

Title Page

Title: The Best Interests of the Child in Intercountry Adoption: A Constructivist and Comparative Account

Author: Sarah Sargent

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Dedication

This thesis is dedicated to the memory of my god-mother Rebecca Vaughan and to my god-father Fritz Vaughan, and to my parents Joseph and Nancy Sargent, and the vision that they gave to me of hope, kindness and caring in the world.

I would like to thank Professor Trevor Buck for his supervision, guidance and insight during the research process.

Abstract

This thesis examines the motivations for states to become involved in intercountry adoption. This includes both states that send children in intercountry adoption and states that receive children. The thesis explores the dynamic cycle of events that lead states to intercountry adoption participation. It then explores the ramifications of those for the application and interpretation of the ‘best interests of the child’ standard. This thesis includes empirical work through data gathered by interviews and analysed by constructivist grounded theory methodology. It also includes a comparative analysis of seven different states involved in intercountry adoption. The comparative analysis is again undertaken with the use of constructivist grounded theory methodology. The thesis presents a theory that explains state motivation to engage in intercountry adoption and the effects that these have on the normative meaning that is given to the ‘best interests of the child’ legal standard when used in intercountry adoption. This thesis makes an original contribution of knowledge by examining the motivation of states to enter into intercountry adoption and providing a theory that traces the pathways of how states become involved. It makes further original contributions to knowledge by examining how these motivations impact the normative meaning given to the standard in domestic, international and transnational settings. Yet another original contribution to knowledge is in providing a theory and network map of the normative meanings that are ascribed to the standard in an intercountry adoption setting.

Sarah Sargent

Chapter One

The Best Interests of the Child in Intercountry Adoption: Introduction to a Comparative and Constructivist Research Project

Purpose Statement¹: The purpose of this grounded theory research is to identify the influences on intercountry adoption operation and decision-making at the state level, and the implications of those for the interpretation and application of the best interest of the child standard, and to generate a substantive theory on this process.

Research Question²: What motivates or influences a state to engage in intercountry adoption? How does this in turn effect how the intercountry adoption best interests of the child standard is interpreted and applied?

Introduction

This thesis discusses the best interests of the child standard in an intercountry adoption context. It examines the motivations of states to engage in intercountry adoption as either sending or receiving states. In turn then it considers what effect those motivations have on the interpretation and application of the standard. The thesis uses qualitative research and comparative legal analysis through the application of grounded theory methodology. Ultimately two theories are provided in this thesis. The first theory explains the motivations and the process whereby states become involved as sending or receiving states in intercountry adoption. The second theory, which incorporates the first, answers the second part of the research question on the way in which the best interests of the child standard in interpreted and applied.

At the outset a few things should be said about the focus and approach of this thesis to the research question. This is not the usual account of the best interests standard, of

¹ J Creswell, *Introducing and Focusing the Study. Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (2nd edn, Sage Publications 2007) 107-108 .

² Cresswell (n 1) 103-104.

trying to locate its true nature within a thicket of arguments about the problems of children and rights, of rights and interests, of universal and cultural relativism. Such discussions are already replete throughout the literature, and another accounting of these through this thesis is unlikely to yield any fresh insight. Nor, given the level of problems and controversy that are a daily part of intercountry adoption operations, do they provide any practical grounding in understanding the utility of the standard in the real world.

It should be noted that these theoretical propositions on the best interests standard are particularly peculiar to *intercountry adoption* because of the unique circumstances in which intercountry adoption occurs. These are not intended to be generalised to the best interests standard in other legal usages.

Hague Convention on Intercountry Adoption

This section provides an overview of the important international treaty that is concerned with the operation of intercountry adoption. This is the Hague Convention on Intercountry Adoption (Hague Convention). The Hague Convention on Intercountry Adoption was created in 1993 to deal with issues regarding the regulation of international adoption.³ While there were existing instruments on intercountry adoption, there was a belief that a new instrument needed to be created that was specifically aimed at the changing environment of intercountry adoption operation.⁴ The Hague Convention, like the CRC, is a rights-based document that incorporates the best interest standard. In the Hague Convention, the best interest standard is a key operating principle. There are several references to the standard throughout the document, and it is the guiding standard for determining whether to place a child for intercountry adoption.⁵

³ G Parra-Aranguren 'Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption' Introduction, Paragraphs 1-2.

⁴ Parra-Aranguren (n3) Paragraph 1-2.

⁵The Hague Convention, Articles 1(a), 4 (b); see also Parra-Aranguren (n 3) Paragraphs 48-50.

The Hague Convention is an instrument that is set up to deliver a process for the operation of intercountry adoption, rather than setting up definitive standards for intercountry adoption operation. As the Guide explains:

The purpose of developing the Convention was to create a multilateral instrument which would define certain substantive principles for the protection of children, establish a legal framework of co-operation between authorities in the States of origin and in the receiving States, and to a certain extent, unify private international law rules on intercountry adoption.⁶

2005 Special Session and Guide To Good Practice

In September 2005 the second Special Session was held on the Hague Convention.⁷ The Second Session considered a number of issues,⁸ including a ‘Draft Guide to Good Practice’⁹ for the operation of intercountry adoption. The Philippines’ contingent that attended offered comments that the purpose of intercountry adoption was underscored as one that should operate as a child-centred measure, and not with a focus on the needs of the prospective adoptive parents.¹⁰ The Philippines’ contingent stressed that intercountry adoption should be seen as ‘a social and legal measure for the protection of children’.¹¹

⁶ The Hague Conference on Private International Law, ‘The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice’ (2008) (cited as ‘Guide’) paragraph 26, page 24.

⁷The Hague Conference on Private International Law ‘The Report and Conclusions of the Second Special Commission on the Practical Operation of the Hague Convention of 29 May 1992 on Protection of Children and Co-operation in Respect of Intercountry Adoption’ (17-23 September 2005), online at http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf

⁸ See generally ‘Report and Conclusions’ (n 7).

⁹ The Hague Conference on Private International Law, ‘Conclusions and Recommendations of the Second Meeting of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1992 on Protection of Children and Co-operation in Respect of Intercountry Adoption’, 17-23 September 2005 (cited as ‘Conclusions and Recommendations’) paragraph 1, 3; online at http://www.hcch.net/upload/wop/concl33sc05_e.pdf

¹⁰ ‘Conclusions and Recommendations’ (n 9) paragraph 28, 17.

¹¹ ‘Conclusions and Recommendations’ (n 9) paragraph 28, 17.

The Guide to Good Practice¹² gives detailed information on the best interests standard in the Hague Convention. The information in the Guide provides a detailed and contemporary view on how the best interests standard is seen to operate within intercountry adoption. It does this by linking the standard with other provisions of the Convention, and explaining how these should work together in the intercountry adoption process.

Firstly, the standard is linked with the principle of subsidiarity,¹³ and secondly, with the principle of non-discrimination¹⁴ in intercountry adoption. The importance of subsidiarity is underscored by the Guide's statement that it is 'central to the success of the Convention.'¹⁵ The information in the Guide clarifies that intercountry adoption takes place as one of a broad range of child welfare options, and is not looked to as the first choice or priority when making decisions on a solution for a child.¹⁶ While subsidiarity requires that intercountry adoption is not the first choice, neither does it relegate intercountry adoption to the choice of "'last resort'".¹⁷ This means that the intention of the Convention is that some forms of placement should be considered as less satisfactory than intercountry adoption, such as 'remaining permanently in an institution, or having many temporary foster homes.'¹⁸ The Guide, despite the importance placed on the principle of subsidiarity, emphasises the continued primary role of the best interests standard—commenting, that 'it is not subsidiarity itself which is the overriding principle of this Convention but the child's best interests.'¹⁹

The second principle that the Guide links the best interests principle to is that of non-discrimination.²⁰ The Guide describes this principle as meaning that 'children who are the subjects of national or intercountry adoption should enjoy the same rights and protections as any other child.'²¹

¹² The Hague Conference on Private International Law, 'The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice' (2008) (cited as 'Guide')

¹³ Guide (n 12) 29-30, paragraphs 46-53.

¹⁴ Guide (n 12) 30-31, paragraphs 54-57.

¹⁵ Guide (n 12) 29, paragraph 48.

¹⁶ Guide (n 12) 29-30.

¹⁷ Guide (n 12) 30, paragraph 53.

¹⁸ Guide (n 12) 30, paragraph 53.

¹⁹ Guide (n 12) 30, paragraph 52.

²⁰ Guide (n 12) 30-31.

²¹ Guide (n 12) 30, paragraph 55.

The Guide then goes on to link the best interests principle to several other Convention provisions²²: that of ‘ensuring the child is adoptable’,²³ ‘preserving information’,²⁴ ‘matching with a suitable family’.²⁵

The Guide provides a definitive statement of the best interests standard within the entire fabric of the Convention. The standard does not stand alone, lacking substance, in this rendition of it. All of this, which if adhered to, should serve the purpose of ensuring ‘against the misuse or arbitrary interpretation of the best interests principle to override the child’s fundamental rights when applying this Convention.’²⁶ This is also an acknowledgment that in practice, the best interests principle has been prone to inappropriate application in intercountry adoption operations.

The Guide appears to be a straight forward document expression of the contemporary interpretation and use of the Hague Convention. But in fact, the role of the Hague Conference is given further discussion in Chapter Three-which is in fact anything but straight forward.

The relationship of the best interest of the child and the principle of the subsidiarity of intercountry adoption were also addressed in the Second Special Session.²⁷ The ‘Conclusions and Recommendations’ are clear that ‘subsidiarity means in practice that when all the possibilities have been considered, it is concluded that intercountry adoption is the best solution to find a permanent home for a particular child.’²⁸

The Special Session Conclusions and Recommendations also highlight that intercountry adoption should not occur in isolation from other child welfare practices.²⁹ It points out, with reference to the Draft Guide, that intercountry adoption should be part of a continuum of services and decisions that are made about what is best for a child.³⁰ The model described by the Special Sessions Conclusions and Recommendations is that of a

²² Guide (n 12) 31.

²³ Guide (n 12) 31.

²⁴ Guide (n 12) 31.

²⁵ Guide (n 12) 31.

²⁶ Guide (n 12) paragraph 33, 28.

²⁷ ‘Conclusions and Recommendations’ (n 9) paragraph 31, 18.

²⁸ ‘Conclusions and Recommendations’ (n 9) paragraph 31, 18.

²⁹ ‘Conclusions and Recommendations’ (n9) paragraph 73, 26.

³⁰ ‘Conclusions and Recommendations’ (n 9) paragraph 73, 26.

several phased child welfare system,³¹ moving from ‘family preservation or reunification, temporary child care or institutionalization and national (domestic) adoption.’³² Intercountry adoption is to be part of the child welfare system, where it is envisioned as ‘the next phase in that continuum.’³³

Moreover, it is stressed that intercountry adoption should never be the preferred response when a child faces being placed away from their home.³⁴ Rather, efforts should be made to allow the child either to remain at home, or to provide services that would permit the child to return to live in their home.³⁵

The Guide itself is very clear that intercountry adoption must not be considered in isolation, but included as part of a state’s child welfare system. The Guide comments that ‘intercountry adoption does not occur in a vacuum and should be part of a national child care and protection strategy.’³⁶

It also stresses the importance of adherence to the principle of subsidiarity in intercountry adoption—and just what is encompassed by the use of that term-- by commenting that:

The subsidiarity principle is central to the success of the Convention. It implies that efforts should be made to assist families in remaining intact, or in being reunited, or to ensure that a child has had the opportunity to be adopted or cared for nationally. It also implies intercountry adoption procedures should be set within an integrated child protection and care system which maintains these priorities.³⁷

In short, the Guide provides a very detailed structure of what the best interests standard encompasses in intercountry adoption. But what happens to the standard so painstakingly reasoned and described in the Guide when it is actually utilised, when it is put to use by different Member and non Member states? What other meanings are encountered? What happens to the standard when it encounters those challenges listed at

³¹ ‘Conclusions and Recommendations’ (n 9) paragraph 73, 26.

³² ‘Conclusions and Recommendations’ (n 9) paragraph 73, 26.

³³ ‘Conclusions and Recommendations’ (n 9) paragraph 73, 26.

³⁴ ‘Conclusions and Recommendations’ (n 9) paragraph 75, 26.

³⁵ ‘Conclusions and Recommendations’ (n 9) paragraph 75, 26.

³⁶ Guide (n 12) paragraph 17, 3.

³⁷ Guide (n 12) paragraph 48, 29.

the beginning of this chapter, the ‘historical, legal, socio-economic, political and cultural settings of a region’³⁸?

And what happens additionally when the standard encounters the state motivations for engaging in intercountry adoption? What is not discussed by either the Guide or other literature on intercountry adoption and the best interests of the child are the processes by which the standard moves from one setting to another—and what effects that has on the standard. Even if literature acknowledges the difficult terrain faced in the implementation of international law of children’s rights generally, the processes by which such terrain is negotiated and what outcome that has on the international law doctrines is not discussed. Thus, the more particular definition of the intercountry adoption best interests standard and the varying contexts in which it is applied are likewise not discussed in the literature.

Yet understanding this is critical to understanding in a real sense how the standard is not only used but affected in the shift from an international organisation to states and the host of other domestic and international level actors that are involved in intercountry adoption. This is also further discussed within the thesis.

Understanding how meanings are ascribed, how they are formed, shift, change, and influence other meanings offered for the standard is far more critical to a realistic perception of the standard and of intercountry adoption itself. To do this, the thesis sets out the proposition that the standard should be understood within a normative framework, as described briefly further within this chapter and then more in-depth in the following chapters of the thesis.

The following section looks at the development of child welfare and intercountry adoption, and common themes that predominate in their depiction.

³⁸ W Ncube, ‘The African Cultural Fingerprint? The Changing Concept of Childhood’ in W Ncube (ed) *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa* (Ashgate, 1998) 10.

Child Welfare and Intercountry Adoption

As will be discussed in this literature review the issues that surround intercountry adoption do not parallel child welfare issues, but are simply a modern day rendering of persistent issues. Intercountry adoption is the child welfare issue *de jour*. In the early twentieth century, the discussion on children's issues focused on the international development of child welfare.³⁹ Issues that have persisted over time include the symbolism of a child and childhood in politics. A focus on children's issues at an international relations level is a means of both masking and avoiding other issues that might be more difficult to confront, less flattering to a national image or the acknowledgment of which might simply not advance the agenda that is being presented.⁴⁰

The development of child welfare to be seen as 'children's rights to a childhood'⁴¹ occurred before the inter-war years of the twentieth century⁴², but it was during that period significant growth of the notion of child welfare as an international level concern occurred.⁴³ In the interwar years, child welfare was linked with notions of world peace⁴⁴ and the advance of national democratic governance.⁴⁵ At the same time, children were cast as the 'calamities of war'.⁴⁶

There were disagreements between national governments⁴⁷ as to whether or not child welfare should be endorsed as an international issue.⁴⁸ For instance, Britain was uncertain whether it wanted the hugely popular issue to feature in international relations, fearing that it might undermine Britain's position as an international leader.⁴⁹

³⁹ D Marshall. 'The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations 1900-1924' (1999) 7 *The International Journal of Children's Rights* 103, 110-117.

⁴⁰ D Marshall, 'Children's Rights in Imperial Political Cultures: Missionary and Humanitarian Contributions to the Conference on the African Child of 1931' (2004) 12 *The International Journal of Children's Rights* 273, 295.

⁴¹ Marshall (n 46) 137.

⁴² Marshall (n 46) 136-137.

⁴³ Marshall (n 46) 110-118.

⁴⁴ Marshall (n 46) 120.

⁴⁵ Marshall (n 46) 145.

⁴⁶ Marshall (n 46) 137.

⁴⁷ Marshall (n 46) 110-118.

⁴⁸ Marshall (n46) 110-118.

⁴⁹ Marshall (n46) 113-118.

Whether or not the League of Nations should officially include child welfare within its ambit was part of other strategising for international position and prestige amongst countries: ‘...the immediate circumstances of the inclusion of international child welfare within the League of Nations activities, in 1924, belong largely to the larger history of a jealous British diplomacy.’⁵⁰

Children as a somewhat voiceless group are appealing—perhaps all the more appealing because of that voicelessness—and can be shaped into convenient symbols⁵¹ to advance many different agendas. This allure of the child as symbol continues today, where child welfare is now accepted as an important international relations issue—but the particulars of debates play themselves out through intercountry now, rather than the threshold question of whether international relations should encompass a topic such as child welfare.

Children’s rights in international law are met with a host of challenges:

...attempts to implement the body of international law on children’s rights have to contend with the historical, legal, socio-economic, political and cultural settings of the region.⁵²

The same circumstances that make implementation of children’s rights challenging apply no less to the best interests standard. What is there to say about the best interests standard? Much has been written and debated, little resolved, little accord reached.⁵³ But is there a need for resolution and accord on the meaning of the standard? It would

⁵⁰ D Marshall (n 46) 113.

⁵¹ D Smolin, ‘A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood’ (2003) 17 *Emory International Law Journal* 967, 1000.

⁵² Ncube (n 45) 10.

⁵³ For a sampling of discussion on the best interests standard, see P Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law and the Family* 1; J Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ (1994) 8 *International Journal of Law and the Family* 42; S Gooneskere, ‘The Best Interests of the Child: A South Asian Perspective’ (1994) 8 *International Journal of Law and the Family* 117; S Burman, ‘The Bests Interests of the South African Child’ (2003) 17(1) *International Journal of Law, Policy and the Family* 28; A An-na’im, ‘Cultural Transformation and Normative Consensus on the Best Interests of the Child’ (1994) 8 *International Journal of Law and the Family* 62; B Rwezaura, ‘The Concepts of the Child’s Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa’ (1994) 82; S Parker, ‘The Best Interests of the Child—Principles and Problems’ (1994) 8 *International Journal of Law and the Family* 26, 26.

appear not. The standard is extensively used,⁵⁴ seemingly even with the lack of clear definition.⁵⁵ Many models of interpretation and application of the standard have been proposed—bemoaning the lack of any single approach to determining what is in the best interests of a child.⁵⁶

It is well recognised that there are competing interpretations of the best interests standard.⁵⁷ This is true in Africa, where the best interests standard is subject to at least two rival interpretations.⁵⁸ One interpretation, which is referred to as a ‘wider’⁵⁹ interpretation, is inclusive of concepts of the child seen as in harmony with traditional or customary African values and society.⁶⁰ The ‘narrower’⁶¹ version of the best interests standard is seen as one which promotes the individual as paramount, and of an individual rather than collective focus on rights.⁶² The lack of definition, however, is not necessarily seen as troubling or even in need of resolving.⁶³ Indeed, this can be seen as a positive attribute that allows the principle to be applied in a manner that does not clash with existing cultural or community norms and concepts.⁶⁴

⁵⁴ Alston (n 60) 3-5. Alston comments that ‘But perhaps the strongest evidence of the extent to which the principle has gained general acceptance is the frequency with which it is used at the international level in general.’ 4; R Warshak, ‘The Approximation Rule, Child Development and Children’s Best Interests After Divorce’ (2007) 1(2) *Child Development Perspective* 119, 119, commenting that ‘The prevailing rule for deciding contested custody cases in the United States—the best-interests-of-the-child standard—has been criticized for being vague and allowing too much judicial discretion.’ 119. Parker (n 60) 26.

⁵⁵ Alston (n 60) 4-5, 10-12, 17-19; S Parker (n 60) 26; but see Warshak (n 61) arguing that it would be appropriate to create a ‘best-interests standard with reforms that allow for more uniform and predictable decisions in litigated cases, retain the benefits to children of individualized decision making, and accommodate new knowledge about the individual child, as well as about child development in general.’ 124.

⁵⁶ See for instance, J Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ (1994) 8 *International Journal of Law and the Family* 42, who proposes a specific model for the use of the best interests standard; J Eekelaar, ‘Children Between Cultures’ (2004) 18(2) *International Journal of Law, Policy and the Family* 178, 185-186.

⁵⁷ Rwezaura (n 60) 100-101.

⁵⁸ Rwezaura (n 60) 100-101.

⁵⁹ Rwezaura (n 60) 100.

⁶⁰ Rwezaura (n 60) 100. He describes the compatibility as one where ‘there is often no clear separation between the interests of the child or children on the one and the interest of adult members of the family or any relevant social group on the other hand. The main reason for this lack of separation lies in the way the traditional society was organized economically as well as socially.’ 100.

⁶¹ Rwezaura (n 60) 100

⁶² Rwezaura (n 60) 100

⁶³ F Banda, ‘Custody and the Best Interests of the Child: Another Viewpoint from Zimbabwe’ (1994) 8 *International Journal of Law, Policy and the Family* 191, 191.

⁶⁴ Banda (n 70) 191; Rwezaura (n 60) 109, who states that ‘the concept of the best interests of the child is best appreciated in the wider social and economic matrix of any community.’

It is not the intent of this thesis to provide a rigorous exploration of the origins of the best interests of the child standard. The thesis examination begins with the best interests standard already established as a norm, thus by passing the first stage of a norm's life cycle as presented by Finnemore and Sikkink, that of norm-creation.⁶⁵ However, as their research stresses, norms come from somewhere, and it would be remiss to not at least address the origins of the best interests standard, now well embedded within international law for children.

Kline gives a brief description of the emergence of the standard as linked to 'historical developments'⁶⁶ on how Western society saw children.⁶⁷ She says that the best interests standard rose up alongside conceptions of "'child saving'"⁶⁸ in the 1800's.⁶⁹ Prior to this:

During the sixteenth and seventeenth centuries, childhood emerged as a distinct state in the life cycle during which time children were recognized as socially, intellectually and emotionally dependent and were thus entrusted to their families (and in particular to their mothers) for protection, nurturing and socialization. In the nineteenth century, the conception of childhood as distinct from adulthood reached a new height, and children's interests became increasingly recognized as severable from, and independent of, those of their parents. As middle classes assimilated these understandings of childhood, concern developed about the denial of childhood to working-class and poor children. Consequently, a "child saving" movement emerged from what had previously been a more generalized form of poor relief and religious benevolence.⁷⁰

Thus, the rise of the best interests standard occurred in conjunction with ideas of rescuing children, of bringing aid from the higher strata of society to the children of the less privileged classes. The best interests standard emerged at the same time that child welfare was emerging as an international issue. Both child welfare and the best interests standard were heavily imbued with notions of child rescue, of a provision being made for children by those in society who were in more privileged places. As a result, there was an emphasis in the normative value of the best interest standard creation on two

⁶⁵ See discussion in Chapter Six.

⁶⁶ M Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology and First Nations' (1992) 30 *Osgoode Hall Law Journal* 375, 391.

⁶⁷ Kline (n 73) 390-392.

⁶⁸ Kline (n 73) 392.

⁶⁹ Kline (n 73) 391-392.

⁷⁰ Kline (n 73) 392.

things. Firstly, was the focus on rescue of children but without a concomitant focus on salvaging the situation for the parents of the child—child welfare not being the same as *family* welfare. Secondly, child welfare and the best interests standard were used as tools to lift children into higher strata of society.

Modern intercountry adoption is not immune from these themes of rescue and privilege. Instead, justifications for intercountry adoption resound with them.⁷¹ Perry comments that ‘in a sense, the access of affluent white Western women to children of color for adoption is often dependent upon the continued desperate circumstances of women in third world nations.’⁷² And yet the birth mother or the larger family of the child and their circumstances are rendered to near invisibility in depictions of intercountry adoption.⁷³

Given however, the stance that Perry presents as intercountry adoption being inherently *reliant upon* maintaining structures of inequality, the claims of the best interests standard then become specious. As Kline points out, in this way, the best interests standard, itself part of a ‘liberal form of law’⁷⁴, acts as a ‘liberal form of law...to obscure and thereby legitimate and reproduce, oppressive structures.’⁷⁵

These views of intercountry adoption and the place of the best interests standard within them should raise alarm and concern. Is intercountry adoption motivated by seemingly benevolent but ultimately iniquitous and destructive aims? Does the best interests standard serve the interests of the child, or is it deeply embedded within a structure that

⁷¹ See generally S King, ‘Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption’ (2008) 30 Michigan Journal of International Law 413, on the ways in which intercountry adoption is depicted in American legal scholarship,

⁷² T Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory* (1998) 10 Yale Journal of Law and Feminism 101, 105.

⁷³ For a discussion on this, as one of five narratives present in mainstream American legal scholarship on intercountry adoption, see King (n 78) 441-444. He says, ‘Another contemporary narrative derives from the failure to acknowledge birth parents. If birth parents are acknowledged in the literature at all, references typically contextualize them as dead, sick, incapacitated, impoverished, desperate, neglectful, addicted to drugs and alcohol, or shamed into abandoning their children.’, 441. He goes on to say that ‘Too few legal scholars take on the challenge of seeing ICA from the perspective of poor birth parents, who may have been enticed, coerced, or tricked into relinquishing birth rights. Instead birth parents undergo an “othering process” in which they are unworthy of keeping their children or willingly relinquish their children for a few bucks. ...Few recognize that there are children in poor countries who may benefit most from staying with their families, within their communities and their culture, rather than being uprooted in order to satisfy the desires and imaginations of Western adults.’, 442-443.

⁷⁴ Kline (n 73) 390.

⁷⁵ Kline (n 73) 390.

promotes and replicates inequality and thereby meets those aims rather than what is truly needed for the well-being of the child.

New Ways of Looking at Intercountry Adoption: A Review of Literature

Intercountry adoption literature has distinct divisions. Some of the literature is focused on whether there was a need for regulation and on the advent of the Hague Convention. There is a focus on the provisions of the Convention Articles focused on the mechanics of the Convention, in which way the instrument would work and what its provisions were. An example is an article by Pierce that focuses on the provisions of the Hague Convention for the performance of tasks by adoption agencies.⁷⁶

This literature review does not focus on scholarship that is primarily concerned with a mostly nuts-and-bolts black letter law presentation of the Hague Convention, or arguing for or against certain of its provisions.⁷⁷ Instead, this discussion focuses on emerging themes in the literature as being most representative of contemporary constructions of intercountry adoption. The dilemmas presented and the context of discussions show that intercountry adoption has moved on from the consideration of the Convention to other and still persistent issues on intercountry adoption itself.⁷⁸

Contemporary articles on intercountry adoption call for a new way of looking at, researching and understanding intercountry adoption. These come from disparate academic theoretical standpoints, but the message common to all three is the same—intercountry adoption literature and scholarship insufficiently explains the phenomena. Worse, in some cases, the current scholarship can even serve as a mask to the inequities

⁷⁶ W Pierce, 'Accreditation of Those Who Arrange Adoptions under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children' (1996) 12 *Journal of Contemporary Health Law and Policy* 535.

⁷⁷ Examples of this literature are Pierce (n 83); H Kennard, 'Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoption' (1994) 14 *University of Pennsylvania Journal of International Business Law* 623; P Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise' (1994) 28 *Family Law Quarterly* 53.

⁷⁸ Bergquist writes on the theme of rescue as part of intercountry adoption, K Bergquist, 'Operation Babylift or Babyabduction? Implications of the Hague Convention on the Humanitarian Evacuation and 'Rescue' of Children' (2009) 52(5) *International Social Work* 621; Selman provides updated information on the demographics of intercountry adoption, P Selman, 'The Rise and Fall of Intercountry Adoption in the 21st Century' (2009) 52(5) *International Social Work* 575.

that are part of the intercountry adoption system. Broadly these three articles are representative of calls within intercountry adoption literature for different understandings: feminism, post-colonialist, and empirical work. A fourth category of emerging intercountry adoption research comes from people who themselves were adopted through intercountry adoption.

Feminism

A seminal article by Perry argues for viewing intercountry adoption from a feminist legal standpoint. She argues that the intercountry adoption depictions that exist do not adequately account for the situation of women within intercountry adoption. She comments that:

social perceptions of the relationships between competent mothering and race correspond closely to the hierarchies of women by race. All too often, society portrays Black women as inadequate to the task of mothering Black children. They are portrayed as competent caretakers of white children, but only in the role of domestic worker, rather than legal mother. At the same time, society seems to presume the adequacy of white women to competently mother children of any race.⁷⁹

Given that intercountry adoption is commonly the sending of a child of colour to be adopted into a white family; these perceptions of mothering deserve exploration within the dynamics that make up the social explanations and justifications of intercountry adoption. Perry sums this up powerfully:

...there is a transfer of children from the least privileged to the most privileged. The imbalance in the circumstances of the two women involved in international adoptions presents a troubling dilemma: in a sense the access of affluent white Western women to children of color for adoption is often dependent upon the continued desperate circumstances of women in third world nations.⁸⁰

She concludes that there is a strong call for another view of adoption, one that can be provided through the use of feminist legal theory:

⁷⁹ Perry (n 79) 104-105.

⁸⁰ Perry (n 79) 105.

As long as factors such as race, class and patriarchy powerfully affect so many women's lives and choices, they must be a part of any meaningful analysis of this important and long-standing practice.⁸¹

Another scholar has taken up an analysis of intercountry adoption from a feminist perspective, using global critical race feminism. He quotes Adrien Katherine Wing to describe what it is, saying:

“Despite constituting a plurality of the world's people, women of color are usually situated on the bottom rung of each society, whether they live in developed or developing countries. The concept goes beyond mere color or racial identification. What these women may have in common is their potential relationship—likely an oppositional one—to sexist, racist and imperialist structure....To assist women of color, we need to delineate their multiple identities, examine how these identities intersect to privilege or lead them to face discrimination...”⁸²

However presented as a feminist view of intercountry adoption, it is possible that Jones' work would be seen as antithetical to the aims of feminist research. The solution that he promotes is the adoption of children by ex-patriates of the sending state.⁸³ This does nothing to promote the awareness of women's viewpoints or situations that Perry so importantly calls to the fore.

Dubinsky is another researcher who addresses intercountry adoption from a feminist perspective.⁸⁴ She raises, as does King, discussed below, the themes that appear in discussions of intercountry adoption, identifying main themes of 'rescue and kidnap.'⁸⁵ She discusses the feminist response to these two depictions of intercountry adoption, arguing that these are not adequate ways to understand intercountry adoption:

Kidnaps and rescue speak to certain truths, but they are incomplete, partial and abstract. Both rely on unreflective thinking about mute, essentialized, sacral children. Babies are not just so many bananas, and the intense emotional

⁸¹ Perry (n 79) 108.

⁸² B Jones, 'International and Transracial Adoptions: Toward a Global Critical Race Feminist Practice?' (2004) 10 Washington and Lee Race and Ethnic Ancestry Law Journal 43, foot note 5, 45.

⁸³ Jones (n 89) 55-64.

⁸⁴ K Dubinsky, 'The Fantasy of the Global Cabbage Patch: Making Sense of Transnational Adoption' (2008) 9(3) Feminist Theory 339.

⁸⁵ Dubinsky (n 91) 339. See also L Briggs, 'Mother, Child, Race, Nation: The Visual Iconography of Rescue and the Politics of Transnational and Transracial Adoption' (2006) 15(2) Gender and History 179.

attachments between adults and children in our world are too complicated to fit into simple binaries.’⁸⁶

Post-Colonialism

Just as Perry’s work on intercountry adoption and feminism can be considered seminal work, so too may a recent article by King become a seminal piece of post-colonialist research on intercountry adoption.⁸⁷ King challenges the way in which American legal scholarship depicts intercountry adoption, finding it to be insufficient and incomplete.⁸⁸ He calls instead for the use of a post-colonialist viewpoint to fully understand intercountry adoption.⁸⁹ King’s work exposes five common narratives of intercountry adoption in the American legal scholarship, and challenges these by proposing alternative narratives from a post-colonialist perspective.⁹⁰ King explains that

Post-colonialism is a set of theories that critique analytical structures—such as literature, film, law and political science—that identify previously colonized peoples through binary opposition structures that reflect a hierarchical inferiority of the previously colonized populations...The aim of post-colonialist theory is to expose provincialism in Western theory and politics, in favour of heterogeneous discourses, particularly discourses that have their origins in the lives, cultures and vocabulary of historically oppressed people.⁹¹

The issues of post-colonialism and links to intercountry adoption are explored in non-legal academic texts, being a common offering. Hubinette is perhaps characteristic of the post-colonialist intercountry adoption scholarship- and on the theme that is identified as critical in intercountry adoption by this thesis.⁹² The thesis in particular looks at the international relations concept of ‘informal empire’⁹³ put forth by Wendt

⁸⁶ Dubinsky (n 91) 342.

⁸⁷ King (n 78)

⁸⁸ King (n 78) 413-419; 427-452.

⁸⁹ King (n 78) 426-428.

⁹⁰ King (n 78) 427-452.

⁹¹ King (n 78) 426-427.

⁹² Generally see T Hubinette, ‘The Adopted Koreans of Sweden and the Korean Adoption Issue’ (2003) 6(1) *The Review of Korean Studies* 251; T Hubinette, ‘Adopted Koreans and the Development of Identity in the ‘Third Space’ (2004) 28(1) *Adoption and Fostering* 16. T Hubinette, ‘The Orphaned Nation: Korea Imagined as an Overseas Adopted Child in Clon’s *Abandoned Child* and Park Kwang-su’s *Berlin Report*’ (2005) 6(2) *Inter-Asia Cultural Studies* 227; T Hubinette, ‘Contested Adoption Narratives in a Swedish Setting’ (2006) 2nd International Conference on Adoption Research, University of East Anglia, Norwich, U.K., at <http://www.uea.ac.uk/swk/icar2/pdf/s/Tobias%20Hubinette.pdf>.; T Hubinette, ‘From Orphans to Babylifts: Colonial Trafficking, Empire Building and Social Engineering’ in J Trenka, J Oparah and S Shin *Outsiders Within: Writing on Transracial Adoption* (South End Press, 2006).

⁹³ See discussion in Chapter Six.

and Friedham.⁹⁴ This is explored in depth in Chapter Six, linking some intercountry adoption practices between sending and receiving states to the particular embedded power dynamics that resound in the idea of post-colonialism. Legal literature, aside from King, may have neglected to explore this important feature of intercountry adoption. Nevertheless, it is an important aspect of the theory ultimately presented in this thesis, and turns up again with particular emphasis in the discussion of relationships of informal empire. Post-colonialism and Cold War themes are also seen in the discussion on the United States in Chapter Four.

Inherent within the idea of post-colonialism is the idea of politics, especially global politics, having a hand in events that shape intercountry adoption. This idea is covered in a recent article by Saunders.⁹⁵ His take on intercountry adoption is a direct opposite than that of King, albeit discussing intercountry adoption in the context of global politics. Saunders' approach might be dismissed as overly naive, where he seems baffled by the lack of a universal applauding of the benefits of intercountry adoption. He sidesteps the issues of inequity, that Perry and King raise, saying,

One might expect these new, rather symbiotic relationships [between sending and receiving states] would be seen by the vast majority of the international community as promoting the common good and serving the best interests of the children involved. Nothing could be further from the truth.

His comment is not that the relationships do not promote the common good nor serve the best interests of children. Rather, his comment reflects a tone of bafflement that intercountry adoption is not seen in this light. Interestingly his article highlights the political battles that rage over intercountry adoption in international relations. He pitches the battle as one between the United States and the European Union, proposing differences between views on intercountry adoption as representative of differences resulting from the differing immigrant histories of the United States and Europe.⁹⁶ He says that:

⁹⁴ See discussion in Chapter Six.

⁹⁵ R. Saunders, 'Transnational Reproduction and its Discontents: The Politics of Intercountry Adoption in a Global Society' (2007) 1(1) *Journal of Global Change and Governance* 1.

⁹⁶ Saunders (n 102) 6-7.

...international adoption removes children from everything that is native and places them in a foreign environment where, in most cases, they become part of a family of a different ethnic origin, live in land where their ancestors never set foot, and speak a language other than that of their birth. But to the American psyche, there is nothing strange, nor necessarily undesirable about this. Successive generations of immigrants have set sail for American shores leaving behind their culture, language, and native soil, in many cases forever. More important to personal development than ethnicity, or other immutable factors attributable to one's birth, are the concept of self-determinism and individualism, which are deeply rooted in the American national mythology. Perhaps this explains why the US and the EU cannot seem to agree on the basic nature of intercountry adoption and its value to receiving and sending societies.⁹⁷

Saunders' article raises many questions about the way that intercountry adoption is depicted and reasons that people and states do and do not engage in it. He argues the rescue and humanitarian motives for intercountry adoption engagement are sufficient in and of themselves to justify intercountry adoption, and further that this fuels decisions to join the Hague Convention on Intercountry Adoption.⁹⁸ He comments that the matter of states becoming involved in intercountry adoption 'has generated political spillover which is affecting both domestic and foreign policy in a number of countries.'⁹⁹ With that statement, this thesis has no dispute. It begs the questions, however, of how and why intercountry adoption becomes politicised in both domestic and international levels, and further, *with what effect* to intercountry adoption itself? Saunders' article goes on to note that there is comment in the literature that 'the American adopter in the years from 1945-1975 could not help but engage in a mental game of saviour and saved, dominant and dominated, lucky and unlucky'.¹⁰⁰ It seems to be a case of the ends justifying the means, then, in adoption. Saunders remains oblivious to the deeper discourse that runs through the issues he presents of (American) adoption motivations and justifications for involvement. These are further discussed in a variety of ways throughout the thesis, coming up again specific to American adoption in Chapter Four, with further analysis in Chapters Five and Six.

⁹⁷ Saunders (n 102) 7.

⁹⁸ Saunders (n 102) 4.

⁹⁹ Saunders (n 102) 4.

¹⁰⁰ Saunders (n 102) 7.

Empirical Research

An article by Breuning and Ishiyama discusses the need for empirical work to explore specific questions on intercountry adoption practices in sending countries.¹⁰¹ They raise this need in the context of a focus similar to that raised by Saunders, of looking at ‘intercountry adoption as a political issue and as an explicitly human face of globalization.’¹⁰² They consider five issues that give rise to debate in intercountry adoption, those being, ‘international legal issues, the impact of globalization and neoimperialism, cultural factors and democracy and governance issues.’¹⁰³ Their conclusions are that a ‘country’s economic interconnectedness best explains its adoption laws’.¹⁰⁴ They explain that ‘our findings suggest that the more globalized an African country is, the more likely it is to have a less restrictive intercountry adoption policy.’¹⁰⁵ They also comment that the Hague Convention has seemingly little influence on the way that intercountry adoption is conducted, and that rather, ‘intercountry adoption from Africa is largely dependent on the laws of the sending and receiving country, the diplomacy between the two, and the degree to which each state monitors the actions of the private and public agencies involved in intercountry adoption.’¹⁰⁶

The idea of the importance of the dyadic relationship of the sending and receiving state in setting up the ways in which intercountry adoption is further discussed extensively in this thesis and form a core element of the theory ultimately presented in answer to the research question. Also of importance is the role of the non-state actors, which includes private and public agencies, a point also discussed and forming another core element of the theory that will be presented. The idea of intercountry adoption being a *political* issue between two states is also something that forms a very key element of the theory that will be presented.

Breuning and Ishiyama have focused on intercountry adoption empirical work from sending nations in Sub-Saharan Africa. A complementary piece of empirical work

¹⁰¹ M Breuning and J Ishiyama, ‘The Politics of Intercountry Adoption: Explaining Variation in the Legal Requirements of Sub-Saharan African Countries’ (2009) 7(1) Perspectives on Politics 89, 89-90.

¹⁰² Breuning and Ishiyama (n 108) 90.

¹⁰³ Breuning and Ishiyama (n 108) 91.

¹⁰⁴ Breuning and Ishiyama (n 108) 97.

¹⁰⁵ Breuning and Ishiyama (n 108) 97.

¹⁰⁶ Breuning and Ishiyama (n 108) 97.

focuses on the United States as a receiving country.¹⁰⁷ It explores the choices that are made by the US as the receiving country as to which children it wants to receive through intercountry adoption. Quiroz comments that ‘there is little doubt that transnational adoptions are part of a global enterprise, reflecting preferences of the adoptive population. These preferences are a combination of individual or personal tastes, historical or current relations with a particular country, views of children from sending countries and the marketing of programs by private agencies.’¹⁰⁸

Through an examination of visas issued over a 10 year period in the United States for children to be received in intercountry adoption, Quiroz makes several comments and findings. Sending states have an influence over the process, as she says, ‘The policies of sending states undoubtedly also interact with adoption agency influences and personal preferences.’¹⁰⁹ As do Breuning and Ishiyama, Quiroz looks at the variation in requirements that sending states have in the requirements that adoptive parents must meet.¹¹⁰ She does not try to identify the reasons for these restrictions as do Breuning and Ishiyama, but instead says that these ‘provide at least some measures by which to compare the relative ease of adoption for US couples.’¹¹¹ She concludes that the policies of sending countries for adoptive parents is not sufficient to ‘itself explain which countries are in the top 20 [of sending states to the United States].’¹¹² There is another factor that comes into play, and that is the nature of the relationships that the United States as a receiving state has with the states that send children, ‘the supply of the world’s needy children and other countries [sic] willingness to engage in adoption *demonstrates the power of the USA in forming and maintaining such relations with sending countries.*’¹¹³ (emphasis added)

That is, the influence of the receiving state over the sending states dictates much of what happens in intercountry adoption—and the specific dyadic relationship between sending and receiving states have much to do with which children are sent through

¹⁰⁷ P Quiroz, ‘Transnational Adoption: Reflections of the “Diaper Diaspora” on Reconfiguring Race in the USA’ (2008) 28 (11/12) *International Journal of Sociology and Social Policy* 440.

¹⁰⁸ Quiroz (n 114) 444.

¹⁰⁹ Quiroz (n 114) 446.

¹¹⁰ Quiroz (n 114) 446.

¹¹¹ Quiroz (n 114) 446.

¹¹² Quiroz (n 114) 449.

¹¹³ Quiroz (n 114) 449.

intercountry adoption. Quiroz concludes that ‘it is not the argument of this paper that transnational adoption drives US foreign policy but rather that it fits within the larger social policies that drive the larger social policies that drive economic world domination by the USA.’¹¹⁴

The thesis research would agree with the arguments that Quiroz makes. Foreign policy is most definitely a component of modern intercountry adoption engagement. The theory presented shows that foreign policy drives the decision, rather, of whether or not a state ultimately engages in intercountry adoption. Issues of international power and prestige as well play into whether and how a state enters into intercountry adoption, whether as a sending or receiving state.

Quiroz’s research looks at the racial preferences that are expressed by adoptive parents in the United States. She argues that the racial preferences shown by adoptive parents show the contemporary societal interpretations of race within the United States, where race is reflected in a preferential hierarchy. She says that the United States has moved from a racial classification structure that was ‘two-tiered’¹¹⁵—‘White’¹¹⁶ and ‘non-White’¹¹⁷ to one that now has three parts, where the categories now:

include “White”, “Honorary White”, and “Collective Black”, where whites remain at the top of the structure and an intermediary group of honorary whites serve as a buffer between whites and collective blacks at the bottom of the hierarchy. Each category contains several groups: Whites (e.g. new whites such as Russians, assimilated light-skinned Latinos, assimilated Native Americans and some native Asians) Honorary Whites (e.g. light skinned Latinos, Korean-Americans, Middle Eastern Americans, Chinese-Americans); and Collective Black (e.g. Blacks, dark-skinned Latinos, Hmong and New West Indian and African immigrants.). However, access to the white or honorary white categories is limited by those in power and honorary white status is subject to change.¹¹⁸

Quiroz compares adoption statistics from 20 states that sent the most children to the United States to look at racial patterns in adoption. She looks at adoptions from 1990-2005. Her analysis shows that ‘the past 16 years the majority of adoptions have been

¹¹⁴ Quiroz (n 114) 450.

¹¹⁵ Quiroz (n 114) 441.

¹¹⁶ Quiroz (n 114) 441.

¹¹⁷ Quiroz (n 114) 441.

¹¹⁸ Quiroz (n 114) 441.

from either the White or Honorary White category, whereas approximately 20 per cent of adoptions have been from the Collective Black category'¹¹⁹; thus arguing that racial choice of adoptive parents plays a significant factor as to which countries children are adopted from.¹²⁰ Quiroz further 'compared policies of countries in the top 20 along with five other countries that fall into the...Collective Black category (Dominican Republic, Jamaica, Trinidad and Tobago, Liberia and Nigeria) in order to determine if the number of international infant adoption programs offered by agencies could be linked to the degree of restrictiveness of a country's adoption policies.'¹²¹ She remarks that 'a comparison between the five "Collective Black" sending countries with countries in the top 20 for the past 16 years, suggests that, in general, adoption is no more costly, and restrictions are not substantially different for these countries. Indeed, when added costs of travel are taken into account it is difficult to understand why some sending countries in the top 20 and five "collective black" countries are not in greater demand by US adoptive parents.'¹²² She also comments on the situation of African-American children in the US care system and the phenomena of the United States sending children to other states for adoption:

In the year 2000, almost 20,000 children were adopted by US citizens from other countries. At the same time, nearly 125,000 US children, mostly African-American and biracial, remained in need of adoptive homes. Added to this, African American infants are now entering the transnational adoption market as a number of US adoption agency websites advertise to Canadian and European couples to place African American and biracial infants with some agencies citing lack of "demand" as driving this phenomenon.¹²³

Two issues in this stand out in respect to intercountry adoption. The first is that the United States sends children from the lowest rung of the racial preference hierarchy to other states for adoption whilst at the same time bringing in children for adoption from other states. The second is the use of the internet for adoption, another recent phenomenon in intercountry adoption that has occurred since the drafting of the Hague Convention. The thesis theory speaks to the role of social marginalisation in the sending of children in intercountry adoption, demonstrating that children who are

¹¹⁹ Quiroz (n 114) 449.

¹²⁰ Quiroz (n 114) 444, 449.

¹²¹ Quiroz (n 114) 446.

¹²² Quiroz (n 114) 446.

¹²³ Quiroz (n 114) 449.

socially marginalised within their own state are at risk of being sent in intercountry adoption.

Empirical research has also been done on the use of the internet by adoption agencies to promote the adoption of children, and whether practices are compatible with the standards of the Hague Convention on Intercountry Adoption. Chou, Browne and Kirkaldy carried out empirical work to investigate how intercountry adoption is carried out on the Internet.¹²⁴ This is redolent of concerns raised about private adoption agencies carrying out functions under the Hague Convention.¹²⁵ Concerns over internet adoption sites are perhaps a more modern version of that issue. Concerns were raised during the drafting of the Hague Convention over what, if any, role private agencies should have in the performance of intercountry adoption tasks.¹²⁶ Chou *et al* comment that ‘the role of ethnicity in the selection of children for international adoption is yet to be determined.’¹²⁷ That question has been explored by the research of Quiroz, showing that racial preferences do play a role in the selection of a child for adoption. Again, this is further explored in Chapter Four.

The specific aim of Chou *et al*’s research was to investigate whether internet adoption sites were in compliance with Hague Convention standards and CRC standards.¹²⁸ They found that there were many violations of Hague Convention and CRC standards by internet adoption websites:

...the most fundamental being that it does not always prioritise children’s needs or respect their rights. This is highlighted by the fact that over a third of the website explicitly gave adoptive parents the power to select a child they wish to adopt and less than half specify the provision of post-adoption follow-up.¹²⁹

Other problematic practices identified were around the use of a child’s photo on the website. This was seen a ‘breach of the children’s privacy.’¹³⁰ Website language was

¹²⁴ S Chou, K Browne, and M Kirkaldy, ‘Intercountry Adoption on the Internet’ (2007) 31(2) *Adoption and Fostering* 22. See further discussion on the use of media, images and the internet in intercountry adoption in Chapter Four in the section on the United States.

¹²⁵ See generally Pierce (n 83).

¹²⁶ Pierce (n 83) 545-546.

¹²⁷ Chou, Browne and Kirkaldy (n 131) 25.

¹²⁸ Chou, Browne and Kirkaldy (n 131) 25.

¹²⁹ Chou, Browne and Kirkaldy (n 131) 28.

¹³⁰ Chou, Browne and Kirkaldy (n 131) 28.

used that had the effect of ‘promot[ing] children as a commodity and an object of desire.’¹³¹

Finally, the research highlights six areas where legal provisions should be strengthened in regard to intercountry adoption practices, ‘fees’¹³², ‘assessment of children and their biological families’¹³³, ‘assessment of prospective adoptive parents’¹³⁴, ‘selection’¹³⁵, ‘transition’¹³⁶, ‘follow-up’¹³⁷ specific to ‘children’s progress and ensure services are available for those with needs.’¹³⁸

The Voice of Those Adopted Through Intercountry Adoption

A fourth area of emergent intercountry adoption literature is that of people who themselves were adopted through intercountry adoption. One anthology that includes people who were adopted through intercountry adoption is ‘Outsiders Within: Writing on Transracial Adoption.’¹³⁹ The Introduction to the book states its own important contribution:

This book is a corrective action. Over the past fifty years, white adoptive parents, academics, psychiatrists, and social workers have dominated the literature on transracial adoption. These “experts” have been the ones to tell the public—including adoptees—“what it’s like” and “how we turn out.” Despite our numbers and the radical way we have transformed the colour and kinship of white families, the voice of adult transracial adoptees remain largely unheard. Our cultural production has been marginalized and essays discussing our personal experiences of adoption have remained undistributed and largely unknown.¹⁴⁰

¹³¹ Chou, Browne and Kirkaldy (n 131) 28.

¹³² Chou, Browne and Kirkaldy (n 131) 29.

¹³³ Chou, Browne and Kirkaldy (n 131) 29.

¹³⁴ Chou, Browne and Kirkaldy (n 131) 29.

¹³⁵ Chou, Browne and Kirkaldy (n 131) 30.

¹³⁶ Chou, Browne and Kirkaldy (n 131) 30.

¹³⁷ Chou, Browne and Kirkaldy (n 131) 30.

¹³⁸ Chou, Browne and Kirkaldy (n 131) 30.

¹³⁹ J Trenka, J Oparah and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (South End Press, Cambridge, Massachusetts 2006). See also J Trenka, *The Language of Blood: A Memoir* (Graywolf Press, 2005).

¹⁴⁰ J Oparah, S Shin and J Trenka ‘Introduction’ in J Trenka, J Oparah and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (South End Press, Cambridge, Massachusetts 2006)1.

The Introduction of the book also touches on a theme raised by Quiroz, which is how racial preference drives choice in intercountry adoption, but goes further in commenting upon the lived experiences of adoptees around issues of race in their receiving country

As the authors of this book suggest, this shift in adoption patterns [increasing transnational adoption] is also due to the valuing of European, Latin American and Asian children over black children...

Discussions about adoption have typically separated adoptees who were adopted across racial lines within their country of origin...from those who were adopted transnationally. It...suggests that the problems facing transnational adoptees are primarily related to finding a family and adapting to a new country, rather than to the traumatic experiences of racism, marginalization, and discrimination, both systematically and on the personal level, within our own adoptive community.
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Normative Meaning and Normative Usage of the Best Interests Standard in Intercountry Adoption

The best interests of the child standard in intercountry adoption needs to be understood within two different contexts. These are its normative meaning¹⁴² within a legal context and the meanings assigned to it in its actual usage.¹⁴³ As a starting point, it is useful to have a definition of what is meant by norm: ‘There is general agreement on the definition of a norm as a standard of appropriate behaviour for actors with a given identity’.¹⁴⁴ In other words, the best interests standard can be understood as a norm—a legal norm—that sets out the expected behaviour with regard to intercountry adoption and what decisions about involving a child in intercountry adoption should entail—further discussed below.

¹⁴¹ Oparah, Shin and Trenka (n 147) 2.

¹⁴² A Wiener, ‘Contested Meaning of Norms: A Research Framework’ (2007) 5 *Comparative European Politics* 1, 5.

¹⁴³ Wiener (n 149) 4.

¹⁴⁴ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887, 891.

This is perhaps a more helpful way to categorise the debates about the best interest standard. It is not, that the standard lacks meaning, as is usually claimed.¹⁴⁵ Rather than lacking in meaning, the standard instead is assigned different normative meanings by actors in different settings. When being interpreted within a specific milieu, the norm is seen as having ‘social facticity’¹⁴⁶ or ‘appearing as appropriate to a group.’¹⁴⁷ But when the norm is shifted outside of this context, it loses that ‘cultural validation.’¹⁴⁸ In other words, removed from a specific cultural environment, it loses the context which gave it a particular meaning—with the consequence as the setting for the use of the norm shifts, so does its meaning.

The norm is heavily invested with cultural symbolism and meaning, but those are in turn dependent upon being contained within the environment in which the norm is being utilised. Those meanings, that give a norm a sense of legitimacy,¹⁴⁹ are stripped away by the movement of the norm outside the structure that gives it those meanings.¹⁵⁰ That is to say that the meaning given to norms is ‘socially constructed.’¹⁵¹

Constructivism

It would be apposite to provide at this juncture a description of constructivism—as the constructivist approach underlies the entire ontology of the thesis research.

Constructivism is a way of studying social relations—any kind of social relations. While it draws from a variety of other ways of studying such a broad and complex subject, it stands on its own as a system of concepts and propositions. Constructivism is not a theory as such. It does not offer general explanations for what people do, why societies differ, how the world changes. Instead constructivism makes it feasible to theorize about matters that seem to be unrelated because the concepts and propositions normally used to talk about such matters are also unrelated.¹⁵²

¹⁴⁵ Alston (n 60) 4-5, 10-12, 17-19; S Parker (n 60) 26.

¹⁴⁶ Weiner (n 149) 5.

¹⁴⁷ Weiner (n 149) 5.

¹⁴⁸ Weiner (n 149) 5, 12.

¹⁴⁹ See discussion in Chapter Six on normative legitimacy.

¹⁵⁰ Weiner (n 149) 4-5, 12.

¹⁵¹ Weiner (n 149) 5, 12.

¹⁵² N Onuf, ‘Constructivism: A User’s Manual’ in V Kubalkova, N Onuf and P Kowert (eds) *International Relations in a Constructed World* (M E Sharpe Inc, Armonk, New York, 1998) 58.

This thesis then makes use of a constructivist approach towards the research undertaken. As Onuf's quote indicates, constructivism is simply a way of understanding social relations, and in building theories about things encompassed within those social relations. This is again, fitting, for the thesis research, because the use of grounded theory methodology entails the building of a theory –and it is to this end that constructivism lends itself. As well, this thesis looks at the state-to-state relationships that are integral to carrying out intercountry adoption exchanges of an individual child. As Onuf explains, relationships between states can be analysed through the use of constructivism.¹⁵³ Indeed, constructivism was first used in the study of International Relations.¹⁵⁴

It should be noted that these theoretical propositions on the best interests standard are particularly peculiar to *intercountry adoption* because of the unique circumstances in which intercountry adoption occurs. These are not intended to be generalised to the best interests standard in other legal usages. In this way, this thesis research is also a departure from the usual literature on the best interests standard, which does not isolate its usage within certain kinds of children's cases or legal matters.

The central tenet of constructivism is that people and societies, agents and structures, construct or constitute each other. Constructivists argue that international life is social, that is, that it follows norms and rules which make up social structures. These structures reproduce only through the practices of knowledgeable agents. Structures and agents cannot exist without each other: they are mutually constitutive. Actors draw on the rules that make up structures in their everyday routines, and in doing so they reproduce rules. They have the capacity to understand what they are doing and why they are doing it, which allows them to “reflexively monitor” the social practices they engage in. Structures make possible similar social practices across time and space, thus ensuring the relative stability of social life.”¹⁵⁵

This observation regarding constructivism by Prugl relates to the discussion in the third chapter and the concluding chapter on the complex web of actors that are involved in intercountry adoption. These actors are what are referred to in some of the constructivist

¹⁵³ Onuf (n 159) 59.

¹⁵⁴ Onuf (n 159) 59.

¹⁵⁵ E Prugl, 'Feminist Struggle as Social Construction: Changing the Gendered Rules of Home-Based Work' in V Kubalkova, N Onuf and P Kowert (eds) *International Relations in a Constructed World* (M E Sharpe Inc, Armonk, New York, 1998) 128.

theorists' discussion as agents.¹⁵⁶ As Prugl points out it is the agents/actors that carry out the norms that are imbued in different settings, and whose own understandings of these norms help in turn again inform and shape these norms. This is as true for the best interests standard as a norm as it is for any other kind of legal norm.

Actors and agents have a particular place in constructivist accounts of norms and norm transfers. This is addressed as well in more detail within the thesis. This section gives only an introduction to the concept of agents or actors in constructivist theory. Onuf explains the place that agent or actors have in constructivist account-and their relationship to rules:

A rule is a statement that tells people *what* we should do. The “what” in question is a standard for people’s conduct in situations that we can identify as being alike and can expect to encounter. The “should” tells us to match our conduct to the standard... ..

Rules tell us who the active participants in a society are. Constructivists call these participants agents. People are agents, but only to the extent that society through its rules, makes it possible for us to participate in the many situations for which there are rules.

...rules make it possible for us to act on behalf of social constructions, which may be ourselves, other human beings or even collections of people, along with the rules, the practices, and the actual things that we make and use. Conversely, agents need not be individual human beings to be able to act on behalf of others...Agency is a social condition. Thus, the government of a country is a collection of people and a social construction. According to the relevant rules, these people act, together and in various combinations, on behalf of that country as a much larger collection of people.¹⁵⁷

Wendt defines norms as ‘shared beliefs which may or may not manifest in behaviour depending on their strength, but norms can only have effects if they are so manifested.’¹⁵⁸

This thus highlights the need for norms to have actors or agents to make their effects real—a norm has no effect whatsoever until and unless it is acted upon by agents or

¹⁵⁶ See for example Onuf (n 159) 59-60.

¹⁵⁷ Onuf (n 159) 59-60.

¹⁵⁸ A Wendt, *Social Theory of International Politics* (Cambridge Studies in international Relations Series, Cambridge University Press, Cambridge 1999) 185.

actors—an important point to be raised about the best interests standard and the critical factor that this thesis stresses, that the best interests standard's use—its manifestation—is what is of consequence. The norms—the discussions of what the standard ought, could or should be—until or unless acted upon by agents—have no effect. It is the meanings of the standard that have been acted upon by agents—at various levels of the norm's cycle and process—that have not been fully explored in the literature but are the ones which in fact are applied within the complex web of intercountry adoption engagement. All of this is set out in much fuller detail in the concluding chapter of the thesis, contributing to the theory about the best interests standard in an intercountry adoption context.

Overview of Constructivism in International Relations

Since this thesis utilises constructivist view points, a summary of some key international relations constructivist theory will be helpful.

Interests are an important part of the constructivist view of international relations, but only within a dynamic of creation, according to the work of Brunnee and Trope.¹⁵⁹ They explain that the importance of understanding the relationship between identity formation and interest determination is a critical one within the constructivist view of international relations: 'the emphasis on identity formation as relational, and prior to interest formation, is a central constructivist tenet.'¹⁶⁰

Wendt explains this further in his description of constructivism in international relations:

Constructivism is a structural theory of the international system that makes the following core claims: (1) states are the principal units of analysis for international political theory; (2) the key structures in the states system are intersubjective, rather than material; and (3) state identities and interests are in

¹⁵⁹ J Brunnee and S Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Columbia Journal of Transnational Law 19, 32.

¹⁶⁰ Brunnee and Toope (n 166) 30.

important part constructed by these social structures, rather than given exogenously to the system by human nature or domestic politics.¹⁶¹

The constructivist theory of intercountry adoption that is presented follows these general principals of constructivism. It shows that the state's charter is formed before its international relations aims are identified and where intercountry adoption is identified as a means of advancing other foreign policy or national interest aims. Thus, the identity of the state as contained in the charter is formed before the state's interests are formed, as demonstrated in its decision on whether or not those interests in its international relations can be advanced through intercountry adoption engagement. It also conceives of state identity as constructed, again, as represented by the processes that go into the creation of a charter. The level of analysis in the theory is done at that of the state, making Wendt's constructivist theory on international relations particularly apt for describing and unpacking the processes contained in the theory.

International Relations 'Collateral Benefits' of Intercountry Adoption Engagement ?

Understanding a state's motivation to enter into international treaties may also help understand what motivations it has for operating as either a sending or receiving country in intercountry adoption, and in the use of the best interests standard and children's issues as tools in discussion of other international relations issues. In other words, understanding state behaviour in the international realm may have some corollaries into the motivations of both sending and receiving states for entering into intercountry adoption. Onuma and Hathaway give somewhat conflicting accounts of the reasons that determine a state's course of action regarding international treaty ratification. Onuma sees a state as more or less compelled to adhere to international treaty terms, with perhaps of all states, only the United States not being held to task for treaty observance.¹⁶² He is critical of theories such as the one that is proposed by Hathaway

¹⁶¹ A Wendt, 'Collective Identity Formation and the International State' (1994) 88(2) American Political Science Review 384, 385.

¹⁶² Y Onuma, 'International Law in and With International Politics' (2003) 14(1) European Journal of International Law 105, 115-116.

¹⁶³that suggest the lack of harsh consequences for treaty non-compliance provide incentives for states to enter into international treaties.¹⁶⁴ He advocates that this is not normative, but rather is the globalised experience of the United States, and is globalised without sufficient consideration as to whether it reflects the experiences generally of other states in relation to international treaties.¹⁶⁵ Hathaway has formulated a theory that predicts the behaviour of a state in treaty compliance once it has ratified a human rights or other kind of international treaty.¹⁶⁶ This ‘integrated theory’¹⁶⁷ combines elements of both political science and international law.¹⁶⁸ Her theory explores what motivates a state to take on the obligations that come with ratification of an international human rights treaty.¹⁶⁹ Her theory predicts that states might be motivated to sign onto these treaties because of the likelihood of a lack of enforcement of their obligations.¹⁷⁰ It is this element of her theory which might be subject to Onuma’s observations, yet there are other valuable parts to her theory that are of more relevance in the identification of reasons states might enter into intercountry adoption. She finds that the rewards a state might reap in signing onto a human rights treat serve as motivators for the state to do so.¹⁷¹ These rewards are not necessarily directly related to the treaty itself but rather, Hathaway refers to these rewards as ‘collateral benefits’.¹⁷² These rewards can include

¹⁶³ O Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’ (2005) 72(2) The University of Chicago Law Review 469

¹⁶⁴ Onuma (n 169) 119. Onuma comments, ‘There are certainly cases in which a nation violates a rule of international law, yet no nation or international organization takes a countermeasure or sanction. This is particularly the case with a superpower’s violation of international law. But this is an exceptional luxury which only a few major powers---especially the US, the only superpower---can enjoy. This fact suggests a very problematic feature of theories expounded by US scholars. In the fields of both international law and international relations, there has been a tendency to regard those theories as general theories to be followed (or even imitated) by other scholars and to be applied universally. However, if US scholars construct their theories by unconsciously assuming the US as an actor in international society, such a theory cannot claim general validity precisely because the US is an exceptional, not an ordinary, nation. One of the reasons why the claim of the irrelevance of international law has been predominant is that the study of international relations itself has been carried out most actively in the US and has been accepted by international relations scholars in other nations without elaborate critical examinations of the *US-centric nature* of the discipline.’ 119, emphasis in the original.

¹⁶⁵ Onuma (n 169) 119.

¹⁶⁶ Hathaway 2005 (n 170) 469. See also O Hathaway ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 Yale Law Journal 1935.

¹⁶⁷ Hathaway 2005 (n 170) 472.

¹⁶⁸ Hathaway 2005 (n 170) 472.

¹⁶⁹ Hathaway 2005 (n 170) 474.

¹⁷⁰ Hathaway 2005 (n 170) 473-474.

¹⁷¹ Hathaway 2005 (n 170) 473-474.

¹⁷² Hathaway 2005 (n 170) 474, 514.

improvement of a state's standing in the international community¹⁷³ and resulting access to 'increased foreign aid or cross-border trade'.¹⁷⁴ In this Onuma and Hathaway find some point of agreement, as Onuma suggests that states have a variety of reasons for entering into international treaties and becoming involved in the international legal arena: 'nations have made use of institutions and notions of international law for various purposes, such as to establish and maintain diplomatic, commercial, financial and transportation relations...'¹⁷⁵

In addition to the rewards reaped from treaty involvement, however, there are other reasons that states enter into specific treaties that have to do with global exercises of authority between nations:

In the case of bilateral treaties, powerless nations are forced to accept treaties which are disadvantageous to them because of the unequal power relationship...Thus, treaties that are disadvantageous to smaller nations tend to last a long time. Unequal treaties which were imposed on—although, theoretically, concluded on the basis of the free will of the parties—The Ottoman Empire, China, and many other non-European nations in the nineteenth and early twentieth centuries serve as typical examples of international law as a tool of powerful nations.¹⁷⁶

There are two points then to take from this consideration of why states enter into international treaties. A state might enter into a treaty because it perceives a benefit to itself in so doing that might not be directly related to the carrying-out of the treaty itself. These are the rewards that Hathaway calls 'collateral benefits.'¹⁷⁷ Onuma challenges the notion that a state enters into an international agreement to get such indirect gain with any disregard for the likelihood of the treaty terms being enforced. Yet, whether or not the potential of enforceability is a factor in a state entering into a treaty, Onuma and Hathaway both agree that perceived advantages to the state might influence a state to enter into a particular international treaty. On the other hand, Onuma suggests that there

¹⁷³ Hathaway 2005(n 170) 574.

¹⁷⁴ Hathaway 2005 (n 170) 514.

¹⁷⁵ Onuma (n 169) 116.

¹⁷⁶ Onuma (n 169) 117.

¹⁷⁷ Hathaway 2005 (n 170) 474.

is reverse corollary-that states might enter into treaties because of a compulsion from more influential nations.¹⁷⁸

International law and International Relations

Both Onuma and Hathaway raise questions about why states comply with international law. These questions are key in studies in international law and international relations, but in itself, are not a focus of the thesis. Nevertheless, it is important to consider the background of this in both international relations and international law, as this thesis through its explanation of the theory presented, bridges principles of international law and international relations, which are discrete academic fields. Because of space constraints and the scope of the thesis research, it is most prudent to rely upon the descriptions given by Hathaway. Much more discussion could be had on this literature, but it is only a piece of the thesis. But it is important that there be a summary of the positions in the literature of each, as well as framing the discussion that follows on the use of constructivist theory from international relations and normative meaning.

Hathaway notes that international law and international relations scholars have tended to pay no heed to the research of the other.¹⁷⁹ She indicates that this has changed recently and groups the literature into two broad groups of “rational actor model”¹⁸⁰ and “normative theory.”¹⁸¹ She describes the scholarship that falls under the rational actor model as having

a shared belief that states and the individuals that guide them are rational self-interested actors that calculate the costs and benefits of alternative course of action in the international realm and act accordingly...Compliance does not occur unless it furthers the self-interest of the parties by, for example, improving their reputation, enhancing their geopolitical power, furthering their ideological ends, avoiding conflict or avoiding sanction by a more powerful state.¹⁸²

¹⁷⁸ See further discussion on this in South Korea section in Chapter Four, and in Chapter Six, discussions of power relationships between states, 196-202.

¹⁷⁹ Hathaway 2002 (n 173) 1942-1943.

¹⁸⁰ Hathaway 2002 (n 173) 1944.

¹⁸¹ Hathaway 2002 (n 173) 1944.

¹⁸² Hathaway 2002 (n 173) 1944.

On the other hand, the scholarship that she places under the label of normative theory ‘argue[s] that state decisions cannot be explained simply by calculations of geopolitical or economic interests or even the relative power of domestic groups.’¹⁸³ She goes on to explain that

all of the normative theories....share the fundamental claim that it is the transformative power of normative discourse and repeated interactions between transnational actors, rather than the calculation of political, military, or financial advantage, that is responsible for the formation and continuation of human rights regimes. Norms, in other words, have a causal influence on human rights regimes. ...This process of norm proliferation and socialization is aided by the human rights activism of nongovernmental organizations which motivate international discourse on human rights, establish international networks of people and institutions to monitor human rights violations, and rally public opinion in support of efforts to convince governments to create human rights regimes and press other states to join them.¹⁸⁴

For her own work, Hathaway utilises the transnational legal process put forth by Koh.¹⁸⁵ She argues that the transnational legal process shows that states adhere to international norms because of ‘repeated participation in the transnational legal process.’¹⁸⁶ The transnational theory holds that this adherence occurs because of ‘norm-internalization’¹⁸⁷ generated by the mutual interactions of ‘transnational actors-usually foreign policy personnel of the governments involved, private norm entrepreneurs and non-governmental organizations’.¹⁸⁸

Hathaway notes shortcomings in the transnational legal process.¹⁸⁹ She notes that the transnational legal process fails to identify which norms a state will comply with, or what characteristics of a state might lead to compliance with a particular norm.¹⁹⁰ There are other shortcomings as well, which include the failure of this to explain the process in any detail by which norms are internalised by states. Whilst at first blush it might appear that the transnational legal process would be a useful theoretical base for the

¹⁸³ Hathaway 2002 (n 173) 1955.

¹⁸⁴ Hathaway 2002 (n 173) 1957.

¹⁸⁵ Hathaway 2002 (n 173) 1960.

¹⁸⁶ Hathaway 2002 (n 173) 1961.

¹⁸⁷ Hathaway 2002 (n 173) 1961.

¹⁸⁸ Hathaway 2002 (n 173) 1961.

¹⁸⁹ Hathaway 2002 (n 173) 1962.

¹⁹⁰ Hathaway 2002 (n 173) 1962.

thesis research, it is, in fact not suited. Hathaway made use of it for the study of international human rights treaty compliance. It is a theoretical base that has room for non-state actors, which is important for intercountry adoption research. Intercountry adoption consists not *only* of state actors, but of other actors as well, as discussed further within the thesis. But the transnational legal theory does not go far enough or provide enough depth to explore the heart of the research question.

As discussed further in Chapter Two, constructivist theories on international relations offer the missing pieces that the transnational legal process does not. It offers additional standpoints on why states act in certain ways, as well as offering information on the creation of norms and normative meaning, and how and why norms transfer from one setting to another. The transnational legal process also seems to envision only a one way flow of normative meaning, from international to domestic settings. As discussed in the final chapter of this thesis, that is not a full picture of the way in which normative meaning travels. As discussed with the best interests standard in Chapter Six, normative meaning can be generated from a variety of sources, including domestic state and non state actors. Moreover, the flow of normative meaning is not one way—it is interactional, both shaped and shaping normative meaning of other actors, with normative meaning transferring from both domestic to international and international to domestic.¹⁹¹ Ultimately, the thesis makes use of a constructivist theory on normative life cycles¹⁹² to complement the international relations constructivist theory to explain the transfer of normative meaning of the best interests standard.

There is yet another field of scholarship that goes to the heart of why nations cooperate with each other and comply with international norms. This is in the study of international cooperation.¹⁹³ International cooperation theory sees ‘iterated processes, which continue beyond initial agreements and result in complex and enduring governance orders and potential social change.’¹⁹⁴ One emergent theme in the field of cooperation theory has been to study the rule of non-state actors in the international

¹⁹¹ See discussion in Chapter 6.

¹⁹² Finnemore and Sikkink (n 151); see further discussion in Chapter Six.

¹⁹³ K O’Neill, J Balisger, S VanDeveer, ‘Actors, Norms and Impacts: Recent International Cooperation Theory and the Influence of the Agent-Structure Debate’ (2004) 7 Annual Review of Political Science 149, 150-151.

¹⁹⁴ O’Neill, Balsiger and VanDeveer (n 200) 150.

arena.¹⁹⁵ Another emerging subject of study has been that of ‘the regulative and constitutive effects of norms in international politics.’¹⁹⁶ O’Neill, *et al* identify what they call ‘two waves’¹⁹⁷ of normative research.¹⁹⁸ The early work on norms is reminiscent of the claims made in transnational legal theory—that external influences in the form of shared norms ‘engendered international cooperation by shaping state interests in preferences that gave state actors more shared interests.’¹⁹⁹ But that view of normative influence on states was found inadequate and another phase of study on norms had a very different approach to understanding the relationship and influences of norms and states.²⁰⁰ The work of Davis and Cortell²⁰¹ and Finnemore and Sikkink²⁰² which is discussed extensively in Chapter Six is characteristic of this second phase of normative research.²⁰³ O’Neill *et al* describe this second phase of normative research:

Second-wave research seeks to better understand various domestic influences of international norms on state actors, the public, various societal elites and domestic discourses.

Second-wave literature looks for changes in domestic discourses, national institutions, and state policies. It seeks empirical evidence of domestic “salience” of particular transnational norms, focusing on processes of state socialization and the acceptance of previously rejected norms.²⁰⁴

O’Neill *et al* also pick up on the transnational network concept that Cotterrell has commented upon, and its relationship to norms, saying that, ‘the transnational networks literature locates normatively grounded agency within networked individuals and their groups.’²⁰⁵ Transnational networks include ‘non-state actors (individuals, groups,

¹⁹⁵ O’Neill, Balsiger and VanDeveer (n 200) 156-158.

¹⁹⁶ O’Neill, Balsiger and VanDeveer (n 200) 159.

¹⁹⁷ O’Neill, Balsiger and VanDeveer (n 200) 161.

¹⁹⁸ O’Neill, Balsiger and VanDeveer (n 200) 161-162.

¹⁹⁹ O’Neill, Balsiger and VanDeveer (n 200) 161.

²⁰⁰ O’Neill, Balsiger and VanDeveer (n 200) 161-162.

²⁰¹ J Davis and A Cortell, How do International Institutions Matter? The Domestic Impact of International Rules and Norms (1996) 40(4) *International Studies Quarterly* 45. See discussion in Chapter 6.

²⁰² M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887. See discussion in Chapter 6.

²⁰³ O’Neill, Balsiger and VanDeveer (n 200) 161.

²⁰⁴ O’Neill, Balsiger and VanDeveer (n 200) 162.

²⁰⁵ O’Neill, Balsiger and VanDeveer (n 200) 162-163.

corporate bodies).²⁰⁶ Non-state actors have received much attention in academic literature, alongside work that considers normative influence, as O'Neill *et al* comment, 'The increasing emphasis on norms and ideas has progressed hand in hand with the growing importance of NSAs, as the latter have often been able to exert leverage in the normative realm.'²⁰⁷

Van Kersbergen and Verbeek also discuss the standpoint of transnational theories in normative studies. They comment that 'transnationalists depart from the notion of the unitary state and argue that international norms may have an effect because transnational or domestic non-state actors put pressure on governments to comply with international norms.'²⁰⁸ Thus, the non-state actors at both a domestic and international level are seen as having a role to play in normative actions. Van Kersbergen and Verbeek also comment upon the Finnemore-Sikkink normative lifecycle, arguing that it has shortcomings in failing to 'take into account the possibility that somewhere along the way, the meaning of the norm is subject to change, and might even be subject to restoration of the situation before the adoption of the norm.'²⁰⁹

Network Theory

Closely related to the idea of transnational theories are those of network theories. Network theories involve studies of relationships of domestic and international actors, and include analysis of normative meaning.

The use of social network theories within the study of international relations is another area of relevance for the thesis. Social networking theory has been described by Goddard as one that 'conceives of networks—ties among actors—as the building blocks of political interaction.'²¹⁰ A wide range of actors can be studied within social networking theory, including 'individuals, coalitions, institutions or states.'²¹¹ Social network theories have been used in the study of international relations, although the use of this is not without some novelty and some questions arising.²¹² Nevertheless, social networking theory is seen as one that can provide added insights into international

²⁰⁶ R Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris*

²⁰⁷ O'Neill, Balsiger and VanDeveer (n 200) 168.

²⁰⁸ K VanKerbergen and B Verbeek 'The Politics of International Norms: Subsidiarity and the Perfect Competence Regime' (2007) 13(2) *European Journal of International Relations* 217, 220.

²⁰⁹ VanKerbergen and Verbeek (n 215) 222. See discussion on this normative cycle in Chapter Six.

²¹⁰ S Goddard, 'Brokering Change: Networks and Entrepreneurs in International Politics' (2009)1(2) *International Theory* 249, 250.

²¹¹ Goddard (n 217) 254.

²¹² E Hafner-Burton, M Kahler, and A Montgomery, 'Network Analysis for International Relations' (2009) 63 *International Organization* 559, 580-586.

relations research.²¹³ One researcher also argues that it can work in a complementary fashion with constructivist accounts of international relations and normative meaning. Goddard says that:

network theory augments constructivist theories of entrepreneurship. Theorists such as Sikkink and Keck have proposed that an entrepreneur's success depends on the content of the norm introduced. Using network theory, constructivists could better specify the conditions under which the content of the norm matters. As argued here, while content is critical—an actor's ideas must resonate if they are to be accepted throughout the network—whether or not the norm is salient depends as much on who is promoting it as the content of the norm itself.²¹⁴

Network theories themselves can be seen as falling within a constructivist paradigm, concentrating as they do on the 'dynamic processes'²¹⁵ within the network.²¹⁶ Networks themselves are seen as 'significant actors in international politics and represent a specific mode of international interaction and governance.'²¹⁷ Network theories apply to domestic spheres as well as to international politics, again encompassing a wide array of actors and their links:

Networks define domestic and international politics as well. In domestic politics, actors operate within networks of coalitions, maintaining ties with political parties, interests groups and institutions...patterns of relations among states, institutions and non-governmental organizations suggest network structures²¹⁸

Network theory thus provides some insights into the network that the thesis presents on intercountry adoption and the normative meaning given to the best interests standard. As presented, the theory takes on many aspects of network theory, showing the relationship between actors in intercountry adoption. The description that Goddard has of a fragmented network is particularly apposite for understanding that of the best interests standard—showing as it does the likelihood for different meanings to be

²¹³ Hafner-Burton, Kahler and Montgomery (n 219) 584-585.

²¹⁴ Goddard (n 217) 273.

²¹⁵ Hafner-Burton, Kahler and Montgomery (n 219) 560.

²¹⁶ Hafner-Burton, Kahler and Montgomery (n 219) 560.

²¹⁷ Hafner-Burton, Kahler and Montgomery (n 219) 561.

²¹⁸ Goddard (n 217) 255.

attached to the standard throughout the network. As well, two different meanings of the standard are present by very influential actors. The Hague Conference presents a view of the standard underpinned by the idea of intercountry adoption subsidiarity; whilst the United States, a major receiving state gives short shrift to the idea of subsidiarity in the best interests of children in intercountry adoption. As well, the standard receives different meanings in the state-to-state dyads of sending and receiving state. In turn, the individual states are influenced by their own unique circumstances of national identity and internal situations that led to their involvement with intercountry adoption. All of these dynamics contribute to what normative meaning is given to the best interests standard.

The thesis, and the final theory presented in Chapter Six, address the idea of normative transfer of meaning alongside a utilisation of the Finnemore-Sikkink cycle. As well, the final theory looks at intercountry adoption and the best interests standard not as a product of international law only, but as part of a transnational network. The transnational network allows an inclusion of international law, but also encompasses the idea of the influence of non-state actors at both the domestic and international levels, and the activity of norms at both levels—and the transfer of normative meaning.

Conclusion

This chapter has reviewed the concepts that are important to the thesis and exploration of the thesis question. The chapter has outlined the complex areas where investigation of the research question will lead through the remainder of the thesis. The chapter, and indeed, the thesis stress the need to look beyond black letter law to answer the research question and to fully understand the way that the standard works in intercountry adoption decisions. The best interest standard arose alongside and with the development of child welfare. Its origins reflect the interests that brought child welfare to the fore of societal and international concern. Child welfare was never only about what was necessary for children or focused on children—it always had concomitant focuses that

included international prestige, of issues of rescue and privilege. This, as will be discussed in the thesis, continues to be reflected in the current operation of intercountry adoption. And that in turn is reflected in the way in which the best interests standard is utilised within intercountry adoption.

The chapter also reviewed the contemporary issues being raised about intercountry adoption. Recent scholarship moves past black letter law and an examination of the Hague Convention's provisions to a wider examination of underlying issues of race and ethnicity, and highlight as well the issues of power and privilege between nations, the relationship and contrasts between sending and receiving states, women's issues and how recognition of or equally important the lack of recognition contributes to the ways in which intercountry adoption is depicted and the environment within which it is carried out. These themes recur throughout the thesis as it continues the exploration of and constructing an answer for the research question. How and where do different factors and forces come into the shaping of the meaning of the best interests standard? How are these related to the reasons that intercountry adoption is carried out in sending or receiving states? Instead of a hodgepodge of contentious issues surrounding intercountry adoption and the best interests standard, can some sense be made of the dynamics and process? The rest of the thesis sets out to do just that.

Chapter Two --Constructivist Methodology: Empirical Analysis and Comparative Legal Analysis

Introduction

The task of a methodology chapter is to explain the research approach as taken with regard to the selected research question, to describe and justify its selection and application, and to highlight any shortcomings that such any approach may have. That, then, is the task of this chapter in explaining its research design.

A constructivist research paradigm was chosen. Within that paradigm, constructivist grounded theory chosen as the methodology for analysing the results of both elite interviews and a comparative legal analysis of seven countries. This appears to be a first use of constructivist grounded theory as a methodological basis for comparative legal analysis.

This seemingly simple task of this methodology chapter is compounded by difficulties that lay just beneath the surface in a discussion of thesis research that combines empirical research and comparative legal analysis. Empirical research, whether quantitative, qualitative or a mixture of both, does not have whole-sale acceptance within legal academic research. While comparative legal analysis might not need to justify its mere presence within legal academic research to the degree that empirical work must, nevertheless, there is no agreement on how or why such research should be done.

Taken together, the use of empirical research and comparative legal analysis make the writing of a methodology chapter a challenging task. Thus, in this chapter, it will not be enough to simply provide a description the methodological analysis undertaken.

It is at least necessary within this chapter to acknowledge the issues surrounding legal empirical research and comparative legal analysis. It is far beyond the scope of this thesis to resolve those issues, and the temptation is there to ignore these issues and side-step the quagmire altogether. There is a strong sense that to even broach these subjects

is to inevitably open a Pandora's Box, but a full accounting of the place of empirical research and comparative legal analysis in this thesis require just such an action—opening the Pandora's Box on the debates in these subjects.

The thesis research includes empirical data analysis through conducting elite interviews, and comparative legal analysis of seven states. Analysis for each was done using a methodology called constructivist grounded theory. This methodology is further discussed in this chapter. The selection of this specific approach to the research question is also discussed in this chapter. Methodology is indeed a key part of this thesis, with the use of constructivist grounded theory for comparative legal analysis an original use of the methodology.

Statement on Ethics Approval

Ethics approval was sought and obtained through the Leicester DeMontfort University procedures and regulations. The code of ethics that was developed by the Socio-Legal Studies Association was used as a guide for the ethical conduct of the interviews. At all phases of the interviewing, the procedure was guided by the principle of informed consent with attention paid to the importance of confidentiality and in accepting that prospective interview participants might decline to become involved with the interview process.

The first section of this chapter discusses the process of designing an approach to research, through the selection of a research paradigm. The selection of a methodology for a particular research project is part of the larger task of paradigm selection.

Methodology Used: Overview

The research done in this thesis is based on application of constructivist grounded theory. It is comprised of two elements, a comparative analysis of seven states and of elite interviews with seven individuals.

The seven states are China, Guatemala, India, South Africa, South Korea, Sweden and the United States. States were chosen that have active or developing issues in

intercountry adoption, including bringing the Hague Convention into force. These states are not intended to be a representative sample of states involved in intercountry adoption, as might be expected with quantitative analysis. Instead, the states represent a geographic mix, and include both sending and receiving states. States were also selected if there was English-language material available. The analysis for the states was done according to the steps put forward in constructivist grounded theory, with a selection of texts for each state. The texts analysed for each state are listed at Appendix B. A set of relational statements was developed, using the axial coding diagram at Appendix A and discussed in this chapter. The relational statements for each state are listed in Chapter Four. The texts selected are from a variety of academic fields. Again, using constructivist grounded theory, there was no pre-determined number of relational statements to be devised from the analysis, and thus, there are varying numbers of relational statements for each state.

Elite interview were held with seven individuals. These individuals hold key positions in government, policy-making organisations, social service organisations and as researchers. Semi-structured interviews were held. Four interviews were held face to face, the other three interviews over the telephone. Three interviews were transcribed, while notes were taken of the other four. The transcripts and notes were analysed according to constructivist grounded theory, and relational statements developed from the analysis of the combined interviews. The relational statements presented in Chapter Three do not represent one interview, but are an amalgamation of the codes derived from the interviews. The purpose of elite interviews is not to obtain a representative sample. Instead, as discussed within this methodology chapter, the purpose of the interview is to obtain data to analyse with constructivist grounded theory methodology.

Selecting a Paradigm

Designing a strategy to address a particular research problem or question requires much more than the selection of an appropriate methodology. The selection of a methodology is only part of the larger process of designing a suitable research strategy. Methodology is but one piece of the puzzle to be fit into the research strategy design. Methodology is, however, an integral part of that design. This section discusses the considerations that go into the selection of an appropriate research paradigm, and the challenges in

establishing an appropriate paradigm for legal research, including debates on positivist and constructivist paradigms.

There are important consequences inherent in the selection of a research paradigm, according to Guba and Lincoln:

Each interpretive paradigm makes particular demands on the researcher, including the question that the researcher asks and the interpretations that he or she brings to them.¹

Just what these demands are and how they have been dealt with in the thesis are considered throughout this chapter.

Research Paradigms

What is meant by the concept of a ‘research paradigm’? It is described as ‘[t]he net that contains the researcher’s epistemological, ontological and methodological premises...an interpretive framework.’² Guba and Lincoln have identified five such research paradigms, identifying them as ‘positivism, post-positivism, critical theory, constructivism, and participatory.’³ The discussion in this chapter focuses on the differences between positivism and constructivism. Law has generally been approached from a positivistic paradigm, although the discussion of positivism, much less of paradigm selection, is rarely had in legal research.

There is a growing body of literature, discussed in this chapter, that challenges the sufficiency of a positivist view of law.

Positivistic Paradigms and Constructivist Paradigms

There are obvious differences between a positivistic and constructivist paradigm. Guba and Lincoln offer descriptions of these approaches—positivism sees ‘the nature of

¹ N Denzin and Y Lincoln, ‘Introduction: The Discipline and Practice of Qualitative Research’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (Sage Publications, 3rd edition, 2005) 22.

² Denzin and Lincoln (n 1) 22.

³ E Guba and Y Lincoln, ‘Paradigmatic Controversies, Contradictions and Emerging Confluences’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (Sage Publications, 3rd edition, 2005) Table 8.3, 195.

knowledge’⁴ as ‘verified hypothesis establish as facts or law’⁵ and has an ‘inquiry aim’ of providing explanations that have predictive value.⁶ The value of hypotheses and results are judged by their ‘internal and external validity, reliability, and objectivity.’⁷ A constructivist paradigm, on the other hand, views the ‘nature of knowledge’⁸ as something that involves ‘individual or collective reconstructions coalescing around consensus.’⁹ Constructivism has as its goal the ‘understanding’¹⁰ of these constructed meanings, with the value of the work judged by its ‘trustworthiness and authenticity, including catalyst for action’.¹¹

Selecting a Paradigm for Legal Research

Law operates for the most part with an unchallenged, albeit unacknowledged, positivist perspective.¹² It may strike an odd note then to discuss research paradigms and perspectives in conjunction with law. Some social scientists maintain that there has been a methodological ‘revolt against positivism.’¹³ That revolt, however, has not reached too far into legal interpretation and understandings of the law. Positivism is alive and well within its legal realm—where the common interpretations given to law, legal instruments and legal principles are unvarying and invariably overwhelmingly positivistic.¹⁴ There is a groundswell of change however away from a strictly positivistic view of law and further discussed in this chapter.

Is there another way that ‘law’ could or should be conceptualised? What are the differences between positivistic interpretations and constructivist interpretations? What

⁴ Guba and Lincoln (n 3) Table 8.2, 194.

⁵ Guba and Lincoln (n 3) Table 8.2, 194.

⁶ Guba and Lincoln (n 3) Table 8.2, 194.

⁷ Guba and Lincoln (n 3) Table 8.2, 194.

⁸ Guba and Lincoln (n 3) Table 8.2, 194.

⁹ Guba and Lincoln (n 3) Table 8.2, 194.

¹⁰ Guba and Lincoln (n 3) Table 8.2, 194.

¹¹ Guba and Lincoln (n 3) Table 8.2, 194.

¹² For further discussion on positivism in law, see discussion on page 5-11, this chapter.

¹³ D Foley and A Valenzuela, ‘Critical Ethnography: The Politics of Collaboration’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (Sage Publications, 3rd edition, 2005) Table 8.3, 17.

¹⁴ See, for instance, M Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (Cambridge University Press, 2005) 11, 16, commenting on the way that law is commonly seen from a positivist viewpoint.

would be the research implications for views that take up a different, non positivistic view of what 'law' is?

Positive Law

Just what is meant by positive law, or law discussed in a positivistic paradigm?

Dyzenhaus gives a concise description:

Positive law, properly so called, is not merely law whose existence is determinable by factual tests but law whose content is determinable by the same sort of tests, here tests which appeal only to facts about legislative intention... That judges will have to engage in at least some measure of moral deliberation is not denied, but as soon as they do they are, from the positivist perspective, no longer engaged in legal reasoning.¹⁵

Thus, according to the definition that Dyzenhaus sets forth, positive law considers law to be confined to statutes, case precedent and perhaps legislative intent, but no more. If anything else is included in the equation, then what is being considered is no longer 'law'. Positive law thus draws a tight and perhaps one-dimensional boundary around what it considers to be within the realm of law. It draws on the precepts of positivistic paradigms that value objectivism and neutrality in their examination and analysis.

This same narrow banding of what is included in the concept of law by positivists is outlined by Goldsworthy, who again notes the necessary absence of morals in law, when seen from a positivistic viewpoint.¹⁶

Dyzenhaus argues that this strict definition of positive law that is exclusive of any moral consideration is ultimately unworkable in a contemporary legal setting.¹⁷ This definition ignores realities of legal constructs such as human rights law and its implementing mechanisms, as there is an express 'moral commitment to human rights'¹⁸ in these

¹⁵ D Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24(1) Oxford Journal of Legal Studies 39, 45.

¹⁶ J Goldsworthy, 'The Self-Destruction of Legal Positivism' (1990) 10(4) Oxford Journal of Legal Studies 449, 449-550.

¹⁷ Dyzenhaus (n 15) 66-67.

¹⁸ Dyzenhaus (n 15) 66.

instruments and bodies.¹⁹ Goldsworthy likewise concludes that these definitions of positive law do not hold sway because it is impossible to escape the moral content of law—a content that positivism does not recognise or acknowledge.²⁰ By refusing to acknowledge this moral content, ‘legal positivism has self-destructed.’²¹ This may be more hopeful than actual, but does point to contemporary trends that regard positivism, on its own, as an insufficient standpoint for legal scholarship. These are discussed further within this chapter.

The Place of Empirical Legal Research: A Pandora’s Box?

Empiricism, within the realm of legal academic scholarship, does not receive the same matter of fact acceptance that it does in other fields. An example is cited in a 1989 journal article of an American academic being refused academic tenure just because of this uncertainty and unease—indeed, in this situation, it should be read as an outright rejection and ouster--- over the place of empirical work within legal academic research:

At another leading law school, a distinguished visiting professor, brought to the school to begin a program in “law and society” featuring empirical research, was refused tenure by the president of the university despite a large majority of the faculty approving the appointment. The victorious minority of the faculty had urged, *inter alia*, that no one had defined the scope or utility of empirical research, at least not to their satisfaction.²²

Have things moved on since then at least in the American experience, some nearly two decades ago? It would appear so, although only incrementally, with empirical legal research considered in, for instance, a 2001 symposium on ‘Empirical and Experimental Methods in Law’²³ where it was hopefully noted that ‘...there are signs that empirical and experimental methods are becoming more common in legal scholarship.’²⁴ That is, incremental acceptance means that empiricism is no longer such heresy as to deny academic tenure, and that it can keep edgy company alongside other so-called

¹⁹ Dyzenhaus (n 15) 66-67.

²⁰ Goldsworthy (n 16) 485-486.

²¹ Goldsworthy (n 16) 486.

²² N E H Hull ‘The Perils of Empirical Legal Research’ (1989) 23(5) *Law and Society Review* 915, 915.

²³ R McAdams and T Ulen, ‘Symposium: Empirical and Experimental Methods in Law: Introduction’ (2002) *University of Illinois Law Review* 791, 791.

²⁴ McAdams and Ulen (n 23) 791.

experimental methods in legal research. This is a far cry from widespread academic acceptance.

True, these examples are reflective only of the American experience with empirical research. What of the British academic acceptance of empirical work within legal research? Socio-legal research, which includes empirical research within it, still has not settled the questions on the place or aim of empirical work;²⁵ nor, indeed, whether it is the place of law to find an association with the social sciences²⁶ or alongside the humanities.²⁷

Hillyard's comments on the 'Nuffield Inquiry on Empirical Legal Research'²⁸ highlight these points:

The report notes how legal scholarship is characterized by the lone researcher undertaking close textual analysis of the legal material. But it does not explore the ways in which this form of research is very different from the research carried out by social scientists. Within the social sciences, the focus of research is on the use of either deductive or inductive methods to explain or understand some selected social phenomena. The researcher is perceived either as independent and objective or intimately part of the construction of knowledge. In relation to the latter, the crucial characteristic that of researchers is that they are trained to reflect on the extent to which their insider/outsider position affects their understanding of the phenomenon under study. In contrast, the aim of so much legal scholarship is to influence legal reasoning and produce clarity using a self-referential system. The aim is not to further the understanding of the

²⁵ P Hillyard, 'Law's Empire: Socio-legal Empirical Research in the Twenty-first Century' (2007) 34(2) *Journal of Law and Society* 266, 275-276; H Genn, M Partington, S Wheeler, 'Law in the Real World: Improving Our Understanding of How Law Works: Final Report and Recommendations' (The Nuffield Inquiry on Empirical Legal Research, November 2006), online at http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf, which comments that 'Empirical legal research is now recognised as having a central position in legal scholarship alongside the doctrinal, text-based body of legal research in jurisprudence and substantive law and practice. Abroad, and particularly in the USA, the empirical legal studies movement (ELS) is regarded as one of the most vibrant areas of legal scholarship. ..Indeed law schools and individual scholars in the USA are jostling to establish their ELS credentials, concerned not to be left behind a fast rolling bandwagon.' 1, para 3. The broad acceptance of empirical legal studies in the United States described does not match the author's own experience on the acceptance of this in the USA. The author has experienced views on legal scholarship and research as much more traditionally tied to doctrinal work and not giving an equal status to empirical work.

²⁶ Hillyard (n 25) 275

²⁷ Hillyard (n 25) 275

²⁸ Genn, Partington and Wheeler (n 25).

phenomena of law, legal institutions or processes using a range of quantitative and qualitative research methodologies.²⁹

Hillyard's comments make clear that he views the purpose and method of legal research to be very different than that conducted in social sciences. He goes further to suggest that there may be more in common with law and the humanities than law and the social sciences.³⁰

Then again, there is no agreement as to what should be studied as part of law, if the study of law is to include more than the study of legal documents, instruments, and case decisions. There are scholars who promote, indeed, insist, that law cannot be studied without taking into account a much broader scope than the mere four corners of a legal instrument.³¹ On the other hand, strict legal positivists would argue that once the study of law has moved beyond those legal instruments, documents and case decisions, what is being studied is no longer law at all.³² Some scholars debate whether a research agenda in law can appropriately intersect with other disciplines, given a view that the law makes up a distinct field with inherently more value than others:

Law as a field, and much legal scholarship concerned with it, continues to close itself off as superior in relation to social sciences and maintains a legocentric stance.³³

A debate on what should be studied in empirical legal research must take account of socio-legal work and contemporary debates on its place in legal research. Socio-legal scholarship accepts a broad view of what the study of law should and can involve and focuses on law's interaction with broader society³⁴ or community.³⁵ Cotterrell argues very specifically of the necessity for the 'sociological interpretation of legal ideas.'³⁶ He argues that the specific use of the term 'sociological' is to be broadly understood as

²⁹ Hillyard (n 25) 275.

³⁰ Hillyard (n 25) 275-276.

³¹ W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn Cambridge University Press, 2006) 26-36; 75-81; discussing plural law as part of legal education; R Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 29-44.

³² Dyzenhaus (n 15) 45. See Menski (n 31) 150-160 for a good discussion summarising legal positivism.

³³ Menski (n 31) 168.

³⁴ Menski (n 31) 161-168; 176, 185-190.

³⁵ Cotterrell (n 31) 7-8; 43, 67, 161.

³⁶ Cotterrell (n 31) 55.

seeing law ‘systemically and empirically as a social phenomenon.’³⁷ He explains the important elements of this conception:

First, law is an entirely *social* phenomenon. Law as a field of experience is to be understood as an aspect of social relations in general, as wholly concerned with the coexistence of individuals in social groups. Secondly, the social phenomena of law must be understood empirically (through detailed examination of variation and continuity in actual historical patterns of social coexistence, rather than in relation to idealized or abstractly imagined social conditions.). And thirdly, they must be understood systematically, rather than anecdotally or impressionistically; the aim is to broaden understanding from the specific to the general. It is to be able to assess the significance of particularities in a wider perspective, to situate the richness of the unique in a broader theoretical context and so to guide its interpretation.³⁸

It is worth noting that the approach called for by Cotterrell involves inductive reasoning (‘from the specific to the general’³⁹) as part of his overall call for an empirical and contextual approach to the study of law.

In a recent article, Cotterrell discusses four approaches towards understanding what ‘law’ is, when looking at transnational communities. He focuses on how law should be thought of, with methodological consequences, for a type of legal focus that occurs to systems that include ‘non-state actors (individuals, groups, corporate bodies) and is not restricted within the jurisdictional limits of a single nation state.’⁴⁰ He argues not only for a pluralistic approach to law,⁴¹ but for a particular approach even towards legal pluralism. He describes four different approaches to understanding legal pluralism,

³⁷ Cotterrell (n 31) 55.

³⁸ Cotterrell (n 31) 55. See also A Bentzon and others, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law* (North-South Legal Perspectives Series No. 1, Mond Books, 1998) discussing concepts of legal centralism, which links concepts of legal positivism and legal centralism, in commenting on the sources used for legal research:., 31, 39, The sources used for legal research are in legal positivism/legal centralism are ‘case law, statutes, subsidiary legislation and legal theory derived from textbooks and articles.’ 49.

³⁹ Cotterrell (n31) 55.

⁴⁰ R Cotterrell, ‘Transnational Communities and the Concept of Law’ (2008) 21(1) Ratio Juris 1, 2.

⁴¹ Cotterrell 2008 (n 40) 7-8.

rejecting three of these approaches as in appropriate for the task of looking at transnational networks and regulation.⁴²

The three rejected approaches he terms monistic, agnostic and statist. A monistic approach is where ‘there must be a single criterion of law to be applied to the diversity of legal regimes and...this criterion will then determine the relationship between those regimes.’⁴³ An agnostic approach in contrast ‘avoids any final determination of the criterion of law’. Instead it ‘merely recognises the interaction of various normative regimes with varying degrees of practical effectiveness and authority.’⁴⁴ The statist approach has yet another view, where it ‘would recognise some regimes as law by reference to particular criteria usually modelled on those applicable to nation state law, and would see other regimes as merely non-legal regulation.’⁴⁵ He sees the fourth approach as ‘the only *genuinely pluralist* approach to law among these four possibilities’.⁴⁶

This fourth approach would challenge the commonly positivistic view of law, and of the pre-eminence of nation states as the source of law.⁴⁷ Instead it would ‘recognise the prominence of state law but not assume that all law must conform to or be measured against the state law model, or exist in evitable subordination to or dependence on the law of the state.’⁴⁸ He goes on to say that there is a need to develop such a pluralistic approach, one that would contain two elements, a focus within it on multiculturalism and the recognition of multiple sources of law within a nation state.⁴⁹

Cotterrell concludes that ‘At present the relationship between transnational communities and the concept of law is hardly explored.’⁵⁰ This relationship is given some exploration within the thesis, particularly in the final chapter that presents the theory. However, it was not an intended consequence of the research or research question. Nevertheless, the theory and its discussion may well have something to contribute to an understanding of

⁴² Cotterrell 2008 (n 40), see discussion below in this chapter.

⁴³ Cotterrell 2008 (n 40) 8.

⁴⁴ Cotterrell 2008 (n 40) 8.

⁴⁵ Cotterrell 2008 (n 40) 8.

⁴⁶ Cotterrell 2008 (n 40) 10.

⁴⁷ Cotterrell 2008 (n 40) 10.

⁴⁸ Cotterrell 2008 (n 40) 11.

⁴⁹ Cotterrell 2008 (n 40) 11.

⁵⁰ Cotterrell 2008 (n 40) 16.

this relationship, and present some information for further exploration in this area. As presented in the final chapter, a constellation of influences act and interact on the normative meaning that is given to the best interests standard, including governmental and nongovernmental actors, and actors at a domestic and international level. In this way, the idea that Cotterrell has presented of the need to consider the interactions of transnational networks and law is indeed taken up in the theory presented in the final chapter.⁵¹

Just why having legal positivism as the dominant paradigm in law is problematic for both empirical legal research and comparative legal analysis is further discussed in the following sections of the chapter.

Methodology and Empirical Legal Research

The proposition of the need for methodological soundness is not universally recognised when it comes to legal empirical research; other debates on legal empirical research aside.⁵² Methodology might be given short shrift, if it is mentioned at all. Some legal scholars claim that the inexplicably complex nature of some legal research subject matter makes it ‘impervious to analysis by any particular theory—whether legal, economic or social scientific.’⁵³

How is sound empirical legal research delineated from that which is not?⁵⁴ How does such research establish any credible claims to be interdisciplinary? If empirical legal research does not have to meet any standards other than that which its author sets out for it, how can it cross into other disciplines if it does not take account of and is not accountable to the research requirements of those other fields? And what value is

⁵¹ See discussion in Chapter Six.

⁵² See discussion on the place of empirical research within legal academic research, 48-50,

⁵³ A McEvoy, ‘A New Legal Realism for Legal Studies’ (2005) *Wisconsin Law Review* 433, 437, commenting on the subject matter that makes up New Legal Realism. See also, M Rieman, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 50 *American Journal of Comparative Law* 671, 687-688. There tends in these discussions to be a blurring of the concepts of theory and methodology, with them being used almost interchangeably.

⁵⁴ L Epstein and G King, ‘The Rules of Inference’ (2002) 69(1) *The University of Chicago Law Review* 1, 9, 12-13; H Chodosh, *Global Justice Reform: A Comparative Methodology* (New York University Press, 2005) 4, commenting that ‘...comparative law has not yet formalized justifications for distinguishing superior from inferior comparisons.’ In a related discussion, L Epstein and G King, ‘Building an Infrastructure for Empirical Research in Law’ (2003) 53(3) *Journal of Legal Education* 311, they further discuss methodology and development of legal empirical research in American law schools.

interdisciplinary legal research if it unable to reach an audience in other fields?⁵⁵

Having completed a study on American legal empirical research, Epstein and King conclude that ‘the current state of empirical legal research is deeply flawed.’⁵⁶ And they further make the point that empirical legal research that pays scant attention to methodology would not meet even the most minimal of standards for research in other areas of study.⁵⁷ Without that it is difficult to justify the claims of some empirical legal research to be interdisciplinary. A complete disregard for the research rules accepted across many other fields leaves empirical legal research isolated and lacking in credibility. Epstein and King comment:

The sustained, self-conscious attention that is so present in the journal of traditional academic fields (without which scholars in those disciplines would be unable to publish their work in reputable journals or expect to be read by anyone with an interest in how the world works)...is virtually non-existent in the nation’s law reviews.’⁵⁸

Law also lacks what other fields of study have: ‘a subfield devoted to methodological concerns’.⁵⁹

Epstein and King make the point that the research must stand on the soundness of its own design, including the research question and the methods used to analyse data, and arrive at conclusions.⁶⁰ This—rather than skilled legal argument—is the nature of defensible and vindicable empirical legal research.⁶¹ There are considerable limitations on empirical research that relies upon ‘persuasion and advocacy’⁶² rather than well developed methodology and research design for evaluation of the research and its results.⁶³

Thus, if empirical legal research desires credibility in other academic fields where it makes claims to be of an interdisciplinary nature, it is crucial that such research have the

⁵⁵ Epstein and King (n 54) 6.

⁵⁶ Epstein and King (n 54) 6.

⁵⁷ Epstein and King (n 54) 6.

⁵⁸ Epstein and King (n 54) 6.

⁵⁹ Epstein and King (n 54) 11.

⁶⁰ Epstein and King (n 54) 9, 18-19.

⁶¹ Epstein and King (n 54) 9, 18-19.

⁶² Epstein and King (n 54) 9.

⁶³ Epstein and King (n 54) 9, 18-19.

necessary underpinnings of a well-developed research design, including that of adherence to an explicit methodology.

Issues in Comparative Legal Analysis

Just what is comparative legal research or comparative legal analysis? Is it something steeped in mystery and unattainable, except by those highest up in the ivory tower?⁶⁴ This a view often presented⁶⁵, but one that is arguably very incorrect, in that it fails to take account of the acts of comparison that are inherently part of any kind of legal analysis:⁶⁶

All lawyers are comparatists in a natural sense, as when they make distinctions, draw deductions or look for a case in point. There is an innate process which has much in common with the procedures of comparative law. Common lawyers compare cases and cross—reference them very carefully. The case method is essentially a comparative method based on similarity, analogy and differentiation.⁶⁷

Methodology and Comparative Legal Analysis: ‘Incoherence’

This section discusses comparative legal analysis and methodology. It provides an overview of discussions on comparative law methodology, and the need for methodological clarity in any comparative analysis undertaken. The need for a sound methodological basis is as critical in comparative law as it is in legal empirical research. It is not a lack of attention to methodology that plagues comparative law, but a plethora of too many methods being advanced, each with an insistence that their particular way of going about the analysis is the only way. Brand observes that ‘the methodological malaise of comparative law seems to be incoherence rather than a lack of efforts.’⁶⁸ Within comparative law, then, there is little tolerance for a range of acceptable methodology. Instead, there is an insistence that there be only one right way to do comparative legal analysis.

⁶⁴ V Palmer, ‘From Leotholi to Lando: Some Examples of Comparative Methodology’ (2005) 53 *American Journal of Comparative Law* 261, 265- 266. Palmer states that ‘The general message from academic circles...is that comparative law is a difficult and forbidding field reserved for a special few’, 266.

⁶⁵ Palmer (n 64) 265- 266.

⁶⁶ Palmer (n 64) 262.

⁶⁷ Palmer (n 64) 262.

⁶⁸ O Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2006) 32 *Brooklyn Journal of International Law* 405, 408.

But just what is comparative law? Just as there is no consensus or coherence on the methodological approaches that can or should be used, there is no agreement just on what comparative legal analysis is. Muir Watt proposes the essential question: ‘What is it that is being compared?’⁶⁹ There is disagreement on whether the goal of comparison is to highlight *similarities* or *differences*.⁷⁰ The position taken on this is dependent upon the perceived aim of the comparison.⁷¹ The focus has been on similarities when commercial and business law have been the subject of comparative legal analysis.⁷² Similarity, rather than difference, has been the focus as a means of promoting endeavours that would benefit transnational or globalised business pursuits.⁷³ Commercial ventures are more likely to be taken up if there is a focus on similarities rather than differences.⁷⁴

Comparative law is of course more than inspecting the workings of a foreign legal jurisdiction.⁷⁵ Rather, comparative law entails, perhaps obviously, the actual act of contrasting one object or concept with another, be they legal jurisdictions or other objects or concepts.⁷⁶ But beyond this, there is little agreement on what comparative law is or what it can or should encompass. Comparative legal analysis has been found to be highly unsatisfactory:

[comparative legal analysis] has been a resounding failure with regard to its more general development as a field of inquiry... Comparative law has rarely shown itself capable of generating broad and deep insight of general interest, e.g., into the structure and development of legal systems or into the relationship between law, society and culture on a regional or worldwide basis.⁷⁷

The criticism then is that comparative law does not look beyond the traditional field of black letter or positive law. Can the concerns in the criticism be addressed? Why is it

⁶⁹ H Muir Watt, ‘Globalization and Comparative Law’ in M RiemannRiemann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 588.

⁷⁰ R Cotterrell, ‘Comparative Law and Legal Culture’ in M Riemann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 711-713

⁷¹ Cotterrell 2006 (n 70) 711-713.

⁷² Cotterrell 2006 (n 70) 712, 733-734; Cotterrell (n 31) 147.

⁷³ Cotterrell 2006 (n 70) 733-734; Cotterrell (n 31) 147.

⁷⁴ Cotterrell 2006 (n 70) 733-734; Cotterrell (n 31) 147.

⁷⁵ K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd revised edition, T Wier, translator, Clarendon Press, Oxford, 1998) 6

⁷⁶ Zweigert and Kötz (75) 6.

⁷⁷ Riemann (n 53) 685.

that comparative law has been locked into a particular standpoint? Can it break free of that to be used to address other points of analysis, such as the one suggested of ‘the relationship between law, society, and culture on a regional or worldwide basis?’⁷⁸

Functionalism

The first part of this inquiry can be answered by looking at the doctrine of functionalism, and the place it has been given in comparative legal research. Due to its pre-eminence, comparative law often is seen as *being* functionalism, without either recognition that there is such a doctrine as functionalism or that there are other ways in which comparative legal analysis can be undertaken.⁷⁹

Functionalism, the approach advocated by Zweigert and Koetz, has been labelled as the foremost approach to comparative legal analysis.⁸⁰ To the extent that there has been attention given to comparative law methodology⁸¹, it has been dominated by the idea that comparative legal analysis is synonymous with the functionalist approach of comparison.⁸² Functionalism has been described simply as holding to the precept that “the only things which are comparable are those which fulfil the same function”⁸³ – thus its name. But is this approach as narrow and confining as it sounds? In fact, a further look into functionalism shows that it has a great deal of depth and breadth. Zweigert and Koetz identify two differing aims that a comparative law study might have.⁸⁴ One is ‘theoretical description’⁸⁵, which shows ‘how and why certain legal systems are different or alike.’⁸⁶ A second aim is an ‘applied’⁸⁷, analysis that looks at ‘how a specific problem can most appropriately be solved under the given social and economic circumstances.’⁸⁸

⁷⁸ RiemannRiemann (n 53) 685.

⁷⁹ Palmer (n 64) 284-285.

⁸⁰ O Brand, ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies’ (2006-2007) 32 Brooklyn Journal of International Law 405. 409-421.

⁸¹ Palmer (n 64) 262.

⁸² Palmer (n 64) 284-285.

⁸³ Palmer (n 64) 284, quoting Zweigert and Koetz, 68.

⁸⁴ Zweigert and Koetz (n 75) 11-12.

⁸⁵ Zweigert and Koetz (n 75) 11.

⁸⁶ Zweigert and Koetz (n 75) 11.

⁸⁷ Zweigert and Koetz (n 75) 11.

⁸⁸ Zweigert and Koetz (n 75) 11.

Zweigert and Koetz also are concerned that comparative law be distinguished from what they refer to as the ‘sociology of law’⁸⁹—or what might also be considered a socio-legal approach to law. Does this mean that a comparative law analysis cannot be done from a socio-legal perspective? Not at all—even Zweigert and Koetz do not see these as mutually exclusive approaches to legal analysis. Rather, they saw them as inherently complementary, with socio-legal approaches gaining strength when combined with a comparative approach.⁹⁰

Even with this description of aims that goes beyond mere legal system description, however, Zweigert and Koetz have an overwhelmingly positivistic point of view on comparative law research, urging for instance the goal of locating ‘neutral’⁹¹ legal principles across legal systems when doing comparison.⁹² A critic of the functionalist approach says that the concept of ‘*tertium comparationis*’⁹³ as the standpoint for functionalism—that is ‘an external, neutral position for comparative research’⁹⁴—‘is neither possible nor desirable for comparative law.’⁹⁵

Just why is this an unsatisfactory approach for doing comparative legal analysis? It is an inherently positivistic way of approaching law. Post modern theorists are critical of functionalism because of its underpinnings that focus on what is similar as the only area of inquiry for comparative analysis. According to Riemann, these post modern critics ‘question the time-honored principle of functionality by pointing to its systemic bias in favour of like solutions and to its inherent insensitivity towards difference.’⁹⁶

Other Methodological Approaches to Comparative Legal Analysis

There are, however, other approaches offered for comparative legal analysis. The approach suggested by Lasser offers some insights into the workings of comparative law research. While Lasser proposes his own methodology for comparative analysis, he

⁸⁹ Zweigert and Koetz (n 75) 10.

⁹⁰ Zweigert and Koetz (n 75) 10-12.

⁹¹ Zweigert and Koetz (n 75) 10.

⁹² Zweigert and Koetz (n 75) 10-11.

⁹³ M Van Hoecke and M Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *International and Comparative Law Quarterly* 495, 495; N Jansen, ‘Comparative Law and Comparative Knowledge’ in M Riemann Riemann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 314-315.

⁹⁴ Van Hoecke and Warrington (n 95) 495.

⁹⁵ Jansen (n 93) 314.

⁹⁶ Riemann (n 53) 681.

does so without insisting that it be the only way.⁹⁷ He does it rather as an exercise of showing the challenges in comparative law research, and how methodology is contextual—such that different research goals result necessarily in different research design, with different research outcomes.⁹⁸ Through discussion of his methodology, he provides an important springboard for recognition of the larger issues of research design that must be addressed in comparative law, but that heretofore, seem to have received little systematic attention.

Lasser's methodological discussion does several useful things. It acknowledges the importance of being able to clearly identify whatever methodology is used in the comparative analysis.⁹⁹ He argues that methodology need not be restricted to a singular type.¹⁰⁰ He implicitly recognises the need to identify the ontological and epistemological elements of research paradigms, in addition to methodology.¹⁰¹ He also notes the futility in continuing to hash out whether comparative law should focus on similarity or difference.¹⁰²

Identification of these elements helps to move comparative law past the endless circular arguments about its form and purpose, caught up in a functionalist framework. Instead, he identifies the broader questions that are part of any research design, that of the role and views of the researcher, the goal of the research, the influence that those will have on the selection of a paradigm, including the selection of methodology, and ultimately, influence the result of the research.¹⁰³

Lasser notes his

approach to comparative practice, therefore, acknowledges and accepts the critique that any choice of methodology significantly affects the construction, description and interpretation of the object of analysis. My response has simply been to *treat comparative law as a relational practice*. The idea is to forge relationships with prior comparative analyses, with the objects of analysis, with other disciplines (in my case, literary theory and criticism) and with the audience

⁹⁷ M Lasser 'The Question of Understanding' in P Legrand and R Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 224, 232-236.

⁹⁸ Lasser (n 97) 209,217-221,232-234.

⁹⁹ Lasser (n 97) 219-220.

¹⁰⁰ Lasser (n 97) 224.

¹⁰¹ Lasser (n 97) 217, 234.

¹⁰² Lasser (n 97) 218-219.

¹⁰³ Lasser (n 97) 209-212;217-221;232-236.

that foster a sense of *responsibility* towards the materials with which one works.¹⁰⁴

By referring to his approach as a relational one, he moves past a positivistic standpoint to one that is inherently constructivist. His viewpoints on the impact of methodology choice, as well as the possibility to use methodology that encompasses other academic fields are practical and valuable as a starting point for considering other ways in which comparative legal analysis can be done.

Cotterrell argues that a different view of both law and of the function of comparative analysis is needed.¹⁰⁵ This broader view requires recognition of the position that law has in both the social relationships between individuals and the social relationships between communities.¹⁰⁶ Cotterrell explains that law is ‘a protector and shaper of tradition, an expression of shared belief and ultimate values, and—in much less definable ways—an expression of national expectation, allegiances and emotions.’¹⁰⁷

Likewise, Menski urges an approach to comparative legal analysis that takes a different and broader view of what ‘law’ is. As Menski notes, ‘[w]e are always thrown back to the conundrum of defining ‘law.’’¹⁰⁸ There are real dangers when a researcher limits their idea of law to positivistic notions and sources – the result is ‘impoverish[ed] legal research and understanding.’¹⁰⁹ In short, comparative legal analysis is enriched when it moves past a positivistic standpoint. Menski criticises approaches to comparative legal analysis that fail to account for both a broader definition of law and the dynamics of legal intersections.¹¹⁰ Menski holds that narrow black letter approaches to comparative law fall short of providing a true picture of the studied subject—neglecting many important considerations that worthwhile and compelling comparative analysis must

¹⁰⁴ Lasser (n 97) 235, emphasis in the original.

¹⁰⁵ R Cotterrell, ‘Comparative Law and Legal Culture’ in M RiemannRiemann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 733-736; Cotterrell (n 39) 146-147.

¹⁰⁶ Cotterrell 2006 (n 105) 734.

¹⁰⁷ Cotterrell 2006 (n 105) 734.

¹⁰⁸ Menski (n 31) 35.

¹⁰⁹ Menski (n 31) 66.

¹¹⁰ Menski (n 31) 32-33,34-58; 127-128;129;184-190.

yield.¹¹¹ Much is missed by using only narrow constricted definitions and methods in comparative law:

Combined with statist legocentric approaches, boxed visions have impoverished legal analysis and made it amazing easy for positivists to define away the socio-cultural dimensions of law as ‘extra-legal’¹¹²

Menski offers a model through which comparative legal analysis can be undertaken. The view he offers of law is that of pluralism—where law is seen as coming from diverse sources, not only from the positivistic law accounts of law emanating solely from statutes or case precedent.¹¹³ Menski argues that there are four elements that contribute to a comparative methodology that overcome the problems of legal positivism. These are ‘a deep commitment to theory... a commitment to interdisciplinary... [to] be ready to acknowledge difference ...’¹¹⁴ and to ‘remain critical at all times.’¹¹⁵ The first two can be practically achieved, Menski suggests, through the use of ‘an inter-disciplinarily theory focused methodology.’¹¹⁶ Just such a methodology is utilized in this thesis research, constructivist grounded theory, which is discussed in detail in the following section.

Combined, the effect of these four elements is to engage a comparative legal researcher in a consideration of law that transcends the traditional positivistic notions of law as a uniform and black letter subject, and results in a pluralistic understanding of law—‘ a plural phenomenon... always part of a dynamic interaction process between different legal sources.’¹¹⁷

Banakar presents a review of a recent handbook that is instructional to students in how to approach comparative legal analysis.¹¹⁸ As Banakar points out however, the book far transcends the scope of an ordinary textbook. Instead it presents a persistent argument

¹¹¹ Menski (n31) 32-33,34-58; 127-128;129;184-190.

¹¹² Menski (n 31) 32.

¹¹³ Menski (n 31) 184-190, 610-613.

¹¹⁴ Menski (n 31) 66.

¹¹⁵ Menski (n 31) 68.

¹¹⁶ Menski (n 31) 68.

¹¹⁷ Menski (n 31) 127.

¹¹⁸ R Banakar, ‘Power, Culture and Method in Comparative Law’ (2009) 5(1) *International Journal of Law in Context* 69.

for reconsidering how legal scholars approach the entire pursuit of comparative legal research. This message is an ‘expression of a *resistance* to academic orthodoxy’.¹¹⁹

This resistance takes the form of challenging the overtly positivistic black letter law approaches that are dominant. These approaches are dominant not only within comparative legal analysis, but within legal academia generally. The handbook calls for alternative views of law—rejecting the idea that an adequate or informed analysis can be done through a methodology that limits itself to seeing law through its traditional black letter lens. Instead it calls for a method that rejects the usual ‘state-orientated positivist methodology of traditional legal scholarship.’¹²⁰ It also argues that ‘the scope of comparative studies of law must transcend the notion of law as a body of rules in order to include the dynamic institutional processes and practices which produce and produce the normative structures of legal systems.’¹²¹

Banakar does not just stop with a critical overview of the handbook’s methodological message. He goes on to argue for his version of methodology.¹²² Whilst this thesis does not take on board the details of his methodology, several themes that he promotes within it are worth considering. Firstly, he says analysis should begin with a review of ‘legal rules at the macro level’, which allows examination of ‘how legal rules are employed to bring about an *interaction* between the normative structures of law and society.’¹²³ He then comments that legal rules are greatly influenced by the ‘institutional settings in which they are used.’¹²⁴ This setting determines if rules ‘are adopted, enforced, alternatively modified or marginalised.’¹²⁵ The heart of the methodology that Banakar promotes is one that looks to the ‘interaction’¹²⁶ between ‘law’¹²⁷ and ‘social forces.’¹²⁸ Comparative law analysis would look to ‘the

¹¹⁹ Banakar (n 118) 83.

¹²⁰ Banakar (n 118) 73.

¹²¹ Banakar (n 118) 72.

¹²² Banakar (n 118) 81-83.

¹²³ Banakar (n 118) 81.

¹²⁴ Banakar (n 118) 81.

¹²⁵ Banakar (n 118) 81.

¹²⁶ Banakar (n 118) 82.

¹²⁷ Banakar (n 118) 82.

¹²⁸ Banakar (n 118) 83.

communicative actions which make the production and reproduction of norms and rules, whether social, cultural or legal, possible.¹²⁹

Banakar further argues that an adequate comparative analysis methodology requires a component of empirical research.¹³⁰

This chapter has discussed the debates in mainstream legal academia on the use of empirical research and on comparative legal methodology, even calling into account the need for sound methodology as the basis for legal research. Much of this has sounded in heterodoxy, challenging the common canons on accepting legal research unblinkingly from a black-letter positivistic standpoint, on emphasising the need for a solid methodological base for legal research, and of the place that empirical work—including qualitative work—has in legal academic scholarship. This chapter proposes the use of methodology that is both compatible with the principles that Banakar has pronounced, but that also run the risk of being likewise denounced as outside of academic orthodoxy.

The methodology that is proposed and justified in this chapter was developed prior to the Banakar article. Banakar's research is timed serendipitously, in fact. The points that are made by Banakar as to what is needed in comparative methodology are those contained in the methodology used in the thesis. He argues that comparative law requires that:

studies of law have to merge with studies of social institutions and behaviour, i e. with the forms of knowledge generated by sociology, social anthropology, history, psychology, political science, economics and so on. This means that contextualisation cannot be confined to paying lip service to social theory by recognising in passing the social forces that interact with law and its institutions. It must, instead, apply an empirically informed conceptual framework that helps us to explore these social forces as an integral part of the way law manifests itself. Thus, the focus of our study is neither the law nor the social forces underpinning it, but the ongoing *interaction* between them. The central unit of our analysis can neither be legal rules nor social norms of organisation, but the communicative actions which make the production and reproduction of norms and rules, whether social, cultural or legal, possible.¹³¹

¹²⁹ Banakar (n 118) 83.

¹³⁰ Banakar (n 118) 73.

¹³¹ Banakar (n 118) 83.

Whilst not using his methodology, this thesis nevertheless encompasses the major ontological and epistemological points he raises as necessary for contemporary comparative legal analysis.¹³² So, far from beyond the pale, the use of the constructivist grounded theory and empirical work in a comparative legal analysis in this thesis is part of the growing groundswell to approach comparative legal analysis from complex and nuanced methodological standpoints. Not forgetting the keen importance to be placed on methodology raised by Epstein and King¹³³, the methodology used in this thesis is carefully explained and followed in its application that follow this chapter and are in remainder of thesis.

The Use of Constructivist Grounded Theory

This section discusses the use of constructivist grounded theory. It provides an overview of grounded theory methodology, including the development of the constructivist strand. Next it details prior usage of grounded theory methodology as a legal research methodology and justifies its usage as a methodology for comparative legal analysis and analysing elite interviews. Finally it discusses its appropriateness for use in intercountry adoption research.

What is grounded theory? And what is constructivist grounded theory? Simply put, grounded theory is a methodology that results in the analysis of empirical data in increasing abstractions that results in a theory that describes the inter-relationship of concepts observed in the analysis.¹³⁴ Grounded theory itself is an outgrowth of a ‘reject[ion] [of] positivistic notions of falsification and hypothesis testing’¹³⁵ that was common in the social sciences.¹³⁶ Grounded theory was first proposed by Glaser and Strauss in 1967, as a qualitative sociology method.¹³⁷ The founders of this methodology described it as the ‘discovery of theory from data.’¹³⁸ They proposed it because they

¹³² Banakar (n 118) 81-83, where Banakar develops a detailed methodological approach to legal comparative research.

¹³³ Epstein and King (n 54).

¹³⁴ K Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications Inc. Thousand Oaks, California 2006) 9-12.

¹³⁵ R Suddaby, ‘From the Editors: What Grounded Theory is Not’ (2006) 49(4) *Academy of Management Journal* 633, 634.

¹³⁶ Suddaby (n 135) 633-634.

¹³⁷ B Glaser and A Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* - (Aldine Transaction, 1967, reprinted 2006) 7.

¹³⁸ Glaser and Strauss (n 137) 7.

found the then current methodological practices in sociology to be wanting.¹³⁹ Their development of grounded theory methodology has been described ‘as a reaction against the extreme positivism that had permeated most social research’.¹⁴⁰ Suddaby explains that the creation of grounded theory ‘challenged the prevalent assumptions of “grand theory”, the notion that the purpose of social research is to uncover preexisting and universal explanations of social behavior.’¹⁴¹

It is acknowledged that there is a split in schools of thinking on how grounded theory should be used. It is beyond the scope of this research to fully engage in this debate, which is likely to rage on in any event. A brief discussion will be had on this.

The Decision to Use Grounded Theory

The decision to use grounded theory methodology for the comparative analysis was not one that was made at the outset of the research. Initially I began work on the methodology of legal comparison with the idea that it would be straightforward to identify a method, to describe it and justify its use. What I found instead was the morass of methodological debate which is described in Chapter Two. Although intellectually the debate of methodological analysis was an interesting one, for it was accompanied by a sense of despair. How was I going to find an appropriate methodology for comparative legal analysis? I recall very clearly the moment when I decided to investigate the use of grounded theory methodology for legal comparison. I was driving to work, and was on an overpass that overlooks the city centre of my home town. From seemingly nowhere, the thought of ‘grounded theory’ flashed across my brain. I began an immediate and eager investigation of the use of grounded theory for this purpose, and everything that I read confirmed its appropriateness for use within my own thesis research, as a method for comparative legal analysis, as more fully set out within this chapter. The choice of grounded theory methodology for legal comparison was only made after struggling through the conundrum on comparative legal analysis methodology. That said, it became apparent that grounded theory, and specifically constructivist grounded theory methodology was a justifiable fit for the aims of the research. The sense of despair was replaced by a sense of exhilaration. After setting up

¹³⁹ Glaser and Strauss (n 137) 4.

¹⁴⁰ Suddaby (n 135) 633.

¹⁴¹ Suddaby (n 135) 633.

the way in which grounded theory methodology would be utilised, I was amazed at what information was developed through the use of relational statements. Certainly these were not connections and abstractions that I would have gained through a typical singular reading of a text or group of texts. Constructivist grounded theory was opening new doors, new analytical pathways, and a rich and exciting new depth of data on intercountry adoption.

This section gives an overview of the contemporary debates on grounded theory, following a discussion on the historical evolution of the methodology. It is not possible to do justice to the depth of the debates in this section, and it does not attempt to do so, but does acknowledge the on-going contemporary methodological conversations on grounded theory. As with comparative legal methodology and the place of empiricism in legal work, much is unsettled about the uses and interpretations of grounded theory.

Grounded theory, as noted, began as a revolt against the heavy emphasis on positivism and quantitative research in the social sciences. Its two founders each came from different schools of thought. Glaser was said to be very influenced by ‘the rigorous positivistic methodological training he in quantitative analysis from Columbia University’.¹⁴² This is in contrast to the approach that Strauss has ‘as a relativist, pragmatist, and symbolic interactionist.’¹⁴³

Since its introduction, there has been a great deal of focus on the continuing use and development of the methodology. This has been driven in no small part by the parting of the ways of its founders.¹⁴⁴ Strauss and Glaser have developed very different permeations of the methodology, with Strauss pairing up with Corbin to produce further works on the use of grounded theory.¹⁴⁵ Glaser’s strand of grounded theory is still noted for being positivistic in orientation, with the belief that through research engagement there is ‘a truth waiting to be uncovered.’¹⁴⁶ On the other hand, Strauss, including his

¹⁴² K Charmaz, *Grounded Theory: Objectivist and Constructivist Methods*, in N Denzin and Y Lincoln (eds) *Strategies of Qualitative Inquiry* (2nd edn, Sage Publications, 2003) 253

¹⁴³ J Mills, Y Chapman, A Bonner, and K Francis, ‘Grounded Theory: A Methodological Spiral from Positivism to Postmodernism’ (2007) 58(1) *Journal of Advanced Nursing* 72, 74.

¹⁴⁴ Mills, Chapman, Bonner and Francis, (n 143)74.

¹⁴⁵ A Clarke, ‘Situational Analyses: Grounded Theory after the Post-Modern Turn’ (2003) 26(4) *Symbolic Interaction* 553, 559.

¹⁴⁶ Mills, Chapman, Bonner, and Francis (n 143) 74.

work with Corbin, is seen as developing the strands of grounded theory that led to constructivist grounded theory.¹⁴⁷

Notably, Charmaz, as discussed, has developed a strand of grounded theory that resides in the constructivist paradigm. Charmaz further notes that ‘What grounded theory is and should be is contested.’¹⁴⁸ She sees no strict demarcations on the fields within which grounded theory can be used: ‘...researchers starting from other vantage points—feminist, Marxist, phenomenologist—can use grounded theory strategies for their empirical studies. These strategies allow for varied fundamental assumptions, data gathering approaches, analytic emphases, and theoretical levels.’¹⁴⁹

There is a vast array of views on grounded theory, and where it fits and why. This section now provides a brief sampling of these. This has been driven in no small part by the parting of the ways of its founders.

But there is no agreement amongst commentators about just where various strands of grounded theory are located. Even the proponents of different strands themselves seem to move about. Thus pinpointing the specific paradigm of a specific strand of grounded theory may depend very much at what point in time a particular version or researcher is being referenced.¹⁵⁰ For instance, Clarke focuses on discourse analysis of work through an application of grounded theory, which is where she departs from constructivism.¹⁵¹ Clarke argues that grounded theory should be within the post-modern paradigm.¹⁵² She says that this links grounded theory to its roots in symbolic interaction: ‘...some such methods should be epistemologically/ontologically based in the pragmatist soil that has historically nurtured symbolic interactionism and grounded theory.’¹⁵³ She also groups her approach to grounded theory as close to the constructivist approach that Charmaz espouses.¹⁵⁴ Building on the view that Clarke has

¹⁴⁷ Mills, Chapman, Bonner, and Francis (n 143) 74.

¹⁴⁸ Charmaz 2003 (n 142) 250.

¹⁴⁹ Charmaz 2003 (n 142) , 252.

¹⁵⁰ C Urquhart, ‘An Encounter with Grounded Theory: Tackling the Practical and Philosophical Issues’ *16. http://www.slis.indiana.edu/faculty/hrosenba/www/Research/methods/urquhart_grounded-theo-is.pdf

¹⁵¹ Mills Chapman, Bonner and Francis (n 143) 75.

¹⁵² A Clarke, ‘Situational Analyses: Grounded Theory after the Post-Modern Turn’ (2003) 26(4) *Symbolic Interaction* 553, 553.

¹⁵³ Clarke (n 152) 555.

¹⁵⁴ Clarke (n 152) 559.

for a grounded theory methodology in a post-modern paradigm, researchers Mills, Chapman, Bonner and Francis discard it in favour of a constructivist approach.¹⁵⁵

Mills *et al* found that whilst there were many advantages to the use the approach that Clarke sets out, that constructivist grounded theory was more suitable for their particular frames of research. In addition to ‘locat[ing] participants in their social world—a world that is full of actors other than themselves’¹⁵⁶—something accomplished by the use of Clarke’s approach. A constructivist approach brings in another dimension, that of ‘how the discourses produced by others influence participants’ constructions of reality’.¹⁵⁷

The difference between the approach of Clarke and that of constructivists has to do with view of human agency.¹⁵⁸ The approach of Clarke does not consider agency to be at the core of the analysis, whereas in contrast, constructivists are interested in “subjective and intersubjective social knowledge”¹⁵⁹ that is produced by “active construction and cocreation of [social] knowledge by human agents that is produced by human consciousness.”¹⁶⁰

Mills, Francis and Bonner explain that the paradigmatical location of grounded theory is dependent upon the larger debates within academia on what should undergird research and its methodology:

If we envisage grounded theory methodology as a spiral that starts with the traditional form, we can see that such adaptations are reflective of the various moments of philosophical thought that have guided qualitative research and that it is the researcher’s ontological and epistemological position that determines the form of the grounded theory they undertake.¹⁶¹

Taken in that vein, it is fruitless to expect that debates on the location of grounded theory within one paradigm or another will cease. Just as views on research change and

¹⁵⁵ Mills, Chapman, Bonner and Francis (n 142) 72.

¹⁵⁶ Mills, Chapman, Bonner and Francis (n 142) 78

¹⁵⁷ Mills, Chapman, Bonner and Francis (n 142) 78

¹⁵⁸ Mills, Chapman, Bonner and Francis (n 142) 75.

¹⁵⁹ Mills, Chapman, Bonner and Francis (n 142) (quoting Lincoln and Guba) 75.

¹⁶⁰ Mills, Chapman, Bonner and Francis (n 142) (quoting Lincoln and Guba) 75.

¹⁶¹ J Mills, A Bonner and K Francis, ‘The Development of Constructivist Grounded Theory’ (2006) 5(1) International Journal of Qualitative Methods 1, 9.

move within the larger world of academia and research so will the views on grounded theory methodology. It is in some ways a mirror then that simply reflects back the ongoing debates in wider research circles. This view is succinctly expressed by Urquhart who ends with some pragmatic advice on how to regard grounded theory methodology:

Perhaps we should view the ontology of grounded theory method, as proposed in 1967, as being the product of the political and historical context of the time. The various indicators of philosophical position from the literature since may be seen as a product of more recent shifting ideas and epistemologies in qualitative research. Above all, it is a *method*, and as such, can be used comfortably in most paradigms.
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As stressed within this chapter, what is important to identify is the paradigm where the researcher places themselves, and utilise a methodology that is appropriate for that paradigm and for the inquiry aims of the particular research project.

Charmaz, who has pioneered the development and use of the constructivist school of grounded theory, describes the two strands as ‘objectivist’¹⁶³ and ‘constructivist’.¹⁶⁴ The ultimate question in the debate over the differing schools in grounded theory is choice of research paradigm. It is not just a choice of methodology or of the right philosophy from which to approach grounded theory methodology. If the chosen research paradigm is constructivist, then a choice of constructivist grounded theory is only one of many methodological choices available within that paradigm.

Charmaz describes constructivist grounded theory as focusing on ‘social interactions.’¹⁶⁵ In this way it is different from the focus that ‘objectivist’¹⁶⁶ or

¹⁶² Urquhart, (n 150) *16. Urquhart also comments that, ‘the somewhat ambiguous philosophical position of grounded theory method should give researchers pause to think. As it is an inductive, emergent method that is located mainly in post positivism, this means that researchers need to carefully consider their own philosophical positions. That said, it is primarily a method, and can be used in several different paradigms.’ *19.

¹⁶³ Charmaz 2006 (n 134) 131-132.

¹⁶⁴ Charmaz 2006 (n 134) 130-131. See also Mills, Francis and Bonner (n 161).

¹⁶⁵ Charmaz 2006 (n 134) 129.

¹⁶⁶ Charmaz 2006 (n 134) 130-132.

‘positivist’¹⁶⁷ approaches have, where there is an attempt to provide rather than a contextualised result, one that is representative of a neutral, universal sort of truth.¹⁶⁸

Regardless of the school of grounded theory one proposes, it is important to note that grounded theory has undergone significant evolution since its inception.¹⁶⁹ Initially, the founders of grounded theory, Strauss and Glaser, were emphatic that grounded theory should be used only by capable sociologists, and not put to use by researchers in any other discipline.¹⁷⁰ Grounded theory has obviously moved to a much wider range of disciplines and is now a widely accepted qualitative methodology.¹⁷¹ Yet, the debate remains about whether any departure from grounded theory as conceived of by its founders is in fact grounded theory. Charmaz sums this up:

So who’s got the real grounded theory? Glaser (1998) contends that he has the pure version of grounded theory. That’s correct if one agrees that early formulations should set the standard.¹⁷²

Insisting that grounded theory remain as it was in 1967 does more than reject a constructivist approach to grounded theory. Such a position also invalidates the use of grounded theory outside of sociology. Yet grounded theory is certainly accepted as a rather mainstream method of qualitative analysis, without limitation as to what field applies it. Such a position—that grounded theory must be understood as only the original version in 1967—would then reject the use of grounded theory outside of sociology and certainly, in no matter what form, as a basis for comparative legal analysis.

While there may be some variations within the technical application of the methodology, the scheme for the methodology remains the same in that it is a several

¹⁶⁷ Charmaz 2006 (n 134) 130-131.

¹⁶⁸ Charmaz 2006 (n 134) 130-132.

¹⁶⁹ Charmaz 2006 (n 134) 8-9.

¹⁷⁰ Glaser and Strauss (n 137) 6-7.

¹⁷¹ See generally, J Creswell, *Introducing and Focusing the Study. Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (2nd edn, Sage Publications 2007) where grounded theory is considered one of five approaches into qualitative research. See also Mills, Francis and Bonner (n 161) 7, commenting that ‘Grounded theory is a research methodology that has an enormous appeal for a range of disciplines due to its explanatory power.’

¹⁷² Charmaz,(n 142) 256.

step process for coding and categorising data that is derived from a variety of sources.¹⁷³ The categorising and comparison of data occurs at an ever more abstract level until a theory is developed from the analysis.¹⁷⁴ Unlike other methods of analysis, the steps of theory creation occur throughout the course of data collection and assessment, rather than at the beginning of the research project.¹⁷⁵ Grounded theory is not meant to set out specific ways in which data is to be collected—rather it is to be understood as an analytical strategy of assessing data through evolving levels of abstract comparisons.¹⁷⁶

Grounded theory also requires careful attention to methodology.¹⁷⁷ Research that does not follow accepted grounded theory canons, while it might label itself as grounded theory, in fact, is not.¹⁷⁸ The importance of well-stated and well-defined elements within any methodological approach is in part to permit an evaluation of the research and its results.¹⁷⁹

Doing Grounded Theory

Comparison is at the very core of what grounded theory methodology does. Grounded theory is described as ‘a general method of comparative analysis.’¹⁸⁰ Grounded theory is not meant to set out specific ways in which data is to be collected—rather it is to be understood as an analytical strategy of assessing data through evolving levels of abstract comparisons.¹⁸¹

There are phased steps in constructivist grounded theory that move from an initial review of data to the end product of a theory that is seen to emerge from the analysis and comparison of data, codes, and categories.

The first step in reviewing data is to do an exercise in initial coding.¹⁸² There are several coding methods that can be applied to accomplish this.¹⁸³ For instance, when

¹⁷³ Charmaz 2006 (n 134) 10-12.

¹⁷⁴ Charmaz 2006 (n 134) 9-12.

¹⁷⁵ Charmaz 2006 (n 134) 9-12.

¹⁷⁶ Charmaz 2006 (n 134) 9.

¹⁷⁷ Charmaz 2006 (n 134) 181-183.

¹⁷⁸ Charmaz 2006 (n 134) 181.

¹⁷⁹ Charmaz 2006 (n 134) 181; Charmaz 2003 (n 142) 268-269.

¹⁸⁰ Glaser and Strauss (n 137) 1.

¹⁸¹ Charmaz 2006 (n 134) 9.

¹⁸² Charmaz 2006 (n 134) 47-57; A Strauss and J Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd edn Sage Publications, 1998) 101-121.

¹⁸³ Charmaz 2006 (n 134) 47-57.

interviewing, one technique used is analysing the transcribed interview line by line.¹⁸⁴ When analysing data derived from texts, other techniques can be used, such as the literary close reading technique of legal documents suggested by Lasser.¹⁸⁵ For non-legal texts and documents, Charmaz's suggestion of other techniques can be used for this purpose.¹⁸⁶ Charmaz suggests asking questions about the text to scrutinize the text for data.¹⁸⁷

The second coding phase, focused coding, can be again accomplished through different coding strategies.¹⁸⁸ One strategy is axial coding¹⁸⁹, where out of the initial coding, larger concepts or categories are developed.¹⁹⁰ Strauss and Corbin describe an axial coding strategy called the 'paradigm.'¹⁹¹ The use of the paradigm reveals further relationships among the categories revealed through axial coding:

There are conditions, a conceptual way of grouping answers to the questions why, where, how come and when. These together form the structure, or set of circumstances or situations, in which phenomena are embedded. There are actions/interactions, which are strategic or routine responses made by individuals or groups to issues, problems, happenings or events that arise under those conditions. Actions/interactions are represented by the questions by whom and how. There are consequences which are outcomes of actions/interactions. Consequences are represented by questions as to what happened as a result of those actions/interactions or the failure of persons or groups to respond to situations by actions/interactions, which constitutes an important finding in and of itself.¹⁹²

Relational statements¹⁹³ developed from axial coding comparisons will be used in the comparative law chapter. Relational statements provide information on how categories are related to each other, but there is no set format as to how these statements must be

¹⁸⁴ Charmaz 2006 (n 134) 50-53.

¹⁸⁵ Lasser (n 97) discussed in this chapter.

¹⁸⁶ Charmaz 2006 (n 134) 37-40.

¹⁸⁷ Charmaz 2006 (n 134) 39-40.

¹⁸⁸ Charmaz 2006 (n 134) 57-63.

¹⁸⁹ Charmaz 2006 (n 134) 60-63; Strauss and Corbin (n 182) 123-142.

¹⁹⁰ Charmaz 2006 (n 134) 60-61; Strauss and Corbin (n 182) 123-125.

¹⁹¹ Strauss and Corbin (n 182) 128.

¹⁹² Strauss and Corbin (n 182) 128.

¹⁹³ Strauss and Corbin (n 182) 145-146.

expressed.¹⁹⁴ These relational statements will be the basis for the comparative analysis between states, the elite interview analysis as well as contributing to the overall theory.

Why do the comparative analysis at this juncture of the grounded theory data analysis? Charmaz comments that an examination of the ‘convergence of structure and process’¹⁹⁵ will reveal ‘the consequences of social policies and practices... in collective and individual life.’¹⁹⁶ The creation of relational statements from the axial code paradigm is just that—a confluence of identified structure and process. This type of inquiry and analysis is germane to the comparative law inquiry and makes explicit less obvious relationships and linkages between process and events in intercountry adoption. A comparison done of states at this stage of axial coding will provide an important insight on the processes involved in intercountry adoption decision making.

A third phase is that referenced by Charmaz as ‘theoretical coding’¹⁹⁷— and by Strauss and Corbin as ‘selective coding’.¹⁹⁸ Charmaz describes this as the phase where a theory begins to emerge—revealed through the relational links between codes.¹⁹⁹ Following this are the several analytical steps that are involved in ‘theoretical sampling’²⁰⁰ and ‘theoretical saturation’.²⁰¹ It is through this and at this stage that the theory from the analysis begins to become evident.²⁰²

Charmaz departs here from Strauss and Corbin as to what shape these final steps should take. Strauss and Corbin promote the idea of a ‘central category’.²⁰³ The central category is meant to be explicative of the other categories and data that have emerged from the analysis.²⁰⁴ Charmaz rejects the identification of a single central category as

¹⁹⁴ Strauss and Corbin (n 182) 145.

¹⁹⁵ K Charmaz, ‘Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (3rd edn Sage Publications, 2005) 514.

¹⁹⁶ Charmaz 2005 (n 195) 514.

¹⁹⁷ Charmaz 2006 (n 134) 63-66.

¹⁹⁸ Strauss and Corbin (n 182) 143.

¹⁹⁹ Charmaz 2006 (n 134) 63.

²⁰⁰ Charmaz 2006 (n 134) 96.

²⁰¹ Charmaz 2006 (n 134) 113.

²⁰² Charmaz 2006 (n 134) 96-97.

²⁰³ Strauss and Corbin (n 182) 146-147.

²⁰⁴ Strauss and Corbin (n 182) 146-147.

too restrictive²⁰⁵ and instead urges that theoretical coding should be done selectively and cautiously so as not to create an artificial structure over codes.²⁰⁶

Finally, Strauss and Corbin stress the importance of research that takes account of what they term as ‘broader conditions’²⁰⁷ and how those have impacted the categories and relationships identified within the research.²⁰⁸ Those broader conditions are identified by Strauss and Corbin as ‘economic factors, organizational politics, rules and regulations, social movements, trends, culture, societal values, language, professional values and standards.’²⁰⁹ Again, these are important elements to capture in the analysis of the thesis research question.

When looking at what might be contained in the final emergent theory, Charmaz notes splits between objectivist scholars and constructivist scholars.²¹⁰ Objectivist scholars look for a theory that ‘favors deterministic explanations, and emphasizes generality and universality.’²¹¹ On the other hand she suggests as compatible with a constructivist approach that of ‘interpretive theory’²¹² which pursues ‘*understanding* rather than explanation.’²¹³ An interpretive theory is one that ‘assumes emergent, multiple realities, facts and values as inextricably linked, truth as provisional and social life as processual.’²¹⁴

By using constructivist grounded theory methodology, then, the theory that will emerge from the thesis research is one that is interpretive rather than positivistic. It will not provide a single general explanation of phenomena in intercountry adoption best interests standard. Rather it will offer insights into state motivation to engage in intercountry adoption, with the consequent influence on the best interests standard.

²⁰⁵ Charmaz 2006 (n 134) 132.

²⁰⁶ Charmaz 2006 (n 134) 67.

²⁰⁷ Strauss and Corbin (n 161) 271.

²⁰⁸ Strauss and Corbin (n 161) 271.

²⁰⁹ Strauss and Corbin (n 161) 271.

²¹⁰ Charmaz 2006 (n 134) 125-129.

²¹¹ Charmaz 2006 (n 134) 126.

²¹² Charmaz 2006 (n 134) 126-129.

²¹³ Charmaz 2006 (n 134) 126, emphasis in the original.

²¹⁴ Charmaz 2006 (n 134) 126-127.

Use of Computer Programs in Coding and Analysing Data

There is not broad agreement within constructivist grounded theory circles on the utility of software programmes in the analysis of data once gathered. Some commentators such as Charmaz and Suddaby question an uncritical usage of software packages for data analysis within grounded theory. Suddaby suggests that the view of this sort of software analysis may be rooted in positivistic views of research, where ‘positivist models of science encourage the notion that researchers stand separate from objects of inquiry to minimize the degree to which the act of observation interferes with or contaminates the observation.’²¹⁵ Charmaz sees the use of software packages as risky when using constructivist grounded theory, where the value of the data and data analysis is at risk because of the use of such programmes.²¹⁶ She also, like Suddaby, links the use of such programmes to an overtly objectivist utilisation of grounded theory methodology.²¹⁷ The limitation of these programmes, according to Charmaz is fourfold: ‘grounded theory methods are often poorly understood’²¹⁸; ‘these methods have longed been used to *legitimate*, rather than to conduct studies’²¹⁹ ‘these software packages appear more suited objectivist grounded theory than constructivist approaches’²²⁰, and fourthly, ‘the programs may unintentionally foster an illusion that interpretive work can be reduced to a set of procedures.’²²¹ Charmaz indicates that Lincoln likewise shares a scepticism of the use of software packages for analysing data.²²² Denzin and Lincoln comment on the reasons that ‘positivist and post positivist criteria’²²³ are deemed antithetical to the goals of constructivist research. Positivist and post positivist methods ‘reproduce only a certain kind of science, a science that silences too many voices.’²²⁴ As discussed in this thesis, intercountry adoption involves the marginalisation and silencing of certain voices—a silencing that would only be enabled through the use of positivistic or post positivistic methods to analyse intercountry adoption. The problems that underlie intercountry adoption as raised by King and Perry in the first chapter make it difficult to justify a positivistic or post positivistic stance on intercountry

²¹⁵ Suddaby (n 135) 638.

²¹⁶ Charmaz 2003 (n 172) 267-268

²¹⁷ Charmaz 2003,n 172) 268.

²¹⁸ Charmaz 2003 (n 172) 268.

²¹⁹ Charmaz 2003 (n 172) 268

²²⁰ Charmaz 2003(n 172) 268

²²¹ Charmaz 2003(n 172) 268

²²² Charmaz 2003 (n 172) 268, referencing personal correspondence with Lincoln .

²²³ Denzin and Lincoln (n 1) 12.

²²⁴ Denzin and Lincoln (n 1) 12.

adoption research—unless some justification can be made for ignoring the very dynamics and issues raised by King and Perry when studying intercountry adoption.

Constructivist Grounded Theory as Legal Methodology

Has grounded theory been previously used as a legal research methodology?

Outhwaite, et.al note that there has been relatively little use of grounded theory as a legal methodology,²²⁵ but nevertheless find it can be very appropriately used to obtain fresh insights in legal research.²²⁶ Their own use of grounded theory was through an analysis of interview results²²⁷—a fairly standard application of grounded theory.

Grounded theory has been used as a legal research methodology; although sparingly, including in studies on women’s legal issues in Africa to analyse interview results²²⁸, and a variant used in legal research on regulatory compliance, by use of the ‘constant comparative method.’²²⁹ Outhwaite’s research group opted for the rather novel use of grounded theory in analysing biosecurity issues²³⁰ because of their desire to examine the problem ‘on the ground’²³¹ and not be limited to ‘only an examination of centralist sources of law.’²³²

²²⁵ O Outhwaite, R Black and A Laycock, ‘The Pursuit of Grounded Theory in Agricultural and Environmental Regulation: A Suggested Approach to Empirical Legal Study in Biosecurity’ (2007) 29 *Law and Policy* 493, 496.

²²⁶ Outhwaite, Black and Laycock (n 225) 496-497.

²²⁷ Outhwaite, Black and Laycock (n 225) 504-505.

²²⁸ Outhwaite, Black and Laycock (n 225) 496, 503; see also Bentzon and others (n 38).

²²⁹ Outhwaite, Black and Laycock (n 225) 496-497, discussing Williams (n 14). Williams’ work is further discussed in this chapter. The use of the constant comparative method is only part of grounded theory analysis, and it is arguable whether it would be appropriate to say that this alone constitutes the use of grounded theory methodology. If only comparison was done, and no theory generated, then the basic premise for the use of grounded theory would have been missed altogether. Grounded theory ought to stand for more than simply doing some type of comparison—because it is much more than that—it is the generation of a theory from compared data—not comparison alone. This point seems to be missed by some scholars who claim that by doing some kind of comparison but without the ultimate aim of theory generation that they have used grounded theory methodology.

²³⁰ Outhwaite, Black and Laycock (n 225) 504—they indicate that it is the first use of grounded theory to look at biosecurity legal issues.

²³¹ Outhwaite, Black and Laycock (n 225) 502.

²³² Outhwaite, Black and Laycock (n 225) 502.

One of the studies referred to by Outhwaite does purport to use grounded theory as the basis for comparative legal analysis.²³³ Williams indicates that he makes use of grounded theory to do a comparative law analysis of competition law in China, Hong Kong and Taiwan.²³⁴ However, his understanding of grounded theory's application appears muddled. He discusses testing his theory by internal and external validity²³⁵—which are not concepts that are employed by grounded theory. Grounded theorists rather employ the use of theoretical sampling and theoretical saturation to arrive at a theory.²³⁶

Williams does not discuss the use of phased coding in his research, and his theory does not in the end, contain the depth or richness of information that one expects to find in a grounded theory analysis.²³⁷ His simple one sentence proposition—that 'competition law can only be effective in a functioning democracy'²³⁸—falls short of what grounded theory methodologists say the resultant theory should comprise.²³⁹ He is not explicit as to how he used grounded theory in making legal comparisons.²⁴⁰ Taiwan becomes a comparative test case for proving the external validity of his theory.²⁴¹ Rather than using comparison as a means of understanding and identifying increasingly abstract concepts and relationships between data, towards the goal of theory development, Taiwan simply becomes an external control group as it were, with the comparison not adding to the data in the theory, but simply being used to test it in a manner not recognised by grounded theory.²⁴²

There are several ways in which grounded theory results might be evaluated. Creswell outlines 5 elements that can be used in evaluating grounded theory research. These are:

²³³ Williams (n 14) 1, 17.

²³⁴ Williams (n 14) 1, 17.

²³⁵ Williams (n 14) 425-431. These are also inherently the characteristics that Lincoln and Guba associate with a positivist approach to a research question, see discussion in this chapter.

²³⁶ See discussion at in this chapter.

²³⁷ Creswell (171) 217.

²³⁸ Williams (n 14) 423.

²³⁹ Creswell (n 171) 217.

²⁴⁰ Williams (n 14) 420-424. The discussion that Williams gives of arriving at his theory is devoid of any notion of comparing categories that emerged from the data examined into higher level of abstractions. It is difficult to tell from his discussion how his described method fits into that of grounded theory.

²⁴¹ Williams (n14) 425,429-431.

²⁴² Williams (n 14) 425, 429-431.

- the study of a process, action or interaction as a key element in the theory
- a coding process that works from the data to a larger theoretical model
- the presentation of the theoretical model in a figure or diagram
- a story line or proposition that connects categories in the theoretical model and that presents further questions to be answered
- a reflexivity or self -disclosure by the researcher about his or her stance in the study ²⁴³

Charmaz offers her own statement on evaluating the theory that is derived from grounded theory.²⁴⁴ She indicates that the derived theory ‘must fit the empirical world it purports to analyze, provide a workable understanding and explanation of this world, address problems and processes in it, and allow for variation and change that make the core theory useful over time.’²⁴⁵

William’s theory and research process does not meet the hallmarks set forth by Charmaz and Creswell. Williams’ theory does not provide a detailed description of the relationship between categories, and lack a coding process that moved categories into increasingly abstract relationships that eventually evolved into a theory. Williams’ approach sounds a cautionary note that more than comparison is needed to make a claim for the use of grounded theory methodology. His one sentence proposition does nothing to describe the insights into comparative law and democracy, and does not provide any explanation of why his proposition must be so.

Yet, despite the shortfalls in his use of grounded theory, Williams opens up valuable considerations by undertaking a grounded theory approach to legal analysis. As he somewhat wryly observes, there is little use made of methodology for the purpose of theory generation in legal research.²⁴⁶ He recognises some risk by having undertaken grounded theory research, commenting that its usage by him ‘might be judged heterodox, even to the point of heresy, or worse, irrelevant.’²⁴⁷

²⁴³ Creswell (n 171) 217.

²⁴⁴ Charmaz 2005 (n 174) 527.

²⁴⁵ Charmaz 2005 (n 174) 527.

²⁴⁶ Williams (n 14) 8.

²⁴⁷ Williams (n 14) 16.

Elite Interviewing and Constructivist Grounded Theory

Dexter explains that there are three characteristics of elite interviewing that separate it from other kinds of interviewing. These are the subjective definition that the interviewee contributes as to the context of the interviewing situation and the interviewing topic²⁴⁸; ‘encouraging the interviewee to structure the account of the situation’²⁴⁹ and letting the subject matter of the interview flow from what the interviewee deemed to be pertinent to the interviewee.²⁵⁰ Dexter further explains that the relationship of the interviewer and the interviewee is a key part of the elite interviewing process, as the relationship is to be understood as ‘a social relationship.’²⁵¹ Within this relationship, the interviewer has two unique roles.²⁵² The interviewer is at once a participant in the interview through the social relationship that is created²⁵³ and is also responsible for ‘recording’²⁵⁴ the information received during the interview.²⁵⁵

Constructivist grounded theory creates a relationship between the researcher and the subject of the research²⁵⁶ that is much as Dexter has described the relationship the interviewer and interviewee in his view of ‘transactional elite interviewing.’²⁵⁷ Dexter describes the ‘social relationship’²⁵⁸ that is formed between both individuals involved in the interview as both an inevitability and an obvious and undeniable fact —stating bluntly that ‘No one has yet discovered any way of relating to others in which they are not present.’²⁵⁹

Dexter further notes that elite interviewing is appropriate when it is important to consider the context of subjective meanings²⁶⁰ and clarifies that the ability to do effective comparison is part of the interviewer’s task within elite interviewing: ‘large

²⁴⁸ L. Dexter, *Elite and Specialized Interviewing* (Northwestern University Press, 1970) 5.

²⁴⁹ Dexter (n 248) 5.

²⁵⁰ Dexter (n 248) 5.

²⁵¹ Dexter (n 248) 140.

²⁵² Dexter (n 248) 143.

²⁵³ Dexter (n 248) 143.

²⁵⁴ Dexter (n 248) 143.

²⁵⁵ Dexter (n 248) 143.

²⁵⁶ Charmaz 2006 (n 134) 25-28.

²⁵⁷ Dexter (n 248) 143-144.

²⁵⁸ Dexter (n 248) 143.

²⁵⁹ Dexter (n 248) 155-156.

²⁶⁰ Dexter (n 248) 18-19.

part of listening with the third ear is noting and adapting to a frame of reference different from one's own.²⁶¹ This underscores the importance of a comparative methodology that equips the researcher for doing just that—to be able to make effective comparisons, whether through interviewing or other research techniques. Given the highly contextualised issues that arise in the intercountry adoption best interests standard, elite interviewing is an important part of the constructivist paradigm being used.

As noted earlier, the analysis of the elite interviews will be done through the development of relational statements. These statements will be analysed for the emergence of the theory, rather than a reliance on direct quotes from the interviews. Direct quotes from interviews may be regarded as unanalysed 'raw data'²⁶² –and Suddaby strongly makes the point that 'Grounded theory is not presentation of raw data.'²⁶³ In other words, analysis that uses the direct quotes of interviews is not seen as appropriate data for a final grounded theory analysis. The analysis of the interview results does not make use of quotes. Rather, it makes use of relational statements that are developed using the axial coding diagram discussed already in this chapter.

Interviews and Constructivist Approaches

A constructivist view on interviews is one that encourages interaction and sees the relationship between the researcher and participant as one which is much more like the social relationship that is described by Dexter. The approach that Dexter describes to elite interviewing is also a rejection of a positivist approach to research:

Traditionally, the researcher/participant relationship is represented hierarchically, with the participant being subordinate to the researcher. This is tied to an objectivist epistemology, condoning the separation researcher and participant. In order to move the researcher and participant to a more equal position of power within the relationship, the researcher needs to plan a more reflexive stance and proactively plan for the time that the participants spend together.²⁶⁴

²⁶¹ Dexter (n 248) 20.

²⁶² Suddaby (n 135) 635.

²⁶³ Suddaby (n 135) 635.

²⁶⁴ Mills, Bonner and Francis (n 171) 10.

Constructivist approaches to interviewing attempt to even out the relationships between the participant and the interviewer.²⁶⁵ There are specific ways in which this is done, which go to the manner not only in which is the interview conducted, but in the approach to setting it up, and to the behaviour of the interviewer before and after the interview is conducted. These include:

scheduling interviews at a time and location of the participant's choice, using a relatively flexible and unstructured approach to questioning so that the participants assume more power over the direction of the conversation, sharing the researcher's understanding of the key issues arising and assuming an open stance towards the participant, as well as sharing personal details and answering questions asked both during the interview and afterwards.²⁶⁶

Perhaps ironically this approach is much the same as called for in elite interviewing structures. The difference is that the constructivist approach seeks to eliminate a perceived power differential between the researcher and participant, where the researcher is seen as being in a more powerful position than the participant. On the other hand, in elite interviewing, the participant is seen as holding a position that is more powerful than the interviewer.²⁶⁷ But the use of a semi structured approach in interviews is presented as being particularly apposite for the interview of elites because they may '*prefer to articulate their views without being put in the straitjacket of close-ended questions.*'²⁶⁸

Having the researcher actively engaged with the participant, whether that participant is an elite or otherwise, is seen by some commentators as simply reflective of current views on the way that qualitative research should be done and not in itself limited to doing elite interviews.²⁶⁹ Views on how research interviews should be conducted then is-- much as are the views of the paradigmatic location of grounded theory--reflective of larger academic views and values and where those views and debates are currently located.

Elite interviews conducted with something other than close ended questions can be used with particular effect when there is a desire to find out about 'depth, context, or the historical record...'²⁷⁰ Finally, in squaring the circle on the discussion on grounded theory, constructivism, interviews and elite interviews, it is worthwhile to consider the view offered by

²⁶⁵ Mills, Bonner and Francis (n 171) 10.

²⁶⁶ Mills, Bonner and Francis (n 171) 10.

²⁶⁷ S Bygnes, 'Interviewing People-oriented Elites' (2008) Eurosphere Working Papers Series, Online Working Paper No 10, 2, emphasis in the original, on line at http://www.eurosphere.uib.no/knowledgebase/wpsdocs/Eurosphere_Working_Paper_10_Bygnes.pdf 2.

²⁶⁸ Bygnes (n 267) 2

²⁶⁹ Mills, Bonner and Francis (n 171) 9.

²⁷⁰ J M Berry, 'Validity and Reliability Issues in Elite Interviewing' (2002) 35(4) PS Politics Science and Politics 679, 682.

Mills *et al* that some strands of grounded theory, even whilst not labelled as or labelling themselves as constructivist, do contain a constructivist view on conducting interviews. They comment that Strauss and Corbin include constructivist interactive elements in their characterisation of the grounded theory interview, which

acknowledge the coconstruction of meaning between researcher and participant, which is implicit in the interview process. Clearly Strauss and Corbin's evolved grounded theory has some constructivist intent.²⁷¹

Thus elite interviews have a high degree of engagement between the interviewer and the participant. Interactional Nature of Interviews

Charmaz remarks upon the interaction nature of interviews for which data for constructivist grounded theory is gathered, noting that a constructivist approach to interviewing is far different from a positivist one. She notes that viewing the interview as interactional exchange between the researcher and the interviewer is one of the key differences between an objectivist-positivist paradigm and a constructivist one.²⁷²

Interviewing has long been a research technique within the social sciences, pioneered by Charles Booth in 1886.²⁷³ Early work utilised interviews for conducting survey-based research²⁷⁴, but the potential to use interviews for a much greater scope rapidly emerged.²⁷⁵ Interviews became widely used in both quantitative and qualitative social science research.²⁷⁶ Contemporary interview usage now regards interviews as 'negotiated text'²⁷⁷ in contrast the earlier of structured interviews.²⁷⁸ Interviews seen through the lens of being a negotiated text stress the interactional elements of the process, where 'interviewers are not the mythical neutral tools envisioned by survey research.'²⁷⁹ This view of interviews stresses a role of the interviewer as part of the exchange between the interviewer and interviewee, with the interviewers as '*active participants in an interaction with respondents....shaped by the contexts*

²⁷¹ Mills, Bonner and Francis (n 171) 9.

²⁷² Charmaz 2006 (n 134) 131.

²⁷³ A Fontana and J Frey, 'The Interview: From Political Stance to Political Involvement' in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (Sage Publications, 3rd edition, 2005) 699-700.

²⁷⁴ Fontana and Frey (n 273) 699-701.

²⁷⁵ Fontana and Frey(n 273) 699-701.

²⁷⁶ Fontana and Frey (n 273) 699-701.

²⁷⁷ Fontana and Frey (n 273) 716.

²⁷⁸ Fontana and Frey (n 273) 716.

²⁷⁹ Fontana and Frey (n 273) 716.

and situations in which they take place.²⁸⁰ That the interactional nature of the interview exchange is a critical part of the constructivist grounded theory approach is yet again underscored in the comments by Charmaz that ‘A constructivist approach *necessitates a relationship with respondents* in which they can cast their stories in their terms.’²⁸¹

Finally, the work of Bentzon *et al*, on the use of grounded theory discusses, aspects of interviewing within grounded theory where rapport is built between interviewer and interviewee, and the interview progresses as a ‘dialogue’,²⁸² again stressing the interactive nature of such an interview exchange.²⁸³ They also reference scholarly work which ‘cautions against...the false notion that the interviewer has to remain an objective disinterested observer.’²⁸⁴

Thus, it is clear that an interactional interview exchange is an essential component of a constructivist paradigm, and more particularly, making use of constructivist grounded theory methodology.

The issue of power in elite interviews another methodological concern, and has been discussed by Smith. She questions whether in fact the power that a person has which leads them to be included as a participant in elite interviews in fact translates into the interview process.²⁸⁵ She argues that the usual depiction of elite interviews with a disproportionate distribution of power between the interviewer and the participant is usually assumed to be reversed when the participant is elite.²⁸⁶ This is the view presented by Welch, *et al* who present this as nearly a given characteristic of elite interviewing. They comment that ‘studies on elite interviewing are unanimous that the power balance is likely to favour the informant over the researcher.’²⁸⁷ This shift of power from the interviewer to the participant is often seen as one of the defining hallmarks of an elite interview.²⁸⁸

²⁸⁰ Fontana and Frey (n 273) 716. Emphasis added.

²⁸¹ Charmaz 2003 (n 172) 75.

²⁸² Bentzon *et al* (n 38) 201.

²⁸³ Bentzon *et al* (n 38) 201.

²⁸⁴ Bentzon *et al* (n 38) 198.

²⁸⁵ K, 650.

²⁸⁶ Smith (n 285) 651. See also C Welch, R Marchan-Pierkkari, H Penttinen, and M Tahvanainen, ‘Corporate Elites as Informants in Qualitative International Business Research’(2002) 11 International Business Review 611, 615 on this point who say that ‘...studies on elite interviewing are unanimous that the power balance is likely to favour the informant over the researcher.’

²⁸⁷ Welch, *et al* (n 286) 615.

²⁸⁸ Smith (n 285) 645, 651.

Smith, however challenges this view of elite interviewing. She rejects the ‘rather simplistic idea that there is a dichotomy between ‘powerful elites’ and ‘powerless others.’²⁸⁹ She says that ‘power relations social scientists sometimes employ in relation to society at large do not necessarily translate directly into the interview space.’²⁹⁰ This being the case, her position is that the interviewing of elites is not subject to any unique methodological concerns, but rather that elite interviews share with other forms of interviews ‘an assortment of potential problems which *all* interviewers *may* encounter.’²⁹¹ Her approach is different than the methodological stances that are presented by Welch *et al.*²⁹² Their research focuses on the perceived need to specifically address methodological challenges in interview elite interviews in a business context.²⁹³ They note that within the literature of interviewing of elites, that there is no ‘comprehensive workable definition of elites.’²⁹⁴ Whilst Welch *et al* speak of positivistic concepts such as the reliability of data that is collected from interviews²⁹⁵ they also comment on constructivist aspects of interviewing, saying that the ‘background of the interviewee and interviewer are an important dimension of interview dynamics.’²⁹⁶

My own experiences with this type of interviewing were not much closer to the dynamics that were described by Smith, where the participant in the interview does not try to act in a dominating or domineering manner, nor did I as the interviewer experience a feeling of a power differential between myself and the participant. This may relate to the dimension that Welch *et al* identify regarding the background of not only the participant but the interviewer as playing into the interview setting. From my own standpoint, the interviews did not seem to contain issues of power dynamics. Rather, these seemed to occur as an exchange between professionals. My own position as an interviewer was influenced by my own lengthy practice of law in children’s issues, which included involvement in law and policy issues in state government committees. Dealing with academics, legal professionals, researchers, politicians, and policy makers was not a new experience. If asked, I would tell the participants briefly of my own professional background alongside the doctoral research I was undertaking. A reflexive consideration of the interviews reveals that I would likely rank myself as a professional peer to those with whom I conducted interviews, given my own professional background and

²⁸⁹ Smith (n 285) 645.

²⁹⁰ Smith (n 285) 652.

²⁹¹ Smith. (n 285) 652.

²⁹² Welch, *et al* (n 286)

²⁹³ Welch *et al* (n 286) 612.

²⁹⁴ Welch *et al*, (n 286) 613.

²⁹⁵ Welch *et al* (n 286) 613,

²⁹⁶ Welch *et al* (n 286) 613.

experience. Thus, I did not enter the interview space at any point even reflecting on the possibility of power differentials.

Data Collection for Interviews

The interviews were conducted in a semi-structured fashion. The interviewees were not asked a set format of questions as would have been done in a structured interview. The comments of Dexter are as relevant today as they were at the time they were written, in delineating the value of the data collection from an elite interview from that which is gained through an interview where the aim of data collection is objectivity. The very nature of the interview itself decries this possibility, because ‘...whether investigators wish it or not, interviewing is a social relationship and the interviewer is part of that relationship.’²⁹⁷ In keeping with a constructivist understanding of data collection, the elite interview itself can be understood in this paradigm. Bearing in mind Dexter’s view of elite interviewing as a social relationship, he questions the utility of the interviewer taking a neutral detached role in the interview process.²⁹⁸ He comments that:

Arthur F Bentley and John Dewey have most clearly challenged the utility of this dichotomy [subject-object] for comprehending social relationships. They have introduced the notion of transaction, the person “exists” in a state of dynamic mutual interdependence with other persons and his “personality” –what he says, realizes and perceives—is a function of this relationship.²⁹⁹

What are the identifying characteristics of an elite interview? As defined by Dexter, there are in fact three elements that separate elite interviews from other types of interviews. These are ‘stressing the interviewee’s definition of the situation’,³⁰⁰ ‘encouraging the interviewee to structure the account of the situation’³⁰¹ and lastly, ‘letting the interviewee introduce to a considerable extent...his notions of what he regard as relevant, instead of relying upon the investigator’s notion of relevance.’³⁰² Much of

²⁹⁷ Dexter (n 248) 140.

²⁹⁸ Dexter (n 248) 140-144.

²⁹⁹ Dexter (n 248) 143-144.

³⁰⁰ Dexter (n 248) 5.

³⁰¹ Dexter (n 248) 5.

³⁰² Dexter (n 248) 5.

the value of the elite interview as data collection is in the information that is gleaned in this way from the interviewee, and in the interviewer being able to conduct an interview in this fashion. Rather than the interviewer presupposing the important topics that will be raised or addressed in the interview, scope is allowed for the interviewee to bring to the fore the matters they view as relevant and important. In this way, the methodology of an elite interview is much the same as that of grounded theory methodology. In this way, elite interviewing is much in line with a constructivist paradigm—that rather than testing or seeking only particular bits of information, information and data and analysis is done inductively and not deductively.

Dexter gives some insight on the unique features of elite interviewing that make it particularly compatible with the use of a constructivist, qualitative grounded theory methodology analysis:

Another characteristic of elite interviewing is this: In the standardized interview, the typical survey, a deviation is ordinarily handled statistically; but in an elite interview, an exception, a deviation, an unusual interpretation may suggest a revision, a reinterpretation, an extension, a new approach.³⁰³

That is to say, the uniformity of response, or indeed, query, is not significant when doing elite interviews. It is the very differential responses that well conducted elite interviews will ideally provide that make the data from such interviews richly informative in a constructivist grounded theory approach.

Dexter further makes the point that interviews on their own should never be the sole source of research data, and that the skill of the interviewer in making sense of the data has much to do with the value of the data gained from interviews.

But one should never plan *or finance* an entire study in advance with the expectation of relying chiefly upon interviews for data unless the interviewers have enough relevant background to be sure that they can make sense of the interview conversations or unless there is a reasonable hope of being able to hang around or in some way observe so as to learn what is meaningful and significant to ask. ...*Therefore, any planning for a study assuming a heavy reliance upon elite interviews should have a contingency plan—an escape hatch—an alternative—so that if the elite interviews prove basically uninformative some other techniques can be substituted.*³⁰⁴

³⁰³ Dexter (n 248) 6.

³⁰⁴ Dexter (n 248) 17, emphasis in the original.

The utility of combining interview data with other forms of data is made as well by Dexter in evaluating the number of elite interviews that are optimum for a research project.

Concentration on a few key informants, may, therefore, help the investigator to acquire a better picture of the norms, attitudes, expectations and evaluations of a particular group than he could obtain solely from less intense observations or through conducting a greater number of less intensive interviews, by themselves. Naturally it will often be preferable to combine the use of informants with other interviewing and with other methods of data collection.³⁰⁵

He points out that there may be value in lesser, rather than greater, numbers of interviews, when doing elite interviews. That is, the quality of the data that is gleaned from this interview format and not the number of interviews is key to the optimal use of elite interviews. Again, in this way, elite interviewing is different from what Dexter has identified as the standard interview.

Finally, some consideration should be given to the skill that is required to successfully complete elite interviews. The semi structured nature of the interview requires much greater skill than a simple rote recitation of questions from a structured questionnaire. Elite interviews must be undertaken by someone who has requisite background in the subject matter, as Dexter has pointed out above. But in addition to that, the interviewer must be skilled at the task of the engagement in the interactional process of the interview:

Interviewing, in conclusion, is very difficult when you think that the good interviewer must know his stuff; he must be listening to what the man is saying; he must think of more questions to ask; he must be thinking of what question was he just asked, to make sure the man is answering it. He must know what's already been covered; know what he has yet to cover. He must anticipate where he's going to go if the man, while he's talking, indicates he's about through with the subject, and in anticipating where the conversation is going to go, he must in his mind be beginning to try to formulate the next question so it will come out well-phrased. Anyone who does it successfully is probably so successful that he should himself be interviewed.³⁰⁶

...

This stands in contrast to the more typical structured interview, where 'the investigator defines the question and the problem, he is only looking for answers

³⁰⁵ Dexter (n 248) 8.

³⁰⁶ Dexter(n 248) 118.

within the bounds set by his presuppositions. In elite interviewing, as defined here, however, the investigator is willing and often eager to let the interviewee teach him what the problem, the question, the situation, is—to the limits, of course, of the interviewer's ability to perceive relationships to his basic problems, whatever these may be.³⁰⁷

Thus, some important points on the use of elite interviewing can be distilled. Elite interviewing is in and of itself an advanced skill. To be effective, it requires sufficient knowledge and background of the subject to engage in a dialogue with the interviewee, rather than a rote uninspired set of pre-determined questions being drilled unresponsively and unreflectively at the interviewee. Given the very rich nature of the data that is gained through an elite interview, as opposed to other sorts of interviews, Dexter suggests that better results are yielded by a concentration on quality over quantity in interviews. A focus on interview numbers as shedding any light on the worthwhileness of the interview process and data is a chimerical one.

Finally, interview data can be beneficially informed by its consideration alongside data collected through other forms and methods. Pragmatically, Dexter suggests that there always be another plan within elite interview data collection to obtain data, for the interviews themselves may not yield constructive data. In a similar vein Suddaby also comments that 'grounded theory studies rarely have interviews as their sole form of data collection.'³⁰⁸ Interviews do not form the sole source of data collection for the thesis. Interviews are used rather to bolster the analysis of the comparative analysis, and data from them are analysed to become part of the emerging theory that is presented in Chapter Six.

The interviewees were selected carefully to be people who were influential in their field, meeting the understanding of an elite. Quality, rather than quantity, was the driving factor in trying to obtain interviews with specific individuals. The interviewees come from a varied set of positions, including governmental officials, academics and holding positions within non-state agencies. Given the high level of skill required of the interviewer, what equipped myself as researcher to undertake this methodology? The appropriateness of this methodology rests as much on the skill of the interviewer, if not

³⁰⁷ Dexter (n 248) 5-6.

³⁰⁸ Suddaby (n 135) 635.

more so, than any other factor which contributes to the evaluation of this as an appropriate methodology for data collection. As researcher, I brought to this research process the skills of active listening and of a considerable depth of knowledge of my research topic. Active listening skills were ones which were crucial to my own work as a lawyer, in a variety of settings—in litigation, in client interviewing, in witness interviews and preparation. Skilled examination of a witness or cross-examination of an adversarial witness in the pressure of litigation requires a honed development of the very skills required of an elite interviewer.

The potential list of interviewees was informed by the participants at the Hague Convention Special Session of 2005. Potential interviewees were not limited to those who actually were in attendance, but rather, the scope of attendees of including government officials, non-state agency personnel, researchers and academics was used to inform the potential base for finding interviewees. Potential interviewees were discussed by myself with my supervisor, and an agreement made if that person seemed to be placed in a key position such that they were likely to contribute the information that is the goal of an elite interview. Initial and follow up contacts were made seeking the interview, and if the person was amenable to grant access to the interview, then a convenient time and method of interviewing was arranged.

Selection of Interview Participants

The interview participants again were not intended to include a representational sample. An effort was made to identify a range of professionals who are involved in intercountry adoption, and not focus solely on legal professionals. Initially the list of participants at the Hague Convention Special Session in 2005 was consulted as providing an overview of the types of professionals that are involved with intercountry adoption. The participants were ones who were recognisable as highly visible professionals within intercountry adoption networks. As discussed within the thesis, there is no hard and fast rule about who can qualify as an elite for the purpose of elite interviewing. The over-riding determinative factor in locating participants for the interviews were again to have a spread of professions, reaching outside of just the legal profession, and from a variety of sites, including academics, policy makers, people from the government sector and people from non-governmental agencies. The interviews

were scheduled for an hour. The participant was asked if they would agree to the recording of the interview, if the interview was conducted face to face. The interviews which were done by telephone were not recorded. Rather, there, the data was transcribed by myself during the course of the interview. The interviews were semi structured, with the participant actively taking the interview conversation to the topics and issues they wanted to speak about. Their own view of what topics were important to cover in the interview added to the depth of data that was gathered during the interviews.

My own professional background as a qualified lawyer having worked in child welfare, and also having professional involvement with policy and political issues, having worked on government committees on drafting legislation for state child welfare and juvenile offender codes, being employed by non-governmental agencies, working closely with governmental agencies all meant that it felt like I was treading on very familiar ground when conducting the interviews with the participants. Much of my professional work has required simultaneous careful listen and transcribing notes. A prime example of this is being involved in litigation, where it is important to both actively be aware of what is being said during testimony of witnesses, during legal arguments or comments or questions by a judge, and at the same time making accurate notation of that information. Litigation is a particularly high pressured arena to do this. It is also a skill that was part of client or witness interviewing. I would rate my own skill and proficiency for note taking whilst being actively engaged with the ongoing dialogue as very high. It is a skill developed as part of legal professional practice.

I explained in some detail if asked by participants my own professional background to interview participants, which includes a first degree in social work and a professional doctorate in law from American universities, as well as extensive legal practice in child welfare. This certainly informed my own interest in the thesis research topic, but beyond that, set the stage from which the interview participants might perceive me as not only a research student at a British university, but as an American with a professional background in child welfare issues. Whilst it is only supposition on my part as to what role the participant perceived me as having, my own impression was that I

was given credence as a professional peer and not only for being a student who lacked a professional grounding in children's legal and policy issues.

Coding and Concept Building

Using process of coding and developing categories, as described in Chapter Two of the thesis, analysis was undertaken to develop categories from the data.

For the literature reviewed for Chapter Four, firstly, a set of initial codes were developed for each piece individual literature. Then the lists of initial codes were combined for the literature reviewed for each state. This list of codes stripped away the sources from which the codes were derived. An analysis of these codes through comparison identified emergent themes and links, which were developed into a set of focused codes. The focused codes were then used as the basis –as a category--for the analysis in the matrix (Appendix A) and in the development of a relational statement. Each relational statement is formed from a singular category. The relational statements for each state are found in Chapter Four of the thesis.

As Charmaz describes:

Focused coding is the second major phase in coding. These codes are more directed, selective, and conceptual than word-by-word, line-by-line, and incident-by-incident coding. After you have established some strong analytic directions, you can begin focused coding to synthesize and explain larger segments of data.

...

But moving to focused coding is not an entirely linear process. Some respondents or events will make explicit what was implicit in earlier statements or events.

...

The strength of grounded theory coding derives from this concentrated, active involvement in the process. You act upon your data rather than passively read them. Through your actions, new threads for analysis become apparent. Events, interactions, and perspectives come into analytic purview that you had not thought of before. Focused coding checks your preconceptions of the topic.³⁰⁹

Charmaz goes on to explain that ‘coding is an emergent process. Unexpected ideas emerge. They can keep emerging.’³¹⁰

A similar process was used to analyse the results of the elite interviews. The notes or transcripts were individually analysed in an initial coding process. Then those codes were stripped of any indication of which interview they were derived from, in the same process that was used to develop categories in the focused coding state for the literature analysis. The categories from the focused codes were then used as the basis for the development of relational statements. Each relational statement is based on a singular category. The categories, and thus, the relational statements are derived from an analysis of codes from all of the interview data, and not as one relational statement developed per individual interview. The relational statements for the interviews are in Chapter Three of the thesis.

The relational statements from the interview process were then used in the development of the theory which is set out in Chapter Six of the thesis. The relational statements of the interviews were not used to develop a separate theory of their own. The interview data was used to support the development of the transnational network theory presented in Chapter Six. The transnational network theory encompasses the relational statements from the interview analysis and the state motivation theory that emerged from the comparative analysis.

In this way, there is a departure from the use of the data from the literature and comparative analysis. That data was used to develop an emergent theory on state motivation to engage in intercountry adoption. This theory answers one part of the research question that is presented at the start of Chapter One. The interview data was used to support the development of the transnational network theory presented in

³⁰⁹ Charmaz 2006 (n 134) 57-59.

³¹⁰ Charmaz 2006 (n 134) 59.

Chapter Six. The transnational network theory encompasses the relational statements from the interview analysis and the state motivation theory that emerged from the comparative analysis.

Theoretical development was aided through the use of creating diagrammatical representations and tables, which are present throughout the thesis. Charmaz comments that the use of such visual representation of the theory is an invaluable and integral part of grounded theory methodology:

The advantage of diagrams is that they provide a visual representation of categories and their relationships. Many grounded theorists...treat creating visual images of their emerging theories as an intrinsic part of grounded theory methods.³¹¹

Diagrams of the results of the interview analysis are provided at Figure 3.1, in Chapter Three—a visual representation of the results of the axial coding analysis of the interview results. The development of diagrams highlights the relationships, dynamics and interplay between categories, leading to the development of an emergent theory.

Coding of text

Each text that was reviewed (listed in Appendix B) individually was given a set of initial codes. Then a combined list of the codes was created, without reference to which text they had come from. The combined list of codes was analysed to develop the categories then used in the axial coding diagrams at Appendix A. The categories were then further analysed through the use of the axial coding diagrams to arrive at the relational statements. After the relational statements were written, the original texts analysed were consulted for the purpose of footnote referencing in the statements. The footnote referencing for the relational statements was done after all of the relational statements were written. During the coding and analysis the information from which particular texts the codes were derived was not available and was not consulted as part

³¹¹ Charmaz 2006 (n 134) 117.

of the analysis. The work to reference the relational statements after they had been written back to the source documents was a very slow and at times tedious process.

The interview data was coded in a similar fashion. The notes or transcripts from each interview were analysed for a set of initial codes. Then the initial codes were compiled into a list, without an indication from which interview they were derived. Those were further analysed to arrive at the categories that were listed in axial coding diagram and used to form the relational statements. The relational statements for the interviews are not representative of each separate interview but are an amalgamation of the data from all of the interviews analysed together.

The Question of Theoretical Saturation

Suddaby comments the problems with data quality and sufficiency can attributed to lack of researcher skill in the use of grounded theory, rather than in problems with the data itself. He says that ‘The failure of data to coalesce into definable conceptual structures that move beyond the obvious may well be the result of a researcher’s failure to thoroughly work between data and extant knowledge in an effort to find the best fit or the most plausible explanation for the relationships being studied.’³¹² The concept of theoretical saturation invokes issues of data quality and sufficiency—but bearing in mind the comments made by Suddaby, the failure to reach theoretical saturation can be due not to inherent problems with the data collected, but with the way in which the data is interpreted. The reaching of theoretical saturation then can be understood as a combined synergism of data sufficiency and researcher skill. But when is theory saturation reached, and how is such a point defined? Suddaby points to this very question as one of the most vexing in the field of applied grounded theory. He comments that

a key point of confusion in grounded theory research is knowing when saturation has occurred during data collection. Because grounded theory research uses iteration and sets no discrete boundary between data collection and

³¹² Suddaby (n 135) 636.

analysis, saturation is not always obvious, not even to experienced researchers. Yet every submitted manuscript contains a statement that saturation occurred. It is a “box” that must be “checked off” prior to publication.

...

Deciding saturation has happened takes tacit understanding, which is achieved as much through experience as through a priori criteria. The indeterminate, messy nature of saturation invites a fundamentalist drift towards positivism—the 25 interviews. But according to Glaser and Strauss, saturation is a practical outcome of a researcher’s assessment the quality and rigor of an emerging theoretical model. ..The signals of saturation, which include repetition of information and confirmation of existing conceptual categories, are inherently pragmatic and depend upon both the empirical context and the researcher’s own experience and expertise.³¹³

Yet, pointing out the lack of agreement on when theoretical saturation occurs and what it means, Charmaz offers a viewpoint in direct contradiction to that of Suddaby. She disagrees on what saturation means and how to tell when this has occurred. Suddaby points to the repetition of information as a hallmark of achieving saturation. Charmaz does not. Instead she states that ‘grounded theory saturation is not the same as witnessing repetition of the same even or stories, although many qualitative researchers confuse saturation with repetition of described events, actions and/or statements.’³¹⁴ Charmaz refers to Glaser in explaining that saturation means that ‘gathering fresh data no longer sparks new theoretical insights, nor reveals new properties of these core theoretical categories.’³¹⁵

Glaser and Strauss also describe another view of when saturation has been achieved and the utility of arriving at theoretical saturation:

The universe of data that the constant comparative method uses is based on the reduction of theory and the delimitation and saturation of categories. Thus, the collected universe of data is first delimited and then, if necessary, carefully extended by a return to data collection according to the requirements of theoretical sampling.³¹⁶

³¹³ Suddaby (n 135) 639.

³¹⁴ Charmaz 2006 (n 134) 113.

³¹⁵ Charmaz 2006 (n 134) 113.

³¹⁶ Glaser and Strauss (n 137) 112.

In this rendering of theoretical saturation, categories are derived from data, and sufficient analysis is done to have arrived at a baseline of codes and categories. When and if those categories prove insufficient to provide an emergent theory, a calculated return is made to the field to collect more data to inform the theory.

Yet another view of theoretical saturation is presented by Strauss and Corbin who say that:

a category is considered *saturated* when no new information seems to emerge during coding, that is, when no new properties, dimensions, conditions, actions/interactions or consequences are seen in the data. However, this statement is a matter of degree. In reality, if one looked long and hard enough, one would always find additional properties or dimensions...Saturation is more a matter of reaching the point in the research where collecting additional data seems counterproductive...³¹⁷

Another hallmark of saturation having been reached is that ‘the analysis has accounted for much of the possible variability.’³¹⁸ Glaser and Strauss provide yet another definition of theoretical saturation, providing three characteristics:

(a) no new or relevant data seem to emerge regarding a category, (b) the category is well developed in terms of its properties and dimensions demonstrating variation, and (c), the relationship among the categories are well-established and validated.³¹⁹

Their concept of validation is one to which this discussion will return.

Charmaz questions the utility of the idea of theoretical saturation altogether, referencing arguments raised by Dey.³²⁰ She comments that ‘Dey challenges the notion of saturation on two counts: the meaning of saturation and its consequences. First, he points out that grounded theorists produce categories through partial—not exhaustive—coding.’³²¹

This is congruent with the description by Glaser and Strauss of creating codes from data, and then analysing them for their ability to support an emergent theory. If they are

³¹⁷ Glaser and Straus (n 137) 136.

³¹⁸ Glaser and Strauss (n 137) 158.

³¹⁹ Glaser and Strauss (n 137) 212.

³²⁰ Charmaz, 2006 (n 134) 114.

³²¹ Charmaz 2006 (n 134) 114.

not able to do so, a return to data collection and analysis is made. This ability of categories to support an emergent theory is what Charmaz says is ‘Dey’s preferred term, ‘theoretical sufficiency’’.³²²

She also refers to a second objection raised by Dey on the concept of theoretical saturation.³²³ Dey indicated that the idea of saturation is too ‘prescriptive’³²⁴ an approach. A highly rigid approach is one to be avoided she says, because ‘when researchers treat grounded theory guidelines like recipes, they do foreclose possibilities for innovation without have explored their data.’³²⁵

Dey’s concept of theoretical sufficiency as a more apt marker than the somewhat confused notion of theoretical saturation has been used in recent research. Douglas, Windsor and Wolin make use of this concept in their analysis of focus group data,³²⁶ describing it as the point at which ‘a depth of data that would allow for the full analysis of the shared dimensions of the study phenomena, or what Dey (1999) referred to as “theoretical sufficiency” had been achieved.’³²⁷

Researcher Antonio Diaz Andrade also opts for the use of theoretical sufficiency over theoretical saturation in the analysis of his work.³²⁸ He argues that the use of theoretical sufficiency permits ‘interpretive researchers to build up and work upon constructs which emerge from the problem under investigation’³²⁹ while serving the same function as theoretical saturation—‘that the data has been properly analysed.’³³⁰ Researchers Boyd and Gumley also note that in their research ‘Consistent with Dey (1999, p. 257) theoretical sufficiency was preferred to theoretical saturation.’³³¹

At this point, a return to the theory validation, the concept raised by Strauss and Corbin, is appropriate. They describe this as:

³²² Charmaz 2006 (n 134) 114, quoting Dey 1999.

³²³ Charmaz 2006 (n 134) 114-115.

³²⁴ Charmaz 2006 (n 134) 115.

³²⁵ Charmaz 2006 (n 134) 114-115.

³²⁶ C Douglas, C Windsor, and J Wollin, ‘Understanding Chronic Pain Complicating Disability Finding Meaning Through Focus Group Methodology’ (2008) 40(3) *Journal of Neuroscience Nursing* 158

³²⁷ Douglas *et al*, (n 326) 160.

³²⁸ A Diaz Andrade, ‘Interpretive Research Aiming at Theory Building: Adoption and Adapting the Case Study Design’ (2009) 14(1) *The Qualitative Report* 42, 48.

³²⁹ Diaz Andrade (n 328) 48.

³³⁰ Diaz Andrade (n 328) 48.

³³¹ T Boyd and A Gumley, ‘An Experiential Perspective on Persecutory Paranoia: A Grounded Theory Construction’ (2007) 80 *Psychology and Psychotherapy: Theory, Research and Practice* 1, 6.

The theory emerged from data, but by the time of integration, it represents an abstract rendition of that raw data. Therefore, it is important to determine how well that abstraction fits with the raw data and also to determine whether anything salient was omitted from the theoretical scheme. There are several ways of validating the scheme. One way is to go back and compare the scheme against the raw data, doing a type of high level comparative analysis. The theoretical scheme should be able to explain most of the cases.³³²

This is consistent with the aims of theoretical sufficiency—that there is an ability of the theory provide a satisfactory and sufficient explanation of the categories, accounting for most of the categories and phenomena which came under analysis.

Thus, despite disagreement between scholars on whether a true state of saturation can be reached, on ways to determine if the state of saturation has been reached, or even on the utility of such a concept within grounded theory methodology, there is agreement that the function of this, as is the function of the concept of theoretical sufficiency, is a measure that the emergent or emerging theory is suitably robust and provides a comprehensive account of the data that has been analysed.

The thesis research also prefers the idea of theoretical sufficiency rather than theoretical saturation, and a concept which is more adequately suited to the constructivist paradigm of the overall thesis. As Suddaby points out, the very notion of theoretical saturation is imbued, albeit wrongly, with positivistic notions of what it takes to achieve this benchmark. A concept that resonates to the same idea, of appropriate and proper data analysis, but without the positivistic pratfalls of theoretical saturation, is to be preferred in a constructivist accounting of the research question.

Thesis Data Collection

Data collection began with an analysis of the literature of the selected states. Early into the research it became apparent that the original selection of the United States, South Korea and China would provide an insufficient amount of data to reach theoretical sufficiency. A plan was made to introduce additional states. The research decision was made to develop a matrix to develop relational statements, and a matrix was developed for each state. From that matrix, relational statements were developed. The relational statements formed the basis for an early, emergent theory. Even after this early theory

³³² Strauss and Corbin (n 137) 159.

emerged, an additional state was added for comparison. The interview selection and process began after the first identification of an emerging theory from the comparative analysis. Interview selection and conduction continued alongside of the continued work on the emergent theory. The theory itself was initially not sufficient—it did not adequately account for the phenomena that was occurring, and required continued study of the data in the relational statements, and in thinking abstractly about the relationships continued in the multiple relational statements.

Each relational statement in the thesis is derived from a single category. Each statement explains, according to the matrix developed, the nature of the category. This process was consistent in both the analysis of the literature and of the interview data. At the time of the interview data collection, the emerging theory was more than nascent, but remained subject to revision and review by a constant return to the comparative data. A fairly exhaustive process of refining the theory and its categories and their relationship to each other was carried out. This is reflected in the work done in Chapter Five of the thesis, moving from the initial themes evident in the relational statements as discussed in Chapter Four, and integrating them into a theoretical whole. At this time, it also became apparent that the interviews were yielding a rich set of data on the actors in intercountry adoption, whilst the comparative data dealt with state motivations to engage in intercountry adoption. The two data sets yielded complementary but different information on the research question.

This required, as a researcher, stepping back to understand the information that was emerging from these analyses. The goal of the thesis was to produce a constructivist theory to answer the research question. In fact, two sets of data were driving two different parts of the question. The challenge became the interrelationship of the data to each other. The comparative theory, as presented in Chapter Five, on its own had theoretical sufficiency to address the portion of the research question on state motivation to engage in intercountry adoption and the subsequent ramifications for the best interests of the child standard. The interview data did not inform the state motivation question. Rather, it went to the heart of the research question—implications for the best interests standard—and also showed that states were but one of the many actors contributing to the normative meaning given to the best interests standard. Whilst

the research question had focused on states, making sense of the interview data meant expanding the theoretical focus of the analysis to include more than states—to include international organisations as well as actors within the state, and non-state actors.

Could the research question be adequately addressed by only looking at the state level of analysis? And the analysis from the interviews quickly suggested, in fact, no. Not only would that leave out the data from the interviews, a focus on the state-level alone and in isolation would not provide a full accounting of the interplay of dynamics in intercountry adoption. The cast of characters in intercountry adoption was busy and interactive. States were a piece of the network, but only a piece. The theory had to incorporate the other dimensions that were revealed by the interview data and analysis.

Analytically, the theory that is presented in Chapters Five, the development of which is discussed in Chapter Four, accounted for the engagement of states in intercountry adoption, and their own construction of normative meaning for the best interests standard. A state level analysis of intercountry adoption was necessary—as the thesis argues—because states are the instrumentality by which a child is exchanged. But a state level analysis on its own was incomplete, and the states were not the only ones engaged in the process of intercountry adoption. And so another theory had to emerge, the data examined and analysed to provide an accounting for these other categories that the state motivation theory simply did not encompass. The result is the theory that is presented in Chapter Six of the thesis, the transnational network theory.

The question then becomes one of data and theoretical sufficiency and theoretical validity. Did the data support an emergent theory? Yes, not only one theory, but two. Was there enough ‘depth of data that would allow for the full analysis of the shared dimensions’³³³? Again, yes, as a richly informative and complex theory began to emerge through a concentrated study and comparison of the data, categories and links.

The amendments asked for include addressing the issue of theoretical saturation and interview samples. It is evident from the relational statements that were developed from the interviews, in Chapter Three, and the subsequent discussion about these, that the data was richly informative. That can also be seen in the development of the

³³³ Douglas *et al* (n 326) 160.

transnational network theory in Chapter Six. Did the interview data provide sufficient information to support an emergent theory? Yes. It did this in two ways. Firstly, it pointed out the different analytical value from the interview data and the comparative data, both, as it were pieces of a larger whole. Rather than slotting into the theory that had been emerging from the comparative data, the interview data suggested the need for a broader and more inclusive theory, that accounted for more than state level analysis and interaction in intercountry adoption. State-level analysis contributed to the emerging theory and answer to the research question, but the analysis of data and emergent theory was going to have to move beyond states only as a site of query, to adequately account for what analysis of the interview data revealed. Secondly, it is part of the theory presented in Chapter 6, which builds upon the state motivation theory to provide a full theoretical account of the data from both the interviews and the comparative analysis and to fully answer the research question.

Theory building and analysis and evaluation required taking the theoretical concepts back to the relational statements. Did the theory account for what the relational statements revealed? Was anything left unaccounted for? Did the theory provide a cogent interpretation of the varied and subterranean dynamics and interrelationships contained in the relational statements? The development of the final theory was a painstakingly slow process, that required careful engagement with the relational statements from both the comparative analysis and the interviews. It required, as did Chapter Five, delving into complex literature in an unanticipated research exercise, to find conceptual glue for the theory—to find well explicated concepts to address what was being revealed. Perhaps it would have sufficed to simply have provided a superficial and descriptive account of what the theory revealed. But to have left the analysis at that level would not have done justice to the theory, the thesis research, nor have been in keeping with the ethos of the thesis research.

But what if the data had proved otherwise? What if the data were not sufficient to support an emergent theory? The option remained to return to interviewees for further data, to re-examine the data obtained, or to seek additional interviews that would help to address the areas in which the data could not support an emergent theory. Had the data

been insufficient, then the right approach to addressing this would have been discussed with my supervisor and further research strategies developed.

This did not prove to be the case.

Rather, an in-depth research exercise was sparked by the data, by needing further information and understanding of what the emergent theory was suggesting, and not just being content to produce a descriptive level narrative of the theories that had emerged.

Interviews were never intended to be a sole source of data for the thesis. Interviews were never intended to support their own emergent theory. It was intended that the data from the combined research strategies would reveal an emergent theory, as described in the Purpose statement of the research in the first chapter. Through the process of data analysis, not one, but two theories emerged. The interview data did not fit into the first emergent theory—but that first emergent theory met the hallmarks of theoretical sufficiency to address the question of state motivation. The interview data and analysis instead revealed that using only the site of state level analysis would not be sufficient in a theory to address the research question, and that further theoretical development was needed. The results, as discussed, are the theories presented in Chapters Five and Six. The theory in Chapter Five is incorporated into the transnational network theory that is presented in Chapter Six

Justifying A Constructivist Grounded Theory Approach to Intercountry Adoption Research

A constructivist approach to research seems particularly apt for intercountry adoption. Intercountry adoption occurs in a variety of contexts and settings, and there is no agreement on its causes, its relationship to various social and other factors, or even on its benefit to children. The inability to isolate singular causal factors seems to perplex researchers who study intercountry adoption.³³⁴

³³⁴ P Selman, 'Intercountry Adoption in the New Millennium: The "Quiet Migration" Revisited' (2002) 21 Population Research 205, 218-219.

Creswell comments on when grounded theory is an apt choice as a research methodology:

Grounded theory is a good design to use when a theory is not available to explain a process... Theories may be present but they are incomplete because they do not address valuable variables of interest to the researcher. On the practical side, a theory may be needed to explain how people are experiencing phenomena...³³⁵

There is no explanation available about why, whether and how nation states and segments of that nation's population become involved in and stay involved with intercountry adoption. Without that explanation, it is difficult to address questions that occur repeatedly about intercountry adoption and the consideration of the best interests of the child. Research that employs grounded theory methodology can thus fill this gap, providing vital information on what starts and sustains intercountry adoption in both sending and receiving countries, and, importantly, why some states opt not to become involved in intercountry adoption at all.

The Appropriateness of Comparative Law as an Inquiry Basis for Research Question

Why is comparative law an appropriate choice for the basis of inquiry in looking at the best interest standard in intercountry adoption? Intercountry adoption is as much a local phenomenon as it is an international one. It requires looking beyond principles of international law, yet at the same time being cognisant of the important international law elements that need to be taken into consideration. Not all countries become involved in intercountry adoption, and those that do so in unique circumstances. Understanding how intercountry adoption operates in a variety of settings, both in sending and receiving countries, and over time, is necessary for an understanding of the application of the best interest standard.

Inherent Comparative Elements in Intercountry Adoption

There is also a comparative element that is inherent in the nature of intercountry adoption itself by the movement of the child from one state to another. Superficially,

³³⁵ Creswell (n 171) 66.

intercountry adoption suggests comparison between the sending and the receiving country—but a comparative look at more than one sending and one receiving country can reveal much about the situational aspects of intercountry adoption, whether it occurs, when it occurs, and what influences its occurrence over time. A constructivist comparative approach to looking at intercountry adoption is close to the applied analysis identified by Zweigert and Koetz—it can take account of social and economic circumstances and on understanding the circumstances of intercountry operation can suggest influences in turn on the determination of the best interest of the child.

What is clear is that intercountry adoption is often situational, dependent on a series of events in time and place. Grounded theory, in particular constructivist grounded theory, can aid in identifying the variant influences on the occurrence of intercountry adoption, and their relationships to each other.

Rosenblatt offers a concise description that has particular resonance with an intercountry adoption best interest standard analysis of constructivist thinking:

...there is always an individual human being choosing, selectively constructing meaning, and consciously or unconsciously responding in terms of the factors, contextual and human, entering into that particular transaction. We can recognize the shaping power of the environment, the society, and the culture. Yet we should understand the possibilities of choice or aspiration within the parameters of our complex culture, with its many subcultures, its ethnic, religious, economic and social groups, and the diversity of groupings any one individual represents or can join—to say nothing of awareness of alternatives provides by knowledge of other major cultural patterns.³³⁶

An understanding of these, in context, is essential to an analysis of intercountry adoption. A search for a single triggering phenomenon or event that universally predicts when intercountry adoption will occur and persist would be perhaps the aim of a positivist approach to the question. That, however, is simply not possible, as it oversimplifies the complex nature of intercountry adoption, and gives no way to account for changes. It might provide an answer for one occurrence fixed in time, but could not adapt to a changing environment, and intercountry adoption is far from a static

³³⁶ L Rosenblatt, 'The Transactional Theory: Against Dualisms' (1993) 55 (4) *College English* 377, 385.

phenomena. Intercountry adoption, concerned as it is with social and familial relationships, and relationships between states, is a subject that can be instructively viewed through a constructivist lens.

There are of course challenges to the use of constructivist grounded theory methodology which must be acknowledged. As discussed earlier in this chapter, empirical legal research does not have universal acceptance within legal academia, and for the most part it is seen as occurring within a positivistic frame. It is from that standpoint of legal positivism that this research methodology markedly departs. Doing comparative legal analysis with constructivist grounded theory methodology again represents a radical departure from legal positivistic frameworks, and in fact, makes an original use of constructivist grounded theory as a methodology for comparative legal analysis. Constructivist grounded theory is the methodology that is selected for analysis as part of an explicit selection of a constructivist paradigm. A constructivist paradigm offers a fresh view of what law is—and to uncover new meanings about law and its effect in the world through legal research.

Summary

A use of constructivist grounded theory will examine influences on best interest decision making in intercountry adoption. It will do so in part by taking a comparative approach—a comparative approach that is embedded within a grounded theory methodological approach—comparison being the *sine qua non* of grounded theory. The value of comparative law has been summed up by Hill as revealing ‘the extent to which the form and substance of any legal system are not ‘natural’, but result from the implementation of moral and political values.’³³⁷ In other words, a carefully crafted comparative legal analysis can reveal those not so apparent links that are involved in the creation of a legal system, and the place of the intercountry adoption best interests

³³⁷ J Hill, ‘Comparative Law, Law Reform and Legal Theory’ (1989) 9(1) Oxford Journal of Legal Studies 101, 115.

standard within it. This is very much in keeping with the goals of a constructivist grounded theory comparative analysis.

Constructivist grounded theory will be used as a methodology for two phases of this research—to analyse the results of elite interviews and as a methodology for comparative legal analysis of sending and receiving countries.

Chapter Three: Interviews on Intercountry Adoption

Introduction

As also discussed in the introduction to Chapter Four, the grounded theory analysis of data yielded unexpected results, information and insights. The results of the elite interviews are reflected in the Relational Statements that follow this introduction. . The elite interview data was analysed in accordance with the methodology described in Chapter Two, and through the use of the diagram in Appendix A. From this relational statements were developed. Each relational statement is an amalgamation of the interview data and do not represent single interview results.

What follows then is a discussion of the results of the relational statements and their relevance to the research question posed in the thesis. This discussion explores the effects of different actors within intercountry adoption on assigning meaning to the best interests standard. The chapter reveals the complex layers of actors that are involved in intercountry adoption delivery. These actors may have complex interests that bring them to intercountry adoption. But these actors do not act in isolation. Intercountry adoption process requires the involvement of multiple actors, working together. The ways in which actors interact and influence the meaning of the best interest standard is explored in further detail in the theory presented in Chapter Six. Chapter Six includes and expands the discussion that is contained in this Chapter, and then following in Chapters Four and Five.

This chapter yields, through the analysis of the elite interview results, insights into the current operation and delivery of intercountry adoption, through a wide array of actors.

Relational Statement One: The operation of intercountry adoption in sending states is marked with the presence of agencies, which may have strong ties to or originate in, a particular receiving state. The number of agencies and their relationship with the sending state government has a large impact on the actual delivery of intercountry adoption services. Agencies make decisions often driven by their own

desire for self-preservation and vested interest in particular type of work. At least two models of operation of intercountry adoption can be found within the Hague Convention on Intercountry Adoption. The two that appear in practice most frequently are either a strong Central Authority model or a strong agency model. This strong-agency model has its origins in American operation of intercountry adoption before the Hague Convention, and is something that the Conventions contents were drafted to accommodate.

Relational Statement Two: The structure of the central authority in receiving states is set largely by the government and its views and policies on intercountry adoption operation. This is influential in turn on the type of relationships that get forged with selected sending states, and how business is done with those states. The attitude that a receiving state takes towards the interpretation and implementation of the Hague Convention is determinative of the strength of a Central Authority, and ultimately, what the operation of intercountry adoption looks like, including the development of relationships with sending states.

Relational Statement Three: The sending state government determines the scope and role of its central authority; which in turn determines the model that is used to operate intercountry adoption within the state, including the role and presence of agencies in the sending state. The strength of the Central Authority role has much to do with the way in which the Convention is applied, adhered to and the model under which agencies, if at all, are involved in the sending state.

Relational Statement Four: Hague Convention intercountry adoption standards and policies are set by a body on private international law. Adherence to these standards is voluntary, and states who do not ratify the Convention on Intercountry Adoption incur no penalties. Individual states make decisions on whether to join or ratify the Hague Convention on Intercountry Adoption. While the Convention is the

dominant instrument in the operation of intercountry adoption, it is not the only one, and is subject to competing influences of other standards. Its practice standards and models are prone to differing interpretation that suit a particular sending or receiving state central authority and its government. This interpretation is determinative of which model—strong Central Authority or strong agency—is implemented in practice.

Relational Statement Five: There is neither a single international body nor law that oversees international adoption, nor a single model that defines the respective roles of the government, the central authorities and any agencies working in a sending or receiving state. Differing standards, interpretations and models can even compete with each other for predominance in how intercountry adoption should be done. There is no single way to “do” international adoption. Standards and models of practice vary across and within Hague members, as well as in states that have not ratified The Hague. Self-interest is largely determinative of the positions taken on how intercountry adoption should be conducted—that is the survival and self preservation of those non-governmental bodies involved, including agencies. There can be competition for prestige and dominance amongst those bodies involved in intercountry adoption operation and policy. On the other hand, the mechanisms of the Hague Convention bring sending and receiving states together for dialogue on the Convention and on intercountry adoption.

Discussion of Relational Statements

The relational statements were developed from the axial coding described in Chapter Two. Each statement is an amalgamation of the interviews and is derived from the interviews as a whole, not from individual interviews.

The results of the elite interviews provide insight into the function and structure of the entities that are engaged in carrying out intercountry adoption. The results of the comparative legal analysis discussed in Chapter Four lead to a theory in Chapter Five on the process that leads a state to involvement in intercountry adoption as a sending or receiving state. It is a complex process with multiple entwined dynamics. The results of the elite interviews show what effects the operation of intercountry adoption once a decision has been made by a state to engage in intercountry adoption. It reveals the

structure of the operations—and the influences on that structure—and points out the many layers of intercountry adoption operation even once a state has made a decision to become involved with intercountry adoption.

What emerges from the relational statements is a picture of how intercountry adoption work and invites consideration of questions on a larger scale—what is the impact of an international instrument on existing practices, not only in intercountry adoption, but of any subject, what are the impacts of the involvement of international organisations in international issues, what happens when there is a mixture of actors, including governments, international organisations and agencies. The results of the elite interviews are a vital part of the theory presented in Chapter Six. The final theory also incorporates the state motivational theory discussed in Chapter Five.

The relational statements are remarkable in demonstrating the complex mixture of actors in intercountry adoption. In what manner do they interact, how do these interactions shape the way in which intercountry adoption is conducted, and, germane to the research question in the thesis, what ultimately does this mean for the interpretation and application of the best interests standard?

Several initial observations can be made. The Hague Convention on Intercountry Adoption—itsself the creation of a private international organisation—takes sway in much of the operation of intercountry adoption. However, the position that it occupies as a legal instrument is a curious one. There is no requirement that states that are involved in intercountry adoption ratify the Convention. Much of intercountry adoption was done before the Convention was established, and even after its establishment, major sending and receiving states continued their intercountry adoption operation without ratifying the Convention. Other states, notably Guatemala, had apparently ratified the Convention, but continued with a highly objectionable process in sending children.

Thus, a discussion of intercountry adoption cannot only take account of the Hague Convention on Intercountry Adoption, and any discussion of that Convention must locate it within a broader spectrum of instruments, policies and organisations. To only focus on the Convention is to miss, as suggested by the results of the elite interviews, the influence, sometimes stronger, of other factions and factors, and of finding the place

that the Convention does have in this wider spectrum, and its relationship to the other dynamics within that spectrum.

Intercountry Adoption Playing Field

The intercountry adoption playing field is a crowded one. There is an apparently disjointed group of contenders—governments, some of which have a Central Authority constituted under the Hague Convention, and a panoply of non-government organisations, in the form of agencies doing business in sending and receiving states, under the auspices set up by the governments of the states in which they are doing business—which might be both a receiving state and a sending state—and there may be the need to meet disparate operational requirements in each location.

So, there is not one body or even one formation of various bodies and organisations involved in intercountry adoption. It is at best an eclectic mix.

But there is also not one legal standard or instrument. This means that the best interests standard in intercountry adoption cannot be interpreted within the confines of one legal instrument. There might be competing legal instruments, or even no legal instrument at all, involved in intercountry adoption operations.

This is not, however, to suggest that no sense can be made of chaos, or that there is even chaos at all. Rather, as this chapter discusses, there are primary forces at work within the disparate players in intercountry adoption, and these provide a mostly orderly structure for how intercountry adoption is organised and runs.

What is on the menu?

The 2005 Hague Special Commission resulted in the production of a Guide to Good Practice, a contemporary interpretation of the Convention as well as a set of operational policies for intercountry adoption under the Convention. It highlights, as discussed in Chapter One (best interests chapter) the current debates on the best interests of the child

within intercountry adoption, and places those debates in a framework around Convention content and principles. In other words, the best interests standard is contextualised within the Convention, taking stock of the issues that are pressing at that moment for states that participated in the Special Commission.¹

Yet, it would be a conceit of the Convention to assume that it is the only instrument that influences the operation of intercountry adoption—or a specific international convention is needed at all for intercountry adoption exchanges of children between two states.

Intercountry adoption is heavily influenced in practical terms by the role of agencies—and it is state governments, sometimes Central Authorities within Hague Convention members—that set the parameters for the scope of the role and operation of agencies, and what sort of relationship the agency will have with the government in its home state, and the government or other agencies in other states in which the agency might seek to do business.

How do those particular structures thrive? And within those, how are particular issues or concerns determined? What determines the views on intercountry adoption operation within this varied group of intercountry adoption stakeholders? It is this that this chapter seeks to explore and answer.

Organisations

Research from Barnett and Finnemore provides a constructivist account of international organisations.² It also discusses the nature of bureaucracies.³ Their research thus yields insights not only into international organisations, but into the nature of domestic non-state actors, and into governmental agencies. These other actors also figure strongly in the operation of intercountry adoption, as shown by the relational statements, and as further discussed within this chapter.

¹ See discussion in Chapter One on the Guide to Good Practice, 3.

² M Barnett and M Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, Ithaca, New York 2004).

³ Barnett and Finnemore (n 2) 16-29; 34-44.

What is a bureaucracy? Barnett and Finnemore describe four characteristics of ‘the modern bureaucracy’:⁴

Modern bureaucracies exhibit *hierarchy*, in that each official has a clearly defined sphere of competence within a division of labor, and is answerable to superiors; *continuity*, in that the office constitutes a full-time salary structure that offers the prospect of regular advancement; *impersonality*, in that the work is conducted according to prescribed rules and operating procedures that eliminate arbitrary and politicized influences, and *expertise*, in that officials are selected according to merit, are trained for their function and control access to knowledge stored in files.⁵

They go on to explain the importance of rules to bureaucratic function.⁶ These rules and the relationship of a bureaucracy to them take on important emphasis in looking at normative meaning and function, a subject that is discussed in more detail in Chapter Six. But they are also important concepts in considering the results of the elite interviews. Barnett and Finnemore explain:

Impersonal rules are the building blocks of a bureaucracy...Rules are explicit or implicit norms, regulations and expectations that define and order the social world and the behavior of actors in it. Bureaucracies are both composed of and producers of rules. Bureaucracies are collections of rules that define complex social tasks and establish a division of labor to accomplish them. At the same time, bureaucracy’s preferred (and often prescribed) job is to create more rules that structure social action and for others in ways perceived to accomplish tasks.⁷

Thus rules-as-norms play a critical role in the structure and function of a bureaucracy, as well its relationships with external entities. Again, this is an important feature of the theory discussed in Chapter Six, and a point that will be highlighted in discussion there.

Barnett and Finnemore define an international organisation as ‘an organisation that has representatives from three or more states supporting a permanent secretariat to perform

⁴ Barnett and Finnemore (n 2) 17.

⁵ Barnett and Finnemore (n 2) emphasis in the original.

⁶ Barnett and Finnemore (n 2) 18.

⁷ Barnett and Finnemore (n 2) 18.

ongoing tasks related to a common purpose.’⁸ They explain that definition focuses on ‘intergovernmental organizations.’⁹

The Hague Conference on Private International Law meets this definition as a self-described ‘global inter-governmental organisation.’¹⁰ It also has ‘a multinational Secretariat—the Permanent Bureau—located in the Hague’¹¹ and ‘nearly 70 Members’¹², thus meeting the criteria for international organisation put forth by Barnett and Finnemore.

While Barnett and Finnemore put forth several observations on the bureaucratic nature of international organisations, four offer particular insight into understanding the dynamics and behaviour of both international organisations and agencies in intercountry adoption operation.

The first is on the relationship that international organisations have with states:

[IOs] often act in concert with states, both at the moment of creation when states define the mandate and at various moments afterward. Nongovernmental organizations also have conspicuously attempted to help create international fields of action, norms and law, often working with and through international organizations. Yet because of their multiple sources of authority, IOs have decided advantages for helping to constitute social reality.¹³

This is a critical observation in the context of intercountry adoptions, since the operation of intercountry adoption under the Hague Convention is carried out by both international organisations, in the form of the Hague Commission, and by states, whether through Central Authorities, or other branches of the government that are involved in intercountry adoption. As well, agencies, non-governmental organisations

⁸ Barnett and Finnemore (n 2) Note 2, 177.

⁹ Barnett and Finnemore (n 2) Note 2, 177.

¹⁰ The Hague Conference on Private International Law, Overview.
http://www.hcch.net/index_en.php?act=text.display&tid=26

¹¹ The Hague Conference on Private International Law, Overview (n 10).
The Hague Conference on Private International Law, Overview (n 10).

¹³ Barnett and Finnemore (n 2) 31.

are also actively involved in intercountry adoption operations. Understanding the interactional dynamics between these intercountry adoption actors is important. A state's international relations aims bring it to intercountry adoption—but then the actual delivery of intercountry adoption whether as a sending or receiving countries becomes diluted amongst many bodies. What happens to a state's international relation aims, when it hands over the functional operation to specific state bodies, or even to bodies outside of the state structure, such as agencies? Do the state's international relations aims get carried out through these bodies? Or—as discussed below, do those bodies have their own interests that might compete with and subordinate the aims that propelled states to engage in intercountry adoption? What happens the aims of state foreign policy, international organisations and agencies involved in intercountry adoption do not mesh?

A second observation is on the influence and growth of IOs and bureaucracy—

The steady expansion of international organizations and the bureaucratization of the world are among the important developments of the last two centuries. ..It occurred because states and nonstate actors looked to international organizations to fulfil certain functions and purposes...Once created, international organizations, acting like the bureaucracies that they were, used their authority to expand their control over more and more of international life. Indeed, the majority of international organizations are now created by other international organizations. ...the social stuff of which they are made—superficially, their rules and the nature of their authority—yields insight into the ways that they exercise power...¹⁴

The use of international organisations in the delivery of intercountry adoption; indeed the creation of an international legal instrument on intercountry adoption by an international organisation seems less remarkable when understood within the broader dimension of the proliferation of international organisations and bureaucracies themselves. That an international organisation has sponsored the drafting of a legal instrument on intercountry adoption fits within this pattern, and should be interpreted within this phenomenon of growth.

¹⁴ Barnett and Finnemore (n 2) 43.

A third observation is on the effects of IO policy determination and setting, which can often result in the IOs (and agencies) pursuing different objectives than the state foreign policy aims:

..[IOs] pursuing important, often defining, policies that were not demanded by state members. Even where the IO did adopt policies favored by states, however, we must remember that correlation is not causation. IOs and states can arrive at similar policies for very different reasons...IOS can be the policy leaders, setting the agenda in their domain of action and cajoling states to adopt it. At the same time, IOs may actually shape the policy preferences of states by changing what states want. It matters who initiates policy and why. By investigating IO interests and determining both where they came from and whether they differ from those of states, we are better able to identify potentially autonomous actions.¹⁵

The call to examine the interests expressed by IOs, in this case, in the context of intercountry adoption policies on its daily operation, and where those differ from or enable the accomplishment of the state international relation aims that were the motivation for entering into intercountry adoption.

A fourth observation is related to the third, and is again on the relationship that IOs (and agencies) have with states, state interests, and other actors—stressing that while state interests have impact on IO and agency choices and interest selection, those state interests do not account for all of the choices which are made. In intercountry adoption this suggests that the international relation aims that led a state to intercountry adoption are not, in the end, the only aims being met through the actual operations of intercountry adoption—and indeed might not be carried out at all:

IOs might act independently from, but consistently with, state interests, interpreting mandates and implementing policy in ways that are perhaps unanticipated but are agreeable to states. They might also fail to carry out state interests, oppose state interests, or change state interests. IOs thus have complicated relationships of both autonomy and dependence with a variety of

¹⁵ Barnett and Finnemore (n 2) 10.

other actors, including states. While state demands matter, they leave much unexplained.¹⁶

The significance of these points on the nature of international organisations and bureaucracies, and their inter-relationship with state foreign policy aims are further developed in the discussion below.

Carrying out Business Under the Hague Convention on Intercountry Adoption

The Hague Convention's provisions for carrying out its terms in a practical sense can be found mainly in Chapter III. These discuss the provisions for the role of a Central Authority, and its delegation of tasks to accredited bodies or public authorities. The Central Authority is charged with carrying out the Hague Convention duties for a member state.¹⁷ Convention duties of the Central Authority can be delegated to 'public authorities or other bodies duly accredited in their State'¹⁸ Accredited bodies must meet certain standards. These are set out in Article 11 of the Convention.

The Convention is specific as to the business goals of such a body, and as to the qualification of its management personnel and staff. The Convention requires that a body that is accredited limits its business goals to 'non-profit objectives'.¹⁹ Further, the Convention sets out that the body 'be directed and staffed by persons qualified by their ethical standards by training and experience to work in the field of intercountry adoption'.²⁰ It is also to be overseen 'by competent authorities of that State as to its composition, operation and financial situation.'²¹ Such a body accredited in one State is only able to operate in another Convention Member state with the permission of both States.²²

¹⁶Barnett and Finnemore (n 2) 11.

¹⁷ The Hague Convention on Intercountry Adoption, Article 6(1).

¹⁸ The Hague Convention on Intercountry Adoption, Article 9.

¹⁹ The Hague Convention on Intercountry Adoption, Article 11(a).

²⁰ The Hague Convention on Intercountry Adoption, Article 11(b).

²¹ The Hague Convention on Intercountry Adoption, Article 11(c).

²² The Hague Convention on Intercountry Adoption, Article 12.

Central Authorities may also delegate their tasks to another sort of entity—‘bodies or persons who meet the requirements of integrity, professional competence, experience and accountability of that State’²³, and also meet standards and requirements to do intercountry adoption work.²⁴

States that are not Convention members still carry out intercountry adoption operations.²⁵ Agencies also play an important role in the operation of intercountry adoption—whether as an accredited body under the terms of the Hague Convention, or carrying out intercountry adoption operations between non Member states, or where one State is not a Convention member. South Korea is often cited as the state from which intercountry adoption started.²⁶ Agencies were instrumental in this start of intercountry adoption in South Korea.²⁷ Choy comments that:

A focus on the institutions [involved in South Korean intercountry adoption] illuminates the multiple tensions surrounding intercountry adoption such as the massive multilevel government bureaucracy associated with the process, and the conflicting agendas among social service agencies, independent adoption schemes, and adoptive parents about how the process should function. Although much has changed in international adoption since the 1959’s...these tensions undoubtedly persist in more recent times.²⁸

Cartwright offers insight into the particular business atmosphere in which international adoption agencies operate-which points out the market nature of international adoption, a competitive market in which agencies cater to paying customers, and for access to those children that are desired by the customers of these agencies, the prospective adoptive parents. These can result in ethical issues in relation to the market conditions of intercountry adoption and the subsequent ‘positions, policies and practice’²⁹ derived from agency contact with other adoption bodies and entities, all of which create the characteristics of the modern adoption system:

²³ The Hague Convention on Intercountry Adoption, Article 22(2) (a).

²⁴ The Hague Convention on Intercountry Adoption, Article 22(2) (b).

²⁵ See discussion in Chapter Four on South Korea and the United States.

²⁶ C Choy ‘Institutionalizing International Adoption: The Historical Origins of Korean Adoption in the United States in K Bergquist and others (eds) *International Korean Adoption: A Fifty Year History of Policy and Practice* (The Haworth Press, 2007) 25.

²⁷ Choy (n 26) 29-40.

²⁸ Choy (n 26) 28.

²⁹ L Cartwright, ‘Photographs of “Waiting Children”: The Transnational Adoption Market’ (2003) 21(1) *Social Text* 74, 83.

Discussions among foreign officials, agency representatives, child advocates, prospective parents, and parents about child image circulation have impacted positions, policies and practice among the agencies and countries involved in transnational adoption. Concerns have included the problematic nature of a system where children of poor countries become commodities and their images become advertisements in a global market, the enhanced potential for racial and esthetic discrimination in image-based child selection, and the child's right to privacy.³⁰

The dynamics of a market in adoption-as-business has resulted in what Cartwright identifies as an 'image culture'³¹ the advertisement of adoption services and attracting potential customers for business through showing children—the effects of which are driven in no small part by the competitive atmosphere between agencies vying for the business of prospective adoptive parents:

These images [of children] functioned initially as lures, drawing prospective clients into the adoption market helping them to imagine “their” child or themselves as parents of children “like these.”³²

The problems of marketing children for adoption over the internet were discussed in Chapter One, and are echoed in this comment by Cartwright, where children's images serve as a draw in a competitive market to attract customers to adoption agencies.

Brian comments on this culture, where agencies focus on catering to the adoptive family preference in marketing intercountry adoption services—and through which, the principle of subsidiarity of intercountry adoption is subsumed by agency driven adoption:

Adoption social workers often advocate international adoption over public domestic adoption by claiming that first-time parents may not be equipped to parent the older children-of-color that are most commonly available through the US foster system. Because facilitators view their role as helping families exercise as much personal choice in building their families according to cultural preferences as opposed to domestic social welfare needs, they rarely seem to

³⁰ Cartwright (n 29) 83.

³¹ Cartwright (n 29) 84.

³² Cartwright (n 29) 83.

challenge or discourage parents' decisions to adopt repeatedly from the same country abroad.³³

Conclusion

While the Hague Convention has a model for strong Central Authority involvement in carrying out intercountry adoption, it also allows for the delegation of certain central authority tasks. However, intercountry adoption began long before the Convention was put into place, and many aspects of the Convention were done to accommodate existing practices—albeit ones that were contested--and some of these tensions were about the role of agencies in intercountry adoption and what business formation these should have.

Thus, while state are driven to intercountry adoption involvement to fulfil international relation aims, in the on-the-ground delivery of intercountry adoption services, these aims are transmitted through those bodies that carry out the business of intercountry adoption—different government bodies designated as the Central Authority, international organisations such as the Hague Conference, and international adoption agencies—which might meet the standards set forth by the Hague Convention, but might also instead be agencies engaged in non-Convention intercountry adoptions. These entities bring forth their own interests and dynamics, which change and alter the interests of states. Intercountry adoption can be presented as an option to be taken after other options are ruled out, in accordance with the subsidiarity principle, or can simply skip over significant considerations of the subsidiarity of intercountry adoption—positions taken in accordance with what is helpful to meeting the aims and self-interests of the bodies involved.

What does this mean for the best interests standard? Yet another layer is added on top of the state foreign policy aims that drive intercountry adoption involvement, that of those entities that are involved in actually delivering intercountry adoption. That further complicates the meanings and definitions that are given to the standard—yet each interest represented in intercountry adoption operation has the opportunity to

³³ K Brian, Choosing Korea: Marketing “Multiculturalism to Choosy Adopters” in K Bergquist and others (eds) *International Korean Adoption: A Fifty Year History of Policy and Practice* (The Haworth Press, 2007) 69-70.

manipulate the standard, subtly, covertly or explicitly, in furtherance of its own specific aims, so long as the standard remains pliable and defined only in these contexts. This should call further into question the common meanings that are given as to what is in the best interests of a child or children in intercountry adoption, meanings that should not be accepted without a further exploration of who defined it, and what the self-interests of that entity might be in intercountry adoption. Alternate ways to construct meanings for the standard, in light of the identified interests of states in engaging in intercountry adoption, and of the entities involved in the delivery of intercountry adoption, including governmental bodies, international organisations, and agencies, are discussed in Chapter Six.

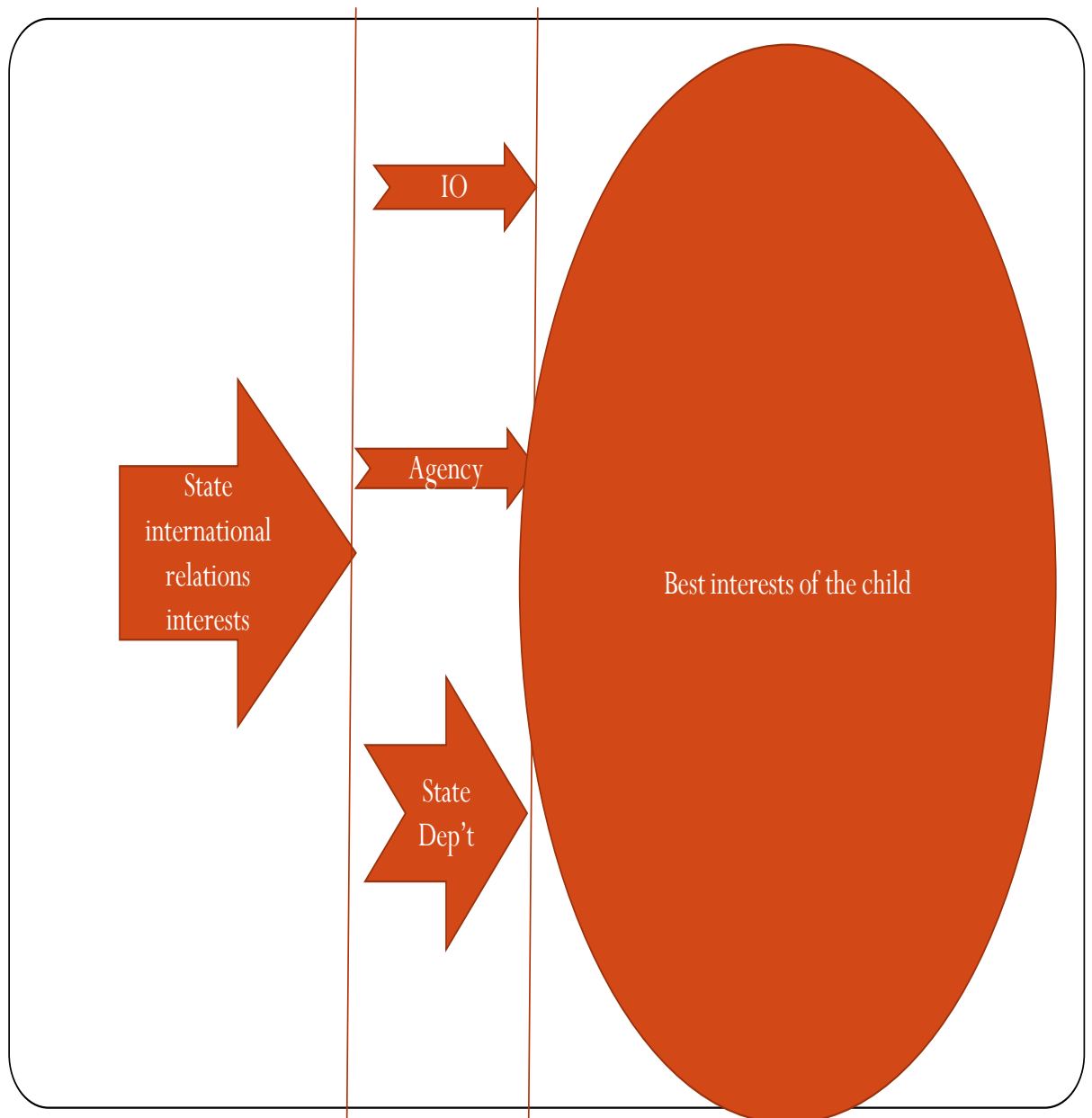


Figure 3.1 Influences on Best Interest Standard Meanings

Figure 3.1 reveals a complex web of interaction in intercountry adoption, on the manner in which meanings are assigned to the best interests of the child standard. As set forth in Chapter Four state interests in international relations propel them towards intercountry adoption involvement. This is true whether states are sending or receiving children in intercountry adoption. However, whether the state has the Convention in force or not, the actual operation of intercountry adoption, from defining state policies

and procedures, to carrying out the daily activities of intercountry adoption with families and children, are handled by a myriad cast of adoption stakeholders, including departments or branches of the state government, agencies, and international organisations, true of both Convention and non Convention adoptions. Thus, the state international relation interests become filtered through the aims of state governmental departments, including Central Authorities, or other departments charged with the handling of intercountry matters, adoption agencies, and international organisations such as the Hague Conference. In turn, the interests of these different groups are further filtered through their interpretation and application of the best interests standard. What results in practice, then, is a best interests standard that has been firstly defined and identified as part of a state's international relations aims, and then further defined and applied through another layer involved in intercountry adoption, that being the agencies, government departments and international organisations involved with intercountry adoption operations. What is visible then in operation is the best interest standard after it has been filtered through this complex web of interaction.

Chapter Four : Intercountry Adoption: A Comparative Analysis of Seven States Using Constructivist Grounded Theory

Introduction

This chapter presents the research findings on the comparative law analysis done on seven countries. These were, in alphabetical order, China, Guatemala, India, South Africa, South Korea, Sweden and the United States. They represent a mix of sending and receiving countries, with the United States having a dual role as both a sending and receiving country. This chapter is divided into sections which discuss each country. The country discussions are presented in alphabetical order.

Axial coding, as discussed in Chapter Two, was done on selected literature for each country. The results of each country's axial coding were analysed and formed into relational statements, which form the basis for the discussion of each country. The axial coding and the bibliography of those articles that were coded for each state is contained at Appendix B. Relational statements were formed using the axial coding diagram at Appendix A.

The section for each state contains an introductory brief overview, relational statements arrived at through axial coding, and a conclusory discussion on the significance of the relational statements.

The chapter then concludes with a discussion of the results of the comparison that lead into the next chapter, which presents a grounded theory on the first part of the research question, what motivates states to become involved in intercountry adoption engagement.

China: Introductory Overview

No discussion on adoption from China can be had without the so called One Child Policy as part of that discussion. The One Child Policy was put into place during 1979 in an effort to curb the exploding Chinese population. As Riley comments, the one child

policy is a misnomer for a policy that nevertheless was intended to limit the number of children a family could have:

...variations of the “One-Child Policy” have been enforced to varying degrees at different times and in different areas of China. However, in nearly all case urban women have been limited to one child. In rural areas, the number of children permitted varies but in general, couples are permitted to have two children, and many have three.¹

Johnson points out the effect of a domestic adoption law passed in 1991.² This law limited Chinese adopters to those who had no children over their own and were over the age of 35.³ Johnson comments that a primary function of this law was intended ‘to provide birth-planning officials with additional regulatory weapons to shore up the one-child policy by eliminating adoption as a potential loophole for those who sought to hide the birth of a child, typically a daughter, in order to try again to have a son over quota.’⁴ As well, China does not have official statistics on the abandonment of children.⁵

The Hague Convention has only recently taken effect in China—it went into force in 2006.⁶

China identifies itself as primarily a state of origin in intercountry adoption.⁷ It describes three types of which are available to children in need—welfare institutions, foster families, and both domestic and intercountry adoption.⁸ Intercountry adoption is described as supplementing domestic adoption efforts.⁹

China’s responses to a Hague Conference questionnaire reveal certain difficulties it has experienced as a country of origin—it remarks that it is under heavy pressure from

¹ N Riley, ‘American Adoptions of Chinese Girls: The Socio-Political Matrices of Individual Decisions (1997) 20(1) Women’s Studies International Forum 87, 89.

² K. Johnson, ‘Politics of International and Domestic Adoption in China’ (2002) 36(2) Law and Society Review 379, 389.

³ Johnson (n 2) 389.

⁴ Johnson (n 2) 389.

⁵ Riley (n 1) 89.

⁶ Hague Convention on Intercountry Adoption Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

⁷ China’s Response to Questionnaire on the Practical Operation of the Hague Convention, 2005, Question 1(a), http://www.hcch.net/upload/adop2005_cn.pdf.

⁸ China’s Response (n 7) Question 4(a).

⁹ China’s Response (n 7) Question 4(a).

receiving countries¹⁰; and that as the number of children available for intercountry adoption decrease due to improved economic situations, it has ceased the development of intercountry adoption relationships with new countries.¹¹ Further, China expresses frustration at being able to obtain post adoption placement reports:

China has established inter-country adoption cooperation relationship with 16 countries. In some countries, the specific adoption affairs are undertaken by the government. But due to limitations of functions and human resources of government departments, they are often unable to provide post-placement reports as timely and completely as adoption organizations. Secondly, the overwhelming majorities of adoption organizations have designated special persons to file post-placement reports. So their reports are satisfactory in both quantity and quality. But some adoption organizations do not pay much attention filing post-placement reports. They are quite passive in attitude and not in real earnest and so they are inefficient and the reports are poor in quality. Thirdly, some adoptive families fail to notify adoption organizations after the home addresses have been changed so that adoption organizations are unable to contact them. There are also some adoptive families who regard adopted children as their own and deem it unnecessary for adoption organizations to interfere in their private life.¹²

China also expresses its dismay with the information that it has been provided by potential adoptive parents.¹³ It notes that the information was not always fully truthful, where application information ‘concealed or evaded important information that is unfavorable to adopters. This is very unfavorable for inter-country adoption.’¹⁴

In 2007, China put new regulations in place which placed new conditions and restrictions on parents who could adopt children from China.¹⁵ China has further announced information on requirements for agencies with which it will process

¹⁰ China’s Response (n 7) Question 17.

¹¹ China’s Response (n 7) Question 17.

¹² China’s Response (n 7) Question 7(e).

¹³ China’s Response (n 7) Question 7(a).

¹⁴ China’s Response (n 7) Question 7(a).

¹⁵ ‘CCCA Draft Regulations’, http://fwcc.org/ccaa_dec06regs.htm; ‘China, Country Information’, Intercountry Adoption, Office of Children’s Issues, United States Department of State, <http://adoption.state.gov/country/china.html>.

intercountry adoptions. ¹⁶An ‘Adoption Alert’ ¹⁷ issued by the United States Department of State on 29 September 2009 indicates that:

China Center of Adoption Affairs (CCAA) has announced that all prospective adoptive families will be required to work with a U.S. Hague accredited adoption service provider for both transition cases and Convention cases beginning December 1, 2009. This will require all families to work with an agency that is both U.S. Hague accredited and a CCAAA-licensed agency for both transition cases and Convention cases for all steps in the intercountry adoption process.¹⁸

Relational Statements

Relational Statement One

From the Chinese perspective, the so-called One-Child Policy was not approached from a political standpoint, but rather as science.¹⁹ China has not seen this policy as overtly political way that it has been seen by the Western world outside of China²⁰—but China’s use of science to approach this problem was because in part of its awe of the seeming ability of Western science to solve problems of this magnitude.²¹ The One-Child Policy was implemented with a state structure where family matters were highly regulated.²² Fertility rates in China have now fallen to below or near population replacement levels.²³ The One-Child Policy is commonly given as a new cause for an

¹⁶ ‘China, Adoption Alert’, 29 September 2009, United States Department of State, Bureau of Consular Affairs, Office of Children’s Issues, <http://adoption.state.gov/news/china.html>.

¹⁷ ‘China, Adoption Alert’ (n 16).

¹⁸ ‘China, Adoption Alert’ (n 16).

¹⁹ S Greenhalgh, ‘Missile Science, Population Science: The Origins of China’s One-Child Policy’ (2005) *The China Quarterly* 253, 253-254; see also S Greenhalgh, ‘Science, Modernity and the Making of China’s One Child Policy’ (2003) 29(2) *Population and Development Review* 163.

²⁰ See Greenhalgh 2003 (n 19) 163-164, 166; Greenhalgh 2005 (n 19) 260-267.

²¹ Greenhalgh 2005 (n 19) 167-168, 171-172.

²² J Bannister, ‘Shortage of Girls in China Today’ (2004) 21(1) *Journal of Population Research* 19, 19-20, 25-26, 39-40; Greenhalgh 2003(n 19) 167, 172; Greenhalgh 2005 (n 19) 260-261; Riley (n 1) 95.

²³ Greenhalgh 2005(n 19) 276; B Stark, ‘Baby Girls from China in New York: A Thrice Told Tale’ (2003) *Utah Law Review* 1231, 1242. See also P Selman, ‘Intercountry Adoption in the New Millennium: The “Quiet Migration” Revisited’ (2002) 21 *Population Research* 205, 219; Table 9, 220; Bannister (n 22) 30.

age-old practice of abandonment of infant girls.²⁴ Girls have been abandoned or killed outright throughout Chinese history—although the causes for this have varied over time and place.²⁵ Strong cultural preferences for a son tied to the survival needs of the family—even today in China there is a lack of social benefits for the elderly—combined with the One-Child Policy to create the recent phenomena of the abandonment of infant and young girls.²⁶

Relational Statement Two

Chinese intercountry adoption occurs within the wider scope of China's relationships with other countries.²⁷ China wants to ensure that it operates at the same economic level as other nations.²⁸ Intercountry adoption is part of the effort to attain economic parity—it creates a flow of Western currency into China²⁹ and makes China very visible on the international stage.³⁰ At the same time, China's intercountry adoption policies assure that it is very much in control of this relationship with other countries—in contrast to other sending countries that operate under pressure from receiving states.³¹ China is determined to occupy a place on par with global leaders, and takes care that its foreign relations, intercountry adoption included, do not act to put it into a position of

²⁴ Stark (n 23) 1241-1243; A Andrew, 'China's Abandoned Children and Transnational Adoption: Issue and Problems for U.S.-China Relations, Adoption Agencies, and Adoptive Parents' (2007) 19(1) *Journal of Women's History* 123, 123; N Luo and K Bergquist, 'Born in China: Birth Country Perspectives on International Adoption' (2004) 8(1) *Adoption Quarterly* 21, 24; Johnson (n 16) 388-389; Bannister (n 22) 21-22, 24-28.

²⁵ Lou and Bergquist (n 24) 23-25; Riley (n 1) 88-89; Bannister (n 24) 21-22.

²⁶ Johnson (n 2) 385-386, Bannister (n 22) 19-20, 21-22, 31-40. Bannister remarks that 'The shortage of females in China predates the modern period and has lasted for centuries or even millennia...The shortage of girls in China is not caused by poverty, even though economic considerations are given as part of the mixture of reasons for daughter loss...The traditional cause of China's shortage of females and the underlying cause today is the son preference endemic in Han Chinese culture, especially in some subcultures within Han regions, and in some minority cultures.' 40-41; Andrew (n 24) 123; Riley (n 1) 91-92.

²⁷ Andrew (n 24) 129; Johnson (n 2) 387-388; Riley (n 1) 96, 99; L Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective on the Contemporary International Order' (2001) 5 *Singapore Journal of International and Comparative Law* 314, 318-326; Luo and Bergquist (n 24) 28-30, 36.

²⁸ Greenhalgh 2003 (n 19) 164, 171-174, 175-176; see generally Greenhalgh 2005 (n 19) and Zhaojie (n 27).

²⁹ Johnson (n 2) 387-388; 389-390; Luo and Bergquist (n 24) 31; Riley (n 1) 100.

³⁰ Luo and Bergquist, (n 24), 29-30; Riley (n 1) 96; Andrew (n 24) 126-127; Stark (n 23) 1253-1254.

³¹ Andrew (n 24) 129; see also discussion about South Korea and Guatemala in this chapter.

subordination.³² Thus, China sets its intercountry adoption policies according to its national aims—and without much regard for pressures from receiving countries.

Relational Statement Three

China lacks a social welfare programme to provide adequate benefits for people in their old age.³³ Chinese elderly people are thus still reliant upon their son to provide for them—a son being a form of social security.³⁴ It is this, along with the Confucian preference for a son to carry on the family line—that leads to a preference for a son in Chinese society.³⁵ The preference may be at some level a simple matter of survival.

Relational Statement Four

The Chinese government has not created a legal mechanism for the abandonment of children,³⁶ even while acknowledging the existence of the problem.³⁷ Parents are left without a legal alternative—yet the abandonment is due in part to the government’s very active agenda to establish itself as a strong nation in the global order.³⁸ In some ways then, the government simply acts as if the abandoned or surplus children are not there³⁹—acknowledging them most specifically when they are in high demand from Western prospective adoptive parents.⁴⁰ It has not acted to eradicate the root causes of the abandonment of the infant girls with the same vigour that it has pursued its global

³² See generally Zhaojie (n 27); Luo and Bergquist (n 24) 29-30; Andrew (n 24) 129.

³³ Andrew (n 24) 123; Riley (n 1) 91-92.

³⁴ Bannister (n 22), 40-41; Riley (n 1) 91-92, 96; Luo and Bergquist (n 26) 23-25, 29.

³⁵ Riley (n 1) 90-92; Bannister (n 22), 31-33, 39, 41-42; Stark (n 23) 1242.

³⁶ Riley (n 1) 90, 94.

³⁷ Riley (n 1) 94-96, 100. Riley comments that ‘Abandonment of children is strictly forbidden...this prohibition shapes the way that children are abandoned and come to live in state institutions. Official documents that describe their history are not permitted to use the word “abandoned”; how these children end up at these institutions is omitted from these documents.’ 94.

³⁸ See China Relational Statement Two.

³⁹ See S Greenhalgh, ‘Planned Births, Unplanned Persons: “Population” in the Making of Chinese Modernity’ (2003) 30(2) *American Ethnologist* 196; Johnson (n 2) who says ‘Our sample of adoptive parents included a large number of parents who had adopted abandoned children outside of government channels and without informing the government, either because they were underage or because they had other children...The result is that at least some of these children will remain unregistered, “black children”, lacking the papers necessary to gain access to good schools, indeed to any school beyond the primary level, and perhaps will be deprived of other entitlements.’ 391.

⁴⁰ Johnson (n 2) 394, noting, ‘the China Adoption Center, dedicated to supervising, coordinating and processing international adoption as smoothly as possible’, 394.

economic goals, nor has it set up alternatives to abandonment for those parents who are faced with the relinquishment of a child for whatever reason.

Discussion

The One Child Policy is a significant feature in any discussion on intercountry adoption in China. That does not however give sufficient recognition to the complex web of scientific, political, economic and social issues that gave rise to such a population control policy. Nor does it take account of the long history of the abandonment of infant girls in China—a practice that continues today due to a combination of modern pressures and traditional values. All of these combine to create the current climate for intercountry adoption in China, where China has put new restrictions in place as to who may adopt, while managing its external relations with the countries that are eager to adopt from China.

Guatemala: Introductory Overview

Guatemala is a sending country.⁴¹ It has several unique problems relating to its implementation of the Hague Convention on Intercountry Adoption. It first ratified the Convention on 26 November 2002, with entry into force on 1 March 2003,⁴² but there has since been great controversy over the exact status of the Convention.⁴³ Five countries lodged objections to the Guatemalan ratification such that they do not recognise themselves as having a treaty relationship via the Hague Convention with Guatemala.⁴⁴ These five countries are Canada, Germany, the Netherlands, Spain and the United Kingdom.⁴⁵

⁴¹ Annex 2, Guatemala Report to 2005 Questionnaire, http://www.hcch.net/upload/adop2005_gt.pdf; see also answer to Question A(1), Guatemala Response to Questionnaire, http://www.hcch.net/upload/adop2005_gt.pdf

⁴² See http://hcch.e-vision.nl/index_en.php?act=status.comment&csid=767&disp=type, as viewed on 28 September 2009. (Details on objections to Guatemala's accession to the Hague Convention on Intercountry Adoption)

⁴³ L Daly, 'Note: To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation By the United States in Order to Maintain Intercountry Adoptions' (2007) 45 Family Court Review 620, *4-*5 (pagination reference to numbers available on electronic version of article, which are not the same as journal pagination.)

⁴⁴ See http://hcch.e-vision.nl/index_en.php?act=status.comment&csid=767&disp=type, as viewed on 8 October 2009. (Details on objections to Guatemala's accession to the Hague Convention on Intercountry Adoption)

⁴⁵ See http://hcch.e-vision.nl/index_en.php?act=status.comment&csid=767&disp=type, as viewed on 8 October 2009 (Details on objections to Guatemala's accession to the Hague Convention on Intercountry Adoption)

Guatemala, until reform legislation was passed at the end 2007, had a bifurcated adoption process that allowed intercountry adoption to bypass the judicial system altogether.⁴⁶ The non-judicial process requires that the child's mother consent to the adoption⁴⁷; but with concerns about fraudulent consents on the rise, the United States government required that there be two DNA tests to prove the identity of the mother and the child.⁴⁸

The United States is a principle destination for children from Guatemala, with for example, eighty-seven percent of the children sent for adoption in 2003 being sent to the United States.⁴⁹ Guatemala has little or no social service provision for families and children.⁵⁰ A high rate of children end up being adopted by Americans—estimates are that Americans adopt 1% of all children born.⁵¹

The status of the Hague Convention and Guatemala's recent steps to re-ratify the Convention are key issues. The Guatemalan Congress passed new national legislation on 11 December 2007.⁵² This legislation domestically implements the terms of the Hague Convention on intercountry adoption,⁵³ and went into effect on 31 December 2007.⁵⁴ While the legislation dramatically changes the process for intercountry adoption, some of the cases that were pending in the system prior to the effective date of the law will be permitted to go ahead.⁵⁵ The US Department of State, in a posting to its website, indicated that the Guatemalan Central Authority had been established on 11

⁴⁶ K Gresham, L Nackerud and E Risler, 'Intercountry Adoption from Guatemala and the United States: A Comparative Policy Analysis' (2003) 1(3/4/) *Journal of Immigrant and Refugee Services* 1, 4-5.

⁴⁷ Gresham, Nackerud and Risler (n 46) 4-5.

⁴⁸ 'U.S. Embassy in Guatemala Adds Second DNA Test to Adoption Procedure,' 2 August 2007, US Department of State, http://travel.state.gov/family/adoption/intercountry/intercountry_3751.html

⁴⁹ P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004' (2006) 23(2) *Journal of Population Research* 183, 192, Table 6.

⁵⁰ 'Adoption and the Rights of the Child in Guatemala' ILPEC Guatemala for UNICEF (2000) 2-3 (cited as 'ILPEC').

⁵¹ E Noonan, 'Adoption and the Guatemalan Journey to American Parenthood' (2007) 14 *Childhood* 201,303.

⁵² 'Guatemala Congress Passes Adoption Legislation', US Department of State, at http://travel.state.gov/family/adoption/intercountry/intercountry_3903.html

⁵³ 'Guatemala Congress Passes Adoption Legislation', US Department of State, at http://travel.state.gov/family/adoption/intercountry/intercountry_3903.html

⁵⁴ 'Warnings: Adoptions Initiated on or After December 31, 2007 in Guatemala', at http://travel.state.gov/family/adoption/intercountry/intercountry_3927.html

⁵⁵ 'Guatemala: Registering In-Process Adoption Case', US Department of State, at http://travel.state.gov/family/adoption/country/country_3908.html

January 2008,⁵⁶ and that the new law does not permit adoptions with nation states that do not have the Hague Convention in force.⁵⁷ This may restrict intercountry adoption to the United States, until it brings the Hague Convention in force until 1 April 2008.⁵⁸ Conversely, however, the US State Department warns that it will have to assess whether the new Guatemalan processes meet the requirements of the Hague Convention, and that if in the assessment of the United States, they do not, then the United States will not permit children from Guatemala to be adopted into the United States.⁵⁹ Information viewed on 22 October 2009, on the United States Department of State website regarding intercountry adoption from Guatemala, indicates that the United States is not processing children for adoption from Guatemala, because:

The U.S. Government believes Guatemala has had insufficient time to implement reform legislation that would create a Convention-compliant adoption process, and as a result, Guatemala cannot meet its Convention obligations.⁶⁰

Relational Statements

Relational Statement One

Guatemala had a civil war that lasted for 36 years.⁶¹ During that time, government forces targeted the indigenous Mayan population in a series of little publicised atrocities.⁶² The government received much backing from the United States during this period.⁶³ Since the end of the war, Guatemala has remained very much under the influence of the United States.⁶⁴ Even following the war, the Mayan population remains at the fringes of the re-constituted Guatemalan society.⁶⁵ Many Mayans fled Guatemala

⁵⁶ Warnings (n 54)

⁵⁷ Warnings (n 54)

⁵⁸ Warnings (n 54)

⁵⁹ Warnings (n 54)

⁶⁰ 'Guatemala, Country Information,' Intercountry Adoption, Office of Children's Issues, United States Department of State, <http://adoption.state.gov/country/guatemala.html>.

⁶¹ P San Pedro, 'Guatemala: Empowerment as Ongoing Process' (2007) FRIDE, 1-2; M Sabin, K Sabin, H Y Kim, M Vergara, L Varese, 'The Mental Health Status of Mayan Refugees after Repatriation to Guatemala' (2006) 19(3) Pan American Journal of Public Health 163, 164.

⁶² Sabin and others (n 62) 164.

⁶³ San Pedro (n 61) 2.

⁶⁴ San Pedro (n 61) 2.

⁶⁵ Sabin and others (n 61) 164; San Pedro (n 61) 4-5. San Pedro describes the current state of the Guatemalan society '...many communities, especially poor ones, are completely controlled by mafia and

into neighbouring countries and even though there has been a cessation of hostilities for some time, some remain afraid to return.⁶⁶ Those that have returned are also suffering from the effects of the atrocities on their community.⁶⁷ They experience the lingering psychological effects of the trauma⁶⁸ and are afraid to speak out about current problems that they experience.⁶⁹ It is mostly Mayan children and children of mixed Mayan and European heritage that are sent in intercountry adoption.⁷⁰

Relational Statement Two

Guatemalan society is very stratified,⁷¹ a legacy of its past as a Spanish colony.⁷² Those at the top of society are of European ancestry and those at the bottom are the indigenous inhabitants of Guatemala—the Mayan people.⁷³ The government is seen as corrupt and operating at the behest of those who are at the top of the Guatemalan society.⁷⁴

Relational Statement Three

Inter-country adoption in Guatemala has flourished since the end of its decades long civil war.⁷⁵ Inter-country adoption (of mostly Mayan children and children with some Mayan heritage)⁷⁶ occurs with very little government intervention or oversight. Inter-country adoptions can by-pass any judicial process.⁷⁷ The result is a nearly unregulated

corrupt police forces. The sum of these precedents has led to a violent, frustrated, fearful and apathetic society, in which the capacity of association is weak and the population has little interest in social and political participation.’ 3.

⁶⁶ Sabin and others (n 61) 164,167-169.

⁶⁷ Sabin and others (n 61) 167-170.

⁶⁸ Sabin and others (n 61) 167-170

⁶⁹ San Pedro (n 61) 3-4, 7-8. K Charmaz, ‘Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (3rd edn Sage Publications, 2005) 527, also discusses the significance of silence. She remarks that ‘Silences pose significant meanings and telling data in any research that deals with moral choices, ethical dilemmas, and just social policies. Silence signifies absence and sometimes reflects a lack of awareness or inability to express thoughts and feelings. However, silence speaks to power arrangements...The “right” to speak may mirror hierarchies of power: *Only those who have power dare to speak*. All others are silences, then, too, the powerless may retreat into silence as a last refuge.’ 527, emphasis in the original.

⁷⁰ ILPEC (n 52) 19-2; J Gibbons, S Wilson and C Rufener, ‘Gender Attitudes Mediate Gender Differences in Attitudes Toward Adoption in Guatemala’ (2006) 54 (1/2) *Sex Roles* 139,143.

⁷¹ San Pedro (n 61) 1-3; 4-5.

⁷² San Pedro (n 61) 1-5.

⁷³ San Pedro (n 61) 4-5.

⁷⁴ San Pedro (n 61) 3-4.

⁷⁵ Gresham, Nackerud and Risler (n 46) 4.

⁷⁶ ILPEC (n 50) 19-20.

⁷⁷ ILPEC (n 50)

market in children, with American prospective adopters as the main ‘buyers’ of the Guatemalan children on offer.⁷⁸

Relational Statement Four

Intercountry adoption arrangements between the United States and Guatemala are heavily underscored by the Cold War and post-Cold War relationship that has developed between these two countries.⁷⁹ The United States continues to exercise a heavy and influential hand in the way that Guatemala conducts intercountry adoption.⁸⁰ Until recently, there has been little regulation of intercountry adoption from Guatemala.⁸¹

Discussion

In a country that is described as having a corrupt government system and police force, where for many years Mayans were the targets of attack in a vicious and long civil war significantly backed and supported by the American government, where now the children of the Mayans have been sent in intercountry adoption, how will the new attempt at Hague Convention compliance take hold? Is it of note that Guatemala is enacting these reform attempts at the same time the Hague Convention is entering into force into the US? Does the timing of the events on Guatemala’s Hague Convention reform attempts and the entry into force of this Convention in the US signal the continued influence not only over the operation of intercountry adoption in Guatemala but over governmental affairs in general? Fear, repression, marginalisation, distrust are all words that describe the experiences of the Mayan population, the source for many of the children who enter into intercountry adoption. The best interest of the child is difficult to calculate in such an equation.

⁷⁸ Selman 2006 (n 49) 192, remarking that ‘the US now accounts for 95 per cent of adoptions from Guatemala.’

⁷⁹ Noonan (n 51) 302- 304.

⁸⁰ For discussion on American attitudes towards adopting from Guatemala, see Daly (n 45) which presents adoption to the United States as beneficial to Guatemalan children, and any limitations on that as having ‘disastrous effects on the lives of children in Guatemala and the thousands of prospective American parents who seek to adopt children from Guatemala every year’, *2. Contrasting this is Noonan (n 53) who argues that American views on adoption are ways to enhance American superiority and authority over sending countries; see in particular 307-310. For further discussion on this, see the discussion on the United States in this chapter.

⁸¹ Gresham, Nackerud and Risler (n 46) 4-5, 6-8; ILPEC (n 50) 5-6.

India: Introductory Overview

Intercountry adoption in India occurs amidst a scene of turmoil. Firstly, there is turmoil in intercountry adoption itself, with the occurrence of periodic adoption scandals.⁸² Secondly, there is an unsettledness within India about its own identity, and trying to live up to its own national aspirations. Although it strives to be ‘constitutionally secular’⁸³, it has to contend with internal divisions that are based on religion and ethnicity—‘...the dream of national independence in 1947 rapidly changed into a nightmare of religious and ethnic violence...this experience has remained a fundamental trauma in India’s national psyche.’⁸⁴

India ratified the Hague Convention on 6 June 2003.⁸⁵

In terms of intercountry adoption, India describes itself as a sending country.⁸⁶ Parents who voluntarily relinquish their parental rights have a 60 day window in which they can rescind the relinquishment and re-establish their rights to the child.⁸⁷

Adoption figures that India sent to the Hague Conference show that in the period of 2001-2003 inclusive, more children were adopted domestically than were adopted through being sent in intercountry adoption. Female children make up the majority of children who are adopted, both domestically and through intercountry adoption. The United States has received the highest numbers of children from India, with about thirty two percent of the children sent going to the United States over that time span. There has been a rise in the number of children going to the United States despite at the same time an overall decrease in the number of children being sent. In all three years, there

⁸² D Smolin, ‘The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals’ (2005) 35 Seton Hall Law Review 403, 405, 446-449; 456-474.

⁸³ P Datta, ‘Historic Trauma and the Politics of the Present in India’ (2005) 7(3) Interventions 316, 316.

⁸⁴ Datta, (n 83) 316.

⁸⁵ Reply to the Questionnaire on the Practical Operation of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, Answer 1.b.

http://www.hcch.net/upload/adop2005_in.pdf

⁸⁶ ‘Reply to the Questionnaire on the Practical Operation of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption,’ Answer 1.a, Hague Conference,

⁸⁷ ‘Reply to the Questionnaire on the Practical Operation of the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, Answer 4.c

were more in-country adoptions of female children than through intercountry adoption.

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Relational Statements

Relational Statement One

India has not reached a solid definition of its sense of self as a nation, either internally or in its relations with other states. Its internal turmoil and external shifting of alliances belie the aspirational strivings of its Constitution.⁸⁹ There is a persistent memory of historic strife that plays into current day relationships between differing religious and ethnic groups within India.⁹⁰ Lack of agreement and clarity on governance powers and separation of powers contributes to the unsettled circumstances in India's self-identity.⁹¹ This in turn contributes to an uncertain identity and role in its relationship with other states.⁹² At the state level then, India's perception of itself and the image that it wants to present in its relations with other nations is in a state of flux, while India comes to terms with internal divisions⁹³ and its growing strength on the world stage.⁹⁴

Relational Statement Two

India has widely disparate economic and social conditions internally.⁹⁵ These divisions occur along lines of ethnicity⁹⁶ as well as gender.⁹⁷ Gender disparity occurs in all levels

⁸⁸ Annex 2, Statistics Forms, http://hcch.e-vision.nl/upload/adostats_in.pdf.

⁸⁹ Datta (n 83) 316-317; P Mehta, 'India's Unlikely Democracy: The Rise of Judicial Sovereignty' 18(2) *Journal of Democracy* 70, 74-79; K Menon-Sen and A K Shiva Kumar, 'Women in India: How Free? How Equal?' (2001) Report commissioned by the Office of the Resident Coordinator in India, 10-11, 14, 80; C MacKinnon, 'Sex Equality Under the Constitution of India' (2006) 4(2) *International Constitutional Law* 181, 189-190; see also J Narain, 'Constitutional Changes In India—An Inquiry into the Working of the Constitution' (1968) 17 *International and Comparative Law Quarterly* 880.

⁹⁰ Datta (n 83) 316-318.

⁹¹ H Pant, 'A Fine Balance: India Walks a Tightrope between Iran and the United States (2007) 51(3) *Orbis* 495, 508-509 on foreign policy issues facing India; P Mheta, 'India's Unlikely Democracy: The Rise of Judicial Sovereignty' (2007) 18(2) *Journal of Democracy* 70, 71, 72-78.

⁹² Pant (n 91) 496-509.

⁹³ Menon-Sen and Kumar (n 89) 7-8, 11-13, on the status of women in India; C MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws"' (2006) 4(2) *International Journal of Constitutional Law* 181, 189-190, 191-196.

⁹⁴ Pant (n 91) 496-509. Pant comments that 'India gradually is coming to terms with its own growing weight in the international system and it is realizing that with power comes responsibilities.' 509.

⁹⁵ Smolin (n 82) 482-483, 484, 488-489.

⁹⁶ Smolin, (n 82) 488.

⁹⁷ See generally Menon-Sen and Kumar (n 89); MacKinnon (n 91) 191-199; Smolin (n 82) 488-489.

of society.⁹⁸ While the Constitution strives for gender equality⁹⁹ along with other attempts to promote equality in all sectors of India's population,¹⁰⁰ the delivery of these is far-removed from the ideals contained in the law.¹⁰¹ Girls and women have a continued subordinate social status.¹⁰² As well, divisions remain across religious and ethnic lines.¹⁰³ The aspirational vision of India does not yet match reality.¹⁰⁴

Relational Statement Three

There are mixed views within India on the benefits and risks of intercountry adoption. It is seen as the means to provide a child with a secure family life and access to material well-being that the child might not have had in India.¹⁰⁵ On the other hand, it is recognised as potentially exposing the child to dangers of trafficking and abuse.¹⁰⁶ As well, while India has crafted a complex legal structure for intercountry adoption,¹⁰⁷ this has not been enough to provide protection in reality,¹⁰⁸ as India has been prone to cycles of intercountry adoption abuse.¹⁰⁹ The ambiguity on the value of intercountry adoption, in conjunction with the widespread gulf that exists between the aspiration of laws on the

⁹⁸ Menon-Sen and Kumar (n 89) 25-26, discussing a lack of correlation between poverty and infant mortality rates; 61-62 on whether women can exercise a choice in whether to become married; 62-65, on the lack ability to make their own choices in every-day living, 'In the majority of cases, women continue to be excluded from decision making on even the most mundane aspects of life. Nearly 90% of women in Uttar Pradesh and over 89% in Bihar, Madya Pradesh, Haryana and Andhra Pradesh, need permission before they can leave the house to visit a friend or relative. Nearly as many needed permission to go to the market.' 64.

⁹⁹ MacKinnon (n 95) 189-190; Menon-Sen and Kumar (n 89) 10-11

¹⁰⁰ Menon-Sen and Kumar (n 89) 10, 14; Mehta (n 91) 70.

¹⁰¹ Datta (n 89) 317; Menon-Sen and Kumar (n 89) commenting that '...there is no denying the facts document in this report—evidence of the huge gaps between Constitutional guarantees and the daily realities of women's lives.' 7; Mehta (n 91) 81.

¹⁰² See generally Menon-Sen and Kumar (n 91) discussing the variety of situations in which this diminished status can be seen.

¹⁰³ Menon-Sen and Kumar (n 89) 79; Smolin (n 84) 488; Datta (n 83) 316-318.

¹⁰⁴ See generally Menon-Sen and Kumar (n 91) on women's issues in India; 79; Mehta (n 91) 81.

¹⁰⁵ S C Singh, 'Adoption Law in India: Need for a Fresh Look' (2002) 15 *Central India Law Quarterly* 152, 159; P C Pati, 'Inter-Country Adoption of Children: Judicial Consideration in India' (2003) 16 *Central India Law Quarterly*, 1, 7.

¹⁰⁶ Pati (n 105) 1-2.

¹⁰⁷ Smolin (n 82) 426, commenting that 'The laws, ideals, and procedures governing intercountry adoption in India, in terms of that nation's role as a country of origin or sending nation, are impressive.'; 426-445, providing a detailed discussion of India's provisions for intercountry adoption operation; Pati (n 105) 1-2.

¹⁰⁸ Smolin (n 82) 426, 475; see also discussion on adoption abuses in Andhra Pradesh; 450-474; Singh (n 105) 159.

¹⁰⁹ Smolin (n 82) 426, 450-474; Singh (n 105) 152-153, 156, 159.

books and their realisation contributes to the lack of definitive direction for India's intercountry adoption.

Discussion

The relational statements are revealing of a turmoil that besets India in both its national identity and the place of intercountry adoption within the country. These also reflect the disparate conditions within the country as to social status of women as well as different ethnicities within the country. India's aspirations are for a nation of equality, both along lines of gender and ethnicity, but achieving this has proven to be another matter altogether. India also experiences uncertainty in how to carry out its internal governance structure and in deciding the place it wants to take in international affairs. Across the board then, in the matters that drive intercountry adoption participation, as further discussed within this thesis, India experiences ambiguity.

There are also mixed views on the worthwhileness of intercountry adoption. There is a conscious recognition that intercountry adoption is not a simple solution for a child, that it is a practice that has been beset with scandals that are potentially harmful to a child, yet on the other hand there is recognition that it can offer opportunities that the child may not have had in India. Thus, India does not have a clear position on intercountry adoption or the benefits or detractions that there might be for a child sent through intercountry adoption.

India is an internally complex country. It has set many high goals for itself as a state and has high aspirations of achieving these, but the reality has been more difficult, and this is mirrored in the status of intercountry adoption—with its well-honed set of legal procedures that still have not been effective in preventing periodic adoption scandals. As well, its high proportion of in-country adopted females decries beliefs that girls are not wanted for adoption within India.

South Africa: Introductory Overview

South Africa only recently put the Hague Convention into effect, in 2003,¹¹⁰ and has not fully developed the infrastructure needed to carry out the Hague Convention provisions.

¹¹⁰ Status Table, Hague Convention on Intercountry Adoption, http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

¹¹¹ It indicates an intention to limit countries with whom it establishes intercountry adoption relationships in order to get its Convention infrastructure established and to pass domestic laws needed related to the Convention.¹¹² South Africa does not actively promote intercountry adoption as a solution for the many children in need within its borders.¹¹³

Relational Statements

Relational Statement One

South Africa only recently legalised intercountry adoption, through a court decision in 2000.¹¹⁴ Since then, South Africa has ratified and implemented the Hague Convention,¹¹⁵ although it does not send a lot of children in intercountry adoption.¹¹⁶ South Africa has a significant number of children who have lost one or both parents to the HIV/AIDS epidemic,¹¹⁷ and so is faced with a large number of vulnerable children.¹¹⁸ Because of the widespread AIDS epidemic affecting especially the South African young adult population, young children are at risk of losing one or both parents to AIDS.¹¹⁹

¹¹¹ South Africa, Response to 2005 Questionnaire, Question 5(d), 6, at http://www.hcch.net/upload/adop2005_za.pdf

¹¹² South Africa, 2005 Responses (n 111) Question 17.

¹¹³ See discussion below.

¹¹⁴ *Minister for Welfare and Population Development v. Fitzpatrick*, Constitutional Court of South Africa, Case CCT 8/00, 31 May 2000; J Sloth-Neilson, 'Children's Rights in the South African Courts: An Overview Since the Ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137,141-142.

¹¹⁵ N Spurr, 'South Africa: Inter-Country Adoption a Last Resort or Best Hope?', 14 October 2005, Inter-Press Services, at <http://www.aegis.com/news/ips/2005/IP051005.html>.

¹¹⁶ Spurr (n 115) ; see also 'Annual Adoption Statistics for States of Origin', http://www.hcch.net/upload/adostats_za.pdf

¹¹⁷ S Madhavan, 'Fosterage Patterns in the Age of AIDS: Continuity and Change' (2004) 58 *Social Science and Medicine* 1443, 1443-1444; L Townsend and A Dawes, 'Intentions to Care for Children Orphaned by HIV/AIDS: A Test of the Theory of Planned Behavior' (2007) 4 *Journal of Applied Social Psychology* 822,822-824.

¹¹⁸ Townsend and Dawes (n 117) 823; Madhavan (n 117) 1448-1451; S Madhavan and N Townsend, 'The Social Context of Children's Nutritional Status in Rural South Africa' (2007) 35 *Scandinavian Journal of Public Health* 107, 108: 'Spurred by the HIV/AIDS epidemic in southern Africa, a few cent studies have shown that AIDS orphans may face a greater risk of nutritional neglect.' 108.

¹¹⁹ Madhavan (n 117) 1447-1448.

Relational Statement Two

The South African Constitution has a special symbolic and powerful place in that country's governance.¹²⁰ It was formed after the end of apartheid, and was set up to be the instrument of governance for a post-apartheid nation.¹²¹ It governs a nation where distinctions on rights are no longer made on the basis of colour or race.¹²²

Relational Statement Three

The history of the South African nation means that it has diverse inhabitants,¹²³ both of European colonisers and their descendants, and the indigenous inhabitants of the country.¹²⁴ It has several different tribes, with different languages and customs, in addition to the British and Dutch based European populations.¹²⁵ Post-apartheid South Africa is cognizant of the differing communities, and gives legal recognition to legal systems and customary law of all the different groups—where they all have equal standing in their legal application.¹²⁶ This sets up an overtly pluralistic legal system within South Africa¹²⁷ - a unique system in an effort to address problems from its apartheid past.

Relational Statement Four

Given the pluralistic legal system in South Africa, what is the place of the best interest standard within that system? The best interest standard is criticised as being a European, rather than African concept¹²⁸-grafted as it were into the South African Constitution,

¹²⁰ S Burman, 'The Best Interests of the South African Child' (2003) 17 *International Journal of Law, Policy and the Family* 28, 28.

¹²¹ Burman (n 120) 28.

¹²² Burman (n 120) 28; C Himonga, 'Implementing the Rights of the Child in the African Legal System: The *Mthembu* Journey in Search of Justice' (2002) 9 *The International Journal of Children's Rights* 89, 93-94.

¹²³ Burman (n 120) 30.

¹²⁴ Burman (n 120) 30.

¹²⁵ Burman (n 120) 30.

¹²⁶ Himonga (n 122) 94-97; Burman (n 120) 31.

¹²⁷ Burman (n 120) 31; Himonga (n 122) 95-97.

¹²⁸ Burman (n 120) 28-29, 38.

without regard for its potential conflict with customary law.¹²⁹ The possible conflict of the best interest standard with customary law is recognised¹³⁰ but how that conflict should be resolved remains an open question-especially given the standard's inclusion in the South African Constitution and the pride of place given in turn to that Constitution.

Relational Statement Five

South African discussion focuses on the subsidiarity of intercountry adoption as an important part of recognising the best interests of the child.¹³¹ The subsidiarity principle is as much a European construct as the best interest of the child principle.¹³² Yet the subsidiarity principle is seen as more in harmony with traditional or customary South African values, with its emphasis on the importance of the child's link to extended family and to community.¹³³ The subsidiarity principle thus might be seen as enhancing the protection of customary law and values in intercountry adoption in a way that the best interest standard does not.

Relational Statement Six

The traditional South Africa familial structure is changing in response to the AIDS/HIV epidemic.¹³⁴ The structure has long focused mainly on the role of extended family¹³⁵ in caring for children when the biological parents were not available, for various reasons, to parent the child.¹³⁶ Yet, use of non-related adults to care for children has also been part of the South African response to caring for children.¹³⁷ The evolution of the family

¹²⁹ Himonga (n 122) 93-94; Burman (n 120) 38; J Sloth-Neilson, 'Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child' (2002) 10 *The International Journal of Children's Rights* 137, 139.

¹³⁰ Burman (n 120) 28-29; 33, 37-38; Himonga (n 122) 94, 97.

¹³¹ Sloth-Neilson (n 129) 141-142, *Minister for Welfare and Population Development* (n 116), paragraphs 27, 32, footnote 33.

¹³² *Minister for Welfare and Population Development* (n 114) footnote 33, Sloth-Neilson (n 129) 141-142.

¹³³ *Minister for Welfare and Population Development* (n 114) paragraph 32, noting that 'The concerns that underline the principle of subsidiarity are met by the requirement in section 40 of the Act that courts are to take into consideration the religious and cultural background of the child...'; Burman, (n 120) 31-33; Himonga (n 124) 94.

¹³⁴ Madhavan (n 117) 1447-1450.

¹³⁵ Madhavan (n 117) 1449

¹³⁶ Townsend and Dawes (n 117) 823-824; Madhavan (n 117) 1443-144.

¹³⁷ Madhavan (n 117) 1449.

structure in South Africa is, as it has been in the past, in response to need¹³⁸ to address the needs of children whose parents cannot provide for them.¹³⁹ These non-related adult care takers become ‘selective kin’¹⁴⁰ a voluntarily formed kin relationship in order to provide care for the child.¹⁴¹

Discussion

South Africa is a country faced with the challenge of providing for children in need, while being short on vital resources, and facing a staggering number of children who need care due to the loss of their parents to HIV/AIDs. Extended family structures in South Africa struggle to cope with the numbers of these children, and alternative forms of care, through the use of non-blood related kin, are being seen. Though South Africa has only recently put the Hague Convention into force, it is not promoting intercountry adoption as a means for providing for these children. Is the lack of intercountry adoption from South Africa a product of the perceived type of children that would be available, the lack of heavy promotion by the government, or something else? South Africa has all of the ingredients that in the past have indicated a country that would heavily engage in intercountry adoption—a large population of children in need of alternative care and the lack of resources to do it. Does that recipe for intercountry adoption engagement on a significant level as a country of origin in fact require something more?

South Korea: Introductory Overview

As discussed below, South Korea is not a member of the Hague Convention and does not indicate any plans to become a member. It has one of the lowest child welfare expenditures as a percentage of its gross domestic product, as compared to other industrialised countries.¹⁴² South Korea has long-standing outflow of children through

¹³⁸ Madhavan (n 117) 1443; Townsend and Dawes (n 117) 823.

¹³⁹ Madhavan (n 117) 1444.

¹⁴⁰ Madhavan (n 117) 1450.

¹⁴¹ Madhavan (n 117) 1449-450.

¹⁴² ‘S. Korea Ranked Lowest in Child Welfare Spending’, 11 July 2007, The Hankyoreh, http://english.hani.co.kr/arti/english_edition/e_national/221703.html ,

intercountry adoption, although the reasons for sending children have changed over time. South Korea has made a transition from a country ravaged by invasion and war to a leading global economic power, but nevertheless, intercountry adoption from South Korea continues.¹⁴³

The adoption of children from South Korea following the end of the Korean War is said to be at the heart of the modern intercountry adoption movement.¹⁴⁴ These adoptions came to be heavily influenced by American Christian agencies.¹⁴⁵ These agencies were motivated by bringing South Korean children into Christian homes¹⁴⁶, and were defiant at the notion of being regulated¹⁴⁷—an attitude that has persisted to the present day amongst American adoption agencies.

Relational Statements

Relational Statement One

Intercountry adoption has been an ‘invisible’ event for a long period of time in South Korean society.¹⁴⁸ Children who were sent to other countries for adoption initially were

¹⁴³ See discussion below. For a detailed history of South Korean intercountry adoption, see R Sarri, Y Baik, and M Bombyk, ‘Goal Displacement and Dependency in South Korean-United States Adoption’ (1998) 20(1/2) *Children and Youth Services Review* 87. The authors note that prior to the advent of intercountry adoption after the Korean War, there were no legal mechanisms for adoption in South Korea, 91-92. The authors also discuss the lack of government services to single mothers, and for child welfare services generally, 99,101-102. The authors comment that ‘Because of the intercountry adoption outlet there was no pressure on the government to establish child welfare programs could remain with their parents and receive assistance. Moreover, there was little or no effort by the government or voluntary organizations to support parents of children at risk for relinquishment.’ 107.

¹⁴⁴ D S Kim, ‘A Country Divided: Contextualizing Adoption from a Korean Perspective’ in K Bergquist, M Vonk, D S Kim and M Feit (eds) *International Korean Adoption: A Fifty-Year History of Policy and Practice* (The Haworth Press, Inc, 2007) 3

¹⁴⁵ C Choy ‘Institutionalizing International Adoption: The Historical Origins of Korean Adoption in the United States in K Bergquist and others (eds) *International Korean Adoption: A Fifty Year History of Policy and Practice* (The Haworth Press, 2007) 29, 33, 37, 38-39.

¹⁴⁶ Choy (n 145) 33; K Bergquist ‘Once Upon a Time: A Critical Look at How Children’s Literature Contextualizes Adoption for Asian Adoptees’ in K Bergquist, M Vonk, D S Kim and M Feit (eds) *International Korean Adoption: A Fifty-Year History of Policy and Practice* (The Haworth Press, Inc, 2007), 3; R Hurdis, ‘Lifting the Shroud of Silence: A Korean Adoptee’s Search for Truth, Legitimacy and Justice’, K Bergquist, M Vonk, D S Kim and M Feit (eds) *International Korean Adoption: A Fifty-Year History of Policy and Practice* (The Haworth Press, Inc, 2007) 175-176.

¹⁴⁷ Choy (n 145) 31-37.

¹⁴⁸ T Hubinette, ‘Adopted Koreans and the Development of Identity in the ‘Third Space’ (2004) 28(1) *Adoption and Fostering* 16, 18; T Hubinette, ‘The Adopted Koreans of Sweden and the Korean Adoption Issue’ (2003) 6(1) *The Review of Korean Studies* 251, 251, 256.

children of mixed cultural heritage,¹⁴⁹ or children conceived by rape or through prostitution, both events resulting from the Korean War and its aftermath.¹⁵⁰ Later, children who were sent to other countries for adoption were linked to circumstances of poverty or the social stigma of illegitimacy—and the child seen as a source of shame.¹⁵¹ This was a literal erasure of these children from Korean society—intended to remove them as completely as if they had never existed within South Korea in the first place.¹⁵² The children did not fit into the image that post-war South Korea wanted for itself as a newly constituted nation state, trying to establish and maintain new relationships with other nation states.¹⁵³

Relational Statement Two

The shroud of secrecy that covered South Korean inter-country adoption within that country was lifted only through external events—through the unwanted (from the South Korean government’s point of view) publicity that it received when South Korea hosted the 1988 Olympics¹⁵⁴; and, more recently and more unrelentingly, through the high profile of adult adoptees from South Korea.¹⁵⁵ Now the South Korean government has tried to include the adult adoptees as part of a larger South Korean community—welcoming back the children that it sent away in the first place—in efforts to extend an image of a modern, global nation, which includes the adult adoptees in its global population.¹⁵⁶ The idea of South Korea has a modern, global nation is one that the government wants to promote through foreign and international relations.¹⁵⁷

¹⁴⁹ Hubinette 2003 (n 148) 255.

¹⁵⁰ Hubinette 2003 (n 148) 255; T Hubinette, ‘The Orphaned Nation: Korea Imagined as an Overseas Adopted Child in Clon’s *Abandoned Child* and Park Kwang-su’s *Berlin Report*’ (2005) 6(2) *Inter-Asia Cultural Studies* 227,229.

¹⁵¹ Hubinette2005 (n 150) 229-230.; H Kim, ‘Birth Mothers from South Korea Since the Korean War’ in K Bergquist, M Vonk, D S Kim and M Feit (eds) *International Korean Adoption: A Fifty-Year History of Policy and Practice* (The Haworth Press, Inc, 2007) 136-137.

¹⁵² H Kim (n 151) 136-137; D S Kim (n 144) 16; E Kim, ‘Wedding Citizenship and Culture: Korean Adoptees and the Global Family of Korea’, in TA Volkman (ed), *Cultures of Transnational Adoption* (Duke University Press, 66-67. E Kim maintains that this literal and figurative removal was and is integral to the South Korea’s post-war identity, 66-67.

¹⁵³ E Kim (n 152) 66-67.

¹⁵⁴ E Kim (n 152) 57; Hubinette 2004 (n 148) 18.

¹⁵⁵ E Kim (n 152) 58-62; Hubinette 2004 (n 148) 21-22.

¹⁵⁶ Hubinette 2003 (n 148) 258-259; H Kim (n 151) 139; E Kim (n 152) 51, 54-55.

¹⁵⁷ H Kim (n 152) 139; E Kim (n 152) 51, 62-64; Hubinette 2004 (n 148) 21.

Relational Statement Three

There is a strong metaphor used in South Korea's contemporary portrayal of intercountry adoption—that is the use of South Korea as 'motherland' to represent the 'mother' of the child that was sent to another country in intercountry adoption.¹⁵⁸ The emergence of this metaphor occurred as South Korea is trying to use intercountry adoption as a means of enhancing its image with other countries and internationally.¹⁵⁹ It is concerned with maintaining a reputation as a progressive, modern democracy, and does not want intercountry adoption to become a topic that tarnishes this.¹⁶⁰ By portraying itself as the metaphorical mother to the adoptees, it tries to create a positive and global image on intercountry adoption, but at the same time, casts a veneer of falsehood across the issue—by not also acknowledging the circumstances under which these children came to be sent away.¹⁶¹

Relational Statement Four

South Korea's involvement in intercountry adoption is complex. Its motivations however, have all been outwardly, rather than inwardly, focused. South Korea initially engaged in intercountry adoption in part as a means to literally remove from the country children who were seen as a stain upon national honour, and allow it to reshape and reform itself in the wake of long years of internal war and invasion.¹⁶² Intercountry adoption also features in its relationship with the United States—a country with whom it has a very intertwined connection.¹⁶³ It arguably keeps intercountry adoption going at some level as a means to satiate the demands that would otherwise arise from the United

¹⁵⁸ E Kim (n 152) 62-65; Hubinette 2005 (n 150) 234-235; H Kim (n 152) 143-145.

¹⁵⁹ Hubinette 2005 (n 150), 234-235; E Kim (n 152) 63-64; Hubinette 2003 (n 148) 258-259. An article by S Mills, 'Mothers in the Corridors of the South African Legal System: An Assessment of the Johannesburg Family Court Pilot Project' (2003) 4(1) JENDA 1, observes that 'In emerging nations and nationalisms, motherhood has historically operated as a strong symbol anchoring the 'nationalist imagery.', 1. From this point of view, the consistent use of the motherhood metaphor suggests South Korea is continuing to develop its national image and self-identity, and sees itself as continuing to be a developing nation, rather than fully developed. That self-image, as not fully on par with developed nations, can explain in part the appeasement stance it is perceived to take to other nations, see discussion below in n 164.

¹⁶⁰ E Kim (n 152), 62-63; D S Kim (n 144) 17-18; Hubinette 2004 (n 150) 20.

¹⁶¹ E Kim (n 152), 53, 66-67; H Kim (n 152) 132, 143-144.

¹⁶² See South Korea Relational Statement One.

¹⁶³ D S Kim (n 144) 6-7,10-11; Choy (n 145) 25-40; T Hubinette 2005 (n 150) 228-229; Hubinette 2004 (n 148) 18-19. Hubinette observes that 'Reflecting the policies of the Korean government and adoption agencies, those countries which sided with the South in the war and continued to be important allies have taken the greatest numbers: the USA, Norway and Sweden, from the 1950's, Denmark, Canada, France, Australia, Belgium, and the Netherlands from the 1960's.' 18-19.

States that it do so.¹⁶⁴ South Korean sending of children continues even though South Korea is now an industrialised country with a strong economy.¹⁶⁵ It comes under little international pressure to sign the Hague Convention, because it is said international adoption from South Korea functions well enough without it.¹⁶⁶ South Korea continues to use intercountry adoption to its perceived national benefit as a tool to manage its public image and its foreign relations.¹⁶⁷

Relational Statement Five

The emergence of the highly visible and vocal adult adoptees from South Korea has occurred in part due to the ability for rapid exchanges of information over the internet—the ability to form virtual communities online.¹⁶⁸ The adult adoptees are able to express their own opinions regarding intercountry adoption¹⁶⁹—and in so doing, challenge the invisibility and repression that has been the watchword for intercountry adoption operation in South Korea.¹⁷⁰ Now the South Korean government has tried to find a way to fit the adult adoptees and their points of view into its current government agenda of globalization.¹⁷¹ Even so, little has been done to stop or reduce intercountry adoptions.¹⁷² The South Korean government has to strike an uneasy balance between a global image as a modern, global nation and its relationship with the United States.¹⁷³

Discussion

Intercountry adoption in South Korea is strongly coupled with its external relationships with other countries. Arising from the aftermath of the Korean War, and continuing into the present day, intercountry adoption has been and continues to be linked with South

¹⁶⁴ Hubinette 2004 (n 148) 18-19; D S Kim (n 144) 10-11;14; see also Hubinette 2003 (n 150) 262-263, commenting that ‘Korea’s use of adopted Koreans as a way of creating a physical bond with Western allies like Sweden can also be seen as a cynical political strategy that has parallels in the country’s history. With a background of Confucian thinking such as *sadaejjuui*, or serving the great, to give away human beings as a way of appeasing a dominating power could well be said to be a Korean tradition...’

¹⁶⁵ D S Kim (n 146) 15-16.

¹⁶⁶ J Trenka, ‘Fools Gold: International Adoption from South Korea’, Le Fromage Electrique, at <http://jittrenka.wordpress.com>. ; same content now at ‘My Adoption File’, <http://jittrenka.wordpress.com/about/adoption-file/> (as viewed 8 October 2009)

¹⁶⁷ See South Korea Relational Statements One and Two; see also Hubinette 2003 (n 148) 260.

¹⁶⁸ Hubinette 2004 (n 148) 21-22; E Kim (n 154) 59-60.

¹⁶⁹ J Trenka (n 168); Hubinette 2004 (n 150) 22.

¹⁷⁰ See discussion in section above on invisibility in South Korea Relational Statement One.

¹⁷¹ See discussion South Korea Relational Statement Two and Five.

¹⁷² D S Kim (n 146) 15-19.

¹⁷³ See discussion in South Korea Relational Statement Four.

Korea's relationships with other countries. South Korea, however, has undergone a considerable transformation in that time period, moving from an impoverished and debilitated nation to an industrialised, modernised one with a strongly performing economy. Yet, intercountry adoption, despite these changes in South Korea, and changes in intercountry adoption itself with the rising visibility and voice of adults that were adopted from South Korea, remains in place, having adapted and been adapted as part of the South Korean image and mission. Considerations of the best interest of the child do not take an active place in shaping intercountry adoption operation's response to events, or the response of events to intercountry adoption.

Sweden: Introductory Overview

Sweden identifies itself as a receiving country.¹⁷⁴ The Hague Convention took effect in Sweden in 1997.¹⁷⁵ Sweden describes a high level of social services that are available to family and children, including day care, health care for children, substance abuse treatment and assistance with finances.¹⁷⁶ Sweden also has very limited domestic adoption, with about 20 newborn adoptions annually.¹⁷⁷ It is necessary to get parental permission for the adoption of a child.¹⁷⁸ Sweden is also concerned, with regard to the operation of the Hague Convention in the formulation of its domestic legislation with 'high ethical standards, transparency of costs for the adoption work as well as the child's rights perspective.'¹⁷⁹ Sweden's focus on ethics in adoption is discussed below.

Hubinette argues that the Swedish view on intercountry adoption is marked by two features: Sweden's 'colour-blind approach',¹⁸⁰ to issues of race, and secondly, the important links between intercountry adoption and Sweden's desired national image as

¹⁷⁴ Sweden's Responses, 2005 Questionnaire, Question 1, http://www.hcch.net/upload/adop2005_se.pdf

¹⁷⁵ Status Table, Hague Convention on Intercountry Adoption, http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

¹⁷⁶ Sweden's Response (n 174) Question 4.

¹⁷⁷ Sweden's Response (n 174) Question 4.

¹⁷⁸ Sweden's Response (n 174) Question 4.

¹⁷⁹ Sweden's Response (n 174) Question 1.

¹⁸⁰ T Hubinette, 'Contested Adoption Narratives in a Swedish Setting' (2006) 2nd International Conference on Adoption Research, University of East Anglia, Norwich, U.K., *9, at <http://www.uea.ac.uk/swk/icar2/pdfs/Tobias%20Hubinette.pdf>.

a progressive democracy that is influential in setting the high water mark on difficult social issues.¹⁸¹ An approach to issues of race that is colour-blind simply means negating, or at least minimising, the existence and ramifications of racial differences in a society.¹⁸² This is a choice, Hubinette argues, that is available to Swedish white adoptive parents, but not to their non-white adopted children.¹⁸³ Intercountry adoption's association with Sweden's national image means that it is linked wider national agendas of practices and attitudes on social issues that aim to put Sweden in the best possible light.¹⁸⁴

Relational Statements

Relational Statement One

Sweden's interpretation of the best interest of the child standard in national laws and policies and in relationships with other countries is consistent with national values of democracy, equality and fairness.¹⁸⁵ The result is highly formal, strong, visible statements on the best interest of the child in inter-country adoption that are consistent with Sweden's national values and identity.

Relational Statement Two

Formal relationships between Sweden and other countries that engage in intercountry adoption, whether as sending or receiving countries, have become part of Sweden's international relationship agenda because of Sweden's highly visible and unambiguous positions on intercountry adoption operation.¹⁸⁶ Sweden has a self-identified role on the need to promote ethical intercountry adoption¹⁸⁷ consistent with its view that

¹⁸¹ Hubinette 2006 (n 180) *1, *2, *7, *9.

¹⁸² Hubinette 2006 (n 180) *6-*8.

¹⁸³ Hubinette 2006 (n 180) *6-*8, *9.

¹⁸⁴ Hubinette 2006 (n 180) *1, *2,*3.

¹⁸⁵ Adoption in Sweden: Policy and Procedures Concerning Intercountry Adoption', MIA, Swedish Intercountry Adoptions Authority, 2005, 5,9; 'Adoption—but at What Price?', 10,11-14, 16-17; Hubinette 2003 (n 148) 254, citing '...Sweden's self image as the world's most democratic country and a paradise for human rights, equality and social justice...'

¹⁸⁶ Adoption—but at What Price (n 185) 16-17; Adoption in Sweden (n 185) 5-6.

¹⁸⁷ F Lindblad, A Hjern and B Vinnerljung, 'Intercountry Adopted Children as Young Adults—A Swedish Cohort Study' (2003) 73(2) American Journal of Orthopsychiatry 190,200—remarking that the

intercountry adoption does not present a long-term solution for children in need,¹⁸⁸ the promotion of the subsidiarity of intercountry adoption as being in the best interest of the child,¹⁸⁹ and the need to actively work with sending countries to create intercountry adoption alternatives so that countries are adequately able to provide for their own children.¹⁹⁰

Relational Statement Three

Intercountry adoption in Sweden occurs within the context of Sweden's international position.¹⁹¹ Sweden has a strong domestic economy¹⁹², a strong sense of what comprises Swedish values and ethics,¹⁹³ with these strongly infused into its formal policies on intercountry adoption.¹⁹⁴ Resultantly, Sweden has strong formal policy statements on intercountry adoption that are reflective of Sweden's self-identified values and ethics, and thus, its national identity.

Discussion

Sweden is actively engaged in intercountry adoption. It is reported to have one of the highest per capita rates of intercountry adoption.¹⁹⁵ Nevertheless, Sweden is not promoting the continued growth of intercountry adoption and has not used its status as a stable democracy with a strong economy to leverage children from other countries to be adopted into Sweden. Rather, it has taken a long view of intercountry adoption, pronouncing it a stop-gap solution only, and promotes the development of child welfare systems in sending countries, and strongly ties the best interest of the child standard to that of the subsidiarity of intercountry adoption. Notably, its Central Authority has been

outcomes of a study on intercountry adoptees to Sweden do not rule it out from a 'national socioethical perspective'; Adoption—but at What Price (n 185) 11-12,16-17.

¹⁸⁸ Adoption—but at What Price (n 185) 12.

¹⁸⁹ Adoption—but at What Price (n 185) ,11-12; 16; Adoption in Sweden, (n 185) 5 ,9;

¹⁹⁰ Adoption in Sweden (n 185) 5, 9; Adoption—but at What Price (n 185) 11-12; Hubinette 2003 (n 148) 258, commenting, that 'Sweden is the eternal role model when mourning the fact that Korea is the O.E.C. D. country spending the least on social welfare, and the Korean media is painfully aware of the fact that a negative image of Korea in Scandinavia has been influenced by the heavy adoption statistics.'

¹⁹¹ Adoption-but at What Price (n 185) 11-12;

¹⁹² Hubinette 2003 (n 148) 252-254.

¹⁹³ B Yngvesson, 'Placing the "Gift Child" in Transnational Adoption' (2002) 36 Law and Society Review 227,233, explaining the original Swedish motivation to engage in intercountry adoption 'as a *responsibility* for socially conscious citizens', emphasis in the original; Hubinette 2003 (n 150) 254; 257; Adoption—but at What Price (n 185) 11-12, 20.

¹⁹⁴ Adoption-but at What Price (n 185) 10-12, 16-17; Adoption in Sweden (n 187) 5.

¹⁹⁵ Hubinette 2006 (n 180)*2.

engaged in active policy discussions on the long-term future of intercountry adoption, its relationship to the best interest of the child, and in conducting studies that the negative consequences that intercountry adoption can have for those who were adopted. Rather than engaging in stories of rescue, Sweden puts an unemotional face on the realities of intercountry adoption. It has assessed the long-term consequences of intercountry adoption and determined that it should take a role in promoting other solutions for children in need. Sweden can be said to have an adoption policy that promotes the best interest of the child in a manner much different from the other countries examined.

United States: Introductory Overview

The United States identifies itself as ‘both a receiving State and a State of origin for intercountry adoption, although it is primarily a receiving State.’¹⁹⁶ The US is generally known for its role in receiving large numbers of children in intercountry adoption, with relatively little attention paid to its dual role as a sending country. Once the Convention is in force in the United States, however, statistics will be kept on children sent for intercountry adoption from the United States, as required by the Convention and domestic implementing legislation.¹⁹⁷ It also has a multi-layered system for social service provision ‘at the Federal, State and local level’.¹⁹⁸ Its social service system for children in care is criticised in a recent audit by the American Government Accounting Office as having policies and practices that contribute to the significant over-representation of children of colour in its child welfare system.¹⁹⁹

¹⁹⁶ United States of America, Response to 2005 Questionnaire, Question 1, http://www.hcch.net/upload/adop2005_us.pdf

¹⁹⁷ United States Response (n 196) 1(a) and 1(b).

¹⁹⁸ United States Response (n 196) 4(a).

¹⁹⁹ ‘African American Children in Foster Care’, United States Government Accountability Office, July 2007, <http://www.gao.gov/new.items/d07816.pdf>. Other scholars note the way in which the US child welfare system reinforces notions of racial prejudice against African Americans, and contributes to the over-representation of children of colour in the US child welfare system—see D Roberts, *Adoption Myths and Racial Realities in the United States* in J Trenka, J Oparah and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (South End Press, Cambridge, Massachusetts 2006).

The United States has only recently put the Hague Convention into force, with the Convention coming into force April 2008.²⁰⁰

Relational Statements

Relational Statement One

The United States' asserts its view that the best interest of the child is served through adoption to the United States, with little or no exploration of other alternatives for the child. This view is asserted in its foreign policy,²⁰¹ with the resulting outcome that it features as a foreign relations issue with those countries from whom the United States wants to be able to adopt children.²⁰²

Relational Statement Two

The history of the United States' relationship with a particular country, as well as the status of its current relationships, correlate strongly with whether that country sends children in intercountry adoption to the United States.²⁰³ This correlation does not account for all of the countries from which the United States receives children, but is strongly suggestive of whether a particular country is likely to send children to the

²⁰⁰ 'Overview', Intercountry Adoption, Office of Children's Issues, United States Department of State, <http://adoption.state.gov/hague/overview.html>

²⁰¹ M Harty, 'Remarks before the Commission on Security and Cooperation in Europe', 14 September 2004, Washington D.C., at www.state.gov/r/pa/ei/otherstmy/54301.htm

²⁰² L Briggs, 'Making "American Families": Transnational Adoptions and U.S. Latin American Policy in A L Stoler (ed) *Haunted by Empire: Geographies of Intimacy in North American History* (Duke University Press, 2006) 351,361-364; Harty (n 201).

²⁰³ Noonan (n 51) Adoption and the Guatemalan Journey to American Parenthood' (2007) 14 *Childhood* 301, 302-304, giving the example of Guatemala/United States relationships; Gresham, Nackerud and Risler (n 46) 3, noting that 'The history of intercountry adoption can be traced alongside political and social instability in sending countries... the increase in intercountry adoption from Latin America began in significant numbers in the 1980's', 3. See discussion above in South Korea section on relationship between the United States and South Korea.; M Engel, N Phillips, and F Dellacava, 'International Adoption: A Sociological Account of the US Experience' (2007) 27(5/6) *International Journal of Sociology and Social Policy* 257,260-263. Although not part of the material consulted for axial coding, see also T Hubinette, 'From Orphan Trains to Babylifts: Colonial Trafficking, Empire Building and Social Engineering' in J Trenka, J Oparah, and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (Southend Press, 2006) 145, who comments, 'American invasions in countries such as Vietnam and Thailand resulted in international adoption from those countries. Thus, it is no coincidence that the countries supplying the most children for international adoption to the West, and primarily to the United States, almost all fall under the American sphere of influence and have been exposed to American military intervention, presence, or occupation, even if civil wars, ethnic cleansing of minorities, and corrupt dictatorships must be added to explain why these supplying countries became involved with the practice in the first place.'

United States in intercountry adoption. Histories of US military intervention or same-sided Cold War relationships suggest a strong likelihood of intercountry adoption.²⁰⁴

This correlation does not bear out in the adoption of Chinese children by the United States; (as there is no recent history of US military intervention in China, and there were no same-sided Cold War relationships between the two nations) which in turn suggests some other considerations at play in the relationships between China and the United States in the structuring of intercountry adoption operations.²⁰⁵

Relational Statement Three

By putting its position on intercountry adoption into strong policy statements, the United States' government perception on how intercountry adoption should operate is forcefully stated.²⁰⁶ These policy statements reflect the American position that intercountry adoption to the United States is generally in the best interest of children, that the US is a superior place for children to live, and that the best interest of the child is not served by the principle of subsidiarity—as that might act to impede adoption by Americans.²⁰⁷ These policy statements on intercountry adoption function as US foreign policy assertions of American authority and are a key feature in its foreign relations statements.²⁰⁸

Relational Statement Four

The US has assigned to itself the role of freely commenting upon and trying to influence and shape the intercountry adoption policy and practices of other countries, acts that are

²⁰⁴ Engel, Phillips and Dellacava (n 203) 260-263. Reference is made to the 'political upheaval in Latin America' as contributing to the numbers of children who were adopted through intercountry adoption. The article goes on to note that 'of the countries from that region [Central and South America], only Guatemala has continued to allow a significant number of children to be adopted by families in the United States.' 260. See also comments by Briggs (n 208) on the status of the Hague Convention on Intercountry Adoption in both Guatemala and the United States: 'That neither nation can readily agree to these terms [of the Hague Convention on Intercountry Adoption] speaks volumes about the nature of the adoption traffic between them and suggests that considerable enforcement measures are needed to ensure an end to illegal and abusive transnational adoption practices, even if laws are changes to ensure conformity with treaty terms.' , 361. Although not part of the material consulted for axial coding, see also Hubinette (n 203) 145.

²⁰⁵ A Andrew, 'China's Abandoned Children and Transnational Adoption: Issues and Problems for U.S.-China Relations, Adoption Agencies and Adoptive Parents' (2007) 19(1) *Journal of Women's History* 123, 129.

²⁰⁶ Harty (n 201) E Barholet, 'International Adoption: Thoughts on the Human Rights Issues' (2007) 13 *Buffalo Human Rights Law Review* 151, 162.

²⁰⁷ Harty (n 201); Briggs (n 202) 350-351, 361.

²⁰⁸ Harty (n 201).

aimed to ensure a liberal supply of children available to US prospective adopters.²⁰⁹

Thus, resultantly, the United States views on how intercountry adoption should operate in other countries are strongly imbedded in foreign relations issues that include national interest, international prestige and power.²¹⁰

Discussion

The United States promotes intercountry adoption through its foreign relations, and rather candidly admits into putting pressure on countries of origin to permit American adoption from those countries. The best interest of the child is seen as being served by adoption into the United States. The US sees the subsidiarity of intercountry adoption as in conflict with its interpretation of the best interest of the child standard, serving to inhibit the free flow of children into the United States via intercountry adoption. The US promotes a system of intercountry adoption that sees adoption into the US as a first and preferred choice for children. Its stance can be contrasted with that of Sweden, which has equally strong policy statements on the operation of intercountry adoption, but links the best interest of the child with subsidiarity of intercountry adoption, and sees its ethical mission as promoting and aiding in the development of alternatives to intercountry adoption.

Emergent Categories from Relational Statements

This section of the chapter discusses the emergent themes from the relational statements of the seven states. A multiplicity of thematical categories arise from the collective relational statements of the seven states. In keeping with the grounded theory

²⁰⁹ Harty (n 201) ‘Second, as a foreign policy matter, we encourage other nations to become parties to the Hague Convention.’ And ‘The Department of State worked aggressively with the Government of Romania to address these serious issues and develop a transparent adoption system. Our objectives have been to restore transparency, improve the Romanian child welfare system so that it meets international standards and lift the intercountry adoption moratorium as early as possible... The Department of State has repeatedly sought commitments from both the current and former Romanian governments that they would process pending [intercountry adoption] cases to conclusion. The U.S. Government has held conversations with Romanian officials at all levels, including a March 2005 meeting between President Bush and President Basescu. Secretary of State Rice discussed this matter with the Romanian Foreign Minister in May 2005. Past US Ambassadors to Romania and other U.S. Embassy officials in Bucharest have impressed upon the Government of Romania the importance we attach to processing the pending cases to conclusion in a legal, transparent and expeditious manner.’

²¹⁰ See United States Relational Statement Three.

methodology set forth, this level of abstraction and analysis next leads to the development of a theory. It is helpful to recall here within grounded theory the concept of a theory as ‘a set of well-developed concepts related through statements of relationship, which together constitute an integrated framework that can be used to explain or predict phenomena’.²¹¹ Thus, from the relational statement categories a theory is developed that answers the question what influences or motivates states to become involved in intercountry adoption. That theory is presented in the chapter that follows this one. That theory was developed from the emergent categories in the relational statements, which then serves the purpose of explaining the process by which sending and receiving states become engaged in intercountry adoption.

These themes provide new insight into intercountry adoption operations and how states are motivated to become involved in intercountry adoption. This section outlines with a brief discussion on their potential implications. Of course while a theme has different detail and contextual content dependent upon the state from which it is derived.

One theme to strongly emerge from the relational statements is that of intercountry adoption related to a state’s internal and external relations. Within this can be included three concepts. Firstly, the different systems set up within a state to deal with intercountry adoption processes, including laws and legal system requirements for intercountry adoption to be completed. Secondly, also includes how intercountry adoption occurs within the state, whether highly visible, or nearly hidden from public gaze. Another concept within this is the symbolism that is attached to intercountry adoption—what meaning is it given? What does it mean to the state? A third concept is the domestic situation of the state—the populations that are marginalised or idealised within the state.

Connected to the idea of intercountry adoption as related to a state’s internal and external relationships is that of the state’s identity. A state’s identity may be connected to the relationships that it forms with other states and how it structures internal responses to intercountry adoption, as discussed in the first theme.

²¹¹ A Strauss and J Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd edn Sage Publications, 1998) 15.

A third theme that emerges is depictions of the best interests standard and the interpretations given to it. Again, it is possible that this theme relates to the other two—the state’s internal and external relations and its identity.

These possible links are more fully set forth in the theory set forth in the next chapter. The discussion here explores these themes in more detail, setting forth some considerations in theory building about these.

Internal and External Relations

Can external relations that a state has with another state influence intercountry adoption behaviour? There have been some questions raised about this, and given the emergence of this theme from the relational statements and its link, as well to a state’s identity; this is worth some further discussion.

Selman has raised the very important question of why certain countries form intercountry adoption relationship with each other, but not with other countries.²¹² He remarks that:

China and Russia continued to be the largest source of children worldwide in 2004 and 2005, but in 2005 Haiti and Vietnam had become the main source for France, and Ethiopia had become more important in the three largest receiving countries. The difference between the three countries suggest that more attention could be paid to the flow between individual countries to explore why the US now accounts for 95 % of adoptions from Guatemala but takes no children from Madagascar. Adoptions to France are particularly high in Vietnam, Haiti and the francophone countries in Africa.²¹³

A similar observation is offered by Hubinette, who notes that the countries whom adopted children from South Korea following the end of the Korean War, where

²¹² Selman 2006 (n 49) 191-192.

²¹³ Selman 2006 (n 49) 191-192.

countries that supported and fought on behalf of South Korea during the war were those who adopted large numbers of children from South Korea.²¹⁴

A look at a demographic table compiled by Selman is also very revealing as to the distinct pattern that the flows of children from one country to another have. Table 7 shows the ten countries of origin that send the most children to the United States, France and Spain during the years of 2004 and 2005.²¹⁵

The numbers are telling of specific channels of flow between countries. For instance, Spain receives children from Colombia, Peru and Bolivia, but of these three, only Colombia was also a top ten sending country to France and the United States.²¹⁶ Haiti and Vietnam sent children to France but not Spain—and Haiti featured as a top ten country of origin for both France and the United States.²¹⁷ Russia and China were among the top ten countries of origin for all three receiving countries, with Brazil a top ten country only for France.²¹⁸ What accounts for these patterns—in some instances a country of origin appearing to send children to only a specific country, while other countries of origin appear to have a literally more global appeal?

Power Relationships and the Exchange of Children in Intercountry Adoption

External relationships do play a part in which countries send and receive children from each other. A review of South Korea and Guatemala show that ties to the United States very much factor into their sending of children to that country. The United States has been the dominating partner in those relationships. But that is not to suggest that all sending countries send children to countries who dominate them in foreign relations. China is very much the exception to those—although China has engaged actively in intercountry adoption, it has tended to do so on its own terms and is a top sending country to the United States, France, and Spain²¹⁹, suggesting a different pattern to its relationships with the country to which it sends children in intercountry adoption. China, as discussed, has a desire to establish itself on equal footing with other nation

²¹⁴ Hubinette 2004 (n 148) 18-19.

²¹⁵ Selman 2006 (n 49) Table 6, 192.

²¹⁶ Selman 2006 (n 49) Table 6, 192.

²¹⁷ Selman 2006 (n 49) Table 6, 192.

²¹⁸ Selman 2006 (n 49) Table 6, 192.

²¹⁹ Selman 2006 (n 49) Table 7,193.

states and uses intercountry adoption as a means to do this. It does not use intercountry adoption as a means to placate other countries with whom it has established relations—intercountry adoption is seen as an exchange among equals from the Chinese point of view—a perhaps rare flexing of international relations muscle from a sending country when China announced its new restrictions on intercountry adoption.

Not all sending countries see intercountry adoption as a one-sided power relationship with the receiving state or states. But what is pointed out nevertheless across these sending countries is the role that their desired relations with other countries play in how and whether they conduct intercountry adoption operations. Noonan identifies a viewpoint that she calls the ‘anti-conquest narrative’²²⁰ in describing the American attitude towards intercountry adoption, and in shaping their view of the child’s country of origin.²²¹ Noonan notes that

this narrative is manifested in the following way: adoptive parents often praise Guatemalan people and culture, but they also note the pervasiveness of poverty and hunger, or what they perceive as the relative unimportance of the country.²²²

The anti-conquest narrative allows the adoptive parent to cast themselves in a role of saving the child from its unhealthy country of origin, a country that the adoptive parent professes to respect, but which nevertheless is seen as an inferior place for children to be raised.²²³ This is done in such a way that the American adopter claims to be free of racism yet at the same time can legitimise American superiority.²²⁴ Thus, the American view of intercountry adoption is one where the adopter sees themselves in a benign, even benevolent role, in bringing a child to an inherently superior place for their upbringing—yet is still able to manage to cast their view of the child’s country of origin without implicating any thoughts of racism or privilege on their own behalf.

²²⁰ Noonan (n 51) 308.

²²¹ Noonan (n 51) 307-310. See discussion in Chapter One on rescue narratives in intercountry adoption.

²²² Noonan (n 51) 308.

²²³ Noonan (n 51) 308-310.

²²⁴ Noonan (n 51) 308-310.

The view that Briggs and Ortiz²²⁵ offer of American motivations to adopt children from other countries echoes the anti-conquest narrative suggested by Noonan. Briggs and Ortiz remark that children from third world countries are seen as ‘malleable innocents’²²⁶ who are worthy of rescue by American adopters—in a way that the children in US foster care, also available for adoption, are not.²²⁷ Additionally, Briggs and Ortiz identify global power politics at work in American adoption of children from areas were formerly part of the Soviet Union constellation: ‘in the case of children from the former Soviet bloc, the narrative of rescue adds an appealing layer of heroism: not only are these children innocent of the political choices of the former leaders of their nation, but their successful upbringing also confirms the US victory in the Cold War.’²²⁸

State’s Identity

A repeating theme in the relational statements is that of a state’s identity or image. China is concerned about establishing and maintaining a position of parity with other states. It runs its intercountry adoption process in a way where China presents itself as an equal ‘trading partner’ with other states, much in the way it conducts its foreign economic policies. Guatemala’s stratified society, and the exclusion of Indigenous Mayan people is reflected in the sending of children in intercountry adoption and through a process noted for its corruption. Its intercountry adoption process mirrors the social make up of the state, and the perceived undesirability of the Mayans within that state. India’s desired image and identity is described as being unsettled, in a state of flux. Likewise, this is mirrored in how it has not reached a final view on the benefits or not of sending children in intercountry adoption. Intercountry adoption in South Africa occurs alongside a backdrop of a new national image developed after apartheid. South Africa desires to be seen as a nation that is inclusive of all its inhabitants, and this may be an inhibiting factor in whether it sends children in intercountry adoption.

²²⁵ A Ortiz and L Briggs, ‘The Culture of Poverty, Crack Babies and Welfare Cheats’ (2003) 21(3) *Social Text* 39.

²²⁶ Ortiz and Briggs (n 225) 42.

²²⁷ Ortiz and Briggs (n 225) 41-42.

²²⁸ Ortiz and Briggs (n 225) 42.

Intercountry adoption has been a sensitive issue with South Korea and the image that it wishes to project of itself to other states. It has tried to keep its position on intercountry adoption in line with the image it wishes to project, which has included responding to the growing voices of adult adoptees that were sent from South Korea for adoption. Again, Sweden has a particular image it wishes to project, and its stance on intercountry adoption is in line with this. And as discussed above, the image that the United States wishes to project is used as a justification for its stance on intercountry adoption.

Best Interests Standard

It is clear from the relational statements that where the best interests standard is considered, much of what is considered to be best for a child in intercountry adoption is shaped by the internal context of the state, and can be responsive to particular situations—and can also be seen as congruent with the identity that a state is trying to project to other states. Even if the best interests standard does not garner specific mention within a relational statement, it can be inferred to exist within a state's policies on intercountry adoption. Where it is specifically a part of a relational statement, it is interesting to observe how its interpretation lines up with the desired state identity or image.

In South Africa, for instance, discomfort with the standard is expressed, and there is a debate on where it fits in the South African legal system and the South African constitution. The standard is seen as being imported from Europe, rather than being something that is a part of South African customary law. When this dilemma is cast alongside the South African desire for an image of an inclusive nation in the aftermath of apartheid, where the indigenous inhabitants of the country were excluded as full members, it is easy to see that there is a desire to make the interpretations of the best interests standard as something that is compatible with the national image of South Africa. South Africa seeks to make a place for customary law within its legal system, and as part of its larger national identity—and the best interest standard must be interpreted in a way that is congruent with customary law and the rainbow nation image—it must not be seen as strictly a Western standard. This includes stressing the importance of the subsidiarity principle in the application of the best interests standard in intercountry adoption. The subsidiarity principle helps bring the best interests

standard out of conflict with customary law—and if followed in practice, would make intercountry adoption a low priority as a solution for a child in need. In this, South Africa’s interpretation is very close to that presented by the Hague Conference in the Hague Convention and the enhanced interpretation given in the Guide to Good Practice.

Sweden, as a receiving state, offers its own interpretation of the best interests statement, saying that the standard must reflect democracy, equality and fairness. It calls for ethical intercountry adoption and in this, says that intercountry adoption should not be regarded as anything but a stop-gap measure, and stresses the need to develop alternatives so that sending states can formulate domestic options for children. It again strongly stresses the importance of the subsidiarity principle in connection with the best interests standard, but for reasons entirely differently than South Africa.

South Africa and Sweden may in fact in a final strictly black letter law analysis have the same interpretation of the best interests standard, including strongly linking with subsidiarity and in the need to include domestic solutions for children alongside intercountry adoption. But the hows and whys for such an interpretation differ very strongly.

The United States does not stress the subsidiarity principle. In fact, it strongly promotes the use of intercountry adoption as a priority solution for children, that in particular it is in the best interests of children to be adopted to the United States. Its position on intercountry adoption stresses the benefit of being adopted into the United States, rather than the overall benefits of intercountry adoption.

Chapter Five – Motivations for State Engagement in Intercountry Adoption: A Constructivist Theory

Introduction

This chapter presents a theory on the motivation of states to become involved in intercountry adoption. This theory is derived from the relational statements which were presented in Chapter Four. Several emerging themes from the relational statements were discussed at the end of Chapter Four. These were: the relationship of intercountry adoption to external and internal relations within the state; state identity, and the best interests standard. The task now through grounded theory methodology is to develop a theory that accounts for the processes and dynamics of state motivation to become involved in intercountry adoption. The process of this theory development is described in Chapter Two. This chapter presents the theory on state motivation. Figure 5.1 represents this theory and will be fully discussed in this chapter. A perusal of Figure 5.1 shows that there are several intricately related concepts that are part of the process.

In coming up with a theory that would satisfactorily account for the abstractions raised in the relational statements, it became apparent that there was much depth to plumb within each of the phases of the emerging theory. A simple descriptive explanation of categories was too simplistic to capture the rich dimensions of what were emerging in the theory. At this point, it became necessary in the thesis research to delve into further research. This was to inform and account for the various elements in the emerging theory—and it soon became apparent that the categories in the emerging theory were themselves the tip of the iceberg of other theoretical concepts, drawn from a variety of academic fields. This departure into other fields in order to fully develop and account for the meaning of categories within the emerging theory was wholly unanticipated as part of the thesis research.

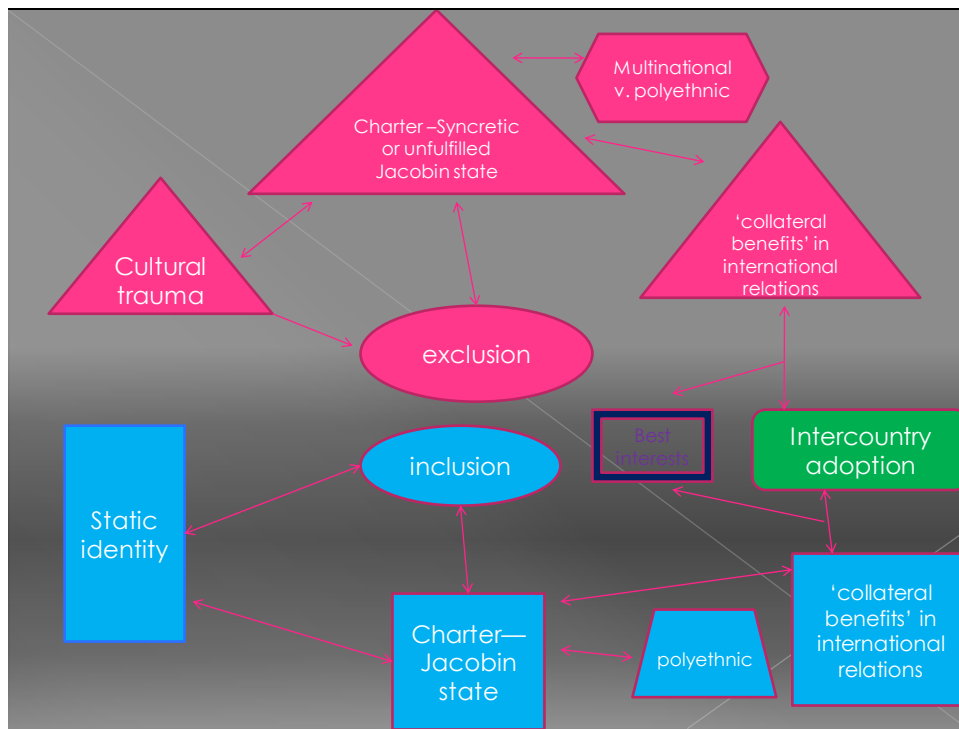
Issues of cultural trauma, exclusion, national identity, national identity development, the place of ethnic population within national identity development, state's interests in their

relationship with other states, are all fields with their own theoretical bases and debates. Preliminary discussion was given in the literature review to these. This chapter returns to these as part of the presentation of the theory on state motivation to engage in intercountry adoption.

This chapter initially provides a discussion of the categories in the state motivation theory, before turning to a discussion of the workings of theory itself. The theory is then discussed, with observations and conclusions on the workings of intercountry adoption drawn from the information on these categories. This provides for a much richer theory, anchoring it within the literature of the multiple dynamics of categories contained within the theory.

In the research process of the thesis, this is where the importance of research paradigm became acutely apparent. The amount of information to be amassed and taken on board to make sense of the categories, to be able to adequately anchor the state motivation theory felt overwhelming. This is where a return to the principles of the development of the research was critical and provided the proverbial light in the wilderness, perhaps calling to mind the words of British psychologist Havelock Ellis, that ‘The Promised Land always lies on the other side of a Wilderness.’¹ The Promised Land of a complete theory lay on the other side of the wilderness of complex concepts. To reach that, it was important to take note of the constructivist paradigm of the research and recall the aims of the research. With this firmly in mind, it was much easier to traverse the wilderness of these concepts. For within each of these fields and concepts were constructivist accounts and theories that informed the categories and the process of intercountry adoption engagement. The journey over the wilderness became a voyage of new discovery, as said, wholly unanticipated, but all the more delightful for that. And in the end, the theory on state motivation is richly underpinned by a wide array of constructivist theory in a variety of academic disciplines. The end result is a theory that ranges over multiple disciplines, bringing them together into a theory that explains the interactional and dynamic process by which states become engaged in intercountry country adoption—and why.

¹ Havelock Ellis Quotes,
http://thinkexist.com/quotation/the_promised_land_always_lies_on_the_other_side/10984.html



5.1 –State Motivation Theory

Explanation of Key Theory Concepts

This section provides an overview of the constituent concepts that make up the theory on intercountry adoption. Firstly, it discusses the common elements of the process of intercountry adoption engagement for both sending and receiving states. Then it looks at the process by which a state becomes a sending or a receiving state in intercountry adoption. It also explains the paradoxical situation of the United States which is simultaneously a sending and a receiving state. Working from the categories that emerged as part of the relational statements, this section now looks at how these further developed into a theory to account for state motivation to engage in intercountry adoption.

Relationship between sending and receiving states

One overriding component of the theory is that of the intense involvement of the state. This intensity should not come as a surprise. The state plays a critical role in the mechanism of intercountry adoption, as revealed by this statement from Howell:

Adoption across national borders has become a matter in which the state in both countries plays an increasingly controlling role. Ultimate power to relinquish a child (a citizen) is held by the nation-state. It transfers those rights to another nation-state, which incorporates the child as its own citizen.²

As Onuma discusses in the literature review chapter, states do not always enter into international treaties from an equal basis nor of their own volition, as he indicates some states may feel coerced into entering an international treaty or other sort of treaty that operates to their disadvantage.³ This same concept of power inequality between states is captured by Onuf in his discussion of constructivist accounts of relationships between states: ‘As formal equals, states may also adopt treaties distributing rights and duties that have unequal consequences among within the sphere [of influence].’⁴

As Howell observes, intercountry adoption is thus distinctively about state to state relationships. There can be no exchange of a child through intercountry adoption unless there are specific connections made from a specific sending state to a specific receiving state. There is no international body, no intermediate clearing house, through which these arrangements are mediated and through which a state can form a relationship with an international body, but not another state, in order to effectuate intercountry adoption. While international agreements are part of what might be entered into in order to create a relationship between states, being a member of either the United Nations Conventions on the Rights of the Child or of the Hague Convention on Intercountry Adoption is not required.

² S Howell, *The Kinning of Foreigners: Transnational Adoption in a Global Perspective* (Berghahn Books, 2006) 229.

³ See discussion in Chapter One at Section International Relations ‘Collateral Benefits’ of Intercountry Adoption Engagement?

⁴ N Onuf, ‘Constructivism: A User’s Manual’ in V Kubalkova, N Onuf and P Kowert (eds) *International Relations in a Constructed World* (M E Sharpe Inc, Armonk, New York, 1998) 70.

As discussed in the previous chapter comparing seven different states,⁵ some states that engage in intercountry adoption are not members of the Hague Convention or have only recently put it into effect, and prior putting into effect were nevertheless major sending or receiving states in intercountry adoption. In some respects, the presence of an international convention is only a superfluous add-on to necessary state to state relationship that must be formed in order to exchange a child. Without that relationship, despite having the Hague Convention in force, no state would be able to engage in intercountry adoption.

Granted, some states will only exchange children with other states that are members of the Hague Convention. But that in and of itself is just a feature of the specific requirements of that state to state exchange of children—the decision to limit sending or receiving a child from a Hague Convention member state is a state level decision that is made and then carried out, or not, with other states. It is a requirement that is created by the state, and not dictated per se by the Hague Convention. Thus, Hague Convention membership may facilitate an exchange but is not *necessary* to the exchange of a child through intercountry adoption. What is necessary is the specific formation of state to state relationships. States might choose to make Hague Convention membership as a necessary condition of an intercountry adoption exchange with another state, but that is a condition that is built into the state to state relationship.⁶

Thus, the relationship between states that exchange children in intercountry adoption where there is a bilateral agreement between them or who both have the Hague Convention may not operate on equal footing. The intercountry adoption transaction may operate to the advantage of one state and to the disadvantage of another. One state may conceivably have felt compelled to enter into the arrangement; the other state may have exerted pressure on the other to enter into the intercountry adoption arrangement.

⁵ See discussion on each state in Chapter Four.

⁶ The Hague Convention permits declarations allow a Convention state to limit adoptions to those Convention states who have delegated Central Authority responsibilities to certain bodies: Article 22 (4), which states, ‘Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authority are performed in accordance with paragraph 1.’ This is a reference to Article 22(1), authorising Central Authority functions to be carried out ‘by public bodies or bodies accredited under Chapter III, to the extent permitted by the law of its State.’

International Relations: The Goals

Just what is it that states are trying to achieve through international relations and international standing? When considering the place that international relations plays in intercountry adoption it is helpful to have a picture of what it is that nations might want to attain through these relations. What is it that they hope to gain or maintain *vis a vis* their relationships with other states? If it is accepted that the goals can be expressed in the term 'power', then the definition given to this concept by Bandeira⁷ is useful for categorisation of the aims of nations within their pursuit of international relations. Bandeira says that there are three elements that comprise a notion of power within international relations:

Three factors must be considered in assessments of power hierarchy among states: territorial extent, economic power and military power. These are the factors that allow states to act independently and influence other states and thus determine the way in which the condition of being an international power is expressed. A state equipped with a military force sums up the value of its territorial extent...and its economic potential. It becomes hegemonic, the head of a system of alliances and agreements of varying scope. To reckon on all the factors that give assurance of victory, as far as victory is foreseeable, requires the capacity diplomatic pressure---the capacity to obtain part of what might have been the result of a victorious war without actually fighting. In addition, internal peace, reflecting the efficient exercise by the ruling social group of its internal hegemonic function, is indispensable if a state is to be an international power.⁸

He suggests that there are four interests that states not only pursue, but whose successful attainment are essential for the basic continued survival of the state.⁹ He calls these 'physical survival, autonomy, and economic well-being'¹⁰ along with "collective self-esteem"¹¹.¹² A state's national interest is the sum of all four of these interests.¹²

Accordingly when intercountry adoption is seen as an expression of a state's national interest in international relations, all of these interests are implicated in a state's pursuit, or not, of intercountry adoption involvement. While each of these separate

⁷ L Bandeira 'Brazil as a Regional Power and Its Relation with the United States' (2006) 22 Latin American Perspectives 12.

⁸ Bandeira (n 7) 2, 12-13.

⁹ A Wendt, *Social Theory of International Politics* (Cambridge Studies in International Relations Series, Cambridge University Press, Cambridge 1999) 235.

¹⁰ Wendt (n 9) 235.

¹¹ Wendt (n 9) 235.

¹² Wendt (n 9) 198.

interests would be worthy of a discussion in their own right, space constraints prohibits a discussion on each of them individually as they might relate to intercountry adoption involvement, but is suggested as an area of future research development. The focus will be on that of the state's interest in collective self-esteem. As seen in further discussion in this chapter this has much to do with the likelihood of a state becoming involved in intercountry adoption—a necessary ingredient for a receiving state, and a possible result of a cultural trauma and exclusion in potential sending states. Wendt provides a description of the collective self-esteem interest:

[It] refers to a group's need to feel good about itself, for respect status. Self-esteem is a basic human need of individuals, and one of the things that individuals seek in group membership...Like other national interests it can be expressed in different ways. A key factor is whether collective self-images are positive or negative, which will depend in part on relationships to significant Others, since it is by taking the perspective of the Other that the Self sees itself...Since groups cannot tolerate such [negative self] images if they are to meet the self-esteem needs of their members, they will compensate by self-assertion and/or devaluation and aggression towards the Other. Positive self-images, in contrast, tend to merge from mutual respect and cooperation.¹³

But does the notion of power as explained by Bandeira or the four interests described by Wendt encompass all that is necessary for an understanding of a state's choices and decisions in the international realm? While these ideas explain what might be at stake and to some extent what motivations might be the driving force, they do not offer an explanation on why states make certain decisions, that is, what prompts one choice from among many that might be taken. Wendt's characterisation of possible motivations for choice is included in his discussion of the 'state interests...' ¹⁴ related to 'the distribution of power: status quo, revisionist, and collectivist.' ¹⁵

Wendt explains that a status quo state is one that rather than seeking an expansion of its power or territorial base, is content to exist within the framework of existing power relations¹⁶—hence of course, the name 'status quo.'¹⁷ By contrast, a revisionist state is

¹³ Wendt (n 9) 236.

¹⁴ Wendt (n 9) 123.

¹⁵ Wendt (n 9) 124.

¹⁶ Wendt (n 9) 124.

¹⁷ Wendt (n 9) 124.

not so pacific.¹⁸ It is a state intent on expanding its influence in a variety of ways, which might be ‘the desire to conquer others, size part of their territory and/or change the rules of the game.’¹⁹ The third kind of interest—the collectivist-- is one that is motivated by a certain sort of altruism.²⁰ Wendt describes this as ‘the desire to help those they identify with even when their own security is not directly threatened.’²¹

Can these motivations explain the reasons that states engage in intercountry adoption? Based on the relational statements in the prior chapter, the United States might use intercountry adoption in pursuit of power as a revisionist state. Sweden’s philosophy towards intercountry adoption, on the other hand, might brand it as a collectivist state. What impact does the type or classification of a state have on its motivations to enter into intercountry adoption? This is further explored in this chapter, with specific attention to cultural plurality within a state, and a state’s national identity aspirations.

But what is the source of the interests—in other words, what is it that prompts the choices about which path a state will take in determining what interests it takes? Wendt’s position is that the path is an internally directed one²², set by the dimensions that have become part of the state’s charter.²³ In other words, a state’s internally constructed characterisation of itself sets a direction that the state will pursue in its relationships with other states.²⁴ Wendt argues that:

Given cause to interact in some situation, actors need to define the situation before they can choose a course of action. These definitions will be based on at least two considerations: their own identities and interests, which reflect beliefs about who they are in such situations, and what they think others will do, which reflect their beliefs about their identities and interests.²⁵

¹⁸ Wendt (n 9) 124.

¹⁹ Wendt (n 9) 124.

²⁰ Wendt (n 9) 124-125.

²¹ Wendt (n 9) 124.

²² Wendt (n 9) 186-187.

²³ See discussion in this chapter on the development of a national charter.

²⁴ Wendt (n 9) 186-187.

²⁵ Wendt (n 9) 186-187.

The place that these common interests—where cultures have a unique place in the development of a state’s identity,²⁶ is discussed below in the formation of national identity.²⁷

This chapter considers, in later discussion, how these elements are played out through intercountry adoption relationships between states, and how intercountry adoption as a foreign policy issue between states is reflective of, and includes, these notions of power and state interests.

Common Elements

The common elements shared by both sending and receiving countries are the creation of a national charter, and the location of the best interests standard within the intercountry adoption process, and its place as a concept that is mutually constructed by a specific sending and a specific receiving country—the product of a state to state relationship.

The Creation of a National Charter

Liu and Hilton have written about the constituent components of a nation’s charter. A charter is described as ‘a central part of a group’s representation of its history...an account of its origin and historical mission, which will have been amended and renegotiated over time to reflect changing circumstances, and frame its response to new challenges.’²⁸ But that description understates the complexity of what is contained in the charter. In fact, the charter fulfils two main functions—constitutional and normative.²⁹ The constitutional functions include providing a blueprint of social hierarchy for the

²⁶ Wendt (n 9) 163. Wendt comments that ‘...*culture is a self-fulfilling prophecy.*’ 186, emphasis in the original.

²⁷ See discussion on the creation of national identity in this chapter.

²⁸ J Liu and D Hilton, ‘How the Past Weights on the Present: Social Representations of History and Their Role in Identity Politics’ (2005) 537, 538.

²⁹ Liu and Hilton (n 28) 538, 539, 540.

group, through its construction of providing groups with ‘status and hierarchy.’³⁰ Other constitutive functions of a constructed charter include providing a ‘foundational myth for a society, defining its rights and obligations for a group and legitimizing its social and political arrangements.’³¹ Normative functions are demonstrated through ‘rules, norms, moral codes, laws...’³² The normative function expressed in laws is found in both domestic and international laws.³³ Another way however, to understand the charter is through a categorisation of its contents, rather than through its functions.

Croucher’s discussion on what is included in the development of a nation suggests that there may be in fact two disparate but equally necessary component parts in a charter: “‘constitutional engineering’”³⁴ and “‘cultural engineering’”³⁵. Constitutional engineering consists of the creation of the ‘legal, political and economic structures’³⁶ that will govern the nation,³⁷ while cultural engineering takes account of ‘cultural and symbolic resources and the ways in which those resources are drawn upon, used and interpreted by government officials, politicians, community leaders and media.’³⁸ These elements provide a detailed look at not only what is contained within the charter, but the charter’s role in nation-building, and in shaping the identity of the nation.

It is however the charter element of cultural engineering—the formation of the specific element of national identity-- rather than the machinery of the legal, political and economic structures that takes predominance in the constructions that establish whether a state becomes involved in intercountry adoption.

When is national identity formed—what is the catalyst for groups to come together and form an overarching collective identity that becomes a national identity? Liu and Hilton provide an answer to this threshold question by indicating that it can be in response to a perceived common aim, which can but need not involve a common adversary, that

³⁰ Liu and Hilton (n 28) 540.

³¹ Liu and Hilton (n 28) 538.

³² Liu and Hilton (n 28) 539.

³³ Liu and Hilton (n 28) 538.

³⁴ S Croucher, ‘South Africa’s Illegal Aliens: Constructing National Boundaries in a Post-Apartheid State’ (1998) 21(4) *Ethnic and Racial Studies* 639, 640, citing D Horowitz, *A Democratic South Africa: Constitutional Engineering in a Divided Society*, University of California Press, 1991.

³⁵ Croucher (n 34) 640, citing A Mazrui, *Cultural Engineering and Nation Building in East Africa*, Northwestern University Press, 1972.

³⁶ Croucher (n 34) 640.

³⁷ Croucher (n 34) 640.

³⁸ Croucher (n 34) 643.

‘ethnic and national identities are often formed when disparate groups unify to achieve some shared goal, such as defending themselves against a shared opponent.’³⁹

Kowert sheds further light on the process of catalysts of national identity formation as a process of the formation of social identity.⁴⁰ He also suggests that conflict plays a key part in the formation of collective identities, and to highlight supposed differences between groups that serve to delineate identity boundaries between them.⁴¹ From this it appears that conflict is instrumental in the genesis of the *need* to shape a national identity.

Doty also gives information on the process of building national identities, suggesting that the state has a primary part in the construction,⁴² suggesting pragmatically, ‘a multitude of practices no doubt go into constructing national identities, and literature suggests that the state plays a significant role in producing and reproducing national identities.’⁴³

The formation of a charter is a vital part of the process for both sending and receiving countries, but what type of charter is formed—what the specific content of the charter is—differs between sending and receiving states, as shown by Figure 5.2, ‘Attributes of Sending and Receiving States.’ This section discusses the process of charter formation, and then discusses the different nation types that are formed by the sending and receiving state’s charter. It begins with a discussion on the concept of a national charter.

There are competing schools of thought on the types of national identity that states construct, and what the basis and drivers are for such formation.⁴⁴ There are on-going

³⁹ Liu and Hilton (n 28) 544.

⁴⁰ P Kowert, ‘Agent versus Structure in the Construction of National Identity’ in V Kubalkova, N Onuf and P Kowert (eds) *International Relations in a Constructed World* (M E Sharpe Inc , Armonk, New York, 1998) 108-109.

⁴¹ Kowert (n 40) 108-109.

⁴² R Doty, ‘Sovereignty and the Nation: Constructing the Boundaries of National Identity’ in T Bierstecker and C Weber (eds), *State Sovereignty as Social Construct* (Cambridge Studies in International Relations Series, Cambridge University Press, Cambridge 1996) 128.

⁴³ Doty (n 42) 128.

⁴⁴ T Kuzio, ‘The Myth of the Civic State: A Critical Survey of Hans Kohn’s Framework for Understanding Nationalism’ (2002) 25(1) *Ethnic and Racial Studies* 20; T Kuzio, ‘Nationalising States’ or Nation-Building? A Critical Review of the Theoretical Literature and Empirical Evidence’ (2001) 7(2) *Nations and Nationalism* 135; S Shulman, ‘Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism’ (2002) 35 *Comparative Political Studies* 554; A D Smith, ‘When is a Nation’ (2002) 7(2) *Geopolitics* 5; T Eriksen, ‘Place, Kinship and the Case for Non-Ethnic Nations’ (2004) 10

debates as to the inter-relationship, if any, between different national identities.⁴⁵ One view is that of national identity based on mutually exclusive basis of civic and ethnic identity.⁴⁶ It is also postulated that shifts between ethnic and civic nationalism are done on an ‘evolutionary’⁴⁷ basis, with the move towards civic nationalism representative of Western nations.⁴⁸ This is however not wholly accepted, for instance there is disagreement about whether all national types have an ethnic influence, or no ethnic influence at all.⁴⁹

Propositions about the types of nations, the basis for their identity and whether indeed nations move between these identities, and if so, what that shift means, is contested.⁵⁰ A shift from ethnic to civic national identification is characterised as a shift from a primary identification with the ethnic components of state inhabitants, to primary identification with the machinery of the state in the form of its governance structures, and the state’s ideals and principles.⁵¹

None of these views, however, square with a constructivist account of how national identity is formed and are not taken on board for discussion of the intercountry adoption theory. The constructivist theory on intercountry adoption presented in this research takes the position that the influence of an ethnic presence within a state never goes away—that it always contributes to how national identity is constructed.⁵² Nor does it see evidence of ethnic presence and influence as evidence of a state having a lesser form of development or being a less advanced nation on some type of measuring stick.

(1/2) Nations and Nationalism 49; E Kaufmann, *Ethnic or Civic Nation?: Theorizing the American Case*; <http://www.bbk.ac.uk/polSOC/staff/academic/eric-kaufmann/theo-american-case> (cited as ‘Kaufman, ‘Ethnic or Civic’); E Kaufmann, ‘Modern Formation, Ethnic Reformation: The Social Sources of the American Nation’. http://sneps.net/OO/images/US_article_Geopol_FINAL.pdf (cited as Kaufman, ‘Modern Formation’).

⁴⁵ See Kuzio 2002 (n 44) Kuzio (2001) (n 44) Shulman (n 44); Smith (n 44); Eriksen (n 44) Kaufmann, *Ethnic or Civic* (n 44); Kaufmann, ‘Modern Formation’ (n 44)

⁴⁶ See generally Kuzio 2002 (n 44) reviewing the work of Hans Kohn on this division; see also S Shulman (n 44); Smith (n 44) (2002) 8-9.

⁴⁷ Kuzio 2002 (n 44) 21, 35. Kuzio comments that ‘By the bicentennial of the US revolution in 1976, the American nation had evolved from ethnic to civic...’, 35.

⁴⁸ E Kaufmann, ‘Ethnic or Civic’ (n 44) 20-31; see generally Kuzio 2002 (n 44)

⁴⁹ See for example, Eriksen (n 44) 51-60; Smith (n 44) ‘; but see also Shulman (n 44) 558 who says ‘On the empirical, most scholars who employ the civic/ethnic and West/East dichotomies are quick to say that most states and nations contain both ethnic and civic components.’ See generally Kuzio 2002 (n 44) .

⁵⁰ Kuzio 2002 (n 44) 21, 27-29; Kaufmann, ‘Ethnic or Civic’ (n 44) 30-31; see generally Shulman (n 44)

⁵¹ E Kaufmann, ‘Ethnic or Civic’ (n 44) 30-31; Shulman (n 44) 555-557.

⁵² Kuzio 2002 (n 44) 29-32.

This thesis takes the position, though contested, that even those states that are said to have their identity predicated upon a non-ethnic –therefore civic—basis still are influenced in identity construction by the ethnic and cultural make up of their inhabitants.⁵³ This, in a constructivist account of national identity formation and aspiration, is simply unavoidable. It is not possible to simply erase this element from national identity formation. Indeed, not all inhabitants of a state are recognised as having full membership—often expressed through granting of citizenship---and who is and is not recognised as a full member of the state influences and is influenced by the form that national identity takes. It is an inescapable fact that not all people present within a state have the same membership status, and that often the fact of full membership status turns on an ethnic or cultural basis.⁵⁴

From that vantage point, it is disingenuous to assert that at some point within a state's identity formation and construction the cultural and ethnic makeup of its inhabitants cease to have any effect.

Ruane and Todd's constructivist theory contends that the formation of what is called ethnic community is not any different from other types of community formation, and challenges as well the simplistic notions of what in fact an 'ethnic community'⁵⁵ is.⁵⁶ Their constructivist explanation on the formation and construction of communities instead indicates that ethnicity is but one factor that contributes to community formation.⁵⁷ At the same they do not deny the existence of ethnic influences in community formation, but say that 'the ethnic category and ethnic communities exist on a continuum with other forms of practical category and community.'⁵⁸ This squares with the account of national identity and cultural diversity presented here, where the ethnic makeup of a nation is understood as to be distinct from its national identity aspirations. Taking the quote from Ruane and Todd, and applying to national identity and cultural diversity, it would be appropriate to first look at national identity aspirations, and then to describe the cultural plurality found within the nation, than to start with an

⁵³ Kuzio 2002 (n 44) 31.

⁵⁴ See discussion on citizenship in this chapter.

⁵⁵ J Ruane and J Todd, 'The Roots of Intense Ethnic Conflict May Not In Fact Be Ethnic: Categories, Communities and Path Dependence' (2005) 45 *European Journal of Sociology* 209, 216.

⁵⁶ Ruane and Todd (n 55) 209-215.

⁵⁷ Ruane and Todd (n 55) 216-224.

⁵⁸ Ruane and Todd (n 55) 216.

examination of the cultural plurality and use that as the determinant of national identity aspiration. In other words ethnic makeup of a state is not on its own determinative of the national identity that is desired or formed.

This account of national identity formation in this chapter is congruent with the constructivist theory put forth by Ruane and Todd, and insists that an influence remains, but how this plays out in construction and re-construction of national identity in turn takes account of two other elements: the form of cultural diversity within the state and the related, although not consequent, form that national identity aspirations take. These are firstly, the form of cultural diversity, if any, within the state's inhabitants, and secondly, the shape of national identity aspirations. These intertwine and impact each other. The formation of a national identity must contend with the cultural make up of its inhabitants---whether this is diverse, and in what ways it is diverse---as well as the state's history, and the interaction of groups of people within the state to date. All of these set up the present day circumstances that national identity construction must---indeed cannot but help---take into account.

What follows is a discussion on forms of cultural plurality within a state, and then different discussion on national identity types, with a rationale for why the two forms selected for analysis have been chosen amongst the many discussions of national identity types.

Cultural Diversity: Multiethnic and Polyethnic Forms of Cultural Plurality

The simple fact of having different cultures or ethnicities present in a state does not in and of itself reveal any useful information on its impact on national identity formation. What is critical to an understanding to national identity formation is an understanding of the type of cultural plurality in a state. This is a starting point for understanding the influence of cultural plurality on the formation of national identity formation, and consequently, the path to intercountry adoption involvement.

Internal cultural diversity can be explained by two different circumstances—these are identified by Kymlicka as multinational and polyethnic.⁵⁹ There are also two types of national identity—again, perhaps related to but not to be seen as a continuum of, or substitute for, the descriptions of cultural diversity: Jacobin and syncretic.⁶⁰

According to Bornman, Kymlicka identifies two kinds of internal cultural pluralism: multinational and polyethnic.⁶¹ A multinational state is one ‘where more than one nation co-exists within the borders of the state. The term “national” in this sense refers to a historical community with its own institutions sharing a distinct language and culture and occupying a given territory or homeland.’⁶² A polyethnic nation is one ‘where cultural plurality is mainly due to individual and familial immigration where distinctiveness manifests mainly in family lives and voluntary associations.’⁶³ These are not mutually exclusive—Kymlicka is explicit that a state can simultaneously have both types of cultural pluralism present.⁶⁴

On the other hand, the two types of national identity aspirations are mutually exclusive. One of ‘Jacobinistic nation-building’⁶⁵ is typified by

loyalty to the state and the so-called nation state [is regarded] as more important than loyalty to subgroups. The ideal of equality is furthermore not only interpreted in social and economic terms, but also implies cultural equality, that is the eradication of all forms of cultural differentiation.⁶⁶

This is in contrast to ‘syncretistic nation-building’⁶⁷ where ‘ethnic, racial and other groupings’⁶⁸ are the ‘building blocks of a larger unity and involves policies of multiculturalism that guarantee the cultural rights of ethnic or other minorities.’⁶⁹

⁵⁹ E Bornman, ‘National Symbols and Nation-Building in Post-Apartheid South Africa’ (2006) 30 *International Journal of Intercultural Relations* 383, 388; see also W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University, 1995) 6, 10-26.

⁶⁰ Bornman (n 59) 386, citing T Hanf, *The Prospects of Accommodation in Communal Conflicts: A Comparative Study*. In H Giliomee and L Schlemmer (eds) *Negotiating South Africa’s Future*, University of the Witwatersand, 1989.

⁶¹ Bornman (n 59) 388.

⁶² Bornman (n 59) 388.

⁶³ E Bornman (n 59) 388.

⁶⁴ Kymlicka (n 59) 17. This is in contrast to the view that Bornman gives to these, where they are presented as apparent opposing types of formations; Bornman (n 59) 388.

⁶⁵ Bornman (n 59) 386.

⁶⁶ Bornman (n 59) 386.

⁶⁷ Bornman (n 59) 386.

⁶⁸ Bornman (n 59) 386.

The state motivation theory utilises these concepts of cultural diversity and national identity type and combination of concepts of cultural diversity and national identity construction. It does not discount nor erase the presence and effect of culturally diverse influences upon national identity construction. It provides a way to understand the construction of national identity, and how the assemblage of internal inhabitants both shape and are shaped by the construction of national identity. These, as discussed further in this chapter, are critical elements of the theory, and to the events that shape whether or not a child is eventually sent in intercountry adoption. The drivers of intercountry adoption require that the understanding of national identity aspirations include a consideration of culture, but with the recognition that culture and ethnicity can have different formations within a state, and those different formations and constructions have much to do with a state becoming (or not) involved in intercountry adoption.

What follows on from here is a constructivist account of national identity formation, and its relevance to the intercountry adoption theory.

Formation of National Identity

National identity is a constituent component of charter building, and is very important in determining whether a state becomes involved in intercountry adoption as either a sending or receiving state. The process of national identity formation is therefore a critical component of the charter development. The constructivist view of national identity belies any idea that national identity is fixed—that there is a final and ultimate identity that is reached,⁷⁰ although the identity might in fact have the facade of fixity:

Yet it remains the case that identities are always in process, always contested, always an accomplishment of practice. Sometimes their reproduction is relatively unproblematic because contestation is low, in which case taking them as given may be analytically useful. But in doing so we should not forget that

⁶⁹ Bornman (n 59) 386.

⁷⁰ Wendt (n 9) 340. For a discussion on this see also Doty (n 42), 123, 125-126; S Croucher, *South Africa's Illegal Aliens: Constructing National Boundaries in a Post-Apartheid State* (1998) 21(4) *Ethnic and Racial Studies* 639, 642.

what we take to be given is in fact a process that has simply been sufficiently stabilized by internal and external structures that it *appears* given.⁷¹

The lack of a set identity is to the benefit of the nation, however, and can be used to the state's advantage in international relations: 'The identity of "we" is a flexible political resource, adaptable to changing circumstances and new crises.'⁷² Doty argues that there is a necessity for the set appearance of national identity.⁷³ Grasping what is included in the abstraction of national identity is a complex concept that 'cannot be reduced to a single dimension.'⁷⁴

Do the nation-building aims of a particular state influence whether a state will engage in intercountry adoption, either as a sending or receiving state? This, of course, is the proposal offered by the theory in this thesis, and as part of the above discussion as to nationhood issues that appear tied to decisions of states to enter into intercountry adoption. Is a Jacobinistic state more likely to enter into intercountry adoption as a sending state than a syncretistic state? In other words, where there is a stress on homogeneity in society, is there more likely to be acts of exclusion that would result in a state entering into intercountry adoption? On the other hand, perhaps counter-intuitively, is a country with Jacobinistic aims more likely to become a receiving country?

A state of course takes account of its existing population when it is determining its charter, and this is in no small part affected by the type of cultural diversity within the state. In the case of sending states, this can either be a result of or result in a designation of which population segment is excluded; and thus, from which the children sent in intercountry adoption are drawn. For this reason a consideration of the cultural pluralism found within a state is important to an understanding of the process outlined in the theory. The type of pluralism has much to do with whether groups are excluded or marginalised, and the ability to formulate a particular national identity aspiration, and indeed, whether those aspirations are likely to be fulfilled. Kymlicka is pessimistic

⁷¹ Wendt (n 9) 340.

⁷² Doty (n 42) 126.

⁷³ Doty (n 42) 126.

⁷⁴ Doty (n 42) 127.

about the possibility of a multinational state to overcome internal fractures, *because of* the shape of the internal multinational character:

What more or what else is required for social unity? The missing ingredient seems to be the idea of *shared identity*... Where does this shared identity come from? In nation-states the answer is simple. Shared identity derives from commonality of history, languages and maybe religion. But these are precisely the things not shared in a multinational state.⁷⁵

This view of shared culture as an imperative part of forming a state not beset with internal fissures, and an identity is shared by Wendt. He explains that shared culture is a basic and necessary ingredient in forming a cohesive community, society or state:

..socially shared knowledge plays a key role in making interaction relatively predictable over time, generating homeostatic tendencies that stabilize social order... That human beings everywhere live in such relatively homeostatic worlds is almost certainly no accident.⁷⁶

These emphasise the importance of that there be some strand of an element that gives mutuality to join a group together. With this, polyethnic plurality is formed. Without this, a multinational state is formed. But these should not be understood as mutually exclusive descriptions of the lack of unity within a state. As Kymlicka discusses, a state can simultaneously be polyethnic and multinational.⁷⁷ The importance of this internal cultural diversity and the state's response to it in the form of national identity aspirations is an important component of the process of a state becoming involved in intercountry adoption.

Syncretic and solely multinational states are unlikely to become a receiving country because of the inner turmoil that may be reflected by these conditions. This includes a lack of inner unity and an unstable and perhaps highly contested state identity:

...a lack of consensus about national identity can bring about a crisis of national legitimacy, that is a sense among certain sections of society that the defined national community is "inappropriate", that they are forced to be a member of it

⁷⁵ Kymlicka (n 59) 188-189.

⁷⁶ Wendt (n 9) 187.

⁷⁷ Kymlicka (n 59) 17.

and that it is an inappropriate object of their loyalty...Plural societies thus often encounter difficulties in effecting a widely held sense of citizenship, that is loyalty to the state and the willingness to comply with the rules of citizenship.⁷⁸

Receiving states will have successfully met their Jacobin charter aims and will have a polyethnic cultural diversity distribution, if not both polyethnic and multinational. They are unlikely to have a solely multinational cultural diversity arrangement. Sending states are likely to have either syncretic or unfulfilled Jacobin charter aspirations. These national aims, and whether or not achieved, interact with the type of cultural diversity present in the state, and this combination is instrumental in whether events are set in place that take a state on a path to intercountry adoption sending of children. The following chart, Figure 5.2, shows the national identity aspiration and cultural diversity attributes of the seven states examined in the comparative law chapter.

Figure 5.2 Attributes of Sending and Receiving States

State	Jacobin or Syncretic	Multinational/Polyethnic	Engagement in Intercountry Adoption	Comments
United States	Jacobin	Both multinational and polyethnic	Yes—both sending and receiving state	Sending—those groups not wholly absorbed into the charter of a Jacobin state—African Americans
Sweden	Jacobin	Polyethnic	Yes—receiving state	
South Korea	Syncretic	Polyethnic	Yes-sending state	
South Africa	Jacobin	Multinational	Yes, sending, but in limited numbers	Contrast with India, South Africa's charter is achieved—

⁷⁸ Bornman (n 59) 386.

				Jacobin status
Guatemala	Syncretic	Multinational	Yes— but see comments	but now undergoing reform, possible changes in national identity to be more inclusive? Shift from multinational to polyethnic?
India	Jacobin	Multinational	Sending	Not successful in its Jacobin charter
China ⁷⁹	Jacobin	Multinational	Sending	Not successful in Jacobin charter

While the receiving states present a straightforward depiction of a situation regarding national identity aims and their fulfilment along with cultural diversity components—the combination of Jacobin aspirations that have been fulfilled and at least a polyethnic element in its cultural diversity resulting in low contestation of national identity and open-ness to admitting a wide range of immigrants into the state, including children through intercountry adoption.

There is nothing so clear that can be gleaned from a review of sending states. This means that there must be a closer look at an individual state’s charter ambitions, and whether these have been achieved. It also requires taking stock of what type of cultural diversity is present in the state. The combination of a syncretic national identity and multinational cultural diversity serves as a vehicle for events that lead a state into intercountry adoption as a sending state. But sending states can also be Jacobin or have a polyethnic dimension. This means that it is far more complex than applying or identifying concepts or labels to understand what brings a state, particularly a sending state, to intercountry adoption involvement. These concepts of cultural plurality and national identity should not in and of themselves, without further analysis, be

⁷⁹ For a discussion on the nature of Chinese national identity and multinational cultural diversity, see S Zhao, ‘Chinese Nationalism and Its International Orientations’ (2000) 115(1) *Political Science Quarterly* 1.

considered as suggestive of whether a state will become involved in intercountry adoption. It is necessary to look at the specific circumstances of each state individually, looking at the actual social constructions of the events identified in the theory.

The Best Interests Standard as an International Relations Policy

The positioning of the best interests standard in state motivation theory is significant. The focus of this thesis is of course focused upon the best interests standard, and it is worth some comment on the late appearance of the standard in the process of actions by states in intercountry adoption. Its appearance as the final action in the processes by which states become involved in intercountry adoption might at first glance appear to be counterintuitive. A cursory and superficial overview of the reasons that states become involved in intercountry adoption might be that the best interests of the child would be the primary, if not sole motivator. Further it might seem it would be the only factor involved in the decision of either sending or receiving countries to become involved in intercountry adoption.

So masterful is the sleight of hand that states perform with the best interests standard by that there is rarely any challenge to this point of view. This speaks to the extreme flexibility with which the best interests standard is utilised and its rather deft use by states in intercountry adoption. Its appearance as the final event in the intercountry adoption engagement process might thus cause some controversy. It upsets the carefully drawn picture of intercountry adoption that both sending and receiving states have created, a picture that serves to enhance the images and aims of those individual states. However this might be received, it is important to give some consideration to what it means for the standard's use thus positioned in the chain of events that bring a state not only to intercountry adoption but to form a specific relationship with a particular state for the intercountry adoption exchange of a child. So, just what does this positioning mean for the best interests standard in an intercountry adoption context?

Kowert notes that something such as the best interests standard—something that has no evident meaning or definition on its own---can indeed be a foreign policy, that

‘rationalizations and justifications *are* foreign policy.’⁸⁰ The best interests standard as that position in the constructivist theory—it serves as the stated basis between two states for the engagement in intercountry adoption. It takes on whatever meaning and content has been constructed for it within the context of the relationship forged between the two states. In this context, the best interests standard itself becomes a foreign policy.

Understanding the dynamics of international relations is an important part of understanding the best interests standard in intercountry adoption, *because* of the standard’s positioning as a function of the relationship between states. Thus, what follows is a discussion that locates the best interests standard within the constructivist account of international relationships between states who engage in intercountry adoption. According to the state motivational theory, the best interests standard is not an abstract notion that is generated once a state has decided to engage in intercountry adoption. Rather, the standard emerges in state to state relationships. The specific purpose and definition given to the standard in its use as a tool between states may very well vary between the state to state relationships. How a sending state constructs and uses the standard with one receiving country may look very different to how the standard is utilised in its intercountry adoption relationship with yet another receiving state. The same is true of receiving states—the conception and utilisation of the standard that it has with one country of origin is likely to be different than with another country of origin, given the mutually constructed nature of the standard and its use.

The best interests standard then can be seen as a mirror of the foreign relations policy of each state. It is a policy that is used to meet other state aims, not an aim in and of itself. ‘National interests’ are used to define the choices that a state makes in its foreign policy.⁸¹ Weldes argues that the concept of ‘national interests’ is vital to the ways in which a state’s foreign policy is conducted and constructed. This is in two ways:

Firstly, it is through the concept of the national interest that policy-makers understand the goals to be pursued by a state’s foreign policy. It thus in practice *forms the basis for state action*. Second, it functions as a rhetorical device through which the legitimacy of and political support for state action are generated. The ‘national interest’ thus has considerable power in that it helps to

⁸⁰ Kowert (n 40) 117.

⁸¹ J Weldes, ‘Constructing National Interests’ (1996) 2(3) *European Journal of International Relations* 275, 276.

constitute as important and to legitimize the actions taken by states.’⁸²
(emphasis added)

Weldes describes some other key points regarding national interests. She takes issue, as do Cortell and Davis,⁸³ with the depiction of the state in Wendt’s constructivist theories on international relations as ‘a single identity and a single set of interests’.⁸⁴ This concept is addressed further in the concluding chapter of this thesis, but it is relevant to make some additional comments here. Weldes says that this view of a state as a unitary actor fails to take account of important components of national interest formation, including ‘the political and historical context in which national interests are fashioned, the intersubjective meanings which define state identities and interests’.⁸⁵ This discussion on interests and identities again is further picked up in the next chapter. Weldes concludes that ‘national interests ...are social constructions that emerge out of a ubiquitous and unavoidable process of representation through which meaning is created. In representing for themselves and others the situation in which the state finds itself, state officials have already constructed the national interest.’⁸⁶ This idea of national interests is an important one, because it is those then that shape a state’s ultimate involvement in intercountry adoption. National interests are what drive international relations, and the way in which national interest are framed have much to do with whether or not a state sees intercountry adoption as a means for accomplishing these other aims and goals.

The idea of the importance of political and historical context for shaping national interests is captured in this theory. The function of multiple state actors is also discussed the final chapter of the thesis, and their importance in the progression of the best interests standards meaning is further discussed there. It is also a key part of the thesis that is presented in the chapter. Nevertheless, when a state decides that international adoption will meet an international relations aim, that interest, as Weldes

⁸² Weldes (n 81) 276.

⁸³ See discussion on Davis and Davis in Chapter 6.

⁸⁴ Weldes (n 81) 280.

⁸⁵ Weldes (n 81) 280.

⁸⁶ Weldes (n 81) 283.

points out, is the platform for action that is taken, and, in itself, the best interests standard, as discussed, can serve as a powerful vehicle –the rhetorical devise that Weldes describes—to promote a specific action.

Having now reviewed the major components of the state motivation theory, the discussion now turns to the specifics of the process for sending and receiving states, respectively.

Sending State Synopsis

What follows is a synopsis of events that lead a state to becoming involved in intercountry adoption as a sending state. These are the stages of events that are set forth in Figure 5.1, the State Motivation Theory.

1. A precipitating event of cultural trauma;
2. In the aftermath of the cultural trauma, the charter is formed, with a process that includes recasting of the state's identity;
3. As a result of both the cultural trauma, and the formation of the charter, a segment of the population is excluded. This exclusion also impacts on the shape that the charter formation takes;
4. The state determines that its identified aims in international relations can be achieved through engagement in intercountry adoption as a sending state; there are international relations 'collateral benefits'⁸⁷ to be gained through engaging in intercountry adoption and decides to enter into intercountry adoption with either specific countries or more generally;
5. Then the best interests of the child standard is invoked as the basis for the process and engagement in intercountry adoption.

Cultural Trauma

Cultural trauma is featured in the account of the sending state, and is the genesis of events by which states become sending states in intercountry adoption. The theory

⁸⁷ O Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72(2) *The University of Chicago Law Review* 469, 474, 514. See also discussion in Chapter Six.

posits that without such an event of cultural trauma that a state will not enter into intercountry adoption as a sending state. Cultural trauma is defined as a very specific kind of traumatic occurrence, which can be linked to calamity, but where much more than the calamitous experience is needed to raise the event to the level of a cultural trauma:

...the status of trauma as trauma is dependent on the sociocultural context of the affected society at the time of the historical event or situation arises. A society emerging from a major war, suffering from diminished economic resources, experiencing rampant internal conflict, or having shaky social solidarity is more trauma prone than others that are more solid in these respects. Historical events that may not be traumatic for other societies are more likely to be traumas in afflicted societies.⁸⁸

Marginalisation and Exclusion

And what is trauma's relationship to exclusion? One description of cultural trauma links these two very closely, giving a sense of why cultural trauma might lead to the exclusion of a group, relating as it does to collective identity:

Trauma is not the result of a group experiencing pain. It is the result of this acute discomfort entering into the core of the collectivity's sense of its own identity.⁸⁹

Exclusion however is not a *fait accompli* after a cultural trauma. Cultural trauma has the potential to unify as much as it has the potential to divide.⁹⁰ The manner in which the

⁸⁸ N Smelser, 'Psychological and Cultural Trauma' in J Alexander, R Eyerman, B Giesen, N Smelser, and P Sztompka (eds) *Cultural Trauma and Collective Identity* (University of California Press, 2004) 36.

⁸⁹ J Alexander, 'Toward a Theory of Cultural Trauma' in J Alexander, R Eyerman, B Giesen, N Smelser, and P Sztompka (eds) *Cultural Trauma and Collective Identity* (University of California Press, 2004) 10. See also Smelser (n 88) 43-44.

⁹⁰ Smelser (n 88) 43-44.

cultural trauma is processed in the collective consciousness determines whether it will result in inclusion or exclusion.⁹¹ A definition of cultural trauma is given as:

...a memory accepted and publicly given credence by a relevant membership group and evoking an event or situation which is a) laden with negative affect, b) represented as indelible, and c) regarded as threatening a society's existence or violating one or more of its fundamental cultural presuppositions.⁹²

Estivill offers a definition of exclusion that shows its complex nature and progression:

Social exclusion may therefore be understood as an accumulation of confluent processes with successive ruptures arising from the heart of the economy, politics and society, which gradually distances and places person, groups, communities and territories in a position of inferiority in relation to centres of power, resources and prevailing values.⁹³

...exclusion is not a linear process...in this case, an initial state, a period of recovery during which external measures or the efforts of the excluded themselves halt or even reverse exclusion and, finally a period of deterioration which leads to chronic exclusion.⁹⁴

Other links and similarities can be pointed to between Estivill's social exclusion model and the events of cultural trauma. Estivill points to the various strands of events within social exclusion, including not just a place within society, but access to society's mechanisms and structures of power and belonging. This is analogous to what Alexander relates in his description of the estrangement that is part of cultural trauma:

⁹¹ Alexander (n 89) 3-4; 43- 44; D Bell, 'Mythscapes: Memory, Mythology and National Identity' (2003) 54(1) *British Journal of Sociology* 63, 70-71; P Sztompka, 'The Trauma of Social Change: A Case of Postcommunist Societies' in J Alexander, R Eyerman, B Giesen, N Smelser, and P Sztompka (eds) *Cultural Trauma and Collective Identity* (University of California Press, 2004)164-166.

⁹² Smelser (n 88) 44.

⁹³ J Estivill, *Concepts and Strategies for Combating Social Exclusion: An Overview* (International Labour Organisation, Geneva, 2003) 19, online at www.ilo.org/public/libdoc/ilo/2003/103B09_267_engl.pdf

⁹⁴ Estivill (n 93) 39.

‘the uneven distribution of material resources and the social networks that provide differential access to them.’⁹⁵

Exclusion as a result of cultural trauma and charter formation can also serve other functions—it serves to mask the events of cultural trauma, burying them, and making any of the conditions and situation of the excluded population their fault--⁹⁶ --certainly dissuading any notion that accountability or responsibility for this is due to the state.⁹⁷

They comment that

there existed clear economic interest in designating traumatic symptoms as individual character flaws rather than the effects of cultural practices or national decisions. It is easier—and cheaper—to pathologize individuals than to critique or dismantle systems of war, empire, patriarchy, economic inequality or racism.⁹⁸

This is clearly illustrated in action in the depiction of the American foster-child population, where Briggs and Ortiz comment that Americans see children in their own foster care system as ‘pathological’⁹⁹ and unattractive in contrast to those children who are available for adoption in other countries.¹⁰⁰ But as Fonseca points out, as regards the view that Brazilians have children in their own domestic system,¹⁰¹ this is a view held in other states of the children in its domestic care system. Yet these same children are seen as highly desirable by adopters from other states.

What is at work here? It has been noted that receiving countries and adopters within those countries may be motivated by the notion of rescue, that the child from another country is somehow more salvageable than one in similar circumstances in their own country. Yet, it is more than the receiving country portrayal of the child in another country as salvageable and desirable that creates the dyadic relationship of a child being sent for adoption between states. The sending state de-valuation of the child, perhaps as

⁹⁵ Alexander (n 89) 21. See also discussion on this in R Saunders and K Aghaie, ‘Introduction: Mourning and Memory’ (2005) 25(1) *Comparative Studies of South Asia, Africa and the Middle East* 16, 18.

⁹⁶ See discussion in Chapter Four, United States Relational statements and following discussion.

⁹⁷ Saunders and Aghaie (n 95) 19.

⁹⁸ Saunders and Aghaie (n 95) 19.

⁹⁹ A Ortiz and L Briggs, ‘The Culture of Poverty, Crack Babies and Welfare Cheats’ (2003) 21(3) *Social Text* 39, 52.

¹⁰⁰ Ortiz and Briggs (n 99) 39-42, 42-44, 52-54.

¹⁰¹ C Fonseca, ‘An Unexpected Reversal: Charting the Course of International Adoption in Brazil’ (2002) 26(3) *Adoption and Fostering* 28, 38.

a part of the state's construction of the events and aftermath of cultural trauma, which de-valuation results in the exclusion of the child, that is not only a necessary corollary to the receiving state desire to rescue, but is a necessary early part of the process of a state sending children.

The Western desire to rescue children in other states through intercountry adoption is mirrored by the same state de-valuing and excluding the children in its own borders. The sending state must first de-value and exclude the child, before the receiving state desire to rescue through intercountry adoption is relevant. Were there no children available for adoption via the sending state process, then there would be no product to meet the demand of receiving state desire to adopt—and were the child not devalued and marginalised in the first place in its state of origin, the receiving state notion of rescue might not even ever come to exist.¹⁰²

The point is also made that cultural trauma is not simply the occurrence of an event—but rather it is through the subsequent responses that assign meaning and context to the event that it rises to the level of a cultural trauma.¹⁰³ This is a complicated process that can also involve the same type of processes that combine to produce exclusion under the Estivill model.¹⁰⁴ Alexander comments that responses to events of cultural trauma are 'mediated by the uneven distribution of material resources and the social networks that provide differential access to them.'¹⁰⁵

The links between cultural trauma and possible exclusion are apparent. Both are processes that occur over time, and the outcomes of which can be greatly influenced by the actions of government structures.¹⁰⁶ Both are strongly part of national/collective identity,¹⁰⁷ and the degree to which the cultural trauma is used to reshape an identity

¹⁰² L Cartwright, 'Photographs of "Waiting Children": The Transnational Adoption Market' (2003) 21(1) *Social Text* 74, 83. See also discussion in Chapter Four, United States section.

¹⁰³ Saunders and Aghaie (n 95) 17-18, discussing J Alexander, see also Alexander (n 89) 10-24

¹⁰⁴ Saunders and Aghaie (n 95) 17-18, discussing J Alexander, see also Alexander (n 89) 10-24; Estivill (n 823) 35-48.

¹⁰⁵ Alexander (n 89) 21, see also Saunders and Aghaie (n 95) 17-18.

¹⁰⁶ Alexander (n 89) 16-17, 19-22; Estivill (n 93) 35-48.

¹⁰⁷ Alexander (n 89) 10; Smelser (n 89) 43-44; Estivill (n 93) 12-19.

that rejects a certain population group as part of the collective identity is determinative of the degree of and forces of exclusion to which that group might be subjected.¹⁰⁸

The Exclusion of Children

Much attention has been given in literature to the removal of children in both a literal and abstract sense from belonging to a community group or the larger societal group of a nation. This has been referred to by various terminology and in various locations. The general idea, however, remains the same across the discussion. There is a decision made within the collective group, be it the state or a smaller collective group, that a segment of the population is removed from belonging, from being seen as an included part of the group.

Not all events of excluding children lead to the state becoming involved in intercountry adoption. There are exclusionary events where the child remains within the state physically, although excluded in the sense of full participation and recognition within the society. Just why is it that children seem to become a particular focus of exclusion at certain times and in certain places? The symbolism associated with a child is particularly poignant with any transformation of national identity¹⁰⁹—and when there is a history of recent events of national trauma—in various forms of societal upheaval, war, or military occupation.¹¹⁰ One concept that is used to express the exclusion of children is that of ‘socially disaffiliated child’, used in research by Mills and Davies, to mean:

A disaffiliated child is one who is significantly disadvantaged because the normal social and emotional affiliative bonds to his or her immediate family, or alternative social arrangements which can adequately compensate for immediate family and are crucial to a normal childhood and a child’s sense of security, have been broken, disrupted or attenuated.¹¹¹

¹⁰⁸ Estivill (n 93) 12-19. The point has been made however that not all events of cultural trauma lead to exclusion. Ericksen comments on the situation in South Africa: ‘...contemporary South African national identity is deeply based on the struggle against apartheid. In spite of its incomplete integration of all ethnic groups in the country (many problems of identity and loyalty remain to be handled) it cannot be said to be ethnic in any conventional sense of the word. However, it is based on the shared memory of a series of transforming experiences, which thus serve to unite people who are otherwise quite different.’; Ericksen (n 44) 60.

¹⁰⁹ K Dubinsky, ‘Babies Without Borders: Rescue, Kidnap and the Symbolic Child’ (2007) 19(1) *Journal of Women’s History* 142, 145.

¹¹⁰ Dubinsky (n 1090) 145.

¹¹¹ G Mills and M Davies, ‘The Marginal Child: A Study of Socially Disaffiliated Children in the South Pacific’ (1999) 7 *The International Journal of Children’s Rights* 239, 246, quoting G Mills The

This can be linked with the cycles of exclusion that are explained in the Estivill model. Social bonds are broken, and the entire well-being and belonging of the child to a collective is affected. The broken social ties lead to the idea of being put into difficulty, occupying a lesser position in the community strata.

Similarly the concept of ‘displacement’¹¹² through intercountry adoption is explained as an act of an ‘erasure of location, of the place of “origin”...the deconstruction of history, the narrative of the past’.¹¹³

Howell discusses the idea of the exclusion of a child within the context of intercountry adoption by the concept of ‘de-kinning.’¹¹⁴ She maintains that this act of exclusion ‘is what makes adoption of abandoned children possible.’¹¹⁵ The thesis theory agrees in principle with this position that the exclusion of a child is a necessary step for sending that child in intercountry adoption. It clarifies that the exclusion of a child does not inevitably result however in the sending of the child in intercountry adoption. The thesis theory departs from Howell’s observation by arguing that de-kinning is not an act that occurs to individuals, but to selected segments of society, who might be certain classifications of children, or certain groups of people, adults and children alike. Adults as well as children might be de-kinned from society, and the de-kinning of adult groups also has ramifications for intercountry adoption.

However, it is important to understand the act of exclusion when looking at intercountry adoption sending, and Howell has several important points to examine on this.

Kinning and De-Kinning

The concept that Howell describes as de-kinning is linked to the idea of kinning—de-kinning being the opposite of kinning—the destruction of bonds rather than the creation of them.¹¹⁶ Therefore, to have a better sense of the idea of de-kinning, it is important to

Disaffiliated Child: A Development Impact Pilot Study Research Proposal (Suva: The University of the South Pacific Research Committee, 1997)

¹¹² P Ahluwalia, ‘Negotiating Identity: Post-Colonial Ethics and Transnational Adoption’ (2007) 3(1) *Journal of Global Ethics* 55, 56.

¹¹³ Ahluwalia (n 112) 57.

¹¹⁴ Howell (n 2) 9.

¹¹⁵ Howell (n 2) 9.

¹¹⁶ Howell (n 2) 9.

consider alongside the idea of de-kinning what is meant by the kinning of a child.

Kinning is described by Howell to be a:

process by which a foetus or newborn (or previously unconnected person) is brought into a significant and permanent relationship with a group of people that is expressed in a kin idiom...my argument is that that is always a deliberate one, and it is one that is engaged in intersubjectively between existing kin and new kin (whether they are biological babies, affines subsequent to a marriage, adoptees, or other adoptive families), Kinning is thus a universal phenomenon and may be operative in domains of both descent and alliance. The process may, however, not be obvious to those involved and be performed implicitly.¹¹⁷

De-kinning is described as occurring when ‘a previously kinned person is thrown out of the kin community for some reason or another or when a newborn child is never kinned for the fact it is going to be abandoned.’¹¹⁸ This can be understood then as the opposite to kinning, it is the destruction of familial and connective bonds, rather than the creation of them, the sense of a child or children belonging to no-one and having no connecting ties.¹¹⁹

The metaphor of erasure is in fact, becomes more than a metaphor through the acts that exclude a child—whatever label is put onto the process-- an act that in fact assures the exclusion of the child from the society by ensuring that the child has no place in the self-created identity of the nation, and thus no recognition that the child is or was ever a part of or belonged to that nation¹²⁰—no trace of belonging or having been part of the society left behind.

The symbolism associated with a child is particularly poignant with any transformation of national identity¹²¹—and when there is a history of recent events of national trauma—in various forms of societal upheaval, war, or military occupation.¹²²

Children may be seen as the ‘bearers of huge social anxiety’¹²³ and there may be a desire to obliterate traces of children that are uncomfortable reminders of events or

¹¹⁷ Howell (n 2) 63-64.

¹¹⁸ Howell (n 2) 9.

¹¹⁹ Howell (n 2) 9.

¹²⁰ D Bell ‘Mythscapes: Memory, Mythology and National Identity’ (2003) 54 (1) *British Journal of Sociology* 63, 70-71.

¹²¹ Dubinsky (n 109) 145.

¹²² Dubinsky (n 109) 145.

situations that do not fit into the new image into which a nation wants to cast itself.¹²⁴ The sending of children away through intercountry adoption results in a literal and metaphoric deletion of the child.¹²⁵ This is done in an attempt to overcome the unease and discomfort that the presence of the child creates,¹²⁶ as a means, perhaps of repressing the effects of the cultural trauma.¹²⁷ One form of reaction to cultural trauma is to repress the trauma.¹²⁸ Mookherjee gives a vivid account of how evidence of cultural trauma was hidden in Bangladesh through the hitherto legally forbidden provision of abortion and intercountry adoption of children conceived through rape.¹²⁹ Two purposes were achieved through these acts. Firstly, the children were removed from the national consciousness, both literally and figuratively:

Whereas the wombs of women in the first months of pregnancy could be ‘cleansed’ through abortion, in the case of advanced pregnancies, women’s wombs could only be made clean only by making the babies, once born, unavailable to the emotions of motherhood. The womb of the Bengali woman was made accessible not only by emptying it of the baby through birth, but by ensuring an emotional effacement. Thus, the women were kept away from their babies, the latter being further removed from Bangladesh through international adoption.¹³⁰

¹²³ Dubinsky (n 109) 145.

¹²⁴ Dubinsky (n 109) 147; T Hubinette, ‘From Orphan Trains to Baby Lifts: Colonial Trafficking, Empire Building and Social Engineering’ in J Trenka, J Oparah and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (Southend Press, 2006) 147.

¹²⁵ Ahluwalia (n 112) 57.

¹²⁶ Dubinsky (n 109) 55; Hubinette (n 124) 147; D S Kim, ‘A Country Divided: Contextualizing Adoption from a Korean Perspective’ in K Bergquist, M Vonk, D S Kim and M Feit (eds) *International Korean Adoption: A Fifty-Year History of Policy and Practice* (The Haworth Press, Inc, 2007) comments that ‘If a woman in Korea had a mixed-race child, her best choice for the child was considered to be obvious, that is, adoption abroad, since the child would be otherwise subject to lifelong discrimination in racist Korea. These children were not accepted in the racially homogeneous Korean society and not only because of their different skin color but also because of the condemned status of their mothers, ironically called “U.N. madams,” “comforters”, or “Western queens.” These children experienced open and inhuman rejection, accompanied by others’ cultural bias, shame, fear, and hostility, from infancy.’, 10. See also N Mookherjee, ‘Available Motherhood: Legal Technologies, ‘State of Exception’ and the Dekinning of ‘War-Babies’ in Bangladesh’ (2007) 14(3) *Childhood* 339

¹²⁷ Smelser (n 88) 45, 47, 50-51; Alexander (n 89) 7-8.

¹²⁸ Smelser (n 88) 45, 47, 50-51; Alexander (n 89) 7-8.

¹²⁹ N Mookherjee (n 126)

¹³⁰ Mookherjee (n 126) 349.

Secondly, the women were then able to be restored to what was deemed their rightful place in society, able to participate in and ‘be made available in the nation-building process’¹³¹ as mothers to children who would be acceptable in the society.¹³²

Underscoring just how deliberate the sending of children in intercountry adoption was as a means to remove unwanted children, Bangladesh subsequently created laws that limit the sending of children through intercountry adoption.¹³³ Intercountry adoption then was a time limited response to a cultural trauma, and seen as necessary to the successful formation of a new nation.¹³⁴

Exclusion takes on a particular poignancy in considering the dynamics of intercountry adoption and the processes that take a state to participation as a sending state—a sender of children from an excluded group. This chapter has considered the theory of exclusion offered by Estivill—a multidimensional and multi-linear process—which results in a portion of the population not belonging to the state’s image—an image crafted in the state’s charter.

Yuval-Davis offers an analysis of belonging as part of a political process—belonging as a process that is in fact, the opposite of exclusion.¹³⁵ When something is seen as belonging, whether on an individual or collective level, that sort of inclusion can be understood as the opposite or reverse of exclusion. Belonging is what happens when the forces of exclusion are mediated.

Yuval-Davis says that belonging is in fact partially the result of political forces, and that those forces must be accounted for in any analysis of belonging¹³⁶—or conversely, this chapter would argue—exclusion. Her position is echoed in the state motivational

¹³¹ Mookherjee (n 126) 350.

¹³² Mookherjee (n 126) 350. See also B Kartveit, ‘The War Children of the World: Report 2—2002’ (War Children and Identity Project, 2002)38-41. See generally also, R C Carpenter, ‘Appendix: Background Paper “Gender, Ethnicity and Children’s Human Rights: Theorizing Babies Born of Wartime Rape and Sexual Exploitation”’ in J Ophaug (ed) *The War Children of the World Report 3-2003* (War and Children Identity Project, 2003); R C Carpenter, ‘War’s Impact on Children Born of Rape and Sexual Exploitation: Physical, Economic and Psychosocial Dimensions’ at <http://people.umass.edu/charli/childrenbornofwar/workingpapers.htm>; K Grieg, ‘The War Children of the World’ (War Children and Identity Project, 2001).

¹³³ Mookherjee (n 126) 350.

¹³⁴ Mookherjee (n 126) 350.

¹³⁵ N Yuval-Davis, ‘Belonging and the Politics of Belonging’ (2006) 40(3) *Patterns of Prejudice* 197.

¹³⁶ Yuval-Davis (n 135) 199-208.

theory—that exclusion results from, in part, the shaping of a state charter, whose contents are broadly political. Of course, sending a child in intercountry adoption can be understood as an extreme or perhaps the ultimate example, of exclusion, from a state:

The politics of belonging involves not only the maintenance and reproduction of boundaries of the community of belonging by the hegemonic political powers but also their contestation and challenge by other political agents. It is important to recognize, however, that such political agents struggle both for the promotion of their specific projects in the construction of their collectivity and its boundaries, and at the same time, positions within and outside the collectivity. The politics of belonging includes also struggles around the determination of what is involved in belonging, in being a member of a community, and of what roles specific social locations and specific narratives of identity play in this. As such it encompasses contestations both in relation to the participatory dimension of citizenship as well as in relation of issues of the status and entitlement such membership entails.¹³⁷

This quotation highlights the complexity of what it is to ‘belong’. In understanding the quality of the concept of belonging, the opposite concept of exclusion, and what that entails becomes more starkly clear. Belonging is not a simple matter of a decision to include some people and exclude others. It entails, as explained by Yuval-Davis, decisions on what belonging means—what characteristics and actions are needed from a person in a reciprocal demonstration of belonging:

When it comes to membership’s rights and responsibilities in the arena of the politics of belonging, the duties involved become much more ephemeral and actually become requirements, rather than mere duties. The central question here is what is required from a specific person for him/her to be entitled to belong, to be considered as belonging, to the collectivity.¹³⁸

In some sense then, the absence of those markers of belonging, as decided in this political process, set out the boundaries of exclusion—who cannot deliver, is not seen as having the ability to deliver, or does not possess the requisite set of characteristics of

¹³⁷ Yuval-Davis (n 135) 205.

¹³⁸ Yuval-Davis (n 135) 209

someone who belongs. The entire act of sending children in intercountry adoption can be seen as the expression of these politics of belonging—and of exclusion. Those children sent in intercountry adoption are those who are deemed to not belong.

Intercountry Adoption Perpetuates the Effects of Cultural Trauma

Intercountry adoption in particular can be seen as reinforcing and perhaps even exacerbating the effects of cultural trauma in the daily existence of individuals, families and communities and ultimately states through the sending of children in intercountry adoption. These can be seen through an examination of the 5 characteristics that Stamm *et al* set out for events of historical trauma:

(a) communal feelings of familial and social disruption, (b) existential depression based on communal disruption, (c) confusion toward owning ancestral pain accompanied by the temptation to adopt colonial values, (d) chronic existential grief manifested in destructive behaviours, (e) daily reexperiencing of the colonial trauma through racism and stereotyping, and (f) lack of resolution of the existential, communal pain¹³⁹

The last two points appear especially salient for consideration in the effects of cultural trauma and its relation to the sending of children in intercountry adoption.

(e) ‘daily reexperiencing the colonial trauma through racism and stereotyping’,¹⁴⁰ —

The theory presupposes that the act of sending children through intercountry adoption creates this condition by exacerbating the feeling and bringing cultural trauma persistently into the present, and through the sending of children making the sending itself a present act of cultural trauma.

Eyerman discusses that there is a sense of ‘sorrow’¹⁴¹ that underlies culturally traumatised groups.¹⁴² Sorrow and loss may permeate the essence of culturally traumatised groups, and the continual and additional loss that is brought about by the

¹³⁹ B Stamm and others, ‘Considering a Theory of Cultural Trauma and Loss’ (2004) 9(1) *Journal of Loss and Trauma* 89, 94.

¹⁴⁰ Stamm and others (n 139) 94

¹⁴¹ R Eyerman, ‘The Past in the Present: Culture and the Transmission of Memory’ (2004) 47(2) *Acta Sociologica* 159, 164.

¹⁴² Eyerman (n 141) 164.

sending of children through intercountry adoption is likely to exacerbate the feelings of sorrow, expressed or unexpressed.

and (f) 'lack of resolution of the existential, communal pain.'¹⁴³

National Self-Esteem and Self-Image of Sending Countries

Engaging in intercountry adoption as a sending country may do damage the self-esteem of a nation.¹⁴⁴ It can be hypothesised that this is linked in part to the constant re-infliction of damage of cultural trauma through intercountry adoption participation. This poor self-esteem as part of the national identity is also likely to perpetuate the constructions and chain of events which keep a state sending children in intercountry adoption. In other words, so long as the negative national self-identity continues, so, too, is the sending of children in intercountry adoption likely to continue.

The sort of image a nation has of itself influence its choices in establishing its interests and can emanate from that state's experience in its relationships with other states:

[Collective self-esteem] can be expressed in different ways...a key factor is whether collective self-images are positive or negative...Negative self-images tend to emerge from perceived disregard or humiliation by other states..¹⁴⁵

That collective self-esteem is part of a state's national interests was discussed earlier in this chapter. This raises the question of whether a state is motivated to engage in intercountry adoption as a sending state in an effort to raise its collective self-esteem. However, as discussed, a move to sending children in intercountry adoption does not raise state self-esteem; it has the reverse effect of creating a continuous cycle of re-experiencing or re-inflicting trauma, and thus exacerbating the low self-esteem of the state. Given the power dynamics that can exist between the state to state relationship in

¹⁴³ Stamm and others (n 139) 94. Fierke also addresses this phenomena, relating of effects 'where the group is left dazed, helpless and too afraid, humiliated or angry to even initiate the mourning process.' K M Fierke, 'Whereof We Can Speak, Thereof We Must Not Be Silent: Trauma, Political Solipsism and War' (2004) 30 *Review of International Studies* 471, 482.

¹⁴⁴ Fonseca (n 101) 38.

¹⁴⁵ Wendt (n 9) 237.

intercountry adoption, discussed further in Chapter Six, sending children in intercountry adoption may be as embarrassing or humiliating to the sending state.

A certain level of low national self-identity and esteem then is needed for a state to send children in intercountry adoption. Steps taken to bolster national self-image are also likely to result in a reduction or halt altogether the sending of children in intercountry adoption.

Wendt provides a reminder that there are of course other influences on how state interests are defined, that these can also be defined as a result of ‘the international system’¹⁴⁶, such that how a state defines its interests are effected by both internal and external dynamics. Such self-perception by a nation is likely to be either a positive or a negative one.¹⁴⁷

Cultural Trauma in Sending Countries

The theory posited here indicates that cultural trauma is a triggering event for a state to become involved in sending children through intercountry adoption. Is this true for the states that are involved in the comparative legal analysis of this thesis? The states that send children are China, Guatemala, India, South Africa, South Korea and the United States. Given what is known about the children that they send in intercountry adoption, can a link be established between a cultural trauma event and the children that are sent in intercountry adoption?

Country	Cultural Trauma Event	Children Sent in intercountry adoption	Links between children send and cultural trauma
China	Famine/Governmental Change	Females, infant females	Yes
Guatemala	Civil war waged against Mayans	Mayan/Mayan heritage children	Yes
India	Partition	Unclear demographics – children appear	Yes-given ethnic and religious

¹⁴⁶ Wendt (n 9) 234.

¹⁴⁷ Kowert (n 40) 109.

		to be drawn from lower caste, already marginalised part of population	tensions in partition, colonialism - India has marginalised populations as a result of religious groups, caste systems and religious tensions
South Africa	Colonialism/Apartheid	Unclear demographics, mostly black South African	Relatively small numbers of children sent— inactive sending state in comparison to others, especially in light of needy child population
South Korea	South Korean War	Initially children of mixed ethnic heritage—now children of	Initially yes, now an entrenched practice (discussed in chapter Six)
United States	Slavery of African Americans	African American children ¹⁴⁸	Yes

Figure 5.3 Cultural Trauma in Sending States

¹⁴⁸ See R Eyerman, 'The Past in the Present: Culture and the Transmission of Memory' (2004) 47(2) *Acta Sociologica* 159 on the cultural trauma faced by African Americans and in the United States. On the high number of African Americans in state care see 'African American Children in Foster Care', United States Government Accountability Office, July 2007, <http://www.gao.gov/new.items/d07816.pdf>; on newstory on African American children sent in international adoption see 'Canadians Look South to Adopt Black Kids', 24 August 2004, http://www.amren.com/mtnews/archives/2004/08/canadians_look.php; see also D Roberts, 'Adoption Myths and Racial Realities in the United States' in J Trenka, J Oparah and S Shin (eds) *Outsiders Within: Writing on Transracial Adoption* (South End Press, Cambridge, Massachusetts 2006).

The occurrence of cultural trauma in each one of these states and its links to the state's involvement in sending children in intercountry adoption is an area noted for future research. Again, the purpose of the inductive grounded theory methodology is helpful to raise here. Grounded theory is a method of reaching higher abstractions to form a theory to explain events, and it is in this that the concept of cultural trauma is invoked. Cultural trauma is a concept that covers many of the themes revealed in the relational statements and appears to be the triggering factor in a state becoming involved in sending children.

Receiving State Synopsis

This section provides a synopsis and then full discussion on the events that lead a state into becoming involved with intercountry adoption as a receiving state. As with a sending state, there is a multi-event process that leads to a state becoming a receiving state. A state must go through all of these steps to reach the decision to engage in intercountry adoption as a sending state. A state might have some characteristics or processes in common with these, but all of the theory components must be in place for the country to ultimately become engaged as an intercountry adoption receiving state.

1. A state reaches a plateau in its construction of national identity¹⁴⁹ and has also achieved a position of economic prosperity and relative strength in its international relations.
2. The state has a result of this permitted more influx of different kinds of people, has set up a Jacobin rather than syncretic nation, where the loyalty is to a central nation state and not to groups or subgroups. This is often reflected in a change of immigration policy that has a broader acceptance of immigrants without an emphasis on their ethnicity or countries that are seen as very similar.¹⁵⁰
3. The state determines that it can obtain a 'collateral benefit'¹⁵¹ in international relations through entering into intercountry adoption. A decision is made to enter into intercountry adoption relations with specific countries.

¹⁴⁹ See discussion in this chapter on national identity formation.

¹⁵⁰ See discussion in this chapter on immigration.

¹⁵¹ Hathaway (n 87) 474, 514.

4. The best interests of the child standard is invoked as basis for the process for receiving children through intercountry adoption.

National Identity of Receiving States

As discussed in this chapter, the internal identity of a state is never fixed, but always in a cycle of being constructed and re-constructed, but can reach a point of apparent stasis, as a point of low contestation.¹⁵² This understanding of the receiving state's identity is important because it is the starting point of the process for a state to become a receiving state in intercountry adoption. A state that has not entered into a phase of low contestation of its identity will not begin the process to enter into intercountry adoption as a receiving state. Likewise, it can be theorised that if a state enters into a phase where there is highly contested identity, that this will be the trigger for it to withdraw from involvement as a receiving state in intercountry adoption. Wendt says that

From a constructivist perspective the mark of a fully internalized culture is that actors identify with it, have made it, the generalized Other, part of their understanding of Self. This identification, this sense of being part of a group or "we", is a social or collective identity. That gives actors an interest in the preservation of their culture. Collective interests mean that actors make the welfare of the group an end in itself...¹⁵³

In the sense of having reached a point of stasis in internal identity, the idea of a fully internalised cultural as part of national identity is an important one in understanding the importance of an identity that is not being contested, and what the internalised view of the collective self is, and does.

The view of who is seen as an Other has important implications for receiving states in intercountry adoption. De Souza explains that:

the creation of an "other" necessitates the creation of a "same", the latter being accorded great power and status. The "other" is seen as lowly and unsophisticated in

¹⁵² See discussion in this chapter on national identity formation.

¹⁵³ Wendt (n 9) 337.

contrast to the dominant group, whose members are seen as civilized and superior.
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This is reflective of one of the motivations for receiving states to engage in intercountry adoption—an assertion of power and dominance. This sense is further heightened, for as Dubinsky explains: ‘The history of child welfare in the West suggests that child-saving has always been conferred a kind of nobility: there are vast and blinding pleasures attached to rescue.’¹⁵⁵ Intercountry adoption, with its more dramatic sense of salvage and rescue of a child that is othered—and can be rescued from the perceived dire consequences of that otherness—heightens this sense of nobility and rescue, and also serves to underscore the superiority of the rescuer.¹⁵⁶

National Type of Receiving States

While at first glance it may seem that a state that values multiculturalism over national loyalties would be open to intercountry adoption as it is open to population diversity, a further analysis of this reveals the opposite in fact may be true. When a nation opens itself up to intercountry adoption, this is because the national identity appears to be static, giving the fundamental nature of the state as something that is immutable. In the national identity of receiving state, there is an over-riding basis for national identification that transcends differing groups within the nation. It is not a desire for diversity or subgroup identification that encourages states to become receiving states for intercountry adoption. Rather, a state opens itself up to intercountry adoption because the perceived effects of subgroup and ethnic identities have been muted by loyalties to the ideals and symbolism included in civic identity—where the ethnic identity, if not altogether gone, plays a more minor role in national identity. The national interests that can be achieved through intercountry adoption outweigh any risks that might occur through a de-stabilisation of national identity due to the intercountry involvement. On the other hand, syncretic states with a highly contested national identity are thus likely to become receiving states in intercountry adoption.

¹⁵⁴ R De Souza, ‘Motherhood, Migration and Methodology: Giving Voice to the “Other”’ (2004) 9(3) *The Qualitative Report* 463, 466. See also Dubinsky (n 840) 145-147, H Bhabha, ‘Of Mimicry and Man: The Ambivalence of Colonial Discourse’ (1984) 28 *October* 125, 126.

¹⁵⁵ Dubinsky (n 109) 147.

¹⁵⁶ See discussion in Chapter One on this theme in intercountry adoption.

This makes it unlikely that a state with a highly contested identity—that has not settled on an internal notion of what its identity is or should be—will become involved in intercountry adoption as a receiving state. Only after a state has reached a reduced point of disagreement about its identity is it likely to become involved in intercountry adoption. In other words, if it lacks the appearance of a fixed identity, it is unlikely to become involved in intercountry adoption.¹⁵⁷

Intercountry Adoption: Who Can be a Member of a Receiving State

Selman comments on the observed links between intercountry adoption and immigration policies: ‘The growth of intercountry adoption in Spain has been associated with an increase in immigration and there is a need for more analysis of the similarities and dissimilarities between intercountry adoption and child migration.’¹⁵⁸

This link is more than a casual one—it is one that is significant for an understanding of the process by which a state decides to become a receiving state in intercountry adoption. Such a decision, as the synopsis above shows, is far more complicated than a decision to extend membership to children in distant states. The best interests of the child’s best interests are not a significant influence on a state decision to receive children through intercountry adoption.¹⁵⁹ Factors that do appear to be key to the decision of a state to receive children through intercountry adoption include a state’s perception of how it is constituted—how should members of that state be determined—and issues related to achieving a stable internal identity and external status and position in its relationships with other states. Accordingly the best interests standard is not directly applied in the decision of the state to receive children, but is instead utilised as a justification to fulfil other national needs.

¹⁵⁷ See discussion in this chapter on formation of national identity.

¹⁵⁸ P Selman, ‘Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004’ (2006) 23(2) *Journal of Population Research* 183, 189.

¹⁵⁹ Dubinsky (n 109) 147; K Lovelock, ‘Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada, and New Zealand in the Post W.W. II Period’ (2000) 34(3) *The International Migration Review* 907, 909-910. See also generally, discussions on intercountry adoption engagement in Chapters Four and Five.

The links between intercountry adoption, migration and immigration have been observed by several researchers.¹⁶⁰ Lovelock traces the development of receiving state intercountry adoption policies through the inclusion of intercountry adoption in national immigration policy.¹⁶¹ She argues that for many years, intercountry adoption policies were not developed outside of immigration policies such that the ‘welfare of a child of a different national origin and location’¹⁶² was never the driving force behind the creation and implementation of these immigration policies.¹⁶³

Rather the inclusion of intercountry adoption as part of immigration policies served other national interests.¹⁶⁴ At the same time, immigration policy is an essential instrumentality for the very occurrence of an intercountry adoption.¹⁶⁵ Lovelock comments that

Intercountry adoption can only take place if immigration policy facilitates the practice, and by extension, if the practice is in keeping with national objectives.¹⁶⁶

The primary motivation in the formulation of immigration policy and practices are to obtain benefits of some sort for the state.¹⁶⁷ These benefits are ones that are congruent with perceived national aspirations, which are inclusive of a state’s evaluation of ‘their relation to the international community and how their national objectives and practices shape or impact international standing, reputation and image.’¹⁶⁸

¹⁶⁰ P Selman, ‘Intercountry Adoption in the New Millennium: The “Quiet Migration” Revisited’ (2002)21 Population Research 205; Selman 2006 (n 159); K Lovelock (n 160); C Choy ‘Institutionalizing International Adoption: The Historical Origins of Korean Adoption in the United States in K Bergquist and others (eds) *International Korean Adoption: A Fifty Year History of Policy and Practice* (The Haworth Press, 2007). See also ‘Consultation Paper, Aspects of Intercountry Adoption’, The Law Reform Commission, Ireland, March 2007 for a discussion on intercountry adoption and immigration.

¹⁶¹ Lovelock (n 159) 907.

¹⁶² Lovelock (n 159) 909-910.

¹⁶³ Lovelock (n 159) 909-910, 923,933, 943-944.

¹⁶⁴ Lovelock (n 159) 909-910,923, 933, 943-944.

¹⁶⁵ Lovelock (n 159) 909.

¹⁶⁶ Lovelock (n 159) 909.

¹⁶⁷ Lovelock (n 159) 909.

¹⁶⁸ Lovelock (n 159) 910. See also discussion Croucher (n 34) 642-644 on the links between immigration law and establishing national identity.

Inclusion of intercountry adoption in national immigration policies generally occurred along with other changes in more general national immigration policy.¹⁶⁹ Just what the shifts in immigration policy represent is contested. Kaufman links immigration policy changes away from ethnic-based entry criteria have been linked by Kaufman to changes in how nations identify the basis of their existence.¹⁷⁰ According to Kaufman, the shifts occur when nations identify themselves as having a civic rather than ethnic basis at the foundation of defining the nation.¹⁷¹ This suggests a linear view of national identity development and change that is not supported in a constructivist view.

On the other hand, Shulman, whilst not espousing a constructivist view on national identity formation, contests the argument that shifts in immigration policy reflect larger changes in national identity.¹⁷² Rather, he says, such policies are crafted by a limited and privileged powerful group of officials and that instead, immigration policies are tied to self-identified benefits of the nation,¹⁷³ with possible economic and other benefits as the motivation for changing immigration policy.¹⁷⁴ Shulman's view is consistent with that presented by Lovelock.

Regardless of whether immigration policy changes do reflect a change in national identity basis, an important question to consider is what events are necessary to bring about a shift in national identity basis? Kuzio remarks:

Evolution from ethnic to civic nationalism is only likely to take place after the core ethnic group is self-confident within its bounded territory to open the community to 'outsiders' from other ethnic groups.¹⁷⁵

¹⁶⁹ Lovelock (n 1590) 919-920; Kauffman, 'Ethnic or Civic' (n 44) 30-31. Choy comments on the juxtaposition on immigration policies and intercountry adoption highlight the differential status created for children and adults: 'Placing Korean adoption in the historical contexts of US immigration as well as the Cold War is useful for understanding the radical nature of this phenomena. For much of the first half of the twentieth century, exclusion was a dominant theme in the history of Asian immigration to the United States. U.S. legislation historically marked various Asian peoples—Chinese, Japanese, Koreans, South Asians and Filipinos—as strange, dangerous, and inassimilable. These differences were codified in the U.S. immigration laws, for example, which by 1924 had virtually banned Asian immigrants to the United States. By contrast, the practice of international adoption from Asia created a vision of the world in which national, cultural, and political borders could be crossed', Choy (n 161) 28-29.

¹⁷⁰ Kauffmann, 'Ethnic or Civic Nation' (n 44) 30-31.

¹⁷¹ Kaufmann, 'Ethnic or Civic' (n 44) 30-31; see also Kuzio2002 (n 44) 26-28.

¹⁷² Shulman (n 44) 559-560.

¹⁷³ Shulman (n 44) 560

¹⁷⁴ Shulman (n 44) 560.

¹⁷⁵ Kuzio 2002 (n 44) 36.

Although the idea of a linear shift of national identity is inconsistent with a constructivist account of national identity formation, there is still some valuable insight to be gained from the notion that a state must have achieved a certain sense of security and stability both within its internal composition and external relations before it embarks on the course of events that lead it to become a receiving state in intercountry adoption.

Empirical work carried out by Jones and Smith sheds some interesting light on national identities.¹⁷⁶ In carrying out their work, they used ‘two dimensions of national identity: an ascriptive dimension resembling the concept of ethnic identity described in the historical and theoretical literature, and a voluntarist dimension closer to the notion of civic identity.’¹⁷⁷ The ascriptive dimension can be understood as close to the syncretic concept discussed earlier; and the voluntarist dimension as close to the Jacobin concept. The empirical quantitative results are remarkable for the added dimension of information they provide, and move understanding of national identity past the usual qualitative research on this subject.¹⁷⁸ Their findings are that:

...independently of individual differences in socio-demographic characteristics, the higher a country’s degree of post-industrialism, the higher is the relative commitment of its population the more open and inclusive civic/voluntaristic dimension. This tendency is reinforced by a high degree of current military preparedness but weakened in countries with a history of relatively high involvement in external wars during the present century, where the ascribed/objectivist form of national identity has greater popular support. Support for the civic/voluntaristic dimension is stronger among the more affluent classes and, by extension, among political elites who tend to be disproportionately recruited from their ranks. The fact that immigrants also subscribe to this view of national identity highlights an enduring political multicultural countries. The native-born, who constitute the majority, tend to endorse a more closed version of national identity than do newcomers. This difference in emphasis is a potential source of internal conflict.¹⁷⁹

It is worth dissecting this synopsis of Jones and Smith’s research against the discussion that has occurred in this chapter, and comparing it against the constructivist theory of

¹⁷⁶ FL Jones and P Smith, ‘Individual and Societal Bases of National Identity: A Comparative Multi-Level Analysis’ (2001) 17(2) *European Sociological Review* 103

¹⁷⁷ Jones and Smith (n 176) 105.

¹⁷⁸ Jones and Smith (n 176) 104.

¹⁷⁹ Jones and Smith (n 176) 112.

intercountry adoption, and looking closer at one of their concluding points as it relates to receiving countries.

They conclude that a post-industrialism is aggregated to a national identity type that conflates with that of Jacobin. They indicate that this type is strong in nations that have not engaged recently in a war but do have a certain amount of military strength. This squares with the proposition that receiving states must have a certain economic and military attainment, along with an achieved Jacobin national identity.

Based on the discussion in this chapter, including the results of the empirical quantitative work done by Smith in Jones, then it would appear that those states that have made the decision to engage in intercountry adoption as receiving states are those who have established a requisite amount of internal stability, including low fluctuation in national identity, and a positive self-image, along with external global power and prestige— perhaps events that took shape at least in part during the Cold War.¹⁸⁰

Conclusion

This chapter has provided a discussion on the elements that comprise the engagement in intercountry adoption for both sending and receiving states. While there are some common elements shared in the process, sending and receiving states take profoundly different routes to reach intercountry adoption. The formation of national identity plays a fundamental role in the process for both sending and receiving states. And of particular significance is the identity that a state develops, along with its national and international interests. Those play out to ultimately determine if a state decides that there is a benefit to engaging in intercountry adoption—not because of a humanitarian impulse, but because an engagement in intercountry adoption provides what Hathaway has identified as a ‘collateral benefit’. Intercountry adoption engagement, whether as a sending or receiving country, helps further some other foreign policy interest of that state. The best interests standard takes its place in the process by simply being a foil for

¹⁸⁰ Choy (n 161) 28-29; Kaufmann, ‘Ethnic or Civic’ (n 44) 30-31; See generally Lovelock (n 159); T Faist, ‘Transnationalization in International Migration: Implications for the Study of Citizenship and Culture’ (2000) 23(2) *Ethnic and Racial Studies* 189, especially at 202-204; also see the discussion on stability and contestation of national identity in this chapter.

the other interests that a state wants to pursue. Intercountry adoption is an adjunct activity, a means to an end, not an end in itself. It has only the meaning that is given to it as mutually constructed between a sending and a receiving state, that allows them to carry out their reciprocal aims in setting up intercountry adoption transactions.

Chapter Six-- The Best Interests of the Child in Intercountry Adoption: A Constructivist Theory

Introduction

This Chapter presents the answers to the research question that was posed at the beginning of Chapter One. It provides a theoretical answer to the questions of the motivations and influences on states to engage in intercountry adoption, and in turn, what effect those have on the interpretation and application of the best interests standard. The answer is both complex and simple.

Figure 6.1 above shows the journey of the best interests standard—and the interaction amongst the different actors in intercountry adoption who create and assign meaning, and then transfer that meaning through their interaction with other intercountry adoption actors.

Theory statement

States become involved in intercountry adoption through a complex cycle that involves formations of national identity and a desire to achieve certain relations with other states. Additionally, for eventual sending states, the process is triggered by an event of cultural trauma. For eventual receiving states, the process begins when a condition of relative stasis is reached in a state's identity. For states that do become involved in intercountry adoption, specific state to state relationships are formed to facilitate the exchange of a child. States formulate a shared meaning of the best interests standard between them, though, one state may bring more influence to bear upon that meaning than the other. States, while important and indeed the primary site for child exchange, are not the only actors in intercountry adoption. There are international level actors and domestic actors within the state who may or may not be linked to the state governmental apparatus.

This theory is significant in that it provides a comprehensive roadmap for the way in which meaning is assigned to the best interests of the child standard as it is utilised in intercountry adoption. Intercountry adoption is itself a complex process. The process occurs at many different levels. There are international organisations and international

treaties that deal with intercountry adoption. There are domestic actors involved who are independent from states. Then there are state-linked actors, who also play a significant part in the delivery of intercountry adoption. Intercountry adoption is something that is primarily however that occurs as a state-to state transaction of the child. Just as there is an exchange of a child in intercountry adoption, however, there is also an exchange and variation of meaning of the standard across the web of actors who are involved in intercountry adoption. The exchange and variation of meaning is not so straightforward a route as the exchange of a child from one state to another—though that state-to-state relationship does play a role in the creation and transfer of meaning.

The best interests standard functions as a norm—and it is within a normative framework that the standard and its journey amongst a transnational network¹ of actors is further analysed and discussed in this chapter.

Within a normative context, the best interests standard can be understood as functioning as a ‘transnational regulation’², as defined by Cotterrell as a:

Regulation that applies to (or is intended to affect directly) non-state actors (individuals, groups, corporate bodies) and is not restricted within the jurisdictional limits of a single nation state.³

The best interests standard clearly meets this definition, as show by the diagram of the transnational network of intercountry adoption. It transcends being either an international law principle or a domestic law principle only. It is a standard that involves not only states, but non-state actors at both a state and international level. This makes it squarely placed then, within what Cotterrell calls ‘transnational networks of community.’⁴ The networks have an important role to play in normative legitimacy, as Cotterrell speaks of the networks:

¹ R Cotterrell, ‘Transnational Communities and the Concept of Law’ (2008) 21(1) Ratio Juris 1,13.

² Cotterrell 2008 (n 1) 2.

³ Cotterrell 2008 (n 1) 2.

⁴ Cotterrell 2008 (n 1) 13.

...transnational networks of community as producing or inspiring their own law, or at least, being in a position to give or refuse legitimacy to forms of regulation addressed to them or developed with reference to them.⁵

The theory highlights the particularly important point that the meaning that is given to a standard in one setting is not the interpretation or application given to the standard in its usage. It also highlights the inevitability of the standard having multiple meanings at any given time. The reality is that the standard is given meanings by the many actors in the complex web of intercountry adoption in a dynamic process. Figure 6.1 outlines this web and the movements of meaning. The theory might best be described as outlining the web of intercountry adoption and where the best interests standard travels within that web, and with what effect. The meaning is traced until it reaches what Wiener calls ‘meaning-in-use’⁶ where the best interests standard is being used in the actual decision making on the situations of individual children and whether or not they will enter into intercountry adoption.

The Theory: Transnational Network of Intercountry Adoption and the Best Interests of the Child Standard

Both the comparative legal analysis chapter and the elite interview chapter have presented substantial information on the intercountry adoption best interests standard. The comparative legal analysis chapter reveals that the best interests standard is used in state to state relationships as a means of achieving each state’s international relation aims. Chapter Three likewise reveals intercountry adoption actors assign meanings to the best interests standard which help meet overall organisational aims. It describes a complex network of actors who are involved in intercountry adoption, including international organisations, domestic level non-governmental agencies, and domestic governmental branches. These actors each have different interests that motivate their participation in intercountry adoption. These interests are transmitted to normative meanings given to the best interests standard. What is the intersection of these two

⁵ Cotterrell 2008 (n 1) 13.

⁶ A Wiener, ‘Enacting Meaning-in –Use: Qualitative Research on Norms and International Relations’ (2009) 35 *Review of International Studies* 175, 176, citing J Weldes and D Saco, ‘Making State Action Possible: The United States and the Discursive Construction of “The Cuban Problem”, 1960–1994’, *Millennium*, 25:2 (1996)361–95.

theories, and their significance for understanding the best interests standard? This Chapter provides a discussion of an overall theory the best interests-standard –as transnational norm; explaining the implications for these as the standard reaches its end users, those that put the standard to usage in their daily work on intercountry adoption involving individual children, including judges, lawyers and social workers.

The theory presented here is the culmination and synthesis of the discussion presented in the preceding chapters. This again follows the diktat of grounded theory methodology, where data is examined through ever increasing abstractions to reach a theory that meets the constructivist theory aims of:

...learning how, when, and to what extent the studied experience is embedded in larger and often, hidden positions, networks, situations and relationships. Subsequently, differences and distinctions between people become visible as well as the hierarchies of power, communication and opportunity that maintain and perpetuate such differences and distinctions.⁷

This theory, as intended by Glaser and Strauss, ‘explains the studied process in new theoretical term, explicates the properties of the theoretical categories, and often demonstrates the causes and conditions under which the process emerges and varies, and delineates its consequences.’⁸

It is worth returning for a moment to re-examine the purpose of the thesis and the specific research question posed. The state level was selected for analysis because intercountry adoption is essentially an action of a state—whether sending or receiving. The importance of the state in intercountry adoption is explained by Signe Howell:

...in recent times, the practice has also increasingly become the concern of the state. Transnational adoption activates one nation- state in a dialogical relationship with other nation-states, at the same time it has become a global process. The actual transfer of a child is no longer simply a transaction between the individuals concerned. Adoption across national borders has increasingly become a matter in which the state in both countries places an increasingly controlling role. Ultimate power to relinquish a child (a citizen) is held by the nation-state. It transfers these rights to another nation-state, which incorporates the child as its own citizen.

⁷ K Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications Inc. Thousand Oaks, California 2006) 130-131

⁸ Charmaz (n 7) 7-8.

...

Transnational adoption may thus be analysed as a two-way process between donor and recipient countries...⁹

But there is activity at levels both within and beyond that of the state—of domestic organisations and of international organisations that are made up of more than one state. As shown by the transnational network theory, intercountry adoption is much complex and layered than the exchange of a child between two states, although that is a critical component of the theory. It is however, only one part of the intercountry adoption transnational network. As well there are choices made at the individual level, as indicated by Howell. That these choices are not always made voluntarily or knowingly on the side of a birth family has been highlighted in the discussion in the Comparative Law chapter. The net effects of individual actions are accounted for in decisions about national identity and state decisions on inclusion and exclusion.

It is helpful here to briefly summarise the salient points from the final theory. The theory from state motivation theory emphasised the importance of state –to-state relationships in intercountry adoption engagement, after states go through a process that leads them to that engagement. The paired states mutually construct a normative meaning for the best interests standard. This co-created standard is imbued with normative meaning that meets the international relations aims of each state generally, and specifically *vis a vis* each other. The interview chapter revealed the transnational network involved in intercountry adoption both internationally and domestically. This network of actors includes international organisations, domestic governmental branches and agencies, and other non governmental agencies. As well, this chapter revealed that there are predominant influences on the normative meaning given to the best interests intercountry adoption standard—that of the Hague Conference, and that of the United States—with varying emphasis on the links between subsidiarity of intercountry adoption and the best interests of the child standard.

⁹ S Howell, *The Kinning of Foreigners: Transnational Adoption in a Global Perspective* (Berghahn Books, 2006) 229.

The theory presented here is an account of these influences, and provides an explanation of the processes that influence the interpretation and application of the best interests standard. This information is relevant for understanding the multiple influences upon intercountry adoption, something that is much more complexly involved than simply providing a home for children in need. Indeed, as revealed by this theory, intercountry adoption is anything but a simple exercise motivated purely by the desire to provide for children in need of a family.

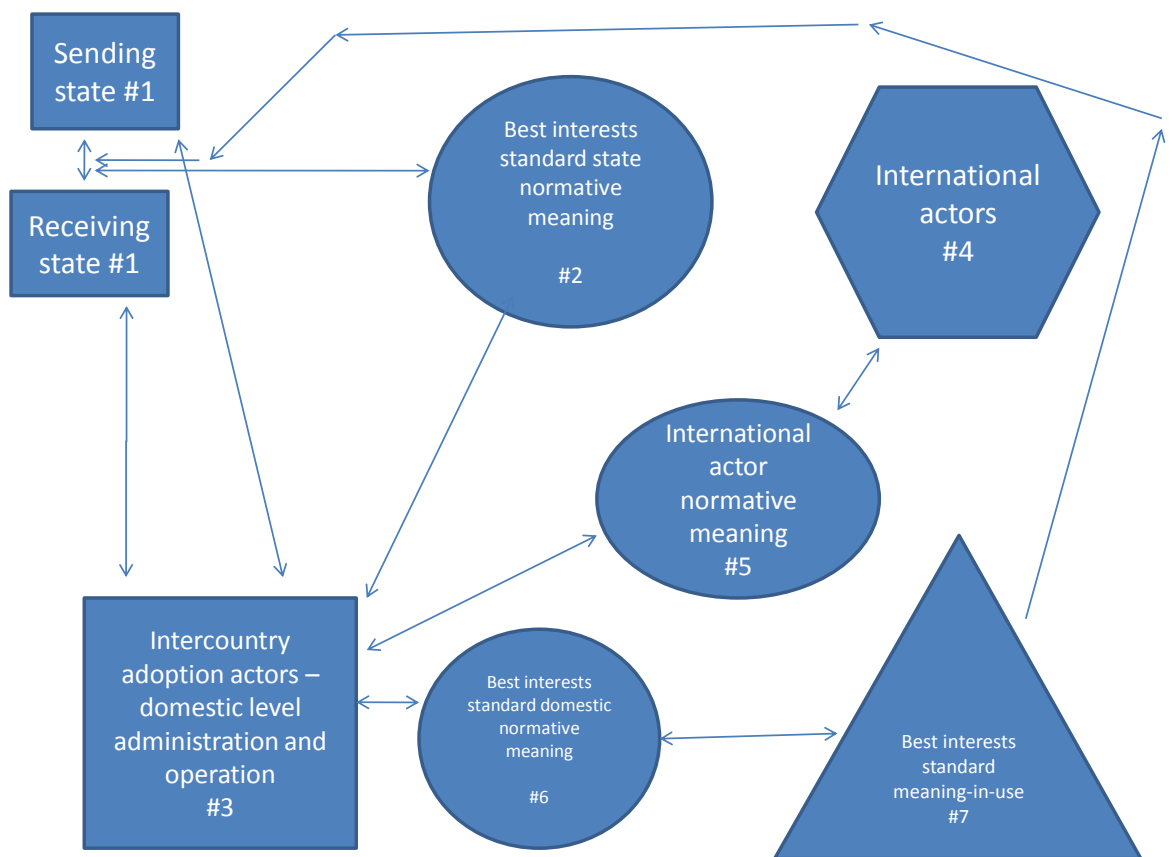


Figure 6.1—Transnational Network of Intercountry Adoption and the Best Interests Standard

Figure 6.1 # 1 and #2 reflect a state's engagement in intercountry adoption as a result of the process outlined in Chapter Five. States become involved in intercountry adoption as a means of advancing national interests and relationships with other states; especially within that state- to- state relationships that are fundamental to the operation of intercountry adoption. The normative meaning of the best interests standard is mutually constructed by the pairs of sending and receiving states that are necessary to the transfer of a child through intercountry adoption. The normative meaning is given to the standard in that instance that promotes the international relations issues that are pursued by each state, and more specifically, as between each other.

However, a state's decision to engage in intercountry adoption as a sending or receiving state does more than trigger the mutual creation of normative meaning for the standard. A state that is engaged in intercountry adoption must deploy a wide range of actors in order to actually implement its involvement in intercountry adoption. These include a wide range of domestic actors, such as domestic governmental actors, agencies operating domestically and other adoption stakeholders. These are shown in Figure 6.1 # 3.

Within the transnational network, the state is not seen as a 'rational, unitary actor'¹⁰ but as 'a host of actors with distinct sets of institutional biases and predispositions that will lead them to favor different foreign policy priorities at any given time.'¹¹ Davis and Cortell acknowledge that their view of the state as consisting of multiple and perhaps conflicting parts is at odds with the usual way in which international constructivist theory has looked at the state. Those have typically treated the state as 'a unitary actor'¹²; and not accounted for internal divisions and components; nor yet how these might be important to normative meaning that is transferred between different settings. This also squares with the view that Weldes offers of the state in forming national interests—that the state is not a 'unitary actor.'¹³ She presents the view that meaning is not only created by interactions between states themselves, but by those individuals who

¹⁰ J Davis and A Cortell, *How do International Institutions Matter? The Domestic Impact of International Rules and Norms* (1996) 40(4) *International Studies Quarterly* 451, 454; 472.

¹¹ Davis and Cortell (n 10) 454; 472.

¹² Davis and Cortell (n 10) 472.

¹³ J Weldes, 'Constructing National Interests' (1996) 2(3) *European Journal of International Relations* 275, 280.

act as state officials, who bring their own meaning into the equation. Weldes explains this:

...state officials do not approach international politics with a blank slate on which meanings are written only as a result of interactions among states. Instead, they approach international politics with an already quite comprehensive and elaborate appreciation of the world, of the international system and of the place of their state within it. This appreciation, in turn, is necessarily rooted in meanings already produced, at least in part, in domestic political and cultural contexts.¹⁴

The thesis and the theory produced do not, as discussed, treat the state as a unitary actor. Rather as described, the state is seen as having multiple components, which act and interact with other state components in the creation of normative meaning for the best interests standard.

In the international transnational network, the different actors that comprise the state can be seen in Figure 6.1 #1, #3, and #7. #1 shows the state the pair of sending and receiving states, while 3 is representative of both governmental and non-governmental actors that become involved in intercountry adoption. #7 represents yet another facet of the state, the end users of the best interests standard—those actors who are responsible for making the determination of whether a particular child should be sent or received by another country through intercountry adoption.

The normative meaning created by states in their pursuit of foreign relations issues, as well as the normative meaning created by international actors influence the domestic level actors that actually put intercountry adoption into operation on a variety of levels, governmentally, to families, to children. In turn, these actors create their own normative meaning for the best interests standard. By no means is that normative meaning uniform across a range of domestic actors in a given state. As discussed in Chapter Three, each domestic actor may have differing individual interests, which in the case of a bureaucracy can include simply the self-survival of that agency. Those interests are reflected in the normative meaning that each domestic actor gives to the best interests standard. Finally, normative meaning in use is created in the exercise of domestic

¹⁴ Weldes (n 13) 280.

actors carrying out their work with intercountry adoption. Whether that norm usage is accepted as having legitimacy depends on the extent to which that norm usage is rooted within actual values and practices of the relevant community.

Figure 6.1 #3 represents (state) level intercountry adoption actors. These are the ones who are essential for the implementation of intercountry adoption administration and operation. These include the actors that are involved in domestic legal and policy processes. It includes both governmental and non-governmental agencies.

The theory is not only an account of the creation of normative meaning at various junctures. It also focuses on the transfer of the standard from one context or domain to another, and what happens to the normative meaning assigned to that standard in the transfer process. The transfer itself becomes a dynamic that is part of the standard's normative meaning construction. Normative meaning does not transfer without being varied. The very act of transfer creates interactional dynamics which shift and alter meaning. Thus, the theory focuses not only on the creation of normative meaning in particular spaces, or with particular actors, but on the process of transfer of that meaning as part of the necessary process of a state becoming involved in intercountry adoption.

One thing that must be considered then is the ways in which an international norm is transferred into a domestic context—in this discussion the international norm is the best interests standard with the normative meaning that is given to it by the Hague Conference. As shown by the discussion of the bilateral agreements, even non Hague Convention members are influenced by the normative meanings of the Conference and give some recognition to the normative meanings, even if the normative meaning is not wholly adopted by each state.

6.1 # 4 shows actors at the international level. The predominant, but not only, actor at the international level is the Hague Conference, as discussed in the Interview chapter. This is an international organisation as discussed in the interview chapter, which by definition is made up of more than one state member.¹⁵ Thus, actors from Figure 6.1 #1 can also be part of 6.1 #4. As well, domestic level actors that are not the state can take part at this level.

¹⁵ See discussion on international organisations in Chapter Three.

Figure 6.1 #5 shows the normative meaning that is given to the best interests standard at the international level.

Figure 6.1 #6 shows best interests standard normative meaning from state actors, each actor creating their own normative meaning.

Figure 6.1 #7 shows the best interest standard end user normative meaning in use, the best interests standard as it is used in daily decisions involved in the situation of an individual child, whether that child should enter and be placed through intercountry adoption.

Understanding Normative Cycles

Interpretation of this theory past a descriptive level of understanding can be done by superimposing a framework for normative cycle—a framework that has been developed by Finnemore and Sikkink.¹⁶ As discussed below however the interpretation of the network does not rely solely on the Finnemore-Sikkink framework. The framework is augmented by complementary concepts throughout the discussion that aid in understanding the diffusion the intercountry adoption best interests standard. One more important concept is important to keep in mind as that discussion ensues and that is the very nature of norms themselves ‘...norms entail a dual quality: that is they are both structuring and socially constructed through interaction in a context.’¹⁷ This constructivist understanding of norms is critical to bear in mind as the discussion of the theory through the lens of a normative framework is undertaken.

The literature review chapter discussed the importance of being able to ascertain where normative meaning is derived. Additionally, it discussed the importance of tracing different sources of normative meaning and the paths that norms take with that meaning. Critical constructivism has presented some frameworks for analysing this. However, the framework of the normative cycle is not relied upon exclusively and is

¹⁶ M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 877, 894-905.

¹⁷ A Wiener, ‘The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to ‘Interaction’ (2007) 10 (1) *Critical Review of International Social and Political Philosophy* 47, 49.

augmented with other theoretical discussion within critical constructivism as needed to explain the theory. Alkoby explains this need

Defining in more precise terms the origins of norms and the preferred image of the international society that ought to share them is not a mere exercise in political theorizing. It would provide a justification for why existing norms ought to spread (rather than only showing implicit sympathy for their diffusion) and in what way, as well as suggest how (and which new norms may be constructed in the future. This, in turn, has direct bearing on the choice of mechanism for normative change.¹⁸

Thus, according to Alkoby, a network map shows the routes by which normative meaning is transferred, but also how and where new meanings can be and are constructed.

Wiener also comments on the importance of being able to ‘identify patterns of interpretation’¹⁹ of normative meaning.²⁰ She argues that the

transfer between contexts enhances the contestation of meaning, as differently socialised individuals—for example politicians, civil servants, parliamentarians, lawyers, lobbyists, journalists, and so on—who have been trained in a variety of traditions and have been socialised in different day-to-day circumstances seek to interpret them. ...once norm interpretation and implementation happen in various contexts (which is usually the case when researching the role of norms in the international realm), the meaning attached a norm is likely to differ according to the respective experience with norm-use. It is therefore important to recover the crucial interrelation between experience with and enactment of meaning in use.²¹

She points out that normative meaning given when the norm is applied or used is different than the meaning it is given in different contexts, and that it is important to be able to pinpoint where and how meanings change. Again the transnational network presented in this thesis provides that ability.

Whilst it is beyond the scope of this thesis, the research that is called for by Wiener on normative meaning and transfer of meaning through contexts is an important one, and a potential next research step on the intercountry adoption best interests standard.

¹⁸ A Alkoby, ‘Theories of Compliance with International Law and the Challenge of Cultural Difference’ (2008) 4 *Journal of International Law and International Relations* 151, 178.

¹⁹ Wiener 2009 (n 6) 181.

²⁰ Wiener 2009 (n 6) 181.

²¹ Wiener 2009 (n 6) 182.

Three Phases of Normative Cycle

This section briefly outlines the three phases of this normative framework, and then returns to a discussion of the theory within it. As will be discussed, there is nothing automatic about progression of a norm through the cycles. Not all norms make it through the three phases of the cycle²², which is described by Finnemore and Sikkink:

Norm influence by be understood as a three-stage process...the first stage is “norm emergence”; the second stage involved broad norm acceptance, which we term...a “norm cascade”, and the third stages involves internalization. The first two stages are divided by a threshold or “tipping point”, at which a critical mass of relevant state actors adopt the norm.²³

While the Finnemore-Sikkink framework was developed to apply to international norms, it can easily be used to explore both domestic and international norms, and utilised to explore the important part of the cycle that involves the transfer of a norm from one setting to another. The transfer of normative meaning from one domain to another is an important part of the transnational network. The diagram shows that the standard has three different normative meanings assigned, by three different sets of actors, to finally emerge in the end-user’s application of the standard in deciding if an individual child should enter into intercountry adoption. Figures 6.1 #1, #3 and are representative of the second stage of the norm cycle, the norm emergence stage, whilst Figures 6.1 #2, #5 and 6 are representative the normative meanings created in this cycle, by and between the entities at figures 6.1. #1, #3, and #4.

Figure 6.1# 7 is representative of the third stage of the cycle, internalization. At this stage a new issue enters into the discussion, which is the legitimisation of the norm.

Stage One--The Creation of Norms: Not From ‘Thin Air’

²² Finnemore and Sikkink (n 16) 895

²³ Finnemore and Sikkink (n 16) 895.

Finnemore and Sikkink discuss the way that norms are produced by agents—referred to as norm entrepreneurs who act to bring the situation where a potential new norm first appears:

.....two elements seem common in the successful creation of most new norms: norm entrepreneurs and organizational platforms from which entrepreneurs act...Norms do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behavior in their community...Norm entrepreneurs are critical for norm emergence because they call attention to issues or even “create” issues by using language that names, interprets and dramatizes them....it is very difficult to explain the motivations of norm entrepreneurs without reference to empathy, altruism, and ideational commitment...Often, however, entrepreneurs work from standing international organizations that have purposes and agendas other than simply promoting one specific norm. Those other agendas may shape the content of the norms promote by the organization significantly.²⁴

This stresses that norms do not simply come from nowhere, but instead, are created for specific reasons by certain entities, which have their own motivations for bringing these norms to the fore in the first place.

Norm meaning adoption has three sources in this theory—the intercountry adoption state-to-state dyad at 1, domestic level intercountry adoption actors at Figure 6.1 #3, and international actors at Figure 6.1 #4.

Stage Two: Norm Cascade

Finnemore and Sikkink describe the second stage of the normative life cycle as the norm cascade:

The second stage is characterized more by a dynamic of imitation as the norm leaders attempt to socialize other states to become norm followers. The exact motivation for this second stage where the norm “cascades” through the rest of the population (in this case, of states) may vary, but we argue that a combination of pressure for conformity, desire to enhance international legitimization, and the desire of state leaders to enhance their self-esteem facilitate norm cascade. At the far end of the norm cascade, norm internalization

²⁴ Finnemore and Sikkink (n 16) 897-899.

occurs; norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.’²⁵

After a norm is created, what happens? And what influences what happens? These are the points that are picked up by Finnemore and Sikkink in the second phase of the normative lifecycle, the norm cascade. They emphasise that normative ‘change at each state...is characterized by different actors, motives and mechanisms of influence.’²⁶ At Stage Two, these actors as ‘states, international organizations, networks’ and their motives are ‘legitimacy, reputation, esteem.’²⁷

A norm moves from stage one to stage two when the norm has reached ‘a threshold or tipping point.’²⁸ This is reached for international norms when it has been adopted by a sufficient number of states.²⁹ This sufficient number has been³⁰ shown by quantitative research to be a minimum of ‘one-third of the total states in the system.’ But beyond this, there is another factor. Whether this tipping point is reached relies not only on how many states, but ‘which states adopt the norm. Some states are critical to a norm’s adoption, others less so.’³¹ With reference to the best interests standard, for instance, it seems that having the United States adopt the normative meaning that underscored the importance of subsidiarity was not critical to that normative meaning becoming widespread—indeed reaching the third stage of the normative lifecycle. Finnemore and Sikkink go on to describe the shift of a norm from stage one to stage two of the normative lifecycle:

Up until the tipping point, little normative change occurs without significant domestic movements supporting such change. After the tipping point is reached, however, a different dynamic begins. More countries begin to adopt new norms more rapidly even without domestic pressure for such change....States, however,

²⁵ Finnemore and Sikkink (n 16) 895.

²⁶ Finnemore and Sikkink (n 16) 895.

²⁷ Finnemore and Sikkink (n 16) Table 1, ‘Stages of Norms’, 898.

²⁸ Finnemore and Sikkink (n 16) 901.

²⁹ Finnemore and Sikkink (n 16) 901.

³⁰ Finnemore and Sikkink (n 16) 901.

³¹ Finnemore and Sikkink (n 16) 901.

are not the only agents of socialization. Networks of norm entrepreneurs and international organizations also act as agents of socialization by pressuring targeted actors to adopt new policies and laws and to ratify treaties and by monitoring compliance with international standards.³²

Finnemore and Sikkink's normative lifecycle is focused on international norms. This thesis uses it to explore normative meaning in both international and domestic settings. Finnemore and Sikkink are clear that the mechanisms that account for normative processes in domestic and international settings have much in common. They reference that research has revealed that

there is more similarity in the way norms and law work domestically and internationally than IR scholars have ever thought. IR scholars have generally assumed that the existence of a coercive state able to enforce laws made domestic order very different from international order..A prominent group of legal scholars at the University of Chicago, however, now argue that, even within a domestic setting, making successful law and policy requires an understanding of the pervasive influence of social norms of behaviour. This is a particularly compelling insight for IR scholars, since the international system is characterized by law and norms operating without direct punitive capacity.³³

This section discusses the second stage of the normative life cycle in regard to the theory presented. It looks at the role of the multiple actors in this stage of normative adoption of the best interests of the child standard. It looks at the normative meaning in state-to state dyads, normative meaning that is advanced by domestic level and international level actors, and what happens with the transfer of normative meaning between domestic and international settings.

Norm Meaning by Intercountry Adoption State-to-State Dyad

The best interests standard is given normative meaning that facilitates the accomplishment of international relations goals between two states. In this way, the best interests standard has a normative meaning that promotes the relationship between the two states in question and is mutually constructed between them. As discussed in Chapter Four, one state may be dominant over the other in this relationship. However, the normative meaning that is generated here is not guaranteed to stay intact. In fact, in

³² Finnemore and Sikkink (n 16) 902.

³³ Finnemore and Sikkink (n 16) 893.

the second phase of the normative lifecycle—the norm cascade-- the opposite is true with the transfer of the standard to other contexts. The particular dynamics of state –to-state relations can influence what normative meaning is given to the best interests standard at this juncture of the transnational network.

The actual relationship between the states in the dyad can take on particular significance on the normative meaning that is given to the best interests standard. Here the concept of an ‘informal empire’³⁴ relationship between two states can exist. Not all state dyads formed in intercountry adoption exchange are in relationships of informal empire. The dynamics of this particular sort of relationship between state dyads has particular pressures brought to bear on normative meaning, and offers insight into some long-standing intercountry adoption issues. Wendt and Friedheim offer a definition of informal empire:

...informal empires are regional and multiple. In the postwar period, the three principal informal empires have been those of the United States, the Soviet Union and France, but there are other, more local examples as well. ..

A necessary condition for informal empire is a distribution of military power so unequal that a more powerful state actor has the material capacity to provide security to a weaker one. The territorial rights distributed by the institution of sovereignty help constitute these capacities, and to that extent it is prior to informal empire. Sovereignty should not be seen as a given, first principle in the analysis of informal empire, however, since through its effects on state identities and interests informal empire helps create the conditions under which one state actor needs security assistance from another. This makes power disparities socially meaningful and compromises de facto sovereignty. After all, the vast majority of materially unequal dyads in the states system are not informal empires. In order to initiate an informal empire, a more powerful state must intervene in a weaker one with the object of creating a regime friendly to it. This can occur without the weak state’s consent...or with its consent...³⁵

³⁴ A Wendt and D Friedham, ‘Hierarchy Under Anarchy: Informal Empire and the East German State’ in T Biersteker and C Weber (eds) *State Sovereignty as Social Construct*, (Cambridge University Press, 1996) 248.

³⁵ Wendt and Friedham (n 34) 248-249. The idea of a type of informal empire relationship existing in intercountry adoption has been raised by T Hubinette ‘From Orphans to Babylifts: Colonial Trafficking, Empire Building and Social Engineering’ in J Trenka, J Oparah and S Shin *Outsiders Within: Writing on Transracial Adoption* (South End Press, 2006) 145 and T Perry, ‘Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory’ (1998) 10 *Yale Journal of Law and Feminism* 101 although not specifically indentifying the relationship as such. Perry comments that ‘The United States never formally held colonies in Latin America. Nevertheless our [the United States’] government had strong military ties to numerous governments in that area of the world. ...The United States has also been a dominant military force in a number of Asian countries, such as Korea and Vietnam where many

What is the relevance of the existence of a relationship of informal empire to intercountry adoption? It has several potential implications for how not only the exchange of children but the best interests standard is constructed and managed between the states. Informal empire is said by Wendt and Freidheim to be brought about by the stronger state seeking to create a friendly relationship within a weaker state, but it is also possible, although not brought up by Wendt and Freidheim, that the weaker state as well desires an amiable relationship with the stronger one, and that the intercountry adoption exchange of children is one way to shore up such a relationship.³⁶ Hubinette remarks that:

In 1980 the new [South Korean] government outlined a new approach to international adoption, integrated with in the so-called nongovernmental foreign policy to expand the emigration program and further develop friendship ties with Western allies.³⁷

The relationship of informal empire has an impact on the national identity of the dominant state:

Through a variety of mechanisms informal empire also has effects, perhaps less profound, on the identity and interests of dominant state actors. Clients may become actively involved as a form of lobbyist influencing the domestic policy of the patrons. ...Finally dominant state actors may develop narratives that justify their role to others and themselves (manifest destiny, white man's burden, and so on,) and that affect national conceptions of self. Informal empire is a codependency, even though it is hierarchical.³⁸

internationally adopted children have been born. The kind of economic and military relationships that the United States has had with some third-world countries can engender the same kind of cultural imperialism that results from more formal colonial relationships. As troubling as it may be for many to admit, a conception of poor, third-world countries as subordinate nations fits very comfortably with the practice of international adoption. This kind of view translates easily into the idea that Western adoptive parents are simply saving unfortunate third-world children by bringing them out of primitive, impoverished and disease-ridden countries into the more affluent life that the West can offer.', Perry, 135. See also generally M Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201, who discusses the themes of rescue and superiority of in the operation of international human rights.

³⁶ See discussion in Chapter Four on appeasing other nations and thus cementing relations with them as a motivation for South Korea to send children, at discussion regarding South Korea in notes 161, 165, 166. See also Hubinette (n 35) 146.

³⁷ Hubinette (n 35) 146.

³⁸ Wendt and Friedheim, (n 34) 250.

Not every state to state relationship between sending and receiving states in intercountry adoption is marked by unequal power dimensions—but it is enough of a potential occurrence between sending and receiving states to merit further discussion, and to determine what the implications and challenges are for the construction of a legitimate best interests standard. As the discussion below on ‘informal empire’ indicates, many of the themes within informal empire relationships are redolent as themes in intercountry adoption, such as the rescue of children and the superiority of the stronger nation.³⁹

The discussion also points out the relevance of identifying possible relationships of informal empire, and being cognizant of the power unbalances that might not only exist between states, but sustain the intercountry adoption relationship,⁴⁰ even if not rising to the level of an informal empire relationship.

Wendt and Friedheim’s observations on the co-dependent nature of informal empire provide revelatory insight on the nature of intercountry adoption when it occurs between states in a relationship of informal empire. This means that intercountry adoption itself is a product of as well as an enabler of the co-dependent relationship, and that at some level the continuance of intercountry adoption is as important for the continuance of the co-dependent informal empire relationship as the informal empire relationship is to the continuance of intercountry adoption. Thus, there would be great reluctance by either partner state in the informal empire relationship to disengage from the intercountry adoption operations that have been created.

In the situation with the best interests standard, it can be theorised that states have selected to follow the Hague Convention normative meaning because it fulfils one or both of these reasons—it increases their standing with and among other states and it enhances national self esteem. In the case of the United States, it can be theorised that until it put the Hague Convention into effect, and even following, the decision to give short shrift to subsidiarity as part of the best interests standard is linked to decisions about its international standing and international reputation—but as shown, in the comparative law chapter, the United States sees its involvement as a receiving state in

³⁹ See discussion in Chapter Four.

⁴⁰ Perry (n 35) 105; 106-107, 134-135, 154-156.

intercountry adoption related to issues of national prestige—that bringing a child to the United States is a way to enhance its standing among nations, and emphasize its position as a leader in the international arena. From that standpoint, its goals are accomplished when it is as simple and quick as possible to bring a child into the United States from another state—making subsidiarity a needless stumbling block for accomplishing its goals.

Thus, the United States exclusion or minimisation of subsidiarity as part of the intercountry adoption best interests standard is congruent with its motivations for becoming an intercountry adoption receiving state. While this position stands in stark contrast to the normative meaning promoted by the Hague Conference, it is completely consistent with the United States' motivations to become involved as a receiving state. And what about those states with which the United States has or had formed bilateral agreements—what were their motivations for adopting the same norm as the United States, in derogation from the norm that was promoted by most of the international community? Answers might be found in the existence of a relationship of informal empire between the United States and those states with whom it entered into bilateral agreements. The states sending children to the United States might then have had a goal of cementing relationships with the United States, specifically, rather than the international community at large. The sending state may see its self-esteem as being enhanced by strengthening the relationship with the dominant state in the informal empire relationship—the United States—and as well, there may well be pressure from the United States to agree to that normative meaning.

The existence of an informal empire relationship between states can explain at least two perplexing phenomena in intercountry adoption: the apparently entrenched nature of intercountry adoption in some sending states,⁴¹ and the prevalence of particular patterns of exchanging children between specific states.

Wendt and Friedheim's account of the 'informal empire'⁴² relationship that can exist between states in international relations⁴³ provides a basis for understanding different

⁴¹ P Selman, 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004' (2006) 23(2) *Journal of Population Research* 183.190-191; P Selman, 'Intercountry Adoption in the New Millennium: The "Quiet Migration" Revisited' (2002) 21 *Population Research* 205, 222.

⁴² Wendt and Friedham (n 34) 247.

exchange patterns of children between specific receiving and sending states.⁴⁴ Some states send a large majority of children to a few particular receiving states, whilst there are more diffuse destinations for children from other sending states.⁴⁵ What accounts for the difference in these well-established patterns in the exchange of a child? Considering the model of ‘informal empire’ against these phenomena reveal some interesting subterranean dynamics in intercountry adoption—reinforcing that the best interests of the child is ultimately a tool of and an expression of relationships between states. The existence of a pattern where a state sends the majority of its children to a specific state, or to a few specific states, is suggestive of the existence of an informal empire relationship between the sending state and the receiving state or states.

When a state says that its receipt of children through intercountry adoption is done for humanitarian or rescuing motives, then this is a signal for the existence of an informal empire relationship in the dyad of the sending and receiving states. This recalls the discussion in Chapter Four where the United States’ reception of children is given this motivation, because this is in keeping with the image and identity that the United States wishes to have in the international community.⁴⁶

But where the destination states of children from a particular sending state is diffuse, it is likely that the sending state is not in an informal empire relationship with any of the receiving states, or indeed, with any state at all. China is an example of a sending state that fits this profile of not being in an informal empire relationship. It is not in a subordinated position *vis a vis* other states such that it would fit within the definition of informal empire. While China sends a large number of children in intercountry adoption, it sends them to a large number of different states, rather than to just a particular few.⁴⁷

⁴³ Wendt and Friedham (n 34) 247-253.

⁴⁴ Selman 2006 (n 41) 191-192; Table 6, 192.

⁴⁵ Selman 2006 (n 41) 191-192; Table 6, 192.

⁴⁶ See discussion on the United States, Chapter Four.

⁴⁷ Selman 2006 (n 41) Table 5, 191; 191-192; Table 6, 192; Table 7, 193; see also S Zhao, ‘Chinese Nationalism and Its International Orientations’ (2000) 115(1) *Political Science Quarterly* 1 for discussion on China’s international relations aims.

Guatemala, on the other hand, sent 95% children in intercountry adoption to one particular state—the United States.⁴⁸ The military relationship between the United States and Guatemala is discussed in the comparative law chapter.⁴⁹ Although on-going intercountry adoption between the United States and Guatemala has ceased⁵⁰; while the exchange of children was on-going, it is a profile that very much fits the description given of an informal empire relationship between these two states.⁵¹

It also has an impact on the behaviour and national identity of the subordinate state with ramifications for the lack of legitimacy of the best interests standard :

In informal empire, the political-military dependence of subordinate on dominant state actors reduces their accountability to society, and, as such, undermines the authority relationship between state and society characteristic of the sovereign state. Subordinate state actors do not need to worry about domestic legitimacy as much as substantively sovereign states do, since they can depend on external coercive support, which enables them to reduce their compromises with, and if necessary repress, opposition groups in society. Indeed, the legitimacy they have to worry about may be more external than internal. In effect, informal empire constitutes a subordinate state apparatus that is alienated from its society. This, in turn, may have the effect of creating at least latent nationalistic groups that might not otherwise exist in society, and setting in motion state-society conflicts that ultimately destroy a client state.⁵²

Thus, the informal empire relationship acts to create a governance structure that is estranged and isolated from the society at large, and does not seek its strength in governance from larger society. Because of this, the government may feel little to no pressure to have a best interests standard rooted in a sense of legitimacy as constructed by society as a whole. It can construct a best interests standard tailored to its specific and narrow aims, which may be wholly out of touch with what the people in the state would consider as a legitimate meaning for the standard. The standard as designed by the governing elite would have little relevance to the rest of the populace, and take no

⁴⁸ Selman 2006 (n 41) 192; see discussion on Guatemala in Chapter Four.

⁴⁹ See discussion on Guatemala in Chapter Four.

⁵⁰ 'Warning: Adoption Initiated in Guatemala on or after April 1, 2008' US Department of State, http://www.travel.state.gov/family/adoption/country/country_4198.html

⁵¹ See discussion in Chapter Four on Guatemala and the United States.

⁵² Wendt and Friedheim (n 34) 253.

account of their beliefs or meanings—it would be created in a vacuum, where the standard’s construct would be wholly disconnected from those whose lives it impacts.

There is little pressure brought to bear from within on a weaker state in an informal empire relationship to have legitimate norms.⁵³ Wendt and Friedman observe that these states ‘can depend on external coercive support, which enables them to reduce their compromises with, and if necessary repress, opposition groups in society.’⁵⁴ Until its cessation, the intercountry adoption relationship between the United States and Guatemala might be considered to have operated in this vein, with consequent ramifications for the operation of intercountry adoption and the inability of the Mayan population group to react to intercountry adoption abuses.⁵⁵

Norm Meaning by Domestic Intercountry Adoption Actors and International Actors

It is not only state dyads that create normative meaning for the best interests standard. As shown in the transnational network diagram, there are two other sites of normative meaning for the standard. These are domestic level actors, both state and non state actors, and international actors.

Domestic level actors, which can be both state and non-state entities as well as international actors also generate normative meaning for the best interest standard. As discussed, organisations can bring a particular pressure to bear in the creation of norms or normative meaning.⁵⁶

Domestic level actors respond to the aims of their particular organisation. As discussed in Chapter Three, bureaucracies are motivated in no small part simply by self-preservation interests. The normative meaning that they generate is likely to reflect interests and meanings that in turn augment, among others, the self-preservation interests of the bureaucracy of a domestic level actor. Some of the agency actors in Figure 6.1 #3 have their own business interests, as discussed in the Chapter Three,⁵⁷

⁵³ Wendt and Friedheim (n 34) 253.

⁵⁴ Wendt and Friedheim (n 34) 253.

⁵⁵ See discussion in comparative law chapter, see also discussion on silences in this chapter. See discussion in Chapter Four on Guatemala. See the discussion on silence in this chapter, 215-217.

⁵⁶ Finnemore and Sikkink (n 16) 899.

⁵⁷ See discussion in Chapter Three.

including the promotion of adoption through what Cartwright identified as an ‘image culture’.⁵⁸ Business interests, self-preservation interests of a bureaucracy, and the need to promote the business of adoption in a certain way to a certain market all influence what normative meaning an agency will both adhere to and promote.

International organisations, such as the Hague Conference on Private International Law, also have a particular role to play in norm meaning. The Hague Conference focuses on many aspects of private international law, not only on intercountry adoption, and these other focuses may impact how it interprets and promotes understandings of the best interest standard in intercountry adoption.⁵⁹ But international organisations such as the Hague Conference, and in turn, the Convention it has developed on intercountry adoption can have a very significant influence on the interpretations given to the best interests standard—transcending the involvement of states that have put the Convention into force—because of the resources and position it can muster—its use of ‘expertise and information to change the behavior of other actors.’⁶⁰ The interpretation of a norm that is given by an international organisation thus can be highly influential over how other actors involved with the norm decide to interpret and use the norm⁶¹--suggestive of the Hague Conference having a very influential role on how the best interests standard as a norm is interpreted—even amongst states that do not have the Hague Convention in force, or in those adoptions that do not fall within the ambit of the Convention.

But, as Finnemore and Sikkink point out, the international organisations cannot act alone in bringing these norms to fruition.⁶² Even the very influential Hague Conference does not act alone—it must bring state actors and other organisations into the fold to bring its desired best interests normative meaning into effect.⁶³ It is necessary for international organisations such as the Hague Conference to ‘secure the support of state actors to endorse their norms and make norm socialization a part of their agenda.’⁶⁴

⁵⁸ See discussion in Chapter Three.

⁵⁹ Finnemore and Sikkink (n 16) 899.

⁶⁰ Finnemore and Sikkink (n 16) 899.

⁶¹ Finnemore and Sikkink (n 16) 899.

⁶² Finnemore and Sikkink (n 16) 900.

⁶³ Finnemore and Sikkink (n 16) 900.

⁶⁴ Finnemore and Sikkink (n 16) 900.

Within Chapter Three the question was raised as to what happens to a state's international relations aims, once the functional operation of intercountry is delegated to different state bodies, and even to bodies outside of the governmental structures, such as agencies.⁶⁵ What influence on the meaning of the standard would there be from the self-interests of these other bodies within the state level government and the domestic level actors?

International organisations interact with states, as shown in the chart by the links between Figure 6.1 # 1 and #4, and #3 and #4. This interaction was also a focal point of discussion in Chapter Three.⁶⁶ The transfer of normative meaning between international and domestic domains is an important part of the theory discussion in this chapter.

Chapter Three concludes with the observation that additional layers of actors that are a necessary part of a state's intercountry adoption involvement bring their own interests and identities into the intercountry adoption process, which in turn shape and are shaped by normative meaning that is given to the best interests standard.

There is a close and constant relationship between domestic norms and international norms such that the understanding of one is impossible without taking into consideration the working of the other, and the 'filters'⁶⁷ through which the norms pass through as they are transferred:

Domestic norms, however, are deeply entwined with the working of international norms. Many international norms began as domestic norms and became international through the efforts of the entrepreneurs of various kinds...In addition, international norms must always work their influences through the filter of domestic structures and domestic norms, which can produce important variations in compliance and interpretation of these norms.⁶⁸

⁶⁵ See discussion in Chapter Three.

⁶⁶ See discussion in Chapter Three.

⁶⁷ Finnemore and Sikkink (n 16) 893.

⁶⁸ Finnemore and Sikkink (n 16) 893.

Transfer of Normative Meaning

Researchers in addition to Finnemore and Sikkink have considered the issue of normative transfer and will be considered in this section along with the work of Finnemore and Sikkink, whilst still working within the rubric of Stage 2 of the normative lifecycle.

Since normative meaning does not transfer unchanged from an international to domestic domain, and does not in fact enter domestic domains with a uniform or universal meaning,⁶⁹ it is critical to give due consideration to this transfer. In what ways are international norms transferred to domestic domains? This may seem too straightforward a proposition to consider, but in fact, it is anything but. Wiener contends the contested meaning of norms when the norm is shifting from an international to a domestic setting ‘transfer between contexts, that the meaning of norms becomes contested as differently socialized actors, for example, politicians, civil servants, parliamentarians, or lawyers trained in different legal traditions seek to interpret them.’⁷⁰

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Transfer from International to Domestic Domains

Since normative meaning does not transfer unchanged from an international to domestic domain, and does not in fact enter domestic domains with a uniform or universal meaning,⁷² it is critical to give due consideration to this transfer process. In what ways are international normative meanings transferred to domestic domains? This may seem too straightforward a proposition to consider, but in fact, it is anything but. Cortell and Davis have identified two ways in which this occurs: ‘the actions and

⁶⁹ Davis and Cortell (n 10) 454.

⁷⁰ A Wiener, ‘Contested Meaning of Norms: A Research Framework’ (2007) 5 *Comparative European Politics* 1, 12.

⁷¹ Wiener (n 70) 12.

⁷² Davis and Cortell (n 10) 454.

interests of state and/or societal actors; and the incorporation of international rules and norms into national laws.’⁷³

In other words, the domestic level actors can bring an international norm into the domestic sphere. This is a critical observation when considering the web theory—showing that there is a transfer of normative meaning from international actors to domestic actors.

Both pathways by which international rules become relevant domestically depend on the interests of state and societal actors.⁷⁴

Davis and Cortell argue that the domestic conditions of a state have a strong bearing on what happens to a norm that has transversed from an international setting to a domestic one.⁷⁵

The international normative meaning of the best interests standard may well become part of national law, or it may enter into the policy structures of the government; or may be blocked from effectively becoming part of the government policies or national law, as in the case of the United States, which has its own normative meaning for the best interests standard that is apposite to that of the Hague Conference international normative meaning. In any event, it is worth considering the Cortell-Davis discussion on these transfer pathways and how they influence the norm.

They argue that ‘the preference of government officials and private commercial interests do not at all times translate directly into the state’s policy choices. Instead, these preferences are mediated by the domestic structural conditions that prevail during the policy debate.’⁷⁶

They conceive of the domestic structure has having two components, the ‘organization of decision-making authority’⁷⁷ and ‘the pattern of state-societal relations.’⁷⁸ The internal devising of these two elements can have a significant influence on the path a norm takes once it enters the domestic sphere. How these internal components are

⁷³ Davis and Cortell (n 10) 454.

⁷⁴ Davis and Cortell (n 10) 454.

⁷⁵ Davis and Cortell (n 10) 454

⁷⁶ Davis and Cortell (n 10) 454.

⁷⁷ Davis and Cortell (n 10) 454.

⁷⁷ Davis and Cortell (n 10) 454.

⁷⁸ Davis and Cortell (n 10) 454.

⁷⁸ Davis and Cortell (n 10) 454.

composed in a state can vary. In the case of decision-making this can be ‘decentralized to centralized depending on the number of bureaucratic agencies, ministries, or other arms of the governmental apparatus that are accorded authority over an issue’.⁷⁹ State-societal relations are said to ‘var[y] along a continuum, one that ranges from close to distant. State –societal relations are distant when societal actors are excluded from policy formation....close state-societal relations result when administrative, regulatory or legislative decision-making procedures incorporate societal actors or their interest into the policy-making process.’⁸⁰

Reasons For Norm Adherence

As referenced at the beginning of discussion of the second stage of the normative lifecycle Finnemore and Sikkink discuss three factors that contribute to norm adherence, these being ‘legitimation, conformity and esteem’⁸¹ How and why these are effective factors in norm adherence relate to state identity and state interests.⁸² Thus, Finnemore and Sikkink advance the proposition that

states comply with norms in stage 2 for reasons that relate to their identities as members of an international society. Recognition that state identity fundamentally shapes state behaviour, and that state identity is, in turn, shaped by the cultural-institutional context within which states act, has been an important contribution of recent norms research.’⁸³

The idea of legitimation in normative adherence, as contributing to a state’s stability, not unlike the link between stability and national identity:

Scholars have long understood that legitimation is important for states and have recognized the role of international sources of legitimation in shaping state behavior...We argue, though, that states also care about international legitimation because it has become an essential contributor to perceptions of domestic legitimacy held by a state’s own citizens. ...Thus, international

⁷⁹ Davis and Cortell (n 10) 454.

⁷⁹ Davis and Cortell (n 10) 454.

⁸⁰ Davis and Cortell (n 10) 454-455.

⁸¹ Finnemore and Sikkink (n 16) 903.

⁸² Finnemore and Sikkink (n 16) 902.

⁸³ Finnemore and Sikkink (n 16) 902.

legitimation is important insofar as it reflects back on a government's domestic basis of legitimation and consent and thus ultimately its ability to stay in power.⁸⁴

This relates to elements presented in Chapter Five of a state's development of a charter, and the importance of the charter in the establishment of the national identity of a state. However, noting Bornman's comment that a lack of an agreement as to just what that national identity should be can bring about 'crisis of national legitimacy, that is a sense among certain sections of society that the defined national community is "inappropriate"'⁸⁵, whether a state is internally perceived to be legitimate has to do with both external and internal forces—the state's acceptance and place in the international community and the state's citizens perception that the charter that is in place is acceptable and desirable.

Inasmuch as domestic normative adherence supports or threatens a particular formation of national identity, then, national legitimacy can either be solidified or shattered. The complex network and interlinking of national identity, national legitimacy and the stability of a state can thus be additionally influenced by choices about normative adherence.

Recalling the discussions in the Theory Chapter, whether a state's charter is Jacobin or syncretic, polyethnic or multinational, will both influence and be influenced by the normative meaning of the best interests standard that a state has adhered to.

States are therefore influenced by their perceptions of legitimacy—both through the eyes of external, or international actors and through the eyes of domestic actors and individuals, according to the position put forward by Finnemore and Sikkink. It has relevance in considering normative adherence for the best interests standard in the transnational network. Given that Chapter Three reveals that there are two hegemonic and competing interests of the intercountry best interests standard. One stresses the importance of the principle of subsidiarity in intercountry adoption best interests standard—this being the normative meaning of the Hague Conference. The other, the

⁸⁴ Finnemore and Sikkink (n 16) 903.

⁸⁵ E Bornman, 'National Symbols and Nation-Building in Post-Apartheid South Africa' (2006) 30 *International Journal of Intercultural Relations* 383, 386.

normative meaning given by the United States, promotes intercountry adoption as a measure of nearly first resort.

What pressure is brought to bear externally—which can also be understood as internationally—on states with regard to these competing normative meanings? As Onuma points out in Chapter One ⁸⁶ the United States is in a unique and peculiar position in the international world because of its ability to eschew international norms, choosing to ignore them when it chooses and not only adhere to but promote its own norms. It is immune to external pressures in a way that other states are not currently, and more than that, can even bring its own external pressure to bear on states for adherence to the United States' normative meaning. An example of this in intercountry adoption is the pressures that were brought to bear on Romania to freely permit sending of children for adoption to the United States in the context of talks for Romania to join NATO. ⁸⁷ The United States attempt through the carrot of NATO membership to pressure Romania in this way can be seen as an attempt to exercise the powers of a dominant state in an informal empire relationship.

Conformity and Esteem

Finnemore and Sikkink describe the interconnectedness of the factors of conformity and self esteem in bringing about Stage 2 norm adherence:

Conformity and esteem similarly involve evaluative relationships between states and their state “peers.” Conformity involves what Robert Axelrod refers to as “social proof” –states comply with norms to demonstrate that they have adapted to the social environment—that they “belong.”... Esteem is related to both conformity and legitimacy, but it goes deeper, since it suggests that leaders of states sometimes follow norms because they want others to think well of them, and they want to think well of themselves. ⁸⁸

⁸⁶ See discussion in Chapter One, at Section International Relations ‘Collateral Benefits’ of Intercountry Adoption Engagement ?

⁸⁷ See on this R Post, *Romania: For Export Only: The Untold Story of Romanian ‘Orphans’*(2007) 107.

⁸⁸ Finnemore and Sikkink (n 16) 903.

States therefore are susceptible to the opinions of other states as a factor which influences their adoption of a particular normative meaning for the best interests standard. This is further influenced by the closely related factor of state esteem, as discussed in the following section. The particular relationship between state pairs of sending and receiving states and the influences of conformity and esteem within those are significant in which normative meaning of the best interests standard a state takes on board.

The notion of state self-esteem in intercountry adoption has been discussed in Chapter Four. States who send children in intercountry adoption suffer from low national self-esteem.⁸⁹ On the other hand, states that receive children have high self esteem.⁹⁰

Esteem is linked to a state's decision to take on a particular normative position:

'...leaders of states sometimes follow norms because they want others to think well of them, and they may want to think well of themselves.'⁹¹ In other words, normative meanings are chosen or adhered to because of the state's susceptibility to pressure from other states, or, because the state see the adoption of a normative meaning as enhancing the state's self-esteem.

A state will choose the normative meaning which it perceives enhances its self-esteem. As pointed out in Chapter Five, a state may paradoxically send children in intercountry adoption as a way to enhance its self-esteem, when in fact it has a detrimental effect on self-esteem—though that detrimental effect goes unacknowledged.

Stage Three—Internalisation of Norms

Stage three of the Finnemore-Sikkink framework is concerned with the internalisation of norms. This internalisation is said to occur norms have become 'internalized by actors and achieve a "taken-for-granted" quality that makes conformance with the norm almost automatic.'⁹² This is reflected in Figure 6.1# 7. At this part of the process, the

⁸⁹ See discussion on national self esteem in Chapter Four.

⁹⁰ See discussion on national self esteem in Chapter Four .

⁹¹ Finnemore and Sikkink (n 16) 903.

⁹² Finnemore and Sikkink (n 16) 904.

best interests standard is being used to make decisions about whether an individual child should be sent in intercountry adoption or received by another state through intercountry adoption. This is also what Wiener has identified meaning- in -use.⁹³

It is in its application at Figure 6.1#7 in the theory that the best interests standard is most often discussed in the literature. That is, the way in which the standard is applied and utilised comes under much scrutiny. However, as shown in the web theory, much normative meaning has been created, developed, discarded and transmitted by the time the standard is given its norm usage in 6.1 #7.

The influence of the domestic actors in 6.1 #3 of the theory in the internalisation of norms is recognised in comments by Finnemore and Sikkink:

Professions often serve as powerful and pervasive agents working to internalize norms among their members. Professional training does more than simply transfer technical knowledge; it actively socializes people to value certain things above others...As state bureaucracies and international organizations have become more and more professional over the twentieth century we should expect to see policy increasingly reflecting the normative biases of the professions that staff decision- making agencies.⁹⁴

According to these comments, the influence of domestic actors over the eventual norm meaning of the best interests standard should only increase over time. Whether this is in fact so for the best interests standard is something that could be considered in future research. But, regardless of that, the norm usage is heavily influenced by the meanings given to the standard by the actors in 6.1 #3, as reflected in the Finnemore-Sikkink comments. Thus, at 6.1# 7 the application of the best interests standard has become routine. So much so is the application of the standard routine that it may on the surface beg the question why this part of the standard's usage should be examined at all. It is not, as discussed, that the best interests standard at any stage of the normative lifecycle lacks meaning. It has meaning as given to it by the various actors in the theory. The meaning that the standard has at 6.1 #7 is derived from the circumstances of who is applying the standard, and from where they derived its normative meaning before transfer to the final stage of normative usage.

⁹³ Wiener (n 6). See discussion in this chapter.

⁹⁴ Finnemore and Sikkink (n 16) 905.

Creating Normative Legitimacy for Meaning in Use

Wiener comments that a ‘research framework that allows comparative studies of normative meanings lies with more or less consequent application of the contingency imperative of norms as socially constructed. That is...we need to understand how and where they are situated.’⁹⁵

Another way to understand the debates about the standard at this juncture is to consider whether or not the standard has achieved ‘legitimacy’⁹⁶ in the way that term is defined by Brunee and Toope:

Legal norms are particularly persuasive when they are created through processes of mutual construction by a wide variety of participants in a legal system. When legal norms are perceived to be legitimate, because of their adherence to an internal morality, and their congruence with a normative inheritance, past and present social practice and contemporary aspirations, they generate adherence and serve to persuade.⁹⁷

Finnemore and Sikkink say that the actors in the third stage of the normative lifecycle are ‘law, professionals, bureaucracy’⁹⁸, whilst the motivation for adherence is ‘conformity.’⁹⁹ How do the observations made by Brunee and Toope on legitimacy of legal normative meaning square with the third stage of the Finnemore-Sikkink life cycle? It is important here to distinguish between different meanings of the use of the term ‘legitimation’ or ‘legitimacy’. Within the Finnemore-Sikkink lifecycle it is used in reference to the second stage of the normative lifecycle, before the norm goes to the third stage, or what Wiener references as meaning in use.

All three- Brunee and Toope, Finnemore-Sikkink, and Wiener discuss the usage of the standard in different terms. But as used within this discussion of the theory, all point to the final stage of the Finnemore-Sikkink life cycle, where the legal system, among

⁹⁵ Wiener (n 70) 5.

⁹⁶ J Brunee and S Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ (2000) 39 *Columbia Journal of Transnational Law* 19, 74.

⁹⁷ Brunee and Toope (n 96) 74.

⁹⁸ Finnemore and Sikkink (n 16) Table 1, ‘Stage of Norms’, 898.

⁹⁹ Finnemore and Sikkink (n 16) Table 1, ‘Stages of Norms’, 898.

others, is putting the intercountry adoption best interests standard to use in making decisions on whether an individual child should be placed through intercountry adoption. Brunee and Toope are clearly referencing the creation of meaning within the legal system, which corresponds with stage 3 of the Finnemore-Sikkink lifecycle. Wiener is discussing the normative meaning of a standard being put to use, which again corresponds, in the instance of the intercountry adoption best interests standard with those professionals, their agencies (bureaucracy) and the legal system determining whether a particular child should be placed through intercountry adoption. This corresponds as well to Stage 3 of the Finnemore-Sikkink lifecycle.

Legitimacy, as a concept used by Brunee and Toope, corresponds with the idea of an internalised meaning, a meaning in use. It is the quality of this meaning in use which they address in their discussions on legal normative legitimacy. Does the intercountry adoption best interests standard meaning in use reach that Brunee-Toope concept of legitimacy?

Simply put, Brunee and Toope argue that legal normative meaning attains a persuasive quality ‘when it is viewed as legitimate.’¹⁰⁰ This persuasive quality is what is lacking from the use of the best interests standard in intercountry adoption—and why the standard is prone to so many ulterior uses. But this persuasive quality would come into being if and when the best interests standard was seen as being legitimate. And that legitimacy in turn would be created through the construction of normative meaning for the standard, by relevant actors, and within local contexts, and as well, through sharing other contexts and constructs for the best interests standard in intercountry adoption.

This has not happened for the standard. There has been some effort in discussions by cultural relativists to determine how the standard ought to be locally applied, but there has not been a concerted effort to determine through a constructivist process to determine what local norms and meanings of the standard within the context of intercountry adoption might be. It is the failure to generate this sort of meaning and understanding for the standard that results in its lack of legitimacy. Without being

¹⁰⁰ Brunee and Toope (n 96) 72.

perceived as legitimate, it then has no persuasive power, and absent that, it is simply an ‘abstract norm [] un-rooted in social practice.’¹⁰¹

Weiner’s discussion of normative meanings delivers some particular insights for understanding the best interests standard and steps for taking the standard into dialogue for construction of legitimate norms.¹⁰² She offers the observation that norms, such as the best interests standard, which are ‘the least specific’¹⁰³ are also ‘the most contested.’¹⁰⁴ As discussed in Chapter One, the best interests standard is widely regarded as a standard lacking in specificity.¹⁰⁵ Therefore, it should come as no surprise, under Wiener’s discussion, that the best interests standard is as controversial and contested as it is. The question remains of course, how to resolve the problems around the standard; not in its place in domestic law, but in the construction of the standard in its norm-use position as part of international relations in intercountry adoption process.

This persuasive quality is what is lacking from the use of the best interests standard in intercountry adoption—and why the standard is prone to so many ulterior uses. But this persuasive quality would come into being if and when the best interests standard was became rooted in social practice. And that rooting in social practice in turn would be created through the construction of normative meaning for the standard, by relevant actors, and within local contexts, and as well, through sharing other contexts and constructs for the best interests standard in intercountry adoption. What is missing from the way that the intercountry adoption standard achieves its meaning in use is this rooting in the social practices and the community. The theory presented shows the absence of community input to the creation of normative meaning at any stage in the lifecycle of the best interests standard, even at the final stage, the meaning in use. This recalls a comment made by Guba and Lincoln on how constructivists view how something attains validity:

...any agreement about what is valid knowledge ...arises from the relationship between members of some stakeholding community...Agreements about truth may be the subject of community *negotiations* regarding what will be accepted

¹⁰¹ Brunnee and Toope (n 96) 68.

¹⁰² Wiener (n 70).

¹⁰³ Wiener (n 70) 9.

¹⁰⁴ Wiener (n 70) 9.

¹⁰⁵ See discussion in Chapter One.

as truth...[The concept of validity] is created by means of a community narrative, itself subject to the temporal and historical conditions that gave rise to the community...¹⁰⁶

Their idea of validity also can be interpolated into what has happened to the best interests standard. It is not seen as having a community based meaning in use. The meaning that the standard has in usage is not one that was achieved by the process that Guba and Lincoln describe. There has been no *community narrative* about the best interests of children, and whether and how intercountry adoption fits with those community ideas taken into account in the normative meaning in use of the best interests standard in intercountry adoption. To the extent that such community narratives exist, they are not accounted for in any of the normative meanings created for intercountry adoption best interests standard.

Just what is needed provide validity to the best interests standard meaning in use? Guba and Lincoln suggest that validity is attained through community narrative. Does other research support narrative or related concepts as bestowing a sense of community validity to normative meanings? Dialogue is suggested as a way forward, on many fronts. Harris-Short suggests grass roots dialogues in the implementation of international human rights documents.¹⁰⁷ Other scholars also suggest that dialogue is important in arriving at locally valid constructions.¹⁰⁸

An-na'im suggest that the best interests standard in a more general context needs to 'be open to challenge, reformulation and refinement through processes of internal discourse and cross-cultural dialogue.'¹⁰⁹ But dialogue alone is not a panacea for all ills. As Greenwood and Levin point out it is possible to have dialogue that arrives at a bad

¹⁰⁶ E Guba and Y Lincoln, 'Paradigmatic Controversies, Contradictions and Emerging Confluences' in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (Sage Publications, 3rd edition, 2005) 204, emphasis in the original. The reference to stakeholding members as helping to define meaning point out the importance of the elite interviews in obtaining information in this research, and as part of a constructivist research paradigm. See discussion in Chapter Four on the formation of a charter. See also R Evanoff, 'A Constructivist Approach to Intercultural Ethics' (2000) 8(3) *Eubios Journal of Asian and International Bioethics* 84.

¹⁰⁷ S Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130, 171-178.

¹⁰⁸ Harris-Short (n 107) 175-178, on the need for dialogue on the United Nations Convention on the Rights of a child.

¹⁰⁹ A An-na'im, 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' (1994) 8 *International Journal of Law and the Family* 62, 64. See also discussion by S Harris-Short (n 106) 175-178.

result.¹¹⁰ Simply having dialogue is no more of a guarantee of achieving this rooting in social practice than might be reached through other processes.¹¹¹ Dialogue may cloak the results with a greater sense of having achieved this legitimacy that is now lacking—and indeed it might—but without a controlled process, it is equally likely that the interpretation arrived at through an undefined process is likely to be as unsatisfactory as the one that it was intended to replace.¹¹²

Cultural trauma was discussed in Chapter Five as the trigger for the process of a state becoming involved in intercountry adoption as a sending state. Under the proposition of the constructivist theory, all sending states will have a cultural trauma event in the process of having become a sending state. The particulars of what and when that was and how it is played out in the present day circumstances will of course be unique and specific to each state.

Given the properties of cultural trauma and repression of the trauma, it is important to consider what the dialogue must take into account, and to understand that what has been repressed, forgotten, or is simply untold is as important to the understanding of the cultural trauma event and its aftermath in shaping national identity as what is clearly visible or heard.¹¹³

Sheriff posits an understanding of this silence as one of ‘cultural censorship.’¹¹⁴ She identifies cultural censorship as a particular sort of silence, one that has perhaps a palpable presence within a group, but may nevertheless contain significant challenges in attempts to unravel and analyse it:

¹¹⁰ D Greenwood and M Levin, Introduction to Action Research: Social Research for Social Change (2nd edn Sage Publications, 2007) 10-11.

¹¹¹ Greenwood and Levin (n 110)10-11. See discussion on this point in the best interests/literature review chapter. See also F Banda, ‘Global Standards: Local Values’ (2003) 17 International Journal of Law, Policy and the Family 1, 13-14, discussing international human rights norms; An-na’im (n 109) 62.

¹¹² Greenwood and Levin (n 110) 10-11; cautioning that ‘consensus-based decision making....open[s] up great potentials for co-option and coercion.’; 10.

¹¹³ See discussion below. K Charmaz, ‘Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies’ in N Denzin and Y Lincoln (eds) *The Sage Handbook of Qualitative Research* (3rd edn Sage Publications, 2005) also discusses the significance of silence. She remarks that ‘Silences pose significant meanings and telling data in any research that deals with moral choices, ethical dilemmas, and just social policies. Silence signifies absence and sometimes reflects a lack of awareness or inability to express thoughts and feelings. However, silence speaks to power arrangements...The “right” to speak may mirror hierarchies of power: *Only those who have power dare to speak*. All others are silences, then, too, the powerless may retreat into silence as a last refuge.’ 527, emphasis in the original.

¹¹⁴ R Sheriff ‘ Exposing Silence as Cultural Censorship’ (2000) 102(1) American Anthropologist 114, 114.

...silence demands collaboration and the tacit communal understandings that such collaboration presupposes. Although it is contractual in nature, a critical feature of this type of silence is that it is both a consequence and an index of an unequal distribution of power...it is constituted through, and circumscribed by, the political interests of dominant groups. While silence tends to penetrate social boundaries, it is not seamless; different groups, wither constituted by class, ethnicity, racialized identities, gender, or language, have markedly divergent interests at stake in the suppression of discourse. Silence, like discourse, must be deconstructed in such a way that these interests are explicitly located within a range of differentiated and opposed social positions in which both linguistic and non-linguistic forms of power are distributed.¹¹⁵

There is however, little research that is aimed at how to understand and evaluate this type of silence.¹¹⁶ Sheriff finds this in itself problematic, and suggests that academic researchers have avoided even acknowledging the pervasive presence of this silence because of the cognitive discomfort that might be experienced by researchers in looking so closely at incidences of dominance, subjection and exclusion.¹¹⁷ She comments that

Anthropologists and other social scientists, for all the obvious reasons, have increasingly favored theoretical visions that portray the subordinate as actively and loudly resistant, and as though they were always one step ahead of, if not immune to, both dominant ideology and the implicit or explicit threats that buttress any system of dominant.¹¹⁸

It may be then that unravelling and evaluating the sort of silence that is part of the cultural censorship is an act that researchers find too daunting, perhaps even too depressing, promoting examination of people and situations in the most dire of circumstances.

But it is precisely those dire circumstances that are the events that lead to children being sent in intercountry adoption—and through silence, through not attending to or addressing in a transparent manner the causes and resultant effect of the cultural trauma event, that perpetuate the conditions that lead to children being sent in intercountry adoption. An honest appraisal of the best interests standard through the sort of dialogue proposed in a social action research milieu requires also addressing, very specifically, those circumstances generated by the unresolved cultural trauma. Failure to address not only those, but the silence that has fallen across sections of the community that are

¹¹⁵ Sheriff (n 114) 114.

¹¹⁶ Sheriff (n 114) 128.

¹¹⁷ Sheriff (n 114) 128.

¹¹⁸ Sheriff (n 114) 128.

likely to have children sent in intercountry adoption, does not accomplish the necessary task of developing and assigning meaningful substance to the best interests standard.

Receiving countries are not immune from this task, either. Receiving countries may need to consider whether they have been part of the uneven relationship of an informal empire, and whether they have participated in the events of a cultural trauma upon a sending country. The receiving state must also confront its silences on events, and the consequence of those, when creating their own meaningful best interests of the child standard.

Dialogue has been discussed throughout this chapter as the means to accomplish several disparate aims, which all tie together when looking at what is needed in addressing the problems identified with the best interests standard. It has been identified as a means of providing validity to normative meaning in use and as a way to disengage from continual cultural trauma that is associated with sending of children in intercountry adoption disengage from processes of continual cultural trauma.

All of these are important aims in and of themselves—establishing meaning in use validity and addressing the problems of cultural trauma—in looking at the process by which states become involved in intercountry adoption, and how those processes must be taken into account when considering the best interests standard. The warning has also been raised by Fonseca and Greenwood and Levin that action research that not just any activity of dialogue will do. Dealing with the sensitive issues that surround intercountry adoption and its processes mean that dialogue must somehow be able to transcend these difficulties. Just how is that to be done?

Some guidance can be found in the work of Evanoff, who develops a method of constructivist ‘intercultural dialogue’¹¹⁹ for communication across differing cultures.¹²⁰

¹¹⁹ R Evanoff ‘Universalist, Relativist and Constructivist Approaches to Intercultural Ethics’ (2004) 28 *Journal of Intercultural Relations* 439, 440.

¹²⁰ Evanoff (n 119) 449-456. S Harris-Short (n 107) similarly calls for ‘a process of internal discourse and external cross-cultural dialogue.’, on matters of international human rights, 175. She comments that, ‘Central to this approach is the idea that securing cultural legitimacy through a process of internal discourse will build on and transform the traditions of the local populace, or at least their underlying values, rather than simply eradicate them. Unlike the one-dimensional dialogues envisioned by some states local cultures are thus considered to be an integral part of the process of change and development.’, 175. This is in many respects different than the approach that is advocated in this chapter, where the aim is not necessarily any transformation of local cultures, but rather to ensure their inclusion

His method provides insight as to how this type of dialogue might occur, and to what end.¹²¹ Evanoff defines a constructivist view of ethics as

a more pragmatic approach which sees the development of particular moral codes as practical solutions to specific problems arising in particular socio-historical contexts....the function of ethics is to help people successfully interact both with each other and the world.¹²²

This definition of ethics provided is from a constructivist vantage, and is congruent with the goal of a mutual construction of the best interests standard through appropriate dialogue—to provide a resolution to the dilemmas that create and surround intercountry adoption involvement—resolutions that address the interests of a child and not the international relations aims of the state. Understanding this, his discussion on dialogue in this context is particularly apropos.

Evanoff gives some specific guidance on how a dialogue on ethics can be conducted—which again can be applied directly in considering how dialogue on the best interests standard could be set up:

Reaching an agreement requires a dialectical process of reflection in which the participants attempt to critique existing ethical principles and norms, to integrate positive features of those principles and norms in new ways, and to create entirely new principles and norms to effectively deal with anomic situations.¹²³

This could be further accomplished through an application of Evanoff's model of 'integrative criticism'¹²⁴ where there is 'a dialectical reconciliation of concepts, that in their initial formulation, may appear as polarities.'¹²⁵ This form of communicating about and between cultures involves 'an effort...to create an entirely new framework, or

in constructions of the best interests standard, albeit with the aim of providing the standard with legitimacy as a transnational legal norm, in its norm-meaning, a meaning that should be congruent with norm-usage.

¹²¹ Evanoff (n 119) 449-456.

¹²² Evanoff (n 119) 453.

¹²³ Evanoff (n 119) 456.

¹²⁴ R Evanoff, 'Integration in Intercultural Ethics' (2005) *International Journal of Intercultural Relations* 421, 432.

¹²⁵ Evanoff 2005 (n 124) 433.

schema, which integrates positive aspects of both traditions, while discarding their negative aspects.¹²⁶

Wiener offers some observations that are useful to consider in the construction of a research structure for the best interests standard. She comments that:

...while in supranational contexts actors might well agree on the importance of a particular norm, say for example human rights matters, the agreement about a kind of norm does not allow for conclusions about the meaning of that norm. As in different domestic contexts, that meaning is likely to differ according to experience with norm-use, it is important to recover the crucial interrelation between social practices that generate meaning, on the one hand and public performance that interpret the norm for political and legal use.¹²⁷

Thus in any research regarding the best interests standard it is critical to understand that it takes on two forms—the norm meaning found in its original creation, and the norm-usage which is imbued in a constructivist process.

Reflections

Charmaz makes the following observations regarding grounded theory and the research journey. This section is asked to reflect upon the research journey, and her comments are apposite for beginning this discussion:

The research journey can be an end in itself rather than a means to establishing a career. We can use grounded theory methods to do more than score career points.

...

Grounded theory methods enhance possibilities for you to transform knowledge. Topics that ignite your passions lead you to do research that can go beyond

¹²⁶ Evanoff 2005 (n 124) 432.

¹²⁷ Wiener (n 70) 12.

fulfilling academic requirements and professional credits... The path may present inevitable ambiguities that hurl you into the existential dislocation of bewilderment. Still, when you bring passion, curiosity, openness and care to your work, novel experience will ensue and your ideas will emerge.¹²⁸

Perhaps the over-riding thing learnt during the course of the PhD thesis research was on the scholarship that is being done on legal pluralism and constructs of law that move beyond the very limiting black-letter law approaches. Law is of course a very powerful social tool and social construct, it defines access to rights, limits powers of states, extends or denies individuals the opportunity to protect themselves from societal inequities and abuses. Recognition of this was something I knew as I began the thesis. Several years of practice as a lawyer in poverty law made me keenly aware of the power of law. Law is a Janus headed coin, it has the power to aid and it extends the power to abuse. Constructions of legal pluralism do much to recognise the reality of how operates in society and in the world.

The other thing of great value that I learnt was the existence of a constructivist paradigm over many fields. Constructivism is said to have originated as an international relations theory. It was only serendipitous happenstance that research making use of a constructivist paradigm moved through the process of theory building into international relations. Constructivism informs many fields, and perhaps one of the most exciting finds is the emerging research links between international law and international relations, where the fields are bridged through the use of constructivist paradigms. The thriving body of research in law and in fields closely associated with law that make use of constructivist paradigms was an important knowledge discovery. Becoming at first conversant with and then proficient within these was both an important knowledge pursuit and necessary to the delivery of a thesis with research integrity, as the theory began to emerge.

¹²⁸ Charmaz 2006 (n 7) 185.

Knowing what I know now –would I have done things differently? Had I known at the outset what I would face, I simply would never have pursued the PhD. It would have been too daunting. But the fortunate thing is that research unfolds, as Charmaz describes, and those moments of ‘existential bewilderment’ presage important moments of deepened understanding and emergence of new ideas and production of new knowledge. As a researcher, I am likely to never stray too far from my roots of interrogating law for social change. To this end, the philosophy of constructivist grounded theory perfectly suited my own ethical standpoints as a researcher and academic lawyer. It calls for using research knowledge to actively ‘contribute to a better world.’¹²⁹ Much existent knowledge would have remained invisible to me had I stayed on the traditionally conservative path of black letter law.

I learnt that there is great synergy occurring in inter-disciplinary research, and that the potential for law to transform increases when tied to these other fields. Law is far from a static and dry field, it is only the traditional black letter views of law that render it so. Its potential for transformation is unleashed from freed from black letter approaches. That is not to say that there is no place for black letter law. Certainly there is, and the work of Menski as discussed in Chapter Two makes clear that positive law has a place within a plural model of understanding law.¹³⁰ The research journey thus also led to discoveries on plural legal models, on different analytical approaches to understanding the law, and on the very nature of law itself—law as I knew before I began my PhD research was certainly more than the words on the page of a statute book or the pronouncements of a Judge in a legal decision. But the PhD research led to the discovery of the scholarship on what law is and what law encompasses.

Limitations

The paradigmatic aspects of the thesis research point it in specific directions. Equally, it precludes taken it in other directions that are antithetical to a constructivist paradigm. The theory and the research behind it are, without apology, not part of a positivistic framework. It would therefore be not only a limitation upon the use of the theory, but an

¹²⁹ Charmaz 2006 (n 7) 185.

¹³⁰ See discussion in Chapter Two.

inappropriate use to propose its use in positivistic frameworks. The theory is not a mere hypothesis to be tested, it is in fact a theory that is derived from and grounded in empirical data. To treat it as other than that is to denigrate the basis from which the research was approached. The strength of the theory is in part the consistent constructivist analysis provided throughout its myriad components. This then too could be said to be a limitation, that those who canonically reject constructivism so will have no utilisation for the theory. Charmaz suggests that ‘constructivist sensibilities are congenial with other approaches such as feminist theory, narrative analysis, cultural studies, critical realism and critical inquiry.’¹³¹ A necessary corollary then is that the research may not be compatible with other sorts of approaches, and cannot sensibly or soundly be utilised within them.

Future Research

This section discusses the areas for future research. It calls for both constructions of local normative meanings of the best interests standard through the applied use of social action research and for the mapping of specific intercountry adoption transnational networks. Firstly, the use of social action research is discussed. Social action research is a specific kind of research that is geared towards the production of the type of local construction of meaning which the transnational network identifies as being missing from the actors contributing normative meaning to the best interests standard. Social action research calls for the creation of dialogue, as discussed within this chapter.¹³² Social action is a specific type of research approach—it is:

a research strategy that generates knowledge claims for the express purpose of taking action to promote social analysis and democratic social change. The social change we refer to is not just any kind of any change. AR aims to increase the ability of the involved community or organization members to control their own destinies more effectively and to improve their capacity to do so within a more sustainable and just environment.

¹³¹ Charmaz 2006 (n 7) 184.

¹³² See discussion in this chapter.

AR is not applied research, and AR explicitly rejects the separation between thought and action that underlies the pure/applied distinction that has characterized social research for a number of generations. This theoretical/applied pseudo –split, in our view, has been a key mechanism by which the social sciences have become deformed. It creates a useless dance between disengaged theorists and engaged actors, a dance that liberates from both sides from the need to generate valid understandings of the social world and its change processes and to hold themselves accountable to both meaningful social consequences and solid methodological and theoretical groundings.¹³³

The particular focus that social action research has is particularly apposite as a next step for the thesis research. It calls for something to be done, that something being the creation of meaningful social change at the local level. The transnational network thesis has pointed out the absence of local normative constructions of the best interests standard in intercountry adoption. This absence means that the interests of those who create normative meaning never engage with local community. As the theory discusses, it is not only the infusion of normative meaning into the network that is an important component of the later structures of normative meaning; but the dynamics of interaction themselves produce change and new normative meanings. That local constructions need to be part of the network is a point that hard needs to be belaboured, but the point must also be emphasised that the inclusion of local meanings into the network does more than put them into the mix of normative meanings available, putting yet another interest to the fore. The locally constructed normative meaning also will also interact dynamically with the other normative meanings, changing their characteristics, and thus bring change across all normative meaning within in the network.

Locally constructed normative meanings being infused into the network also provide voice to components of the actors within intercountry adoption who have not received sufficient inclusion within the intercountry adoption process. This gives a way in which the normative constructions—the voice—of those who have been silenced through

¹³³ Greenwood and Levin (n 110) 5-6.

cultural trauma can be given included. The focus of social action research in making specific types of social change, social change that is geared towards providing local communities more power within a setting is also a tool of empowerment for that segment of actors involved with intercountry adoption whose voice has effectively not only been silenced but written out of the equation of normative meaning altogether. In short, the construction of local normative meaning through social action research overcomes the silencing that has been part of the trajectory of states into intercountry adoption. This applies not only to sending states but to receiving states as well. As discussed, the formation of sending and receiving state dyads are key the exchange of a child in intercountry adoption, and receiving states are complicit with any silencing of those in sending states as part of interactive dynamic of intercountry adoption engagement. The transnational network emphasises the dynamic engagement of both sending and receiving states in forming a normative meaning for the best interests standard that enters into the transnational network. Locally constructed normative meaning in a sending state or in a receiving state would necessarily effect then the normative meaning that is constructed between the states.

The use of social action research is very much in concert with the aims of constructivist grounded theory. Constructivist grounded theory also has the aim of social improvement, as described by Charmaz: Should knowledge transform practice and social processes? Yes. Can grounded theory studies contribute to a better world? Yes.¹³⁴

This position is of course a direct and deliberate rejection of the canons of positivistic paradigms, where as discussed in Chapter Two, the value of such research is based on assessments of proof through reliability and verifiability. But it is important to note that there is much more at stake than the rejection of one research and knowledge paradigm for another. Positivism creates a dual structure which are necessarily part of the thinking that has justified imperialist thinking¹³⁵, and that thinking which challenges the legitimacy of these dualistic conceptions of ‘an “us” and a “them”¹³⁶ these also

¹³⁴ Charmaz 2006 (n 7) 185.

¹³⁵ E Said, Culture and Imperialism (First Vintage Books, 1993) xxiv

¹³⁶ Said (n 138) xxv

challenges the bedrock of imperialistic thinking.¹³⁷ To treat any approach but positivism as the ‘Other’ simply replicates the dichotomies of colonialism, themselves enablers of repression of the ‘Other’.¹³⁸ Bhabha challenges the underlying agendas of these dichotomies in academia:

Are the interests of Western theory necessarily collusive with the hegemonic role of the West as power bloc? Is the language of theory merely another power ploy of the culturally privileged Western elite to produce a discourse of the Other that reinforces its own power-knowledge equation?¹³⁹

Bhabha’s words presage the dynamics located within intercountry adoption, as revealed by the transnational network theory of this thesis:

I am equally convinced that, in the language of international diplomacy, there is a sharp growth in a new Anglo-American nationalism which increasingly articulates its economic and military power in political acts that express a neo-imperialist disregard for the independence and autonomy of peoples and places in the Third World...I am further convinced that such economic and political domination has a profound hegemonic influence on the information orders of the Western world, its popular media and its specialized institutions and academics. So much is not in doubt.¹⁴⁰

In other words, positivism has been a vehicle to promote inequalities and to allow the elevation of some over and at the expense of others. The thesis highlights this imbalance between some sending and receiving states, in the formations of relationships of informal empire. Bhabha’s words can be well applied to explain the dynamics that are revealed about intercountry adoption by the thesis research and the influences on adoption engagement, and constructions of normative meaning for the best interests standard. Positivism is reflected in academia and Bhabha’s challenge to who is privileged to use academic theory to promote what ends is a well-placed challenge to any attempts to consider intercountry adoption from a positivistic paradigm.

¹³⁷ Said (n 138) xxiv-xxv

¹³⁸ H Bhabha, *The Location of Culture* (Routledge Classics, 2006, reprinted twice) 57-58.

¹³⁹ Bhabha (n 141) 30-31.

¹⁴⁰ Bhabha (n 141) 30.

Positivistic research would never reveal the subterranean influences that the thesis research has demonstrated on state motivation to engage in intercountry adoption, nor on the influences on normative meaning constructions for the best interests standard. The aims of positivistic inquires are at odds with that of constructivist inquiries and of social action research. Calling upon research to be used to create with locally constructed normative meaning, whose use is then predicated for the creation of beneficial social change and provide voice to marginalised segments of the community a rejection of a positivistic paradigm. Charmaz comments that:

Objectivist grounded theorists may claim neutrality in producing knowledge and separation from public affairs. Knowledge is not neutral nor are we separate from its production or the world.¹⁴¹

The damage that has been done through the use of legal positivistic frameworks is vividly described by Professor James Anaya, who now serves as the Special Rapporteur has been appointed as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, of the United Nations Human Rights Council.¹⁴² He points out the devastating effects on Indigenous Peoples of resort to positivistic frameworks in international law, but also points out that the pendulum in international law is beginning to swing away from positivistic law.

...the civilizing mission—against the backdrop of the dominant positivist frame of international law that effectively diminished indigenous peoples' rights—ultimately facilitated the acquisitive forces that wrested control over indigenous peoples and their lands.

Thus whether through the doctrine of trusteeship or the positivist legal construction that denied sovereign status to indigenous peoples, international

¹⁴¹ Charmaz 2006 (n 7) 185.

¹⁴² Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Human Rights Council, Ninth Session, Agenda item 3, A/HRC/9/9, 11 August 2008, para 1.

legal discourse and related decision processes developed historically to support the forces of colonization and empire that have trampled the capacity of indigenous peoples to determine their own course under conditions of equality. Early affirmations of indigenous peoples' rights succumbed to a state-centered Eurocentric system that could not accommodate indigenous peoples and their cultures as equals.

However, just as international law once moved away from natural law thinking that was to some extent supportive of indigenous peoples's survival as distinct autonomous communities, international law is again shifting. But this time the shift is in retreat from the orientation that would divorce law from morality and deny international rights to all but, states, or that would regard non-Westernized people as necessarily inferior.¹⁴³

Positive law is on the wane. Particularly it is on the wane within international and transnational law. It should not be given the benefit of a last dying breath within the pages of this research, holding it out as the mirror against which other paradigms must hold themselves and reconcile their research and its results.

Secondly, future research can usefully use the approach of network analysis, as discussed, within this chapter to map the networks of particular states who are engaged in intercountry adoption. This would reveal specific network maps of states, and specific sites of normative construction for the best interests standard.

Summary

This thesis set out to explain the influence and motivations of states to engage in intercountry adoption, and in turn, what those meant on the interpretation and application of the best interests principle. The resultant analysis shows that the best interest standard receives meaning from various actors in intercountry adoption. The state is a primary player, but far from the only one. Recognition of what the 'state' is varies as well, as it in fact is made of up disparate parts that play different roles within the intercountry adoption process. State motivation for engagement in intercountry

¹⁴³ S J Anaya, *Indigenous Peoples in International Law* (2nd edition, Oxford University Press, 2004) 34.

adoption is, in the final analysis, only one of many influencing factors on the application and interpretation of the best interests standard.

The standard is part of the complex web of intercountry adoption—a web that involves the many actors in intercountry adoption creating and utilising normative meaning, and then through their interactions with others within the web, transforming that meaning as it moves from location to location within the network. As discussed, not all normative meaning survives to be transferred. The meanings that get created and moved are those that have successfully transverse the normative lifecycle. Even that however is not sufficient to ensure it is that norm's meaning that is applied in the end—as the standard's normative meaning is ultimately transferred again in normative usage—an application that may look very different from any of the normative meanings assigned to the standard at other points along the web.

Charmaz comments:

Grounded theory involves taking comparisons from data and reaching up to construct abstractions and simultaneously reaching down to tie these abstractions to data. It means learning about the specific and the general—and seeing what is new in them—then exploring their links to larger issues or creating larger unrecognized issues in entirety.¹⁴⁴

The theory presented in this thesis does that, in highlighting the multivariate influences that are brought to bear upon the standard. That said, not every meaning created by every actor has an equal influence—as discussed in this chapter in the normative lifecycle framework, not all normative meanings progress through all of the stages of the normative cycle. Which meanings, and why, can be the subject of future research, with an obvious specific focus perhaps on the links between meanings that emphasis the subsidiarity principle with those that do not. The network theory of adoption provides a new way for understanding and analysing not only the complex relationships between intercountry adoption actors, but a way to understand how their individual and in themselves complex motivations contribute to how the best interests standard is ultimately interpreted and applied. Intercountry adoption is anything but a single dimensional straight forward occurrence or process.

¹⁴⁴ Charmaz (n 7) 181.

The theory emphasises the interactional nature of the process, and also takes account of the motivational influences of states and other actors within the process. It is from these motivational influences to become involved in intercountry adoption that much normative meaning is derived. More than anything, perhaps, the web theory highlights this as a factor on intercountry adoption participation and what this means in how decisions are rendered ‘in the best interests of the child.’

This research had the aim of answering the question of what motivated states to become involved in intercountry adoption and what effect those motivations had on the interpretation and application of the best interests standard. Chapters Four and Five reveal the complex process by which states come to intercountry adoption engagement.

But an exploration of the second part of the question, and what those motivation mean to the interpretation and the application of the standard invokes a much wider range of actors than simply the state. Indeed, just what comprises ‘the state’ is in and of itself something necessarily important for discussion in the presentation of the web theory. The many other actors that were revealed in the elite interviews also bring their own motivations to the fore when participating in intercountry adoption.

The transnational network recognises that states do not act in isolation in intercountry adoption nor in the application and interpretation of the standard. It gives recognition not only to the other actors but to the interactions between the actors—and that those interactions have a shaping influence on normative meaning ascribed to the standard—and to some of the entrenched behaviours in intercountry adoption that have been described but not analysed.

It is beyond the intended scope of the thesis research question to map the specific networks that a specific state might find itself in with relation to intercountry adoption. But this is certainly an area that is ripe for further research. Again, network theories are seen as a way of advancing constructivist analysis, where ‘Constructivist scholars hypothesize that socialization processes are an important determinant of state behavior in international politics. Network analysis offers a method for measuring the sources of socialization and the diffusion of norms based on the strength of ties between states, collective state identities such as security communities, and the importance of

individual states.¹⁴⁵ Such an analysis using network theory, and building on the research foundation set by this thesis would allow for the study of the best interests standard within specific networks, and of specific states. This would further reveal the intricate layers of relationship and dynamics that are part of the intercountry adoption process, but that have not been studied or mapped according to network theory. Such an analysis for instance could provide further information on the networks and relationships of states and the Hague Conference, in relation to the subsidiarity-linked normative meaning for the best interests standard. This could be usefully contrasted with normative meaning given by the United States which deemphasises the importance of subsidiarity in the normative meaning for the principle, and in mapping the links and strength of influences of states within the networks that are set up. Mapping such constellations of relationship and influence could further reveal the pathways of variant normative meaning, and with what consequence.

But in returning focus to the thesis research question, the network theory provides a full answer to that. Not unexpectedly, the thesis research, in answering the question put forward, also reveals areas of future research. In answering the thesis research question, the network theory includes elements which were not identified in the original research question. This alone points to the rich complexity of intercountry adoption, as well as perhaps a tendency to view its operation compartmentally, isolated, in fragments. But it is not a fragmentary or isolated occurrence.

Charmaz reminds that

A constructivist approach does not adhere to positivist notions of variable analysis or finding a single basic process or core category in the studied phenomenon. ...Thus, those who take a constructivist approach aim to show the complexities of particular worlds, views and actions.¹⁴⁶

The theory adheres to a constructivist paradigm —and whilst having revealed much on the occurrence of intercountry adoption, also points the way to future research to add understanding into the processes of intercountry adoption. In the end, the pragmatic

¹⁴⁵ E Hafner-Burton, M Kahler, and A Montgomery, 'Network Analysis for International Relations' (2009) 63 *International Organization* 559, 569.

¹⁴⁶ Charmaz 2006 (n 7) 132.

effect of this is to point to ways in which decisions can be made that are not motivated for the good of an intercountry adoption actor, but indeed, those motivations and interests recognised, decisions made which are in the interests of the child.

Axial Coding: Intercountry Adoption ¹

Categories	Why	Where	How Come	When	=Structure CONDITION	Who m	How	Action /Interaction	= Process what happened as a result of the action /interaction CONSEQUENCE

¹ The idea of the creation of an axial coding diagram was drawn from K Wilson Scott, 'Relating Categories in Grounded Theory Analysis: Using a Conditional Guide and Reflective Coding Matrix' (2004) 9(1) The Qualitative Report 113. See in particular her discussion on the Conditional Relationship Guide, 115-117, and Table 1, 'Example of High Self-Efficacy Conditional Relationship Guide', 118.

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Categories	Why	Where	How Come	When	=Structure CONDITION	Who	How	Action/ Inaction	What happened as a result of action/in action CONSEQUENCE
Agencies in sending states	Part of doing adoption business /agencies may have vested agency in protecting their turf and on going operation of ICA, prevent competition, driv	Usually affiliated with a receiving state	Become part of the model of doing intercountry adoption – Hague Convention has to accommodate because of their existence in United States operations pre Hague Convention — agency interests in self preservation,	Pre-date the Hague Convention, Hague has to accommodate their existence in ICA operations	The operation of intercountry adoption is marked with the presence of agencies, which may have strong ties to a particular receiving state. The number of agencies and their relationship to the sending state government has a large impact on the actual delivery of intercountry adoption services. Agencies make decisions	Can be not for profit but under Hague Convention can also be -- American model drives Hague contents on who can do intercountry adoption under the Hague , beside governmental bodies	Usually set by or approved by receiving state	Sending state permits operation, must be approved by receiving state to operate	Despite a strong model of governmental involvement in running intercountry adoption, via a central authority and its structures, in reality the model involves non governmental agencies, something with its origin in American operation of intercountry adoption before the Hague Convention, and something that the Convention's contents were drafted to accommodate.

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					often driven by their own desire for self-preservation and vested interest in particular type of work.				
Role of central authority in receiving states	Attitude toward intercountry adoption, set rules on operation and	Set by government and its view on how intercountry adoption operates in that state	Highly influential on overall operation of ICA and what relationships look like in sending states, with which states sending relationships formed	When state is HC member and has ratified HC	The structure of the central authority in receiving states is set largely by the government and its views and policies on intercountry adoption and how intercountry adoption should work. This is influential in turn in the type of relationships that get forged with selected sending states, and how business is done with those states.	Designated by government – formal and informal policies and attitudes govern the role that is taken by the central authority and its scope and views	As determined by government policies and attitudes, how the Convention terms are applied and interpreted	Action of the government to set formal and informal policies on how to apply and interpret range of options in Convention	The attitude that a receiving state takes towards the interpretation and implementation of the Hague Convention is determinative of what operations through the Central authority look like and ultimately, what the operation of intercountry adoption looks like, including the development of relationships with sending states.
Role of central authority in	Sets the model for how intercountry	In sending states	Defines the scope and	When state is member of	The sending state governme	Government of sendin	Policies and structures,	Lack of action means lack of	The role of the central authority is determined,

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sending state	ry adoption will be structured and with whom the state will do business to send children, controls number of agencies/relationships with agencies	that have ratified Hague Convention	policies for intercountry adoption in sending state	Hague Convention and has ratified it	nt determine the scope and role of the central authority, and in turn, it determines the model that is used to operate intercountry adoption within the state, including the role and presence of agencies in the sending state.	g state	both formal and informal	oversight, perhaps corruption is possible	as in receiving states, by the government. The strength of this role has much to do with the way in which the Convention is applied, adhered to and the model under which agencies, if at all, are involved in the sending state.
Hague Conference/Hague Convention on Intercountry Adoption	Sending and receiving states address concerns about international adoption operation, have voluntary instrument that sets standards	Private international body – voluntary membership	Motivated to set up instrument, sending and receiving states agree to participate and join	Since 1993, ongoing	Standards set by a body on private international law, standards are voluntary, and no penalty for states that do not ratify standards.	Both sending and receiving states on a voluntary basis	Periodic meetings to discuss the convention's operation, meetings can be a forum for states to demonstrate prestige and highlight their achievements as well	Up to individual states to decide to join or ratify—international political pressure can impact some states 'decision to join or ratify—driven by international relations concerns	Individual states make decisions on whether to join or ratify the Hague Convention on intercountry adoption. The Convention is the predominant instrument in the operation of intercountry adoption, but it is not the only one, and it might be subject to competing influences of other standards. Its practice

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							as a forum for discussion on the convention, provides forum for both sending and receiving states to have discussion on equal basis.		standards and models are prone to interpretation as it suits a sending or receiving state central authority and its government.
Other international governmental bodies and non governmental organisations	Not all intercountry is done under Hague Convention—not all adoptions are Convention adoptions	States that have not ratified Convention, in Hague states in addition to the Convention’s requirements, agencies operating in states both sending and receiving, Hague and non Hague	Intercountry adoption does not have to be done according to Hague, was going long before Convention was established, large sending and receiving states have been doing ica without	Intercountry adoption not driven solely by Hague requirements—other bodies and instruments have statements and standards about intercountry adoption operation	There is no single international body or law that oversees international adoption, nor a single model on what the roles of the government, the central authorities and any agencies working in a sending or receiving state should be. These different standards and models	Various regional governmental bodies, non governmental international organisations, non governmental adoption agencies	Operating in private enterprise, in international arena, in individual states, sending and receiving	In competitive environment, agencies establish themselves and operating turf. INGOs may compete for setting adoption standards in ICA. Other standards besides Hague may proliferate, even in states that have ratified. No single way of doing ICA, is an enterprise within the	There is no single way to “do” international adoption. Standards and models of practice vary across and within Hague members, as well as in states that have not ratified the Hague. What determines how adoption is done is largely what is in the interest—that is the survival and self preservation of those non governmental bodies involved, including

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			hague ratification		can even compete with each other for predominance in how intercountry adoption should be done.			confines set by central authorities	agencies. There can be competition for prestige and dominance amongst those bodies involved in intercountry adoption operation and policy.
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Appendix A China

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/Interaction	Consequences— what happened as a result of action/interaction
Family planning population planning as science not politics within China	Population control measures created through scientific works in China . Large unchecked population growth seen as keeping China from competing with other global powers	China	Attempts to address effects of large population on China’s economy and environment— large population seen as hurtful to China’s power and prosperity internally and internationally Threat of large population	After death of Mao— lessening of strict Mao-ist rules in China	High amount of state regulation in family structure and population.	Chinese government	Effects of population on Chinese economy/world power	Government set out deliberate population control policies because this was seen as necessary to advance China’s prospects in international economics and power. Deliberate ACTION	Strict population control policies in place, that led to new reasons for abandonment of girl children. Measure of science rather than politics. Fertility rate now below replacement rate. OCP still in place, albeit not strictly or uniformly enforced.
Social structure of Chinese families	Confucian based— value for son/father lineage	Ancient and modern China	Impacts on children that are seen as marginal/expendable/necessary— need for a son To have no son is to be seen as not having children Son seen as necessary to provide for family in parents old age	Ancient and modern China	High value placed on father/son in family structure Girls leave birth family and become part of the husband’s family Girls seen as costly/expendable –although changes in modern society	Social structure	Traditions, values	A social structure that has been embedded through the ages continues in place, with traditional values maintaining these, in the face of modern needs to have a son maintain family due to lack of social security. No action taken	Strong cultural preference for sons tied to survival needs of family and values of Confucian values system. Girls expendable across time and place in China with different immediate causes for their abandonment
China’s relationship with sending/other countries	To assert itself as global power alongside other countries, on its terms. Insistence on national	Foreign/international relations	China desire to establish itself on sovereign/equal power base with other countries that once dominated parts of it in colonisation. Adoption seen as “bridge to West”	Historically, China was in dominant position with other countries it came into contact with. Modern recent	China takes action to ensure that it is economically on par with other nations. Operation of intercountry adoption as part	Chinese government	Through governmental policies, laws. Foreign relations.	Deliberate action Establishment of formal laws and policies to establish and carry out these aims.	China places itself in a position of equality to other nations with whom it deals and does not take a position of subordination.

	sovereignty as principle rule of international law. To not be placed in subordinate position vis a vis other countries. Historically held a dominant position vis a vis its relationships with other countries		Adoption part of foreign relations Adoption as part of engaging in capitalist relationships with other countries Adoption bring in foreign hard currency Adoption way to link Western families to China Adoption creating links and ties with other countries China's insistence of post adoption reports, suspend adoptions with Spain due to lack of reports Recent 2007 restrictions on Chinese adoptions (ahead of 2008 Olympics)	hx of colonisation—China has “trauma” memory from that, now insists on value of sovereignty in international law and relations	of this effort. Policies on intercountry adoption to this effect.				This permits it to set intercountry adoption policy according to its national policies and aims, without much interference or influence from sending countries like the US. China's restrictions on adoption have drawn only a whisper of the cry that went out and still is ongoing about Romanian intercountry adoption— response that can only be seen as partly racial— because of the popularity in US of adopting Chinese girls.
Lack of social welfare in China	Country was Communist, making transition to other type of economy Many poor rural areas—son is seen as necessary for survival of elderly parents No alternatives for children—	Through out China, historically and modern Not modern welfare state (contrast with Sweden)	Social values Governmental choice on policy Resources Outward focus of government on developing place in international affairs	Historically and now in China	Lack of welfare policies mean people act as they see necessary to provide for themselves in transitioning country---still strong value for sons as part of survival needs of family. Girls abandoned because there are no alternatives. Government has	Governmental policies	Through not creating child welfare programmes, or social security programmes for the elderly. Focus outwardly on economic development rather than internally (contrast with Sweden) Concentration	Inaction—there has been little or no development of social welfare programmes either for children or the elderly. Government does not create social safety net for the vulnerable populations in its society.	Little investment in social welfare programmes. Families create own response— which results in abandonment of girls, seen as a need for a son for family survival as well as based on long standing social values and familial structure values. Children

	<p>state institutions or adoption, no family preservation programmes Social work not linked with idea of adoption Abuse and neglect not reasons for abandonment of children (different focus than western child welfare)</p>				<p>not created alternative social welfare programmes for children. Rather its policies influence the abandonment of girls. Government has taken little direct action to curb child abandonment of girls.</p> <p>No legal mechanism provided to abandon children</p>		<p>on external relationships, perhaps as a result of the trauma of colonisation and determination to be strong in international economic and other international affairs and relations.</p>		<p>abandoned.</p> <p>Girls seen as expendable in society are sent in ica.</p> <p>Lack of government action means that current situation of abandonment of girls continues.</p> <p>Failure to act as if situation not there.</p> <p>Ignore internal events while focus is on development of international prestige and strength.</p>
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Appendix A Guatemala

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/Interaction	What happened as a result of the action/interaction
									CONSEQUENCE
National trauma	Long civil war	Especially in Mayan communities, Mayans became refugees into Mexico	Regime of terror against Mayans—socially disenfranchised—also rise of fertility when there are unsettled social/economic conditions—thus poor conditions for Mayans is associated with high birth rate	Civil war that lasted 36 years and in post-conflict period	Vulnerable population that cannot provide for its children/children not wanted due to rape/high rates of indigenous (Mayan) and mixed race children put up for intercountry adoption . Child as “bearer of social anxiety”	Most of the Guatemalan population, albeit with particular impact on the Mayan population—targeted and as a consequence of extreme deprivation and poverty Systematic rape/killin g/violence/torture Americans adopting from Guatemala— use of anti conquest narrative by Americans in their depiction of Guatemala and its people. Little knowledge of civil war or US role.	Systematic acts of violence against Mayans, including rape, genocidal acts	Deliberate action Systematic violence aimed at a specific group of people, keeping them on margins of society even after conflict has ended.	Socially marginalised Mayan population is cut off from any meaningful social protection or involvement in governmental institutions—fear of being attacked, memories of being attacked, genocide, keep them silent and voiceless, taken advantage of without any recourse, unable to challenge ills of intercountry adoption processes
Social marginalisation of Mayan peoples	Legacy of colonialism by Spain, through out history of country into present time – racism as a social value	Throughout all levels of social dealings with Mayans— political, educational, social	Social value of racism, place of Mayan in society, Legacy of colonialism	Through out history of country once it was colonised	Unable to provide for children, no government programmes to assist—highly impoverished, most children put up for intercountry adoption are either Mayan or mixed race Mayan/European	Those in control of governmental and political structures— European and European descent	Through acts of violence, extreme poverty, genocidal acts, exclusion from social institutions, lack of governmental programmes of support	Deliberate Action, directed at the Mayan population, keeping them powerless, on margins of society.	Large numbers of children that are Mayan or mixed race Mayan/European enter into a poorly regulated and corrupt intercountry adoption system, mainly sent to the US. Children not wanted in part of Guatemalan society by those outside of Mayan communities.
Corruption in government and judicial processes	Weak government, little judicial oversight	Market created for intercountry adoption, children can/could be adopted without judicial process, no/little oversight of fees charged, process; strong presence	Society in upheaval due to extremes of poverty and highly stratified community	During and after civil war – reflected in intercountry adoption practices that were largely unregulated—that operated as a market in children.	Free and unregulated market for children in Guatemala. Little oversight or regulation. Able to adopt without going through judicial process. Solicitation for sale of unborn children. Best interest of the child	Power elites— exclusion of Mayans	Power held in the hands of a few. Marginalisation and extreme poverty in other segments of society. Society afraid to speak out due to brutalities experienced during and after	Inaction—little is done to curb systemic corruption, although with renewed passage of the Hague Convention, some steps being taken to address concerns on intercountry adoption.	Unfair treatment, uneven power, no recourse for those without power base— fear in speaking up, fear of violent reprisals. Silence. Unable to speak out against practices in intercountry adoption, no government

		of many outside social service agencies for purposes of intercountry adoption			subsumed by market in children.		civil war.		programmes to provide for families. Little choice in giving up child for adoption. No social alternatives invested into by Guatemalan or American governments.
Cold War relationships with the United States	US involved to allegedly stop spread of communism, helped set up military dictatorship in country	Reflected in how intercountry adoption operations occur with US.	US wanted to become involved in governmental control of Guatemala. Covert operation.	After civil war to the present time	Guatemala heavily influenced by US in its political and other governmental dealings . Guatemala heavily influenced by US government in its intercountry adoption operations and policies. US has very little knowledge of Guatemalan civil war, or the US role in that	United States government, Guatemalan government that has been put into place by US, current Guatemalan politicians.	Military interventions, governmental coups. Civil War. Covert operation.	Deliberate action—by the United States government	Social upheaval. National trauma after events. Destruction of many elements of Guatemalan society. Until recently little regulation of intercountry adoption. Only since US is about to enter in Hague Convention is Guatemala making reforms. Little pressure from US until recently to reform its intercountry adoption processes.

Appendix A India

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	= Process CONSEQUENCE
India's struggle for internal and external self-identity	Differences in religion, finding place in international order, violent past, establishing democracy, debates on separation of powers and the limits of authority of the Indian Supreme Court	Internally and externally – within the governmental branches	Past divisions between people in Indian society, status of women as compared to Constitutional ideals, past violence, emerging world power with internal problems of poverty and hunger in some segments of society	Past and present— issues from the past can show up in current day problems	Idealistic content of Constitution for democracy and equality is belied by continuing internal differences and strife, and resolution of difficult issues of daily living	Internal branches of government, other policy makers in foreign policy	Debates over powers of different government branches, living up in practice to the ideals of the Constitution, establishing consistent foreign relations policies and relationships with neighbouring states and balancing with the United States	Governmental views on how India's democratic governance infrastructure should work, and what India's relationships with other states should be and should be based on result in a confused identity. Whether India's relationships are based on shared democratic values, on basis as an emerging power, or geographic location or some combination of three leaves India a state of flux regarding its internal and external structures and relationships.
Difficult conditions for some segments of India's population	Disparity in the wealth and material resource distribution in India, unequal social status for women and girls	Through out class system, and all levels of society	Longstanding social divisions and traditions/customs	Historically and currently	There is a wide spread difference of the affluence and material wellbeing in India, with some segments of the population living in desperate circumstances. As well, girls and women have a subordinated position in the family and throughout society, at all levels.	Laborers, certain tribal members, lower caste members, girls and women	Through longstanding social and family traditions and customs, at all levels of society, court cases do not provide decisions that support an equal status for women and may serve to reinforce a diminished and subordinate status, despite Constitutional and legal provisions to the opposite.	There is a lack of consistency on what is on the books for protections and status of girls and women and how it is delivered— resulting in continued subordinated status for girls and women, within a society that is already divided by a great gulf of economic and material disparity, with a large segment of the population in marginal existence and difficult living conditions, while other segments of the society enjoy economic wellbeing.
Mixed views on intercountry adoption	Views mixed on whether intercountry adoption provides a benefit for	Expressed in court cases	Is adoption a benefit for a child—concerns about child trafficking and other risks, as well as problems	Through India's engagement with intercountry adoption	India's position on the risks and benefits of intercountry adoption remains mixed	Court, adoption agencies and others	Expressed in court opinions, ambiguity may be reflected in how there is	There is no consistent view on the place or process of intercountry adoption within India. There are

	child or whether it exposes a child to risk—taking into account the cycle of intercountry adoption problems experienced by India		of assimilation into a new country—but also note potential benefits of adoption that include improved material benefits				the quality of practice is different from the process that is “on the books”—disparity between the official versions and how it is carried out.	guidance for practice in its laws and policies but the reality of how these are carried out are much different, in part responsible for the cycle of adoption scandals that are experienced in India. There is ambiguity, inconsistency and disparity throughout the intercountry adoption system and process.

Appendix A South Africa

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/Inaction	What happened as a result of action/inaction CONSEQUENCE
HIV/AIDS epidemic	Widespread—government resources put into place to treat and prevent. Through out Africa, not limited to South Africa.	In young adult population	Variety of social and cultural and economic factors	On-going	Young adult population especially impacted, lack of resources to treat and prevent the disease.	Young adult population, children orphaned due to parental death	Initial lack of resources to treat and prevent, now SA government investing in treatment drugs.	Inaction, limited action Response latterly to AIDS treatment. Continuing spread of AIDS epidemic among young adults in South Africa.	Continued spread of epidemic, leaving young children without one or both parents, limited government resources to treat and prevent disease
South African constitution	Establish rule of law in South Africa after apartheid	Throughout South Africa	To establish new rule of law after apartheid	After change of governance, in late 1990's	Basis of South African state after apartheid, important document for the basis of society without apartheid as ruling principle	South African government, South African population	Change in South African government, apartheid abolished	Action Government changes and political changes to create new Constitution to govern post apartheid South Africa	South African constitution set up to govern a re-constituted society that no longer made colour or race based distinctions on people or their rights
Plural legal system and society	Country colonised, other legal systems brought along with customary law. Legal recognition given to effect of customary law	Through out the country	History of colonization and apartheid in South Africa, varied population of tribes and Europeans	On-going through history of country, current	History of country means that there are different groups of people, different social structures and different legal systems and values	Mix of population, different tribes and European colonizers	Legal recognition given to all the legal systems, makes society more pluralistic	Action—steps to give legal and formal recognition to variety of legal systems within varied society/contrast to apartheid governance.	Legal system that recognises the legal systems and customary law of the different population groups within South Africa— putting them all in equal legal footing
Customary laws, culture, values	In African tribes and society. Given recognition on equal footing with other legal systems.	In some segments of South African community.	To provide equality among legal systems after apartheid. Best interest principle not necessarily part of customary laws.	Through out South African history, before and during colonization and apartheid. Now given specific recognition.	Given specific recognition and enforceability in South African society, although some aspects of European law such as best interest standard may conflict.	All segments of South African society	Given legal recognition but without reconciling potential differences	Action Steps given to recognise these through a plural legal system and society.	Customary laws are given equal recognition with other legal systems in South Africa, setting up a pluralistic legal system. The best interest standard must be applied through out as it is part of the Constitution, despite criticism that the standard is a European import and might be in conflict with customary laws.
Best interest of child /formal (closed) adoption)	To give protection to children in legal matters	In SA constitution, and in legal matters concerning children – although it is criticised as being imported and not part of	Give legal recognition to the Paramountcy of the best interest principle	Since inclusion in the SA constitution	The best interest of the child, and that it should be given paramount consideration, is included in the South African Constitution. This applies to intercountry adoption. Formal adoption also seen as a Western	Any child in South Africa	By inclusion as part of the South African constitution	Late recognition of legality of intercountry adoption. Action and inaction— Receives formal legal recognition but is not widely used, perhaps due to conflicts with existing customary law and values.	There is a definite statement about the application of the best interest standard and that it is to be the paramount consideration in legal matters on children. This is despite some criticism of the standard as being an European import and not part of and possibly

		customary law. Focus on individual vs. group rights			construct/import. Mainly is used by white families adopting black African children.			Plural legal system may result in less children going into intercountry adoption.	conflicting with African customary law. Formal (closed) adoption is also seen as a Western import, and usually done by white families adopting black children. Availability of plural legal system may result in less children going into intercountry adoption.
Subsidiarity of intercountry adoption	Recognised as part of the best interest considerations for child in intercountry adoption	In matters dealing with intercountry adoption and best interest of the child	Part of international law, given special emphasis in SA intercountry adoption	On-going	Subsidiarity of intercountry adoption is given particular emphasis in South African discussion of intercountry adoption and is seen as part of the best interest of the child consideration. It is emphasized as being part of international law.	South African policy makers, politicians, other intercountry adoption professionals	Specifically recognized as part of international law and given specific emphasis because of that, along with the best interest of the child, and a necessary part of intercountry adoption operation.	Action--- Given formal recognition as part and parcel of intercountry adoption best interest of the child standard. Recognition of this may result in less children going in ica. Recognition also may be prompted in addition to international law, to consistency with customary law and values.	South Africa gives particular recognition and emphasis to the subsidiarity of intercountry adoption as being part of the best interest of the child standard. Discussion focuses on the subsidiarity principle being part of international law, but without the same commentary that it is an “import”. The subsidiarity principle might be seen as enhancing the importance of customary law and values of a child in intercountry adoption decision making, and in helping to protect the child’s rights.
Structure of South African family	Focus of how children are cared for—effected by long history of apartheid, father/husband working away from home, high incidents of maternal death, extended family and others caring for children	In black South African communities	Structure affected over time by different factors, extended family and non bio kin “selective family” have a role in raising children	On-going	The South African family structure has long been one of extended family and non bio related adults caring for children , in the event of parental death or necessary absence of parent who is seeking work. “Selective kin” is the name given to non bio related care givers – where a kin type of relationship is voluntarily formed and not based on blood ties.	Can be both bio and non bio adults. Formation referred to as “selective kin” where relationship between bio parent and caregiver possibly predictive of how well child will be cared for in fosterage arrangement.	Generally informal arrangements, though some black African families turning to government grants for providing fostering.	Action Family and community structure responding to situation created by AIDS epidemic, attempts to care for children without resorting to ica, and where there are limited government social welfare resources/programmes.	Continued evolution of South African (black community) family structure based on need. Some family bonds are non blood related and are called “selective kin”. It is suggested that the relationship between the caregiver and the parents of the child may determine of the child is “socially marginalised” as a result of the caring arrangement. Alternative child caring arrangements tend to be informal, although some black families are now starting to access government funds for providing fostering care.

Appendix A South Korea

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/Interaction	Result of Action/Interaction CONSEQUENCE
Repression/Invisibility	<p>* To hide national shame at having biracial children/children as a result of war/invasion</p> <p>*children whose mothers could not keep them/provide for them</p> <p>Globalization—show Korea as modern and able to be part of global world , keep the idea of intercountry adoption secret</p> <p>* To keep the image of the country positive</p>	<p>* After Korean War/Start of cold war</p> <p>* After Cold War</p> <p>* after growth of economy, industrialisation, rebuilding of country infrastructure after the war</p>	<p>* wanted to keep children out of society/bloodlines/Confucian family structure/wanted to erase memory of national trauma</p> <ul style="list-style-type: none"> • Repression of national trauma • Influence of US Agencies, easy to send children to America • Belief in American dream, positive life in America contrasted to difficulties in Korea <p>* impacts on global image of Korea, for instance when hosting international sporting events such as the Seoul 1988 Winter Olympics and 2002 World Cup</p>	<p>*right after Korean War ended</p> <p>*globalisation of the Korean Economy—after end of the Cold War</p> <p>* international sporting events such as 1988 Seoul Olympics and 2002 World Cup</p>	<p>There is only visibility around the issue of intercountry adoption when there is an international sporting event or something that puts South Korea in the public eye—higher SK visibility leads to higher ica visibility—but manipulated by SK government and its agenda</p>	<p>Korean government</p> <p>Media</p>	<p>Send children overseas, out of the country</p> <p>Public face of embracing highly visible adult adoptees, show as international relations issue, creation of global community</p> <p>Media shows stories of happily ever after reunions, does not deal with underlying issues of why children were sent abroad</p>	<p>Action—although this seems counterintuitive. Deliberate steps were taken by the government to send certain segments of children out of the country. Very active intercountry adoption programme. In turn, the government has recently taken very deliberate steps in the form of F-4 Visa, and events to “welcome” Korean adoptees back to Korea.</p>	<p>The conditions that gave rise to intercountry adoption are never discussed fully—when in the public eye given a gloss that suits the international relations agenda of the government to put the country in a positive light, otherwise children were seen as a national shame and were sent out nearly invisibly from the country</p> <p>Positive image of intercountry adoption that may lead to reduction of outside pressures to ratify Hague Convention, which is in the self-interest of the US based adoption agencies that are heavily involved in adoption industry---operates to the benefit of the US adoption agencies</p>
Symbolism/Metaphor for Mother/Motherland	<p>Foreign relations picture of returning adoptees and their relationship to both</p>	<p>Modern day South Korea, largely becoming visible in the run up to 2002 World Cup,</p>	<p>To perhaps control the public image of the country on this issue, given the events and embarrassment following the highlighting of this during Seoul 1988 Olympics</p>	<p>Since the 2002 World Cup—and with increasing media attention on returnees</p>	<p>Enhancement of global image, foreign/international relations</p>	<p>Media and government</p>	<p>Television shows, publicity, media</p>	<p>Deliberate action—the decision of what to portray in media, and how to create images that are desired</p>	<p>False image painted of the situation and relationship of the adult adoptee returning to South Korea,</p>

	their birth mother (if found) and to the country of South Korea	government hosted gathering of returned adoptees						by the government.	
Motivation for Engaging in Intercountry Adoption	Hide national trauma /repress visible signs of national trauma Send kids out of the country that are not wanted Benefits South Korea's relationship with the US-international relations Belief that child has a better chance of life in America, keeping an idealized notion of US as "better than" superior to South Korea	In South Korea	No motivation for creating alternatives in country for unwanted children No need to create social service infrastructure, as children sent overseas, gone, no need to admit to need, intercountry adoption as revenue source for country Keeps good foreign relations with the United States Avoidance of issue of poverty and social problems –keeps those issues hidden and invisible as potential embarrassment in the global politics scene, might hurt the standing of the country	Following Cold War—then as part of social change, industrialization, globalization, globalisation politics Currently	Overall motivations for engaging in intercountry adoption have been “public relations issues”—international relations, public face of country, not wanting to face national trauma, erasing, forgetting, moving forward towards industrialization and globalization without addressing problems that give rise to mother / family unable to keep child—US politics lets this remain hidden as the non signing of the HC is not made an issue with this country	Korean government American adoption agencies/ child sponsorship programmes	Through setting or not setting public policy, domestic programmes, not giving any recognition to social problems, intercountry adoption remains the main alternative Reform attempts always fall short of stated goal of eradicating intercountry adoption	Inaction—through not creating social welfare programmes for children or vulnerable mothers. Planned reforms do not meet their goals—mix of action and inaction	Intercountry adoption active to keep the public image of South Korea high, avoiding exposure of problems that underlie why children enter intercountry adoption In cost/benefit analysis, South Korea determines its best to continue with some intercountry adoption
Emergence of Voice of Adult Adoptees	Challenge invisibility of intercountry adoption , challenge why intercountry adoption was necessary/continues	Largely in South Korea media, also in academic research literature, other popular literature, blogs, internet websites	Writers have personal motivations to express themselves, their sense of rage, alienation, not belonging, of mental illness problems, cultural difficulties, even upon return to South Korea or with reunion with birth mother, birth family	Since the 2002 World Cup, and run up, internet development	Product of globalization/internet/online communities form, rapid exchange of information, highly visible adult adoptees not dependent on South Korean government for stating their position	South Korean adult adoptees	Internet, media, popular media, blogs, physical gatherings, moving to South Korea, academic research literature, presentations at conferences on these issues	Action Deliberate actions by adult adoptees	Challenges the invisibility and repression that has been the watchword for ica in South Korea, South Korean government now has tried to find a way to fit the adoptees into the current government agenda of globalization, but has not done anything to stop/reduce adoptions, still trying to balance global image and international relationships with the United States in this issue.

Falseness/Falsity /Tolerance for Falsity	Public/private face of adoption= public face of adoption, adoptees welcomed as “global citizens” Private face of adoption, children seen as needing to be sent away, made invisible, a national shame	Through the operation of intercountry adoption, since the start of the Korean War	To create national agenda/ national image that suited the aims of the time of the South Korean government, and foreign relations with the United States	Not addressing circumstances that led to children being placed for intercountry adoption Falsified documents “Orphans” that have living relatives, parents, extended family	Secrecy, manipulation of situation to suit national agenda, not addressing the core causes of why children are sent in intercountry adoption, not developing social services, failed attempts to eradicate intercountry adoption	South Korean government US adoption agencies	Government processing, agency operation standards, lack of oversight from neutral/disinterested entities, such as state social welfare departments, resistance to regulation on the part of US adoption agencies	Inaction—little change in resources available for social welfare	No change in practices—never addressing in the open the reasons why children sent away in intercountry adoption; no development of social services to provide alternatives
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Appendix A Sweden

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/inaction	Consequence of action/inaction
Strong sense of national identity	Strong economy; position internationally, not subject to recent invasion, colonisation, or threats. Seen as progressive and forward thinking.	At national level, in national and international policy, in families, in setting out ideas or values as “Swedish”	Its position internationally, and its distinctive form of democracy and social provision—welfare state development	Recently—after World War II. Development of strong Swedish economy and welfare state	Sweden is independent in its foreign relations, operating from a sense of strength and also able to state what its values and ethics are in its international relations and policies. It is not trying to gain favour with another country through its intercountry adoption operations. In a pro-active rather than re-active state in how it formulates and carries out its policies.	Government People	Through its strong economy, and its self identity as a progressive democratic nation and with its generous welfare state, able to assert itself without fear of damage to itself, economy, not dependent on other nations good will	Action Steps deliberately taken to express its views in formal documents such as policies and laws.	Strong infusion of identified Swedish values and ethics into national and international policy and relations.
Best interest of the child	Seen as ethically required	Statements on international policy Codified by the Swedish parliament	As part of how Sweden has identified its national values and ethics.	Recently—1979, Swedish Parliament made statements regarding the best interest of the child. Sweden has released policy documents and revised its Intercountry Adoption Central Authority . Review of the values, ethics and operation of intercountry adoption.	The best interest of the child, as conceived of in Swedish values and ethics, is present in national laws, policy and as a feature of its intercountry adoption arrangements with other countries, both sending and receiving.	The Swedish Central Authority, Swedish Parliament	Subsidiarity of intercountry adoption, Intercountry adoption seen as a short term solution, Sweden actively working towards long term solutions to enable children to stay in family environment in country of origin . Some social workers argue for how the birth mother should be incorporated into understandings of adoption. incorporation	Action—deliberate steps to express its position on what constitutes the best interest of the child, in formal documents and laws.	Strong and visible statements on what Sweden views as making up the best interest of the child in formal documents and laws.
Statements on ethics of intercountry adoption	Seen as responsibility of Sweden internally, in its relationship with sending countries, and to minimise competition and market economy approach amongst receiving	In national policy, international policy, statements in national laws.	Responsibility of Sweden to provide leadership	Since 1960’s Development of strong economy	Included in formal documents, such as national law, policy statements from its Central Authority. Highly visible and clear statements on what it sees as an ethical position.	The Swedish government, Central Authority, Swedish parliament	In formal documents, laws, policy statements	Deliberate action Expressing in formal documents Sweden’s view point and position on best interest of the child, ethics, and values and ethics in	Melding of best interest of the child in strong ethical statements about Swedish values and ethics, and Swedish social responsibility—how these should govern its actions with both sending

nations								intercountry adoption.	and receiving countries, actions and policies on both a national and international level, wrapped up in a strong sense of Swedish national identity
Relationships between sending and receiving countries	Seen as ethically required as being co-operative, not exploitative, urging self sufficiency for sending countries, avoiding setting up dependent relationships Relationships between receiving countries should be co-operative and avoid creating competition for children. Favour regulated atmosphere, especially on matters of fees.	Policy statements Actually carrying out foreign relations agenda and relationships	Part of the ethical duty of Sweden in its own identified role in international relations	Recently Since 1979— statement of parliament And since development of strong Swedish economy and welfare state	Intercountry adoption is part of Sweden’s formal international relations agenda	The Swedish Central Authority, the Swedish Government	Through policy statements, formal international relationships, how it conducts its intercountry adoption relationships	Action— Statements in documents, law, policy, and in carrying out its foreign relations with other countries.	Formal and highly visible statements on what place intercountry adoption should have in relationships between states, Sweden’s self identified/self-assigned role in its own international relations and in international affairs with other countries regarding operation of intercountry adoption
Intercountry adoption in Swedish society/families	Once seen as a social responsibility to rescue children, now changed to family formation for childless families . Stated concern for the birth mother in country of origin. Trips to the child’s country of origin.	In countries with whom Swedish has satisfactory international relations (see its relationship with Chile for instance)	Short term solution in formal policy documents, with a social responsibility to aid sending countries in the long term to be able to care for their own children and to develop social structures that do not discriminate against women and children born out of wedlock	Long hx of adoption in society— intercountry adoption since WWII/Korean War— changes in attitude along with the re-emergence of strong Swedish economy and welfare state	How the practice of intercountry adoption is conceived of is in relation to Sweden’s international position created by a strong domestic economy, strong sense of Swedish ethics and values, and strong infusion into formal policy on intercountry adoption of statements of Swedish values and ethics—seen as being reflective of Swedish national identity/character— informally parents take adopted children to country of origin—reunions between child and birth family. Normalising that contact as part of intercountry adoption process.	Families, Swedish Central Authority, the Swedish government	Requirements of becoming approved to be an adoptive parent through intercountry adoption, policy statements	Action Governmental bodies carry out aims of Hague Convention in line with interpretations consistent with Swedish values and ethics and positions on intercountry adoption operation and best interest of the child.	Formal policy statements and positions carried out through agencies and the Central Authority have much to do with how intercountry adoption is perceived and carried out within Sweden.

	Statement of Swedish social worker “no such thing as motherless child.”				
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Appendix A United States

Categories	Why	Where	How Come	When	=Structure CONDITION	Whom	How	Action/Inaction	What happened as a result of action/inaction CONSEQUENCE
Intercountry adoption as in best interest of child	US as best place for a child to be raised—offers most material benefit; arguments against subsidiarity of intercountry adoption	National policy/international policy/ statements	Assertion of US interests in sending countries, seen to operate to US benefit for intercountry adoption to be allowed—perhaps a barometer of other foreign relations issues such as economic and trade issues	In arguing for the need for there to be liberal intercountry adoption to US, when there is resistance or reduction of intercountry adoption from sending countries, change in law to enact Hague Convention	In its foreign policy, US asserts that intercountry adoption (to the US) is in the best interest of the child	US government, policy, relationships with other countries, participation in international bodies	Through foreign policy interactions, statements, Congressional testimony, interactions between heads of state and other governmental representatives, media portrayals of intercountry adoption	Action— Deliberate assertions in foreign relations policy	Consistent statements that adoption to the US is in the best interest of children; foreign relations issue, pressure on sending countries to permit intercountry adoption to US
US/sending country relationship and history	Hx and current relationships impact on whether that country acts as sending country to US for intercountry adoption, how that country responds to foreign relations pressure from the US	Sending countries—where US has relationship—social upheaval, past war, conflict. Close relationship with US during/after social upheaval, conflict.	US is in more powerful position militarily and economically than sending country—exerts influence. US sees itself as superior, superior place to raise child. Inhabitants of sending country seen as inferior, cannot care for child.	History and relationships prior to the start of intercountry adoption—then continuum of events, such as social upheaval, conflict, US involvement,—in some but not all instances with sending countries	This can strongly influence intercountry adoption from some but not all sending countries (exception perhaps China) can be predictive of whether country with this relationship with US will engage in ICA	Military involvement both covert and overt, foreign relations, trade, economic relations	Military involvement both covert and overt, foreign relations, trade, economic relations	Action US becomes involved in internal affairs of other countries through military and economic means	If these conditions exist strongly predictive of intercountry adoption relations in sending to US—but does not account for all countries that send children in ica
How intercountry adoption should operate	To maximize opportunity for American parents to adopt —argue against regulation and subsidiarity of intercountry adoption as in best interest of child, seen as inhibiting adoption	National government policy statements, resistance to implementation of the Hague Convention	Allows maximum opportunity for US to adopt from other countries according to the terms and conditions that the US wants to promote	Throughout history of adoption ==since early 1990's in particular	Strong policy statements that intercountry adoption should not be strongly regulated, that best interest of child is not served by subsidiarity of Ica, position in opposition to international principles and instruments	International adoption agencies, national government	Foreign relations with other countries, diplomatic pressure, Congressional hearings, policy statements	Action Through formal ties to other countries—part of international relationships and foreign relationships with other countries.	Strong position that ICA to US is in the best interest of child, US provides superior place for children. Way to assert US superiority on global scale, in foreign relations
US role in intercountry adoption	To promote US interests and influence in other countries	Mainly in countries with whom US involved with in civil war, other military	Part of foreign relations and trade, perhaps barometer of	Since early 1990's	Strongly interventionist into other countries policies	National government, national policy statements, international/foreign	National government, national policy statements, international/foreign	Action Issue is included along with other	Issue strongly embedded in other issues of national interest, international

		operations	other foreign relations and issues		and practices on ica –acts to ensure liberal supply of children to US	relations	relations	issues of national interest, making intercountry adoption a national interest of the United States	prestige and power.
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Appendix B

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