup> She was denied access through a letter from the court registrar that explained that disclosure would be a contravention of the law.<sup>244</sup> The application before the ECtHR is premised on the claim that the applicant's birth being kept secret made it impossible for her to find out her origins.<sup>245</sup>

The ECtHR recognised applicability of the right to respect for private life but excluded family life from its analysis.<sup>246</sup> It observed that by the legal fiction in France, the biological mother seeking confidentiality is deemed never to have given birth, and thus there is no family relation.<sup>247</sup> Whereas Mukulić established that the right to identity covers the right to know one's genetic origins, Odièvre establishes whether the scope of the right to such knowledge extends to adoptees.<sup>248</sup> The court, in its analysis, drew a distinction between access to information about one's origin and the identity of one's natural parents, and access to a case record concerning a child in care or to evidence of alleged paternity.<sup>249</sup> According to the court, in the former, the biological mother who expressly requests that her information be kept confidential is entitled to protection. Further, the Court accepted the French government's argument that the interests of the child were well reconciled with other competing interests. The government achieved this through four channels: it tried to encourage mothers to assume responsibility for their children,<sup>250</sup> it afforded relinquished children access to certain non-identifying information,<sup>251</sup> and it allowed the mother to waive

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<sup>240</sup> *Odièvre v France*, ECtHR Judgement of 13 February 2003, para 10.

<sup>241</sup> *Odièvre v France*, ECtHR, 11.

<sup>242</sup> *Odièvre v France*, ECtHR, 12.

<sup>243</sup> *Odièvre v France*, ECtHR, 13.

<sup>244</sup> *Odièvre v France*, ECtHR, 14.

<sup>245</sup> *Odièvre v France*, ECtHR, 3.

<sup>246</sup> *Odièvre v France*, ECtHR, 28.

<sup>247</sup> *Odièvre v France*, ECtHR, 30.

<sup>248</sup> Blauwhoff R, 'Foundational facts, relative truths', 81.

<sup>249</sup> *Odièvre v France*, ECtHR, 43.

<sup>250</sup> *Odièvre v France*, ECtHR, 38.

<sup>251</sup> *Odièvre v France*, ECtHR, 48.

confidentiality within a certain window of time.<sup>252</sup> A National Council for Access to Information about Personal Origins was also set up in 2002 to reconcile the rights of adoptees and those of biological parents.<sup>253</sup> It was decided that the French legislation struck a fair balance that ensured proportionality and thus no violation of Article 8 of the ECHR was established.<sup>254</sup> It was held that anonymous births served to promote public health as women have vested interest in giving birth in appropriate medical conditions, and so does the child to be born safely.<sup>255</sup> The value of life was given more significance than the right to know.<sup>256</sup> The Court's findings effectively sanctioned anonymous births.<sup>257</sup>

### 3.3.3 *Jäggi v Switzerland* (2006)

The facts of this case bear some similarities with those in *Milukić*. Mr Andreas Jäggi (the applicant), when born in 1939, had his mother declare that A.H is the father.<sup>258</sup> Before the applicant's birth, the State-appointed guardian brought an action against A.H seeking a declaration of paternity and payment of maintenance.<sup>259</sup> In 1948, the court of first instance dismissed the action and the decision was not appealed against.<sup>260</sup> The applicant was placed in a foster family, a time he claimed to have had regular contact with A.H, as well as having received gifts and money from him.<sup>261</sup> Shortly after A.H's death in 1976, the applicant conducted a blood test analysis that didn't rule out A.H's paternity.<sup>262</sup> In 1999, Mr Jäggi applied for a revision of the 1948 decision, and requested a DNA test on the remains of A.H.<sup>263</sup> Both requests were denied.<sup>264</sup> The courts found that the right to know one's parentage is not absolute and deemed the applicant's requests disproportionate to the rights of the deceased and his surviving family.<sup>265</sup>

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<sup>252</sup> *Odièvre v France*, ECtHR, 49.

<sup>253</sup> *Odièvre v France*, ECtHR, 49.

<sup>254</sup> *Odièvre v France*, ECtHR, 49.

<sup>255</sup> Blauwhoff R, 'Foundational facts, relative truths', 82.

<sup>256</sup> Blauwhoff R, 'Foundational facts, relative truths', 83.

<sup>257</sup> Simmonds C, 'An unbalanced scale', 263.

<sup>258</sup> *Jäggi v Switzerland*, ECtHR Judgement of 13 October 2006, 6.

<sup>259</sup> *Jäggi v Switzerland*, ECtHR, 5.

<sup>260</sup> *Jäggi v Switzerland*, ECtHR, 7.

<sup>261</sup> *Jäggi v Switzerland*, ECtHR, 8.

<sup>262</sup> *Jäggi v Switzerland*, ECtHR, 9.

<sup>263</sup> *Jäggi v Switzerland*, ECtHR, 12.

<sup>264</sup> *Jäggi v Switzerland*, ECtHR, 13-14.

<sup>265</sup> *Jäggi v Switzerland*, ECtHR, 19.

The ECtHR on the other hand noted that the applicant experienced mental and psychological suffering from having attempted to obtain conclusive information throughout his life.<sup>266</sup> Further, the deceased's family didn't put forward any religious or philosophical grounds opposing the taking of a DNA sample.<sup>267</sup> Moreover, the deceased's right to rest in peace was only temporary as the body would inevitably be exhumed when the lease on his tomb was up.<sup>268</sup> The Court also admitted that an individual's interest in discovering his parentage increases with age rather than disappears.<sup>269</sup> Thus, on balancing the interests, the applicant's Article 8 right was held to be violated.<sup>270</sup> Notably, the applicant was in search of the truth simply for truth's sake and not for any particular effect. This could explain the Court's readiness in recognising the right to know the truth.<sup>271</sup>

### 3.3.4 *Godelli v Italy (2012)*

Ms Anita Godelli (the applicant), like Pascale Odièvre, alleged a violation of her rights due to her secret birth in 1943 that made it impossible for her to find out her origins.<sup>272</sup> She was adopted by the Godelli family in 1949.<sup>273</sup> The applicant claimed that her childhood was difficult due to the difficulty in tracing her origins.<sup>274</sup> In 2006, the applicant acquired her birth certificate from the Register Office but her mother's name did not appear.<sup>275</sup> In 2007 she applied for her birth certificate to be rectified but the court dismissed the application on jurisdictional grounds.<sup>276</sup> Her application was still dismissed in the appropriate court on the ground that the law prohibited her access to the information she sought.<sup>277</sup> Her subsequent appeal was also dismissed.<sup>278</sup>

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<sup>266</sup> *Jäggi v Switzerland*, ECtHR, 40.

<sup>267</sup> *Jäggi v Switzerland*, ECtHR, 41.

<sup>268</sup> *Jäggi v Switzerland*, ECtHR, 41.

<sup>269</sup> *Jäggi v Switzerland*, ECtHR, 40.

<sup>270</sup> *Jäggi v Switzerland*, ECtHR, 44.

<sup>271</sup> Blauwhoff R, 'Foundational facts, relative truths', 93.

<sup>272</sup> *Godelli v Italy*, ECtHR Judgement of 25 September 2012, para 3.

<sup>273</sup> *Godelli v Italy*, ECtHR, 7.

<sup>274</sup> *Godelli v Italy*, ECtHR, 9.

<sup>275</sup> *Godelli v Italy*, ECtHR, 10.

<sup>276</sup> *Godelli v Italy*, ECtHR, 11.

<sup>277</sup> *Godelli v Italy*, ECtHR, 12.

<sup>278</sup> *Godelli v Italy*, ECtHR, 13.

The ECtHR, having received a lot of criticism in its determination of the *Odièvre* case, had another opportunity in the *Godelli* case to reassess the balance of rights.<sup>279</sup> While the Court in the present application held that the applicant's right was violated, its judgement prohibited anonymity very narrowly.<sup>280</sup> The difference between Italian and French law is that the former doesn't allow access to any information, nor does it afford mother's the opportunity to change their minds.<sup>281</sup> The Court held that the Italian law gave blind preference to the interests of the mother and thus failed to strike a balance.<sup>282</sup> However, according to the Court's determination, the decision to reveal identifying information is still squarely within the mother's purview.<sup>283</sup>

### 3.4 ANALYSIS

Children are in need of a family and community environment that feels like theirs and affords them a better understanding of who they are. Ideally, these are the family and community of origin.<sup>284</sup> ECtHR jurisprudence maintains that where children are deprived of their natural parents, family life is exclusive to their relationship with their adoptive family.<sup>285</sup> Adoption in many jurisdictions is seen as erasure of the child's biological parents and replacement with the adoptive parents.<sup>286</sup> As such, biological parents lose all parental rights and responsibilities, including the right to maintain contact.<sup>287</sup> However, this is not the universal position. In polynesian countries, the Maori culture and the Islamic faith for example, adoption is an expansion of the family unit, including the adoptive parents without the biological parents necessarily withdrawing.<sup>288</sup>

The Court's decision in *Odièvre* to exclude the protection of family life from its analysis has thus been met by widespread criticism. Some authors have argued that it ignores the psycho-biological connection that the applicant shares with her biological parents which cannot simply be replaced

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<sup>279</sup> Simmonds C, 'An unbalanced scale', 264.

<sup>280</sup> Simmonds C, 'An unbalanced scale', 264.

<sup>281</sup> *Godelli v Italy*, ECtHR, 55.

<sup>282</sup> *Godelli v Italy*, ECtHR, 57-58.

<sup>283</sup> Simmonds C, 'An unbalanced scale', 265.

<sup>284</sup> Ronen Y, 'Redefining the child's right to identity' 18 *International Journal of Law, Policy and the Family*, 2004, 154.

<sup>285</sup> Wedel-Domaradzka A, 'Family life and identity-related rights of the child', 152.

<sup>286</sup> Seymore M, 'Separation and connectedness', 107.

<sup>287</sup> Seymore M, 'Separation and connectedness', 113.

<sup>288</sup> Seymore M, 'Separation and connectedness', 110-112.

by a filial bond with her adoptive parents.<sup>289</sup> Remarkably, in a bench that was heavily constituted (by seventeen judges), there was a significantly large majority of seven judges who dissented.<sup>290</sup> They saw the judgement as granting a mother “a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance.”<sup>291</sup>

The decision in *Godelli* has also been critiqued for claiming to balance competing interests yet still giving the birth mother absolute veto power over the child’s access to information.<sup>292</sup> At the same time, it is not suggested that the right to identity should vest veto powers on the child instead, but rather that a more child-centric perspective that accounts for their views be adopted.<sup>293</sup> Some have even purported that there has been no empirical evidence to suggest a decrease in the number of abortions and unsafe abandonments after the introduction of anonymous births.<sup>294</sup>

In determining the BIC, two factors seem to be diametrically opposed in the eyes of the court - the right to life and the right to identity. The CRC asserts that preservation of the identity of a child is a guaranteed right and ought to be taken into consideration when assessing the BIC.<sup>295</sup> This identity includes characteristics such as national origin, cultural identity and personality.<sup>296</sup> There is, however, a risk of a child seeing themselves solely in terms of their biological needs as their genetic origins offer insight into these elements of identity.<sup>297</sup> Genetic essentialism, clearly detectable in arguments for knowledge of one’s origins, is thus seen as conveying a reductionist idea of identity.<sup>298</sup> This idea is one that focuses greatly on static or unchanging aspects of one’s identity such as genetic makeup, sex, and physical features.<sup>299</sup> This comes with a disregard to dynamic aspects that persons develop for themselves.<sup>300</sup> Nonetheless, the stigma that adoptees face in this bio-centric world cannot be discounted.<sup>301</sup> Also, it is considered imperative to acknowledge one’s

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<sup>289</sup> Feast J, Howe D, ‘Open adoption records, the human rights of adopted people, and discrimination’, 26.

<sup>290</sup> Simmonds C, ‘An unbalanced scale’, 263.

<sup>291</sup> *Odièvre v France*, ECtHR.

<sup>292</sup> Callus T, ‘Tempered hope?’, 664.

<sup>293</sup> Ronen Y, ‘Redefining the child’s right to identity’, 158.

<sup>294</sup> Simmonds C, ‘An unbalanced scale’, 265.

<sup>295</sup> *CRC General comment 14*, 13.

<sup>296</sup> *CRC General comment 14*, 13.

<sup>297</sup> Ronen Y, ‘Redefining the child’s right to identity’, 150.

<sup>298</sup> Blauwhoff R, ‘Foundational facts, relative truths’, 7.

<sup>299</sup> Giroux M, De Lorenzi M, “‘Putting the child first’”, 60.

<sup>300</sup> Ronen Y, ‘Redefining the child’s right to identity’, 157.

<sup>301</sup> Seymore M, ‘Separation and connectedness’, 109.

past (static identity) to be able to shape one's present self (dynamic identity).<sup>302</sup> As such, the CRC advocates for adoptees' access to information about their biological family, in accordance with national laws, in order to protect the BIC.<sup>303</sup>

Buttressing the importance of the right to identity, is the right to maintain relationships with family members, which is also an important element to consider in determining the BIC.<sup>304</sup> Identity cannot be viewed in a vacuum but rather in light of interactions with persons significant to an individual's life.<sup>305</sup> This is because human beings are naturally interdependent rather than independent.<sup>306</sup> Identity is thus directly linked with the relationships we have with other people and society at large.<sup>307</sup> The significance of the relationship with adoptive parents is not denied; yet, the significance of natural parents to adoptees cannot be condemned to nonexistence. Respect for the BIC demands, as far as possible, protection of the relationship between a child and their biological family.<sup>308</sup>

On the other hand, implementation of the BIC also requires a consideration of other principles of the UNCRC. Specifically, in this case, the right to life, survival and development is considered by the Court.<sup>309</sup> The CRC calls for ensuring full respect for a child's inherent right to life, survival and development in assessing and determining the BIC.<sup>310</sup> It must be borne in mind that the protections of the UNCRC extend to unborn children,<sup>311</sup> and thus a child is entitled to life even in utero. The right to life is foundational to the existence of other rights, including that to identity. Without life, we cannot speak of most other rights. In the Court's assessment, denying confidentiality rights to biological parents will inevitably lead to the loss of several children's lives through abortions and abandonments. It was thus seen to be in children's best interests to safeguard their lives first and above all.

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<sup>302</sup> Blauwhoff R, 'Foundational facts, relative truths', 20.

<sup>303</sup> *CRC General comment 14*, 13.

<sup>304</sup> *CRC General comment 14*, 14.

<sup>305</sup> Ronen Y, 'Redefining the child's right to identity', 149.

<sup>306</sup> Ronen Y, 'Redefining the child's right to identity', 151.

<sup>307</sup> Wedel-Domaradzka A, 'Family life and identity-related rights of the child', 153.

<sup>308</sup> *CRC General comment 14*, 14.

<sup>309</sup> Article 6, *UNCRC*.

<sup>310</sup> *CRC General comment 14*, 11.

<sup>311</sup> Preamble, *UNCRC* provides that a child needs special safeguards and care before as well as after birth.

### 3.5 CONCLUSION

The ECtHR has repeatedly asserted that the right to identity not only imposes a negative obligation on states not to interfere, but imposes a positive obligation on them to protect ties that are meaningful to the child.<sup>312</sup> However, the ECtHR has consistently focused on the rights of biological parents to privacy over those of adoptees to identity.<sup>313</sup> While the right to know one's genetic origins is recognised, the Court maintains that such a right cannot be enforced without the consent of the biological mother.<sup>314</sup> Thus, according to the Court, a child's right to know does not impose a corresponding duty on the biological parents to divulge.<sup>315</sup> In the view of the Court, this is protection of a child's more valuable interest in the right to life, even though it may deny their right to identity.



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<sup>312</sup> Ronen Y, 'Redefining the child's right to identity', 147.

<sup>313</sup> Luhamaa K, O'Mahony C, 'International human rights law governing national adoption from care', 183.

<sup>314</sup> Callus T, 'Tempered hope?', 662.

<sup>315</sup> Callus T, 'Tempered hope?', 662.

## **CHAPTER 4: BALANCING THE BEST INTERESTS OF THE CHILD (BIC)**

### **4.1 INTRODUCTION**

Having determined that an adoptee's right to identity includes the right to know one's origin within Chapter 3, two questions still remain for the scope of this study. The first is whether it is in the best interests of an adoptee to have access to information about their biological parents. The second concerns whether the right to access information about one's biological parents can be limited by other interests. Worth noting is that the right to identity is not an absolute right and thus can be limited. In this chapter we shall be considering whether an adoptee's identity rights can be limited by failing to meet the standards of the best interest principle, and/or by being in conflict with the biological parents' right to privacy.

### **4.2 APPLYING THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD (BIC)**

Chapter 2 provided an analysis of the widely agreed upon factors to be considered when determining the BIC. These include respect for the views of the child, an analysis of the specific needs of the child, the importance of family relationships, and the need for the child to grow in a safe and stable environment. Each element shall be used as a point of determination with reference to an adoptee as the subject. A preliminary inference as to whether on the basis of each element, the right to access genetic information should be granted shall be made. Finally, a balance of the different interests of the child shall be made, and a conclusion made as to whether granting the right is in an adoptee's best interest.

#### **4.2.1 The views of the child**

As has been previously discussed, respect for the views of the child is essential when making decisions affecting or concerning the child.<sup>316</sup> It is apparent that an overwhelming number of adoptees desire to have access to their biological parents' records. This is evidenced by the cases brought forth before the ECtHR as well as national courts. Additional evidence is the movements of adoptees seeking to have laws amended to allow them to access their original genetic records.<sup>317</sup>

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<sup>316</sup> Article 12, *UNCRC*.

<sup>317</sup> These include the Adult Adoptee Movement in England, and American Adoption Congress, the Adoptee Rights Coalition and Bastard Nation in America.

It was also noted that when weighing the views of a child, regard ought to be had to the maturity of the child.<sup>318</sup> The competence of a child varies depending on the circumstance and activity in question. Usually, age is used as a general marker of competence as it is related to maturity.<sup>319</sup> The UNCRC, for example, requires States to set a minimum age below which children are presumed not to have the capacity to infringe penal laws.<sup>320</sup> The presumption is that below this age, a child is not competent or mature enough to understand right from wrong. A minimum age is also set for the capacity to marry so as to ensure that the parties to a marriage understand the nature and consequences of their actions.<sup>321</sup> Nonetheless, one must bear in mind that age merely signifies the levels of cognition and reasoning that are likely to have developed at a specific stage of human development - some people may acquire the relevant competence some time before or after the determined age.<sup>322</sup>

The question then stands - at what age can a child be deemed mature enough to understand the consequences of receiving information about their genetic origins? This question has already been settled in certain jurisdictions.<sup>323</sup> Scotland grants adoptees the right to view their original birth certificates, as well as the name and address of the biological parents at the time of birth, from the age of sixteen.<sup>324</sup> This reflects the assertion by Jean Piaget, a renowned child psychologist, that children are not capable of rational thought before the age of fifteen.<sup>325</sup> Northern Ireland has a provision stating that only persons who have attained the age of eighteen may obtain such records.<sup>326</sup> Some jurisdictions do not explicitly provide for the age in which a person is considered eligible to access genetic records. Instead, they have provisions on the age at which a child's consent is required for a valid adoption order to be granted by a court. In Kenya, this age is ten

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<sup>318</sup> Campbell A, 'I wish the views were clearer: children's wishes and views in Australian family law' 38 *Children Australia* 4, 2013, 185.

<sup>319</sup> Williams C, 'Family norms in adoption law: safeguarding the best interests of the adopted child' 18 *St Thomas Law Review* 2, 2005, 682.

<sup>320</sup> Article 40(3)(a), *UNCRC*.

<sup>321</sup> Preamble, *Convention on consent to marriage, minimum age for marriage and registration of marriages*, 7 November 1962, 973 UNTS 7525.

<sup>322</sup> Williams C, 'Family norms in adoption law', 682.

<sup>323</sup> Feast J, Howe D, 'Open adoption records', 28.

<sup>324</sup> *Scotland Adoption of Children Act* (1930).

<sup>325</sup> Campbell A, 'I wish the views were clearer', 186.

<sup>326</sup> Section 54(1), *The Adoption (Northern Ireland) Order* (1987).

years,<sup>327</sup> and in Norway it is twelve years.<sup>328</sup> At these ages, a child is deemed to have a mature understanding of the consequences of adoption. It can be extrapolated that at the same age, adoptees would then have a fair understanding of accessing their biological records. A minimum age should thus be set above which children's views on opening records should carry significant weight.

Some laws put a lot of emphasis on the right of parents to control the upbringing of their children.<sup>329</sup> Specifically as concerns a child's contact with their biological parents, it is presumed that an adoptive parent is best placed to assess the consequences of such contact.<sup>330</sup> However, adoptive parents may need to accept that they have less control of their child's upbringing than a natural parent would.<sup>331</sup> This is because, in spite of the legal fiction that adoption creates, the connection between adoptees and their biological family can never be completely severed and this needs to be acknowledged.<sup>332</sup> The potential involvement of biological parents thus limits the rights of adoptive parents. Further, these parental rights (of adoptive parents) may be limited by children's participation rights.<sup>333</sup> There need not be irreconcilable tension between the two rights.

The Committee on the Rights of the Child recognises the right and responsibility of parents to provide guidance and direction to their children in a manner consistent with the evolving capacities of the child.<sup>334</sup> This is to say that parents have the role of empowering their children to form their independent and autonomous views. In light of Article 12 of the UNCRC, some jurisdictions have rephrased these parental rights and powers as parental responsibilities.<sup>335</sup> In respecting the evolving capacity of children, this parental role diminishes as the child grows in knowledge and understanding.<sup>336</sup> Where an adoptee is deemed not to have capacity, then the views of parents may be called on.

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<sup>327</sup> Section 186(8)(c), *Children Act* (Act no 29 of 2022)(Kenya).

<sup>328</sup> Section 9, *Norwegian Act relating to adoption* (2018).

<sup>329</sup> Lee S, 'A child's voice vs a parent's control: resolving a tension between the convention on the rights of the child and the US law' 117 *Columbia Law Review* 3, 2017, 690.

<sup>330</sup> Blauwhoff R, 'Foundational facts, relative truths', 25.

<sup>331</sup> Harris-Short S, 'Making and breaking family life: adoption, the state and human rights' 35 *Journal of Law and Society* 1, 2008, 45.

<sup>332</sup> Seymore M, 'Separation and connectedness', 112.

<sup>333</sup> Lee S, 'A child's voice vs a parent's control', 690.

<sup>334</sup> *CRC General comment no 12 on the right of the child to be heard*, 2009, 21.

<sup>335</sup> Lee S, 'A child's voice vs a parent's control', 706.

<sup>336</sup> Lee S, 'A child's voice vs a parent's control', 704.

The views of children are not dispositive, but rather a factor to be considered in making decisions regarding children.<sup>337</sup> Some scholars have advocated for a differentiation between seeking the views and wishes of children.<sup>338</sup> Views denote a representation of the child's perspective on a given situation, whereas wishes express desires as to an outcome which may lead a child to believe that their wishes will prevail.<sup>339</sup> Even so, it is important to ensure that Article 12 of the UNCRC is not stripped of its meaning by dismissing the views of children that do not conform with adult's desires as immature or ignorant.<sup>340</sup> It holds that in respecting the views of the child, it is in the best interest of searchers who have attained a mature age and/or understanding to be allowed to access the records they seek.

## 4.2.2 The needs of the child

### 4.2.2.1 Medical needs

It is generally agreed that full disclosure of the medical background of the biological parents and the adoptee is necessary.<sup>341</sup> This is because the consequences of non-disclosure of medical records are usually very dire. Families have been known to sue adoption agencies for adoption fraud, and in very extreme cases even apply to revoke the adoption.<sup>342</sup> This exacerbates the trauma of the adoptee who lost their biological family, only to lose the adoptive one as well. Another direct effect to the child is the denial of effective treatment as soon as it is practical.<sup>343</sup> It also leaves the parents ill equipped to handle the medical needs of the child.<sup>344</sup> It is also not uncommon for there to be other ripple effects such as putting a strain on the family and marriage leading to divorce or separation.<sup>345</sup>

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<sup>337</sup> Lee S, 'A child's voice vs a parent's control', 695.

<sup>338</sup> Campbell A, 'I wish the views were clearer', 185.

<sup>339</sup> Campbell A, 'I wish the views were clearer', 189.

<sup>340</sup> Ronen Y, 'Redefining the child's right to identity', 162.

<sup>341</sup> Blair D, 'Lifting the genealogical veil: a blueprint for the legislative reform of the disclosure of health-related information in adoption' *70 North Carolina Law Review* 2, 1992, 698.

<sup>342</sup> Blair D, 'Getting the whole truth and nothing but the truth: the limits of liability for wrongful adoption' *67 Notre Dame Law Review* 4, 1992, 877.

<sup>343</sup> O'Dell K, McCall R, Groark C, 'Supporting families throughout the international special needs adoption process' *59 Children and Youth Services Review*, 2015, 162.

<sup>344</sup> O'Dell K, McCall R, Groark C, 'Supporting families throughout the international special needs adoption process', 164.

<sup>345</sup> Blair D, 'Lifting the genealogical veil', 702.

The unfortunate misjudgement to conceal medical information is often done under the misguided notion that the child will not find an adoption placement upon disclosure.<sup>346</sup> In actuality, many families are willing to adopt children with special needs that they are aware of.<sup>347</sup> The alternative of secrecy merely gambles the child's life on the odds that the oblivious adoptive family will be willing and able to take on the responsibility of caring for the child.<sup>348</sup>

It is patently clear that there can be no good consequences in concealing medical records. Promoting the position that such information should always be disclosed is the fact that the information is non-identifying and therefore offends no one's right. Therefore, even in balancing all rights and interests, none tips the scales against disclosure. Failure to disclose, however, is tremendously harmful to the child and against their best interests. For the parents, this disclosed information should include mental and psychiatric disorders,<sup>349</sup> physical disabilities,<sup>350</sup> genetic disorders,<sup>351</sup> and any family history of alcoholism.<sup>352</sup> For the child, it is important to have a record of their prenatal history, the history of labour and delivery, and the neonatal evaluation.<sup>353</sup>

#### **4.2.2.2 Psychological & emotional needs**

The phenomenon often referred to as genealogical bewilderment is used to explain the deep sense of loss or abandonment, and of having been cut off from a fundamental aspect of one's life.<sup>354</sup> While there are parts of our identity that are formed through self-determination, some aspects can be described as pre-written codes embedded in our genealogy.<sup>355</sup> These aspects that are formed through genetics rather than environment remain a mystery to many adoptees.<sup>356</sup> These include

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<sup>346</sup> Blair D, 'Lifting the genealogical veil', 707.

<sup>347</sup> Burge P, Burke N, Meiklejohn E, Groll D, 'Making choices: adoption seekers' preferences and available children with special needs' 10 *Journal of Public Child Welfare* 1, 2016, 11.

<sup>348</sup> Burge P, Burke N, Meiklejohn E, Groll D, 'Making choices', 13.

<sup>349</sup> Sullivan P, Geschwind D, 'Defining the genetic, genomic, cellular, and diagnostic architectures of psychiatric disorders' 117 *Cell* 1, 2019, 166.

<sup>350</sup> Blair D, 'Lifting the genealogical veil', 704.

<sup>351</sup> Ramaswamy M, Senthilnathan s, Saravanan A, Snehal M, Siva K, 'Machine learning model to predict risk assessment of a child inheriting a genetic disorder', 2024 - <https://www.biorxiv.org/content/biorxiv/early/2024/08/22/2024.08.22.609095.full.pdf> on 27 February 2025.

<sup>352</sup> Blair D, 'Lifting the genealogical veil', 705.

<sup>353</sup> Blair D, 'Lifting the genealogical veil', 732.

<sup>354</sup> Blauwhoff R, 'Foundational facts, relative truths', 17.

<sup>355</sup> Ronen Y, 'Redefining the child's right to identity', 157.

<sup>356</sup> Klibanoff E, 'Genealogical information in adoption: the adoptee's quest and the law' 11 *Family Law Quarterly* 2, 1977, 193.

physical appearance, personality traits, instincts inherent to the biological family as well as genetic limitations.<sup>357</sup> This leads adoptees to ask questions about who they really are, who they look and behave like, and where they belong.<sup>358</sup> Searchers also assert that they need to know why they were placed for adoption.<sup>359</sup> The process of adoption leaves some adoptees wondering if it is through a fault of their own that they were rejected or abandoned.<sup>360</sup>

Developing a strong sense of identity is tied to having a warm and loving environment, as well as knowledge of one's genetics.<sup>361</sup> While the former can be guaranteed through the adoptive family, the latter cannot be ignored. The most critical period in identity development is adolescence.<sup>362</sup> This is supported by Erik Erikson's Psychological Development Theory. It suggests that the fifth stage of personality development, involving a battle to solve identity confusion, occurs during adolescence.<sup>363</sup> Some adoptees report having a better understanding of themselves after accessing the records.<sup>364</sup> This result is, however, not a guarantee. The desires and wishes of searchers do not always materialise. Especially where it is a reunion being sought, there are chances of it being unsuccessful.<sup>365</sup> Some biological parents reject their children, leaving them emotionally and psychologically hurt.<sup>366</sup> Some search with the mindset of confronting their biological parents for relinquishing them, which often also leads to a bad reunion.<sup>367</sup>

Some findings of research studies are noteworthy. The first is that searchers are the minority of adoptees.<sup>368</sup> Thus, while it can be agreed that psychological problems tied to not knowing one's origins may develop, more often than not, they do not. This psychological need is not innate in adoptees.<sup>369</sup> Nonetheless, the number of this minority is too significant to altogether dismiss.<sup>370</sup> In

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<sup>357</sup> Giroux M, De Lorenzi M, "Putting the child first", 60.

<sup>358</sup> Feast J, Howe D, 'Open adoption records', 33.

<sup>359</sup> Feast J, Howe D, 'Open adoption records', 33.

<sup>360</sup> Klibanoff E, 'Genealogical information in adoption', 193.

<sup>361</sup> Klibanoff E, 'Genealogical information in adoption', 193.

<sup>362</sup> Nackman S, 'Limited spaces: reconciling the chinese american adoptee identity and mental health' MA Thesis, University of Pittsburgh, 2023, 8.

<sup>363</sup> Nackman S, 'Limited spaces', 8.

<sup>364</sup> Feast J, Howe D, 'Open adoption records', 38.

<sup>365</sup> Hancock-Fraser C, 'The search for missing pieces', 25.

<sup>366</sup> Feast J, Howe D, 'Open adoption records', 37.

<sup>367</sup> Hancock-Fraser C, 'The search for missing pieces', 35.

<sup>368</sup> Klibanoff E, 'Genealogical information in adoption', 194.

<sup>369</sup> Carp E, 'Adoption, blood kinship, stigma, and the adoption reform movement', 450.

<sup>370</sup> Klibanoff E, 'Genealogical information in adoption', 194.

addition, most of those who are searchers report having a strained relationship with their adoptive family.<sup>371</sup> Further, amongst searchers, there are those who seek information only, and those who seek reunions. Studies show those who are well informed about their adoption status earlier in life, if they do search, seek only information and no reunion.<sup>372</sup> The implication of these studies is that it is in the best interests of the child to have their psychological and emotional needs met by having access to their genetic records. However, closed adoptions in and of themselves do not cause psycho-emotional problems related to identity.

#### 4.2.2.3 Other Relational Needs

There is a vital need to protect adoptees from entering into prohibited degrees of consanguinity.<sup>373</sup> This is one of the most compelling reasons to provide genetic information to adoptees. This is particularly problematic because people are often drawn to partners due to similarity or familiarity, a tendency referred to as homogamy.<sup>374</sup>

#### 4.2.3 Importance of family ties

Children have a right to a family environment.<sup>375</sup> This right is built on the premise that family relations are fundamental to a child's protection, personal identity, care and protection.<sup>376</sup> When the biological parents are unwilling or unable to care for the child, adoption provides an alternative to the natural family.<sup>377</sup> The UNCRC's protection of the family environment seems to be a reference to a social family that is responsible for nurturing children as opposed to simply a biological one.<sup>378</sup> In many jurisdictions, adoption laws terminate family life with the biological parents in order for the child to be reborn in the adoptive family.<sup>379</sup> The adoption order in and of itself gives rise to family life.<sup>380</sup> The adoption process is defined precisely as one that terminates

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<sup>371</sup> Hancock-Fraser C, 'The search for missing pieces', 25.

<sup>372</sup> Klibanoff E, 'Genealogical information in adoption', 194.

<sup>373</sup> Blauwhoff R, 'Foundational facts, relative truths', 22.

<sup>374</sup> Blauwhoff R, 'Foundational facts, relative truths', 23.

<sup>375</sup> Preamble and Article 16, *UNCRC*.

<sup>376</sup> Fokala E, 'The impact of the best interests and the respect for the views of the child principles in child custody cases', 88 *Nordic Journal of International Law* 4, 2019, 616.

<sup>377</sup> Williams C, 'Family norms in adoption law', 682.

<sup>378</sup> Ronen Y, 'Redefining the child's right to identity', 160.

<sup>379</sup> Harris-Short S, 'Making and breaking family life', 28.

<sup>380</sup> Harris-Short S, 'Making and breaking family life', 33.

legal rights and duties between a child and their natural parents and similar rights and duties towards the adoptive parents are substituted.<sup>381</sup>

The question then is whether the child's biological ties with their natural parents vests in the adoptee an interest in maintaining relationships with them.<sup>382</sup> It is acknowledged that while the adoptive family can nurture the child and provide them with security, it cannot replace the physical, genetic and ethnic connection shared uniquely with the biological family.<sup>383</sup> Still, a distinction ought to be drawn between parents who are involuntarily separated from their children because the state is of the opinion that it is in the child's best interest,<sup>384</sup> and parents who voluntarily relinquish their children. In the former, the standard required to establish family life, that of sufficient constancy and practical existence of close personal ties, can be met.<sup>385</sup> Such a situation is not within the realm of our current study as these parents often do not seek confidentiality. When parents willingly terminate all their rights and obligations towards their children, however, the same should not so quickly be imposed on them.<sup>386</sup> The biological parents' decision should be viewed as an exercise of their freedom of choice and should be respected as such.<sup>387</sup>

Society has cultivated a culture of genetic essentialism that upholds the primacy of genetic relationships.<sup>388</sup> This has had the direct consequence of saddling biological parents with responsibilities that they expressly denounced. The mere desire to relate with a biological parent does not in itself give rise to a family recognised and protected under law.<sup>389</sup> On the basis of the importance of family ties, an adoptee within a confidential adoption context who has never had a relationship with their biological parents cannot be said to have family life with them. It follows that this facet of the best interest principle protects the adoptive family and not the natural one.

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<sup>381</sup> Black's Law Dictionary, 6 ed.

<sup>382</sup> Harris-Short S, 'Making and breaking family life', 33.

<sup>383</sup> Appell A, 'Blending families through adoption: implications for collaborative adoption law and practice' 75 *Boston University Law Review* 4, 1995, 999.

<sup>384</sup> Article 19, *UNCRC*.

<sup>385</sup> *Lebbink v Netherlands*, ECtHR Judgement of 1 June 2004.

<sup>386</sup> *Odièvre v France*, ECtHR, 26.

<sup>387</sup> Marshall J, 'Concealed births, adoption and human rights law', 333.

<sup>388</sup> Blauwhoff R, 'Foundational facts, relative truths', 7.

<sup>389</sup> Wedel-Domaradzka A, 'Family life and identity-related rights of the child', 152.

#### 4.2.4 Safety and stability

Ensuring the BIC is protected also requires ensuring stability of the family environment.<sup>390</sup> The state is usually tasked with ensuring children are placed in safe and stable homes such that it is even considered that no placement is preferred over a suboptimal one.<sup>391</sup> The stability of adoption is linked to the concept of permanence.<sup>392</sup> There are three aspects of permanence. The first is legal permanence which refers to filiation of the adoptee.<sup>393</sup> There are then three types of legal permanence, that is, reunification with the family of origin where the child's safety can be assured; adoption where reunification is impossible; and legal guardianship in which parental rights remain intact but parental responsibilities are transferred to the guardian.<sup>394</sup> The second aspect of permanence is residential permanence - this concerns the continuity of care in a particular home.<sup>395</sup> The third aspect is psychological or relational permanence which refers to the strength of attachments that ensure the adoptee feels safe, cared for, and has a sense of belonging.

Attachment of the adoptee to their birth family is a factor affecting stability.<sup>396</sup> The opening of adoption records is less concerned with legal and residential permanence, and more with relational permanence. Adoption orders, once granted, create a permanent legal relationship between an adoptee and adopter. Principally, adoption is usually considered a measure of last resort.<sup>397</sup> For this reason, its legal permanence is not easily threatened by birth parents as they have already been deemed unwilling or unable to care for the child.

Courts have been known to deny post-adoption contact, their rationale being the protection of the family from any destabilising interference and stress caused by biological parents, and this is believed to be in the best interest of the child.<sup>398</sup> The concern is that where biological parents are still present, they will interfere with the family connection forming between the adoptee and the

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<sup>390</sup> Luhamaa K, O'Mahony C, 'International human rights law governing national adoption from care', 185.

<sup>391</sup> Williams C, 'Family norms in adoption law', 684.

<sup>392</sup> Henrique B, 'Adoptee- and adopter-related predictors of adoption (in)stability' MA Thesis, University of Porto, 2022, 1.

<sup>393</sup> Henrique B, 'Adoptee- and adopter-related predictors of adoption (in)stability', 1.

<sup>394</sup> Pérez A, Ocasio K, White K, Farina A, Rolock N, 'Family well-being after adoption and guardianship: considerations for engaging families across the life course' in Denby-Brinson R and Ingram C (eds) *Children and family-serving systems: a compendium of policy and practice*, Child Welfare League of America, Washington, 2023, 377.

<sup>395</sup> Henrique B, 'Adoptee- and adopter-related predictors of adoption (in)stability', 1.

<sup>396</sup> Henrique B, 'Adoptee- and adopter-related predictors of adoption (in)stability', 4.

<sup>397</sup> *CRC General comment 14*, 14.

<sup>398</sup> Harris-Short S, 'Making and breaking family life', 42.

adoptive parents.<sup>399</sup> Further, courts are hesitant to enforce post-adoption contact contracts as this is seen as state interference with the autonomous (adoptive) family unit.<sup>400</sup> Such enforcement would bar adoptive parents from exercising discretion to deny future contact. However, mere contact with biological parents would not affect family stability. Of more significance is an adoptee's feeling of being misunderstood or of not belonging that makes forming bonds within the adoptive family difficult.<sup>401</sup> This factor of relational permanence can be resolved by giving a voice to adoptees and by meeting their aforementioned psychological needs. This is done through facilitating contact between adoptees and biological parents. Usually, the family bond deepens over time.<sup>402</sup> Prior to sufficiently strong bonds being formed, it may not be in the child's best interest to have interference from birth parents. Where it is strong, biological records will not destabilise the family.<sup>403</sup> Adoptees may even have a better appreciation for their adopters. Over time, it is more important that the adoptee doesn't feel isolated and misunderstood, in which case, disclosure is in the best interest of the child.

#### **4.3 BIC AND COMPETING INTERESTS**

It would be inept to conduct an analysis of the BIC without considering the various competing interests that spark the debate on open adoptions. The shame suffered by parties to an adoption is what drove the move to confidential records.<sup>404</sup> Biological parents seek to protect themselves from the shame of pregnancy out of wedlock; adoptive parents have shame from infertility; and adoptees face the shame of illegitimacy.<sup>405</sup> For example, in the USA for example, where open adoptions were initially practiced, the Children's Bureau recommended the shift to closed adoptions to spare adoptees from embarrassment.<sup>406</sup> Within the same country, a movement of adoptees, Bastard Nation, developed to claim that they are not ashamed of their status and they thus advocate for

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<sup>399</sup> Pérez A, Ocasio K, White K, Farina A, Rolock N, 'Family well-being after adoption and guardianship', 377.

<sup>400</sup> Harris-Short S, 'Making and breaking family life', 41.

<sup>401</sup> Henrique B, 'Adoptee- and adopter-related predictors of adoption (in)stability', 1.

<sup>402</sup> Hancock-Fraser C, 'The search for missing pieces', 32.

<sup>403</sup> Ingall E, 'A presumption in favour of openness: unsealing adoption records' 26 *Cardozo Journal of Equal Rights & Social Justice* 2, 2020, 321.

<sup>404</sup> Appell A, 'Blending families through adoption', 1007.

<sup>405</sup> Appell A, 'Blending families through adoption', 1007.

<sup>406</sup> Samuels E, 'The idea of adoption: an inquiry into the history of adult adoptee access to birth records' 53 *Rutgers Law Review* 2, 2001, 386-387.

access to original birth records.<sup>407</sup> The interests of adoptive parents are mentioned more in the context of stability of the family and less vocally than interests of biological parents. Spearheading the opposition of opening records thus remains the interests of biological parents.

#### **4.3.1 Biological Parents' Anonymity Rights**

There are different views and perceptions about a mother relinquishing her child. Where it is viewed as a mere exercise of her freedom of choice, society regards her as selfish and unconcerned about her child's welfare.<sup>408</sup> If, instead, society chooses to see a woman sacrificing motherhood for the benefit of her child's welfare, a more approving outlook is developed.<sup>409</sup> One survey done on legal anonymous relinquishments showed that over eighty percent of the mothers were unmarried and about fifty percent were below the age of twenty three years.<sup>410</sup> These mothers are likely giving up their children in a bid to protect them from neglect, abuse or future abandonment.<sup>411</sup> Additionally, biological parents were guaranteed anonymity at the time of relinquishment based on a desire to protect themselves from public embarrassment.<sup>412</sup>

Mustering courage to resolve to relinquish one's own child is not without its difficulty and trauma.<sup>413</sup> In truth, it is not uncommon for biological parents to still feel connected to the relinquished children.<sup>414</sup> To have this difficult decision undermined or threatened may be considered hurtful and unjust.<sup>415</sup> Not giving thought to the experiences and considerations of these biological parents is tainted with notions that their actions are selfish.<sup>416</sup> A move to undermine the biological parents' decisions also calls into question the legality of such an action. Allowing for the opening of sealed adoption records is an enactment of a retroactive law.<sup>417</sup> It is the law that

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<sup>407</sup> Greiner M, 'The United States according to bastard nation' Bastard Nation <https://bastards.org/thank-you-for-visiting/> on 28 February 2025.

<sup>408</sup> Marshall J, 'Concealed births, adoption and human rights law', 333.

<sup>409</sup> Marshall J, 'Concealed births, adoption and human rights law', 333.

<sup>410</sup> Feast J, Howe D, 'Open adoption records', 27.

<sup>411</sup> Marshall J, 'Concealed births, adoption and human rights law', 332.

<sup>412</sup> Klibanoff E, 'Genealogical information in adoption', 195.

<sup>413</sup> Klibanoff E, 'Genealogical information in adoption', 195.

<sup>414</sup> Appell A, 'Blending families through adoption', 1018.

<sup>415</sup> Klibanoff E, 'Genealogical information in adoption', 195.

<sup>416</sup> Marshall J, 'Concealed births, adoption and human rights law', 350.

<sup>417</sup> Feast J, Howe D, 'Open adoption records', 29.

grants natural parents the ability to conceal their identity, and they thus have legitimate expectations of their anonymity being retained and respected.<sup>418</sup>

Arguments are put forth that due to changes in culture, anonymity should no longer be protected. For example, there is wider acceptance of single parenthood and destigmatisation of illegitimacy.<sup>419</sup> This position assumes that the general change in societal attitudes will apply to every specific individual. Are there not still mothers who come from extremely religious or conservative backgrounds that would lead them to desire anonymity?<sup>420</sup> Are there still not others who seek anonymity, not because of external pressures, but because of a personal problem they are experiencing?<sup>421</sup> Perhaps these pregnant women are rape victims,<sup>422</sup> or continue to endure the reign of an abusive relationship.<sup>423</sup> Are these not circumstances that should be considered?

#### **4.3.2 Public Interest Considerations**

While adoption centrally involves three parties - the biological parents, the adoptive parents, and the adoptee - the institution of the family is pivotal to society at large and thus public interests must also be considered. The public is primarily concerned with preserving the integrity of the adoption process.<sup>424</sup> This includes ensuring that any laws or policies neither affect the supply of capable adoptive parents, nor the willingness of biological parents to relinquish their children if it is in the child's best interests.<sup>425</sup> Studies show that at any given time, there are fewer children (especially infants) available for adoption than there are parents willing to adopt.<sup>426</sup> The supply of capable adoptive parents is therefore not significantly affected by changes from closed to open adoptions.<sup>427</sup> Any fear of abandonment that adoptive parents may feel in open adoptions also decreases over time.<sup>428</sup>

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<sup>418</sup> Skopek J, 'Reasonable expectations of anonymity' 101 *Virginia Law Review* 3, 2015, 732.

<sup>419</sup> Appell A, 'Blending families through adoption', 1008.

<sup>420</sup> Marshall J, 'Concealed births, adoption and human rights law', 332.

<sup>421</sup> Marshall J, 'Concealed births, adoption and human rights law', 332.

<sup>422</sup> Colin-Greene J, 'Identity and personhood', 1282.

<sup>423</sup> Marshall J, 'Concealed births, adoption and human rights law', 327.

<sup>424</sup> Klibanoff E, 'Genealogical information in adoption', 196.

<sup>425</sup> Klibanoff E, 'Genealogical information in adoption', 196.

<sup>426</sup> Appell A, 'Blending families through adoption', 1008.

<sup>427</sup> Appell A, 'Blending families through adoption', 1009.

<sup>428</sup> Ingall E, 'A presumption in favour of openness', 321.

The more pressing concern is that many biological parents feel that they require anonymity in order to place children up for adoption.<sup>429</sup> Absent such anonymity, jeopardy is placed on the life and health of the mother and the child. In fact, one of the reasons for recognising confidentiality within the Hague Convention is that in several states, this is a matter of life and death.<sup>430</sup> Children are likely to be aborted, abandoned or abused. One of the judges in Odièvre disdained that persons who seek disclosure against their biological mother's wishes, ought to ask themselves whether they would be born if she hadn't been afforded the right to anonymity.<sup>431</sup>

What is ironic is that this liberal world seems more willing to accept a woman's decision to terminate her pregnancy than her decision to give birth and later relinquish her child anonymously.<sup>432</sup> There are four guiding principles of the UNCRC:<sup>433</sup> non-discrimination,<sup>434</sup> the best interests of the child,<sup>435</sup> right to life, survival and development,<sup>436</sup> and respect for the views of the child.<sup>437</sup> In interpreting and applying the UNCRC, all principles ought to be applied, and in this context, particularly the right of a child to life, survival and development.<sup>438</sup> It is important to remember that the UNCRC's protection extends to children conceived but not yet born. As such, their lives also need to be respected and protected as any other children would.

There is also a risk of unwanted children being sold off in the black market with erasure of confidentiality.<sup>439</sup> There would be no way of monitoring the placement and treatment of such a child thereafter. This life-protection rationale is what drove anonymous births to be recognised in the first place. It continues to drive policies and court decisions towards respecting the wishes of biological parents.

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<sup>429</sup> Ingall E, 'A presumption in favour of openness', 321.

<sup>430</sup> Blauwhoff R, 'Foundational facts, relative truths', 52.

<sup>431</sup> Blauwhoff R, 'Foundational facts, relative truths', 84.

<sup>432</sup> Marshall J, 'Concealed births, adoption and human rights law', 330.

<sup>433</sup> *CRC General comment no 5 on the general measures of implementation of the convention on the rights of the child*, 2003, 3.

<sup>434</sup> Article 2, *UNCRC*.

<sup>435</sup> Article 3, *UNCRC*.

<sup>436</sup> Article 6, *UNCRC*.

<sup>437</sup> Article 12, *UNCRC*.

<sup>438</sup> Mero A, 'Adoption and genetic identity: promoting the best interests of the child' 23 *Balkan Social Science Review* 109, 2024, 117.

<sup>439</sup> Klibanoff E, 'Genealogical information in adoption', 196.

#### 4.4 BALANCING INTERESTS

The various aspects of the best interests of the child ought to be balanced against each other on a case-by-case basis. In some cases, the psychological needs of the child far outweigh the stability of the family unit, while in some, the only factor may be the views of the child. A summary of the above analysis is that if the child's views are that they should receive information about their genetic origins, then provided they are mature enough to understand the consequences of their actions, their views should be respected. Further, it is always in the best interest of the child to disclose their medical history, as well as that of their biological family. Where the child is experiencing psychological or emotional trauma from lack of access to their records, it is in their best interest that they receive such records. Lastly, it is always in an adoptee's best interest to safeguard the stability of the adoptive family. Where this stability is threatened by disclosure or post-adoption contact, such disclosure or contact should be delayed or denied. The decision maker thus ought to analyse which needs are relevant to the individual case before them and weigh them against each other. This implies that disclosure should not arise automatically but depending on the circumstances.

A critical question to such an analysis is whether if it is found that it is in the child's best interests to receive their original records, other interests should be considered. The ECtHR has consistently held that the interests of the child should always be balanced against other interests. In *Odievre*, the court held that among the factors to be considered is the choice made by the natural parents, existing family ties, and the views of the adoptive parents.<sup>440</sup> However, the paramountcy of the BIC in adoption suggests that the interests of others are only relevant insofar as they have a bearing upon the interests of the child.<sup>441</sup> This means that the interests of others should not be given independent weight, although they should still be afforded due consideration.

A more accurate view of the interests of the biological mother and that of the public is not as competing, but as contributing to the interests of the child. A biological parent who by all means does not want to be discovered or contacted is likely to reject their child in future, putting them through the very trauma they sought to avoid. Where a biological parent was protecting the child from abuse, there's no guarantee that the searching adoptee will not encounter the danger they

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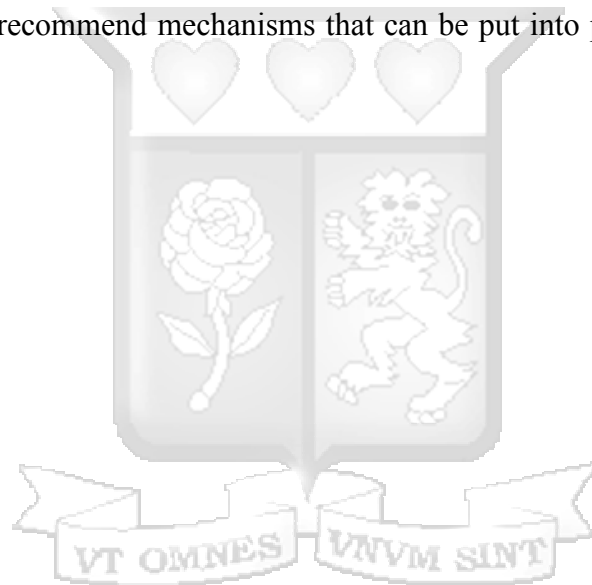
<sup>440</sup> Blauwhoff R, 'Foundational facts, relative truths', 84.

<sup>441</sup> Harris-Short S, 'Making and breaking family life', 37.

were being shielded from at infancy. Indeed, there are parents who opt for abandoning their children in unsafe ways - such as those who threw babies into the Tiber River - because anonymity is not offered to them. In what ways is ignoring these interests best for the child? A limitation on the right to know one's origins may very well be justified if it serves such legitimate aims, balances all interests and is necessary.<sup>442</sup>

#### 4.5 CONCLUSION

The best interests of adoptees ought to be analysed on a case-by-case basis, taking into consideration the various facets of the BIC principle as well as other interests that affect the BIC. Having determined how the best interests of the child are applied to the disclosure of genetic records, Chapter 5 shall recommend mechanisms that can be put into place to ensure these best interests are realised.



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<sup>442</sup> Wedel-Domaradzka A, 'Family life and identity-related rights of the child', 154.

## **CHAPTER 5: CONCLUSION**

This conclusionary chapter is dedicated to providing a summary of the findings of the previous chapters. It shall then provide recommendations that are in line with the findings. Lastly, the limitations of the recommendations shall be outlined.

### **5.1 SUMMARY OF FINDINGS**

Chapter 1 brought attention to the conflict between adoptees' right to identity and biological parents' right to privacy. It outlined three research objectives in resolving this conflict that would be addressed in the following chapters. The first objective was to establish the best interests of the child (BIC) as the theoretical framework. The next was to analyse the legal foundations of the adoptee's right to identity, and the third was to apply the BIC in balancing the adoptees and biological parents' rights. A review of the literature showed that while the right to identity of adoptees is generally recognised, the courts do not find it to override the biological parents' right to privacy. This position is typically critiqued by proponents of open adoptions. The chapter outlined the hypothesis of this current study - that closed adoptions provide safety and stability to adoptees and encourage more biological parents to safely relinquish their children. The chapter proposed that the need for preserving privacy of biological parents does not unjustly restrict adoptee's ability to understand their origins.

Chapter 2 addressed the first objective by exploring the principle of the best interests of the child (BIC) as the theoretical framework. It detailed the ambiguity of the principle and how this has led to diverse interpretations. The chapter also examined the origins and significance of the BIC. The CRC interpretation of the BIC as a substantive right, procedural rule and interpretive tool is also outlined. The distinction between the BIC as a primary consideration in general and as the paramount consideration in adoption is also explained. The factors to be considered and balanced when determining the BIC are highlighted.

Chapter 3 analysed the right to identity in the context of adoptees. Provisions of the UNCRC, the Hague Adoption convention, the ECHR and other instruments revealed the recognition of the right. A review of ECtHR cases found that the courts recognise the right to know one's origin as fundamental to respecting one's right to identity. Nonetheless, the Court did not find a corresponding duty of biological parents to disclose their information. It was found that the

interests of the child still needed to be balanced against those of the biological parents as well as public interests. In the eyes of the Court, a balance of interests tilts against unsealing of closed adoption records. The insights of this chapter directly relate to the second objective.

Chapter 4 fulfilled the third objective in its examination of how the BIC applies to adoptees' right to identity in light of the factors highlighted in Chapter 2. These factors are the views of the child, the needs of the child, the importance of family ties, and the need for family stability. The findings suggest that disclosure is context dependent. The factors of the BIC need to be weighed against each other, and where appropriate, against the desires of biological parents and public interests which have a bearing on the interests of the child.

## 5.2 RECOMMENDATIONS

This section provides practical recommendations as to how to balance an adoptee's right to identity and that of their biological parents to privacy. It outlines social interventions, as well as policy and legislative measures that protect both rights.

### 5.2.1 Encourage Open Adoptions

The ECtHR case of *Kearns v France* is representative of an instance in which a mother later regretted giving birth anonymously and relinquishing her child.<sup>443</sup> Unfortunately for this mother, she missed out on the two month window of time that would have allowed her to retrieve her child.<sup>444</sup> The court, recognising that it is in a child's best interest to enjoy stability in a new family environment as soon as possible, held that two months is sufficient time to allow a birth parent to reflect upon their decision and change their minds.<sup>445</sup> Ms Kearns is not the only mother who later regrets her choice. Indeed, the effects of relinquishment are not just short-term, but often lifelong for birth mothers.<sup>446</sup> Several of them still feel connected to their children after relinquishment, and seek to know how their children are faring.<sup>447</sup> When their children are more grown, birth parents

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<sup>443</sup> *Kearns v France*, ECtHR Judgement of 10 January 2008, para 11-14.

<sup>444</sup> *Kearns v France*, ECtHR, 18.

<sup>445</sup> *Kearns v France*, ECtHR, 80-83.

<sup>446</sup> Feast J, Howe D, 'Open adoption records', 28.

<sup>447</sup> Appell A, 'Blending families through adoption', 1018.

may be less interested in protecting their privacy and may even desire to reunite.<sup>448</sup> Their desire to establish contact is curtailed by the very law that granted them anonymity.<sup>449</sup>

Arranging for open adoption may be an advantageous option. Open adoptions are those in which both sets of parents agree to maintain an ongoing relationship after the biological parents relinquish their parental rights.<sup>450</sup> This could be through visits, letters or phone calls. Biological parents have the comfort of knowing their children were placed in loving homes, and this may even ease their pain or guilt.<sup>451</sup> Adoptive parents still get their parental rights and responsibilities respected, and as such they can regulate the contact with birth parents to prevent any interference.<sup>452</sup> Adoptees have their needs met concurrently - the need for a stable and loving family environment,<sup>453</sup> and the need to know their origins.<sup>454</sup> Adoption agencies should thus, first and foremost, promote voluntary open adoption, offering biological parents the chance to remain involved in the lives of their children.

### 5.2.2 Restricted Access

Adoption presents an avenue to protect the very existence and continuous well-being of dependent children. Given that for some children to be safely relinquished, their mothers require anonymity, this desire ought to be offered its protection. Some open record proponents concede that there may be a need to temporarily seal records at the time of relinquishment in the best interests of the child, but that as the child matures, the need decreases.<sup>455</sup> Where biological parents insist on having closed adoptions and maintaining their privacy, offering restricted access to original records is an effective way to balance the interests of the adoptees against the parents'. The mechanisms that can be employed to respect both the rights of the biological parents and the adoptee include establishing mutual contact registries, allowing adoptees to apply to courts to unseal their records, and enacting laws allowing for open access of all records post-enactment of the laws.

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<sup>448</sup> Weller M, "I want the piece of paper that is my history, and why the hell can't I have it?": Original birth certificates and adoptive identity' *22 Journal of Family Communication* 3, 2022, 281.

<sup>449</sup> Feast J, Howe D, 'Open adoption records', 27.

<sup>450</sup> Fleming A, 'Balancing the adoptive triangle: the need to protect biological parents' privacy rights' *Law School Student Scholarship*, 2012, 22.

<sup>451</sup> Fleming A, 'Balancing the adoptive triangle', 22.

<sup>452</sup> Fleming A, 'Balancing the adoptive triangle', 23.

<sup>453</sup> Appell A, 'Blending families through adoption', 1001.

<sup>454</sup> Fleming A, 'Balancing the adoptive triangle', 23.

<sup>455</sup> Fleming A, 'Balancing the adoptive triangle', 12.

### 5.2.2.1 Establishment of Registries

Mutual consent registries can be established to match adoptees and biological parents who both want to share their information, and/or establish contact.<sup>456</sup> There are two types of mutual consent registries: passive or voluntary registries, and active registries.<sup>457</sup> Passive registries require adoptees and birth parents to seek out the registry and provide their information in order to participate. If both parties have provided their identifying information and consented to its release, then each party is notified and given the information.<sup>458</sup> Active registries operate through the request by one party to locate another who is then searched for by an appointed “confidential.” Once located, the anonymous party is informed of the nature of the search and requested to have their identifying information released. Their response is then relayed back.<sup>459</sup> The registries may be limited to adoptees and biological parents or expanded to allow siblings and other family members to register.<sup>460</sup>

Registries are ineffective if parties to the adoption are unaware of their existence, the process of registration or the way to update information.<sup>461</sup> States thus need to inform birth parents at the point of relinquishment, adoptive parents upon granting adoption orders, and consistently run campaigns and advertisements to inform the public.<sup>462</sup>

Complementary to the registries is the availability of signing contact preference forms. The options are no contact, contact through an intermediary only, or contact at any point.<sup>463</sup> Contact through an intermediary can be in the form of transmitting messages between adoptees and biological parents without revealing any identifying information.<sup>464</sup> These forms are open for amendment at any future date.<sup>465</sup> Similar to signing a “no contact” preference is the establishment of a contact veto registry - registration by biological parents may allow adoptees to access information but

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<sup>456</sup> Ingall E, ‘A presumption in favour of openness’, 311.

<sup>457</sup> Ingall E, ‘A presumption in favour of openness’, 311.

<sup>458</sup> Fleming A, ‘Balancing the adoptive triangle’, 21.

<sup>459</sup> Fleming A, ‘Balancing the adoptive triangle’, 21.

<sup>460</sup> Bialek T, ‘Genealogy sites and adoptions’, 1426-1427.

<sup>461</sup> Fleming A, ‘Balancing the adoptive triangle’, 21.

<sup>462</sup> Fleming A, ‘Balancing the adoptive triangle’, 22.

<sup>463</sup> Baffer B, ‘Closed adoption: an illusory promise to birth parents and the changing landscape of sealed adoption records’ 28 *Catholic University Journal of Law and Technology* 2, 2020, 155.

<sup>464</sup> Klibanoff E, ‘Genealogical information in adoption’, 198.

<sup>465</sup> Baffer B, ‘Closed adoption’, 155.

under strict obligations not to contact their biological parents.<sup>466</sup> It is also possible to register a “zombie veto” which would extend a contact veto beyond death.<sup>467</sup>

In respecting the concept of evolving capacities, registration into a mutual consent registry can be limited to only children who are deemed mature enough to understand the consequences of their actions. Austria and Germany seek to allow children born of anonymous births to retrieve their genetic records at ages fourteen and sixteen respectively.<sup>468</sup> For Scotland, the age is sixteen.<sup>469</sup> In American states, adoptees can only access records in their adulthood with some states having the minimum age as eighteen and others as twenty one.<sup>470</sup> It is up to the discretion of states to determine a suitable age.

Additionally, counselling services ought to be offered to the adoptee, the adoptive parents, and the biological parents.<sup>471</sup> For biological parents, these services should be offered at the point of relinquishment and registration into a mutual consent registry. Adoptive parents should be counselled after being deemed fit to adopt, and upon granting of an adoption order. Adoptees require counselling during adolescence, or any other time prior and thereafter, when they face challenges associated with their adoption status. They should also receive counselling before being allowed to register in a mutual consent registry.

The agencies and institutions mandated to carry out counselling need to be skilled in identifying psychological needs and issues, and in dealing with the effects of opening adoption records.<sup>472</sup> Counselling provides adoptees with an understanding that the records they seek to access were obtained from biological parents at a time when they thought that confidentiality would perpetually apply.<sup>473</sup> This prepares them for the likely disappointment of not tracing their biological family, or even the potential of being rejected.<sup>474</sup>

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<sup>466</sup> Ingall E, ‘A presumption in favour of openness’, 325.

<sup>467</sup> Bialek T, ‘Genealogy sites and adoptions’, 1429.

<sup>468</sup> Simmonds C, ‘An unbalanced scale’, 255-256.

<sup>469</sup> Feast J, Howe D, ‘Open adoption records’, 28.

<sup>470</sup> Baffer B, ‘Closed adoption’, 155-156.

<sup>471</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

<sup>472</sup> Klibanoff E, ‘Genealogical information in adoption’, 198.

<sup>473</sup> Feast J, Howe D, ‘Open adoption records’, 30.

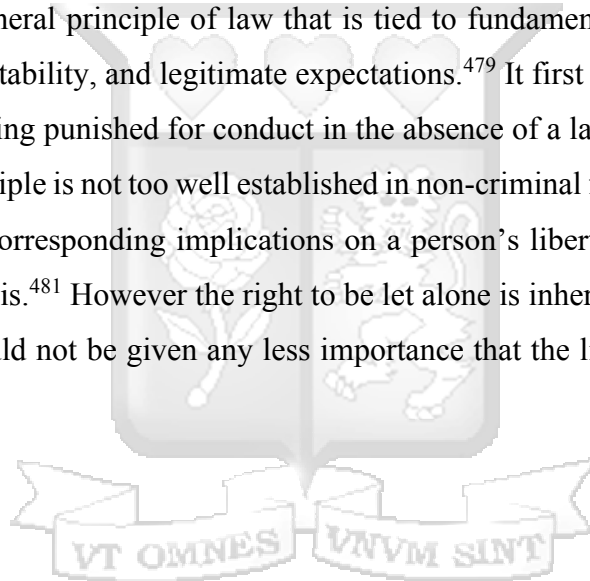
<sup>474</sup> Feast J, Howe D, ‘Open adoption records’, 30.

### 5.2.2.2 Date-based Restrictions

The laws in the UK - England, Wales, Scotland, Northern Ireland - allowing for adoptees to access their records apply retrospectively.<sup>475</sup> This means that, in spite of dissent from biological parents, adoptees are able to access their records. To overcome retroactivity of laws, states may decide that original records may only be accessed by adoptees born after the passing of the law.<sup>476</sup> For example, in the US, Idaho and Tennessee have implemented date-based restrictions.<sup>477</sup>

With such restrictions, biological parents who relinquish their children from the set date are aware that their children will be allowed to indiscriminately access their records upon meeting certain procedural requirements.<sup>478</sup>

Non-retroactivity is a general principle of law that is tied to fundamental principles of equality, legal certainty and predictability, and legitimate expectations.<sup>479</sup> It first emerged in Roman law to prevent a person from being punished for conduct in the absence of a law specifically prohibiting that conduct.<sup>480</sup> The principle is not too well established in non-criminal fields of law because there is a perception that the corresponding implications on a person's liberty are not as significantly adverse as imprisonment is.<sup>481</sup> However the right to be let alone is inherently protected within the right to liberty.<sup>482</sup> It should not be given any less importance that the liberties withdrawn during imprisonment.



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<sup>475</sup> Feast J, Howe D, 'Open adoption records', 29.

<sup>476</sup> Bialek T, 'Genealogy sites and adoptions', 1425.

<sup>477</sup> Bialek T, 'Genealogy sites and adoptions', 1425.

<sup>478</sup> Baffer B, 'Closed adoption', 154, 156.

<sup>479</sup> Kryvoi Y, Matos S, 'Non-retroactivity as a general principle of law' 17 *Utrecht Law Review* 1, 2021, 46-47.

<sup>480</sup> Kryvoi Y, Matos S, 'Non-retroactivity as a general principle of law', 46.

<sup>481</sup> Kryvoi Y, Matos S, 'Non-retroactivity as a general principle of law', 51.

<sup>482</sup> Fleming A, 'Balancing the adoptive triangle', 2.

### 5.2.2.3 Recourse to courts

Given the adversarial nature of the judicial process, it is more ideal to avoid seeking recourse to courts.<sup>483</sup> However, it is still an available option to parties who may not be benefiting from the registries.<sup>484</sup> Expediency should be ensured for matters that do find their way to a courtroom.<sup>485</sup>

Adoptees who seek court intervention are required to show “good cause” for having access to the records they have otherwise been denied.<sup>486</sup> It is quite onerous to prove good cause as it is not a defined concept, and the threshold is considered high.<sup>487</sup> The courts hold that mere curiosity or desire to know one’s ancestry is not good cause, otherwise the requirement to prove it would be a nullity.<sup>488</sup> An applicant needs to show compelling need to receive identifying information.<sup>489</sup> Courts have found good cause where there is a severe psychological problem caused by the absence of the information; an overwhelming need to know; a need to determine an adoptee’s inheritance rights; or a sense of obligation to one’s ancestral religion.<sup>490</sup>

Information about the child and biological family should always be collected, stored and sealed regardless of whether the adoption is open or closed.<sup>491</sup> Adoption agencies should endeavour to collect relevant information about the adoptee, the biological parents, as well as other relatives of the biological parents. In regards to the adoptee, of importance is their original name, physical description at the age of placement, place and circumstances of birth, medical history, and where relevant, their educational history and developmental milestones.<sup>492</sup> The biological parents’ age, race, ethnicity, place of birth, religion, physical description, personality and temperament, medical records, interests and talents, education and employment, the relationship between the father and the mother, and reasons for relinquishment should be recorded.<sup>493</sup> It may be imperative for biological parents to update their medical information as sometimes, (hereditary) illnesses may not

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<sup>483</sup> Klibanoff E, ‘Genealogical information in adoption’, 198.

<sup>484</sup> Appell A, Boyer B, ‘Parental rights vs best interests of the child: a false dichotomy in the context of adoption’ 2 *Duke Journal of Gender Law & Policy*, 1995, 82.

<sup>485</sup> Appell A, Boyer B, ‘Parental rights vs best interests of the child’, 83.

<sup>486</sup> Bialek T, ‘Genealogy sites and adoptions’, 1429.

<sup>487</sup> Fleming A, ‘Balancing the adoptive triangle’, 5.

<sup>488</sup> Fleming A, ‘Balancing the adoptive triangle’, 6.

<sup>489</sup> Fleming A, ‘Balancing the adoptive triangle’, 6.

<sup>490</sup> Bialek T, ‘Genealogy sites and adoptions’, 1432.

<sup>491</sup> Simmonds C, ‘An unbalanced scale’, 266.

<sup>492</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

<sup>493</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

develop until their ages advance.<sup>494</sup> If the adoptee has any biological siblings, similar information as that of the adoptees should be collected.<sup>495</sup> The details of the maternal and paternal grandparents, as well as of any siblings of the biological parents, should also be collected, the contents being similar to those of the biological parents.<sup>496</sup> The awareness of the child's birth and adoption by family members should also be noted.<sup>497</sup> One reason to record this information irrespective of any disclosure arrangements is because the court may order for disclosure, and the relevant details ought to be ready. There are of course other reasons such as preventing the trafficking of children,<sup>498</sup> and public interest reasons.

### 5.2.3 Addressing underlying problems

Laws are not only a mirror to society, but mould societal norms too.<sup>499</sup> Inasmuch as culture impacts the formulation and implementation of laws, laws are also a means of promoting social change. The unfortunate circumstances that lead to parents desiring to anonymously relinquish their children can and should be regulated.

#### 5.2.3.1 Protection of Illegitimate Children

A legitimate child is one who is born within a legally recognised union of a husband and a wife.<sup>500</sup> In several historical human societies, children born out of wedlock were ostracised, neglected, deemed unworthy of family membership and excluded from inheritance.<sup>501</sup> They were also subjected to pejorative words such as “bastard.”<sup>502</sup> It was not until the 18<sup>th</sup> century that destigmatisation began, eventually leading up to legal reforms that protect children born out of wedlock.<sup>503</sup> There are still certain societies that continue to leave illegitimate children at a disadvantage. The Kenyan Islamic community, for example, decried against allowing children

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<sup>494</sup> Fleming A, ‘Balancing the adoptive triangle’, 19.

<sup>495</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

<sup>496</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

<sup>497</sup> Klibanoff E, ‘Genealogical information in adoption’, 197.

<sup>498</sup> Wedel-Domaradzka A, ‘Family life and identity-related rights of the child’, 156.

<sup>499</sup> Ronen Y, ‘Redefining the child's right to identity’, 149.

<sup>500</sup> Al-Insyirah J, Sanjaya U, ‘Status and rights of illegitimate children’ 8 *Notaire* 1, 2025, 83.

<sup>501</sup> Obladen M, ‘Dishonoured: the fate of infants born out of wedlock’ 119 *Neonatology*, 2022, 652.

<sup>502</sup> Obladen M, ‘Dishonoured’, 654.

<sup>503</sup> Obladen M, ‘Dishonoured’, 658.

born out of wedlock to inherit their father's property.<sup>504</sup> A community that does not protect these already vulnerable children creates an environment that pushes a biological mother to relinquish the child, confidentially, for the child's own protection.

### **5.2.3.2 Equal parental responsibility for children**

It is important for laws to place the onus of taking care of children on both mothers and fathers. It is not uncommon for fathers to be absent from the lives of their children out of choice (rather than restrictions imposed by the mother).<sup>505</sup> Raising children is no small feat, and where mothers feel that the burden will rest solely on their shoulders, they are more likely to give their children up for adoption. Whereas if they knew the father could easily be held to account, they are more likely to keep their children. The ECtHR cases earlier discussed, *Mikulic* and *Jaggi*, demonstrate how the law can make it difficult to simply prove paternity. If such processes are streamlined, and child support and maintenance is easily applied for, granted and paid, children and their mothers will be better off.<sup>506</sup>

### **5.2.3.3 State Support of Families**

The state should be expected to provide support for families in need.<sup>507</sup> This could be in the form of allowances paid out to families with children up to a certain age.<sup>508</sup> States could also provide early childhood care and education services. By providing suitable alternatives to parental care, mothers are able to participate easier in the labour-force without neglecting their children.<sup>509</sup> Policies should also maximise the time parents are allowed to take off to take care of their children, for example maternity and paternity leave.<sup>510</sup> Parents that are better able to take care of their children are less likely to relinquish them.

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<sup>504</sup> Ominde T, 'Imams seek court of appeal's help in inheritance disputes' Daily Nation, 4 March 2024 <https://nation.africa/kenya/news/imams-seek-court-of-appeal-s-help-in-inheritance-disputes-4544612> on 4 March 2025.

<sup>505</sup> Fields M, 'Remedies for children when non-resident parents abandon them after separation or divorce' 22 *Journal of the American Academy of Matrimonial Lawyers* 2, 2009, 294.

<sup>506</sup> Fields M, 'Remedies for children when non-resident parents abandon them after separation or divorce', 295.

<sup>507</sup> Harris-Short S, 'Making and breaking family life', 45.

<sup>508</sup> Rostgaard T, 'Family support policy in central and eastern Europe - a decade and a half of transition' The Council of Europe and UNESCO, 2004, 15.

<sup>509</sup> Rostgaard T, 'Family support policy in central and eastern Europe', 20.

<sup>510</sup> Rostgaard T, 'Family support policy in central and eastern Europe', 25.

#### 5.2.3.4 Addressing Crimes of Violence

The violent acts that women face remain the biggest threats against them.<sup>511</sup> The UN has compiled reports highlighting the violence that women face worldwide revealing millions of women that have experienced rape and other forced sexual acts in their lives.<sup>512</sup> A number of women who relinquish their children anonymously are victims of such violence. Laws need to effectively prevent and deter these crimes as well as offer punitive sentences.<sup>513</sup>

### 5.3 LIMITATIONS

In implementing the above recommendations, there are challenges likely to be encountered. For instance, the effectiveness of mutual consent registries is likely to be limited in instances of intercountry adoption.<sup>514</sup> This is because individual states are responsible for implementation of the registries. Therefore, in cases where children are adopted in a different country than those of their origin, it may be difficult to arrange for disclosure and contact, even where consent is mutually expressed. There is thus a need for a state-to-state sharing system.

Another challenge is posed by the internet and advancement in DNA testing that make secrecy in adoption more difficult to maintain.<sup>515</sup> Technology allows people to be found even when they have no desire to be.<sup>516</sup> A biological parent's privacy may therefore easily be violated.

Additionally, the legal system lacks the capacity to safeguard each and every person's right as humans and their relationships are complex and diverse.<sup>517</sup> The importance of genetic records may differ across race, ethnicity and culture,<sup>518</sup> whereas the law is based on an approximation of children's experiences.<sup>519</sup> Some adoptees will inevitably fall through the cracks. These include those whose parents are factually impossible to find and thus no official record of them exists. There are also those whose biological parents will simply refuse to meet them. The state does not have the coercive powers to compel a reunion.

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<sup>511</sup> Sharma N, 'Unending struggles for equality' 4 *Supremo Amicus*, 2018, 289.

<sup>512</sup> Sharma N, 'Unending struggles for equality', 290.

<sup>513</sup> Sharma N, 'Unending struggles for equality', 290.

<sup>514</sup> Fleming A, 'Balancing the adoptive triangle', 22.

<sup>515</sup> Seymore M, 'Separation and connectedness', 115.

<sup>516</sup> Baffer B, 'Closed adoption', 160.

<sup>517</sup> Ronen Y, 'Redefining the child's right to identity', 156.

<sup>518</sup> Weller M, "I want the piece of paper that is my history, and why the hell can't I have it?", 282.

<sup>519</sup> Ronen Y, 'Redefining the child's right to identity', 156.

## 5.4 CONCLUSION

This chapter highlights some of the ways in which the adoptee's right to know their origins can be balanced against their birth parents' confidentiality rights. This is through encouraging open adoption, establishing restricted access measures and addressing underlying social and legal challenges. These recommendations seek to harmonise the competing rights of adoptees and biological parents in a manner that aligns with the BIC principle.

In order for there to be near universal standard practice, these recommendations need to be supported by international instruments and adopted into national legal systems. The UNCRC is the most authoritative legal text on children in international law.<sup>520</sup> Drafting an instrument of comparative strength - such as an optional protocol - would offer clarity on the position of adoptees in regards to their right to identity, and the best way to balance their interests in closed adoptions.<sup>521</sup> Nonetheless, implementation of the UNCRC is largely dependent on how different states interpret the substantive provisions.<sup>522</sup> In fact, the UNCRC owes its popularity to its allowance for state-specific interpretation.<sup>523</sup> States should thus be free to determine for themselves certain particulars, such as the age in which a child is deemed mature enough to access their genetic records.

Ultimately, this study highlights that achieving a fair balance between identity and privacy in adoption requires nuanced solutions. Refining legal frameworks and policies can better reflect the complexities of the adoption process while ensuring the best interests of the child remain at the centre of every decision.

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<sup>520</sup> Ronen Y, 'Redefining the child's right to identity', 148.

<sup>521</sup> Ronen Y, 'Redefining the child's right to identity', 173.

<sup>522</sup> Blauwhoff R, 'Foundational facts, relative truths', 43.

<sup>523</sup> Lee S, 'A child's voice vs a parent's control', 692.

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