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**ADOPTIONS ACROSS IDENTITY BORDERS AND  
THE RIGHT TO CULTURAL IDENTITY IN  
CONTEXT:  
THE CASE OF ENGLAND, GERMANY AND ITALY**

**LAURA ZAGREBELSKY**

**MPhil in GENDER STUDIES**

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## Abstract

This dissertation analyses the phenomenon of adoptions across identity borders and the right to cultural identity in England, Germany and Italy. Drawing from legislation, parliamentary, academic and public debates, newspapers and case law, I argue that adoptions across identity borders and the right to cultural identity are interpreted and performed in each country in a way that is significantly affected by the context and social narratives about identity, childhood, family and national identity.

I first introduce the issue of children's right to cultural identity. Analysis of the literature on multiculturalism and the problems of minorities within minorities highlights that less attention has been given to the situations of children than has been given to those of women. I argue that the reason why the situations of children have been less analysed is due to the special situations of children as individuals lacking autonomy. The right of children to their cultural identity is further complicated by the fact that they are in a phase of life in which they are still developing an identity.

In this dissertation, I adopt a narrative identity approach. This approach places identity in context and highlights the influence of the surrounding social narrative on individual identities. I, therefore, examine the phenomenon of adoption across identity borders and the social narratives that surround it. These social narratives are not universal, but depend on the specific national context. Drawing from the history of citizenship and approaches to multiculturalism in the three countries analysed, I provide a comparison of the different social narratives on national identity in England, Germany and Italy, and their approach to diversity. I then analyse how, in these three countries, the phenomenon of adoptions across identity is, and has been, performed, and how the right to cultural identity has developed and is interpreted.

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This dissertation is dedicated to her and to my two little girls, Alice and Agata.



Terminology, aims and methods.

## 1. Terminology.

Before starting this dissertation clarification on the terminology used is needed. I have decided to use the expression “adoption across identity borders” to refer to the adoptions that entail a change of cultural context. In the academic writing about adoption many terms are used for describing similar ideas. Adoption can be referred to as transnational, international, trans-cultural, cross-cultural, inter-country, trans-racial. Trans-racial adoption is, for instance, commonly used in the United Kingdom and in the USA.

The expression “adoptions across identity borders” has the advantage of including all the adoptions that involve a situation where different identities meet. The common aspect of all these adoptions is that they are made across a frontier. These are adoptions across racial, ethnic, cultural and religious lines. Another reason to use this expression is that it underlines the mutability of the borders intersected: identity borders are not stable or natural borders but are socially constructed frontiers that change throughout history and contexts.

Adoptions across identity borders can be adoptions made within a country or made across national borders. I will use the term domestic adoption to refer to adoption where the child is adopted in his or her country of origin. The terms inter-country adoption, international adoption and trans-national adoption are often used interchangeably to refer to the adoption of a child by an adult or adults that implies the transfer of that child out of their country of origin. In the three countries analyzed three different terms are generally used: in England inter-country adoption, in Germany *auslandadoption* and in Italy *adozioni internazionali*. I have chosen to use the term inter-country adoption in order to be consistent with the language of the Hague’s 1993 *Convention on Protection of Children and Co-Operation in Respect of Inter-Country Adoption*.

Throughout the dissertation I will use the terms racial/ethnic identity and religious identity. The first expression refers to the part of identity that is shaped by the self or hetero-identification with a specific race/ethnicity. I use the word

race/ethnicity because in the context of adoptions across identity borders the two concepts are often used and confused in an ambiguous way. Of course the word race is used to indicate the social construction of racial identity and does not refer to any biological or genetic diversity based on race. Lastly, the expression ‘religious identity’ is used to indicate the part of identity that depends from the self or hetero-identification with a specific religious group.

## **2. Aims and methods of the research.**

This research aims to review the policies and practices of adoptions across identity borders and the way in which the right to cultural identity is interpreted. The study compares the experiences of three European countries: England, Germany and Italy. The aims of the comparison are to reveal the ways in which the diverse social narratives about identity, childhood, family, national identity and adoption, and the different histories of adoption across identity borders influence the interpretation of the right to cultural identity in these three countries.

A child’s right to cultural identity is declared by numerous international conventions. The *Convention on the Rights of the Child*, for instance, in article 8 states that State Parties undertake to respect the right of the child to preserve his or her identity. The right to cultural identity is also declared in relation to adoption: article 16 of the *Hague Convention on Inter-country Adoption* states that the ethnicity, religion and culture of the child should be taken into consideration during the adoption process. All the countries studied in this research are part of both these conventions, however, the ways in which the right to cultural identity is interpreted vary considerably.

The research will investigate

- How the right to cultural identity of adopted children is interpreted in England, Germany and Italy.

- How the diverse social narratives related to identity, adoption, childhood and national identity influence the ways in which the right to cultural identity is interpreted and guaranteed in these three countries.
  
- How the diverse histories and regimes of the phenomenon of adoptions across identity borders in England, Germany and Italy impact on the interpretation of the right to cultural identity.

A necessary precondition for this research is the definition of what is meant by identity. This word has been the subject of a vast literature in various disciplines. Identity is an extremely slippery concept, and the number and variety of theories seeking to explain what identity is and how it works demonstrate the complexity of this concept.

The analysis of what is meant by this word reveals a paradoxical combination of opposed concepts. Identity contains both the ideas of sameness and of difference. The Latin root of the word identity is *idem* which means identical, however identity also includes the idea of difference from others and uniqueness: identity discourses are both about shared belonging and about difference. Identity contains both the ideas of solidity and permanence and the opposite ideas of flexibility and mutability. Identity incorporates both the being and the becoming. It also encompasses self-identification and hetero-identification.

To be able to incorporate these apparently contradictory elements I adopt a narrative identity approach. Through narrative people can integrate and re-elaborate the different forces that influence the creation of identity. The use of the notion of narrative in relation to identity has many advantages: firstly, it puts people's agency at the centre of the process of identity creation; secondly, it situates this process in a certain place and time; thirdly, it recognizes that different elements contribute to creating one's identity, and fourthly, it introduces an evaluative element that enables people to make qualitative distinctions between the different varieties of events of their lives. The process is therefore led by a person in a certain place and time who narrates his or her own identity by choosing and evaluating the different elements of his or her life.

Narrative identity is therefore not produced in a vacuum, but is deeply embedded in the surrounding context. The social narratives available in the context are used by the person to create his or her narrative and by others to evaluate his or her narrative identity. The creation of narrative identity, therefore, is a social construction that reflects the surrounding social narratives.

In the case of the narrative identity of children adopted across identity borders the pressure of social narratives about identity, family and childhood is extremely high. Social narratives not only influence the creation of the narrative identity of the single individual but also shape the ways in which the right to cultural identity is construed. Identity, kinship, childhood are social constructions that have a great influence on how adopted children are expected to respond to their adoption and how the right to cultural identity is interpreted and applied. This study analyses the social narratives and contexts that influence the ways in which the right to cultural identity has been interpreted in England, Germany and Italy.

This is the first comparative study on this topic and it should be considered as a first attempt to rigorously analyse and compare how these three countries deal with children's right to cultural identity in cases of children's adoption across identity borders. The project has been necessarily multifaceted: different sources have been used in this research. Laws, parliamentary debates, newspaper and academic articles have been used to explore the different approaches to the right to cultural identity of adopted children. Case law will be used to exemplify the different policies and practices of the three countries.

The study is not intended to provide a comprehensive analysis of the case law, but in using a wide range of sources it will provide a broad examination of the policies and practices of the three countries. In selecting the case law, I have tried to achieve the highest level of scientific rigour possible. The three countries have different reporting methods for case law and none are fully comprehensive since unreported cases exist in all three countries. For all three countries, I have reviewed the academic literature on adoptions across identity borders to see

which legal cases other authors have already cited. This review has been complemented with the use of online case law databases. In the case of England, I have employed the online databases lexis, nexis and westlaw, using as searching criteria the word adoption, together with the terms race, ethnicity, religion, culture, cultural background, inter-ethnic, inter-racial, inter-religious, *kafalah* or colour. In addition, I have reviewed the academic literature on adoption across identity borders to see which legal cases other authors have cited. In the case of Germany, I have used the online database Moses on-line, specialised in adoption case law, using as searching criteria the word *adoptionen* together with the terms *Raße, Ethnisch, Religion, Kultur, Kulturelle Identität* or *kafalah*. For Italy, I have used the online legal database Juris Data, using as searching criteria the word *adozione* together with the terms *razza, etnia, religione, cultura, inter-etnico, inter-raziale, inter-religioso, kafalah* or *colore*.

### **3. The identification of the research topic.**

The identification of the research topic was a long process. It has been a fascinating journey through different literatures and across disciplines. The decision to focus on adoptions across identity borders and the right to cultural identity in England, Germany and Italy was taken in three stages: I first decided to focus on children in relation to the right to cultural identity, then I chose to look at adoptions across identity borders and, finally, I selected England, Germany and Italy as countries to compare.

The decision to focus on children originates from the review of the literature on the right to cultural identity. Since the late 1990s many political science scholars have discussed the right to cultural identity and the need for a new form of citizenship that takes this right into account: multicultural citizenship (Benhabib, 2002; Kukathas, 1992, 2003; Kymlicka, 1989, 1995a). The new model departs from and adds to the binary form of liberal citizenship. The liberal model is based on the relation between individuals and the state, while the multicultural model adds a third element to the relationship: the cultural, religious or ethnic group.

The review of this academic literature highlighted the special position of minorities within minorities. It has been argued that multiculturalism, especially in the form of cultural group rights, can produce intragroup inequalities and marginalize the weakest elements within the group. Ayelet Shachar calls this phenomenon the paradox of multicultural vulnerability pointing out the ironic fact that individuals within a cultural group can be damaged by the same policies that are meant to protect them as members of the minority group (Shachar, 2001).

From the analysis of the debate on minorities within minorities it became clear that scholars have primarily identified women as the main victims of the paradox of multicultural vulnerability (Benhabib, 2002; Deveaux, 2000, 2006; Okin, 1998, 1999; Phillips, 2009; Shachar, 2001). Women's rights however are not the only rights that can be violated by protecting minority groups' rights. Children, in particular, are a vulnerable minority within minorities.

The investigation of the literature on the right to culture and women's rights is useful to understand why the situation of children has been less studied. Firstly all the solutions given to the paradox of multicultural vulnerability heavily rely on the individual's capacity to choose. The autonomy of the individual seems to be the precondition for any resolution of the paradox. The dependency of children and their incapacity to choose autonomously is therefore a great obstacle to the solutions given to the problem of minorities within minorities.

Secondly the very idea of multiculturalism starts from the assumption that culture is important to individuals. Kymlicka, one of the main scholars arguing for the recognition of a right to culture, argues that cultures serve as *contexts of choice*: cultures provide individuals with a secure framework that allows them to make meaningful decisions. To be free, citizens require options and cultures give meaning to these alternatives. Members of minority groups are in an underprivileged position since the majority culture tends to impose itself as the norm (Kymlicka, 1989, 166; 1995a, 83). For this reason minority cultural communities need special accommodation to exercise their right to choose and

maintain their own culture. The precondition to the recognition of the right to culture, however, is the identification of the cultural identity of the individual: a person is X and therefore enjoys the cultural rights granted for X group. In relation to children, however, it is difficult to determine their identity since they are still developing this.

The review of the scholars that have written about children and the right to cultural identity convinced me to focus my research on children's adoption. This literature shows that three main issues have attracted the attention of scholars: education, health and physical harm (Bradney, 1987; Cullen, 1993; Hamilton, 1995; Reich, 2005; Roche, 1995). Scholars have mainly framed these matters as a problem of determining the child's capacity to decide for his/herself and/or of establishing the limits of parents' rights over their children.

This framework is insufficient to describe all of the possible situations where cultural rights may conflict with children's rights. The phenomenon of adoptions across identity borders, in particular, cannot be explained in these terms. Adopted children are generally quite young and are not of the age where they are considered capable of deciding for themselves. Moreover biological parents are not always able or willing to express their view in relation to the type of adoptive parents that they want for the children.

The study of adoptions across identity borders requires exploring new models to solve the paradox of multicultural vulnerability. The study of adoptions across identity borders presents the researcher with great challenges. It obliges us to question simplified and essentialised notions of identity. It requires us to develop a new identity model that can reflect the complexity, fluidity and developing nature of an adoptive child's identity.

This research focuses on three countries: England, Germany and Italy. I have selected these countries for three reasons: firstly most of the research on this theme has analyzed the experience of the United States of America, Canada and Australia. Only a few scholars have studied the experience of European countries, such as the United Kingdom and Norway, but no one has, until now



compared England, Germany and Italy. Secondly, these three countries have experienced different migration histories and have developed very diverse approaches to cultural diversity. Thirdly the three countries have different histories of adoption across identity borders. These last two points make the comparison of these countries particularly interesting and valuable.

#### **4. Structure of the dissertation.**

The first chapter illustrates the existence of a research gap on children and the right to cultural identity and highlights the need for a new framework able to mirror the fluidity and developing nature of children's identity.

The chapter presents current debates on multiculturalism and the minorities within minority groups. The literature on the paradox of multicultural vulnerability and the main ways to solve it are explored. The review of this literature highlights that the situation of women as possible victims of the paradox has been the main focus for scholars, while the situation of children has been less studied. The analysis of the main solutions given to the problem of the minorities within minorities helps us to understand why children as a minority within minorities are relatively unexplored victims of the paradox of multicultural vulnerability. The main solutions given to the paradox are based on the autonomy of the individual inside the group. These solutions cannot work for children as they are generally considered dependent and non-autonomous subjects.

Another reason for the scarce literature on children and the paradox of multiculturalism is that children's identity is difficult to determine. Children's cultural identity raises difficult questions: for instance what does it mean for a baby to have a cultural identity? Is it the cultural identity of his/her parents? And if yes, is the right to cultural identity of a baby the right of the child or the right of the parents? Children's identity is still at a developing stage and the right to cultural identity should in theory be able to protect both the right of being and the right to becoming. A model that can well illustrate the fluid, developing and

multiple nature of children's identity is the narrative identity approach. The adoption of a narrative identity approach underscores that identity is not developed in a vacuum but, on the contrary, the surrounding context and its social narratives deeply influence the creation of personal narrative identity.

Chapter two presents the debate on children adopted across identity borders and illustrates some of the social narratives relevant in the context of adoption across identity borders. These social narratives are related to the definition of childhood, family, kinship and identity. These narratives are not only relevant because they influence the ways in which adopted children see themselves and are seen by others but also because they influence the ways in which adoption as a phenomenon is perceived and practiced. These social narratives on adoption, childhood, family and kinship shape the way in which the right to cultural identity is interpreted and protected.

The social narratives related to adopted children are not universal but to a certain extent depend on the context. For these reason this is a comparative study of different countries and social contexts. Chapter three illustrates the reasons for comparing England, Germany and Italy. These three countries have developed different approaches to diversity and multicultural regimes. They also have diverse histories of adoptions across identity borders. The comparison between these realities will highlight how the diverse social narratives present in these countries influence their interpretation of the right to cultural identity of adopted children.

Chapter four summarizes the key findings from the comparison of the three countries. The history of adoption legislation and the right to identity in the three countries will be presented and the different approaches towards adoptions across identity borders will be analysed. In doing so I will use laws, parliamentary debates, newspapers and scholarly articles, statistics and case law.

Based on the evidence from the above chapter, the concluding chapter argues for a contextualized right to identity where identity is understood as narrative identity. This right includes cultural identity but frames it as a fluid, mutable and

multiple notion. This study is meant to provide a first comparative study to better understand which are the social narratives that influence the construction of a narrative identity of trans-cultural adopted children in England, Germany and Italy.

Chapter 1: Multiculturalism and the rights of minorities  
within minorities: where are the children?

## **1.1. Introduction**

As Peter Stallybrass and Allan White state, what is socially peripheral is frequently symbolically central (1986). This statement applies well to children: they are socially marginal but have an important symbolic role in every society. Children represent the future of any culture that reproduces itself through the transmission of cultural values and norms from generation to generation. Rules on how to educate children, how to socialise them and who has the responsibility for rearing them are central elements in every culture.

The special role of children in relation to the future of every cultural group places them at the centre of the debate on multiculturalism. However, research on children and multiculturalism has not been fully developed. In particular, children have not been studied as a minority group that can be discriminated against within cultural groups. The issue of minority within minorities has rarely been discussed in relation to children.

Since the early 1990s, the right to cultural identity has been a focus of political and academic debate. Numerous scholars have written on the need for, and limitations of, multiculturalism. In particular, it has been noted that vulnerable members of cultural groups can be damaged by the promotion of multicultural policies. Susan Moller Okin, for instance, argued that recognition of cultural rights can uphold anti-feminist cultural practices and damage women in cultural groups (Okin, 1999).

The position of women within cultural groups has been the major focus of researchers. Women, however, are not the only possible victims of multicultural policies. Cultural practices often relate to children as they represent the future of any cultural group. Recognition of cultural rights has, therefore, a major impact on children's lives, and they should be at the centre of the analysis of both the problems of minorities within minorities and the right to cultural identity.

The reasons for the position of children as a minority group within cultural groups not being adequately researched are related to the presumed lack of autonomy of children and to the characteristics of childhood. On the one hand, the presumed lack of autonomy places children in a difficult position as rights' bearers and as a minority group. On the other hand, childhood is a phase of life where identity starts to develop. It is therefore, extremely difficult to identify the cultural identity of a child.

In this chapter, I will elaborate the reasons why children, as a minority group, have been studied less than other minority groups within cultural groups, such as women. Analysis of these explanations will highlight the particularly difficult position of children in relation to cultural identity, and will clarify why the solutions proposed for issues of minorities within minorities in relation to women are not able to solve problems relating to children.

## **1.2. Multiculturalism and minorities within minorities**

Multiculturalism is a body of thought about the proper way to respond to cultural diversity. Multiculturalists argue that recognition and positive accommodation of group differences are essential. Scholars like Charles Taylor, Iris Marion Young and Will Kymlicka argue that this recognition should be done through group-differentiated rights, and that the classic liberal model of citizenship consisting in a binary relation between the individual and the state should be updated to include the cultural/religious or ethnic group.(Kymlicka, 1995a; Taylor and Gutmann, 1994; Young, 1990)

Multiculturalism is a broad term encompassing very different positions, all of which share a commitment to revaluing identities and guaranteeing the right to cultural identity. However, justification for this commitment varies considerably. There are two main justifications for multiculturalism: one arises from communitarianism, while the other stems from liberalism.

Communitarian scholars have argued that multiculturalism is needed to protect the culture of different communities. Communitarians argue against the idea that the individual comes before the community, and that social goods should be valued in relation to their contribution to individuals' well-being. They, instead, embrace the idea that social goods are "irreducibly social" (Taylor, 1995). Charles Taylor, one of the more influential communitarian scholars, argues that diverse cultural identities and languages are irreducibly social goods. In his view the recognition of the equal respect to all individuals in their varying cultural identities entails replacing the traditional liberal regime with a system of special rights for minority cultural groups.

A second justification for multiculturalism comes from within liberalism. Will Kymlicka developed the prominent theory of liberal multiculturalism (Kymlicka, 1995a, 1995b). Culture is said to be central to an individual's life. First, the autonomy of an individual is secured by culture as it gives to people an adequate range of options from which to choose. It also gives values to these choices and, therefore, allows people to make meaningful decisions. Second, culture is central to an individual's self-respect. Kymlicka argues that there is a deep connection between a person's self-respect and the respect accorded to the cultural group of which he/she is a part. He argues that since culture is so important to people's lives, disadvantaged minority groups are entitled to special protection.

Multiculturalism has been under the scrutiny of many scholars. Authors like Susan Moller Okin argue that protection for minority groups may reinforce the oppression of vulnerable members of those groups (Okin, 1999). Shachar calls this phenomenon the *paradox of multicultural vulnerability*, pointing out the ironical fact that individuals inside a cultural group can be damaged by the protection of their status as group members (Shachar, 2001). Avigail Eisenberg and Jeff Spinner-Halev have named it the problem of minorities within minorities (Eisenberg and Spinner-Halev, 2005). These scholars argue that multiculturalism does not put enough emphasis on existing inequalities *within* minority groups. By protecting minority groups, multicultural policies may increase the power of the dominant members of

minority groups and, as a consequence, undermine the position of the vulnerable members of the group.

The paradox of multicultural vulnerability is especially difficult for liberal defenders of multiculturalism who aim to guarantee inter-group equality while also combating intra-group inequalities, such as gender inequality. Kymlicka, in response to this criticism, argues that it is important to distinguish between two kinds of multicultural interactions: external protection and internal restriction (Kymlicka, 1999). The former are rights that a minority group claims against non-members to reduce its vulnerable position in the society. The latter are rights that a minority group claims against its own members. Kymlicka argues that a liberal multiculturalism should accept only external protection and should reject internal protection (Kymlicka, 1995a, 35; 1999, 31). However, the distinction between internal and external protection is often less clear than it may appear. For instance, granting external protection, such as the right of self-government, to a group that violates the rights of its members entails the imposition of internal restrictions.

The debate on minorities within minorities has not been resolved with Kymlicka's distinction between external protections and internal restrictions; in 1998, Okin initiated a discussion on the possible conflicts between multiculturalism and feminism. She claimed that cultural rights are potentially, and in many cases actually, antifeminist. Cultures are not gender neutral: on the contrary, gender and culture are closely interrelated. The sphere of reproductive life is normally heavily regulated in each culture and, therefore, the protection of cultural practices tends to have a greater impact on women. Okin argues that one of the main aims of culture is to control women and their sexual activities. She therefore claims that those who support the group's right to culture should consider gender inequalities within the group very carefully (Okin, 1998, 1999; Young, 1990).

Academics, lawyers and journalists have discussed extensively practices such as female genital mutilation, polygamy, repudiation and the wearing of headscarves (Brown, 2008; Deveaux, 2000, 2006; Joppke, 2009; Scott, 2007; Song, 2005, 2007).



All these examples concern women, the female body, and women's role in society. The debate has focused mainly on women, leaving the position of children relatively unexplored. However, women are by no means the only possible victims of multicultural policies. Okin herself recognised that she has:

by no means exhausted the subject of oppression within groups that is often justified in the name of cultural preservation or religious toleration. Children, gays and lesbians, persons of minority races, disabled persons, and dissenters are all liable to varying kinds and degrees of mistreatments within many societies, including our own, and we should work to eliminate these mistreatments, in part by paying attention to those aspects of culture that reinforce them.(Okin, 1999, 120)

Why have scholars focused mainly on women and paid less attention to the position of children?

### **3.3. The debate on the minorities within minorities: why not children?**

The focus on women is justified by their position in society and in minority groups. As Ayelet Shachar observes, women have a special position in constituting collective identities. Women as mothers, caregivers and bearers of cultural values are central to the survival of culture, and yet their cultural and biological roles are used as a rationale for limiting their freedom and for monitoring their activities (Shachar, 2001, 56). This special position gives rise to an ironic problem: their critical cultural role leaves them vulnerable to restrictive cultural practices (Shachar, 2001, 50). However, this problem does not only concern women.

#### ***1.3.1. Children and women: similar oppression but different status***

Martha Minow argues that the interest in women resonates with the ideal narrative with which the West chooses to describe itself (Minow, 2002). The Western liberal narrative represents women as liberated in the industrialised West, while still oppressed in other parts of the world. Minow suggests that talking about the conflict between multiculturalism and women's rights is easy for liberals as it means talking about "the others". In fact, analysis of the major controversies arising in this field supports Minow's argument. Female genital mutilation, veiling and forced marriages are practices easily classified as belonging to "others".

The narrative on children, on the contrary, is less clear. No firm position has been reached in relation to children's autonomy and their position in relation to parents' and the community's responsibility for rearing them. Despite official recognition of children's rights in national and international legislation, the question of whether children may properly have rights remains a matter of debate. Their lack of autonomy is clearly something that makes it difficult to treat children's rights as typical rights. As Martha Fineman states:

The very existence of the child presents a dilemma for the liberal theorist concerned with the individual and preserving autonomy and choice. [...] We are uncomfortable with the idea of children, even adolescents, exercising unsupervised "choice", and we structure legal and social relationship so that someone is empowered to act for them and in their interest. (Fineman, 2009, 229)

To analyse the situation of children as rights bearers it is useful to turn to choice theory<sup>1</sup>. Defenders of choice theory argue that a person has a right when others have an obligation to protect that person's choice. Rights are defined as normative powers to determine the obligations of others by the exercise of the will of the rights holder (Campbell, 1992, 1)

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<sup>1</sup> A useful presentation of rights theories can be found in (Waldron, 1989). In relation to children's rights see (Freeman, 1983) and (Bainham, 2005)

In choice theory – sometimes known as will theory - the central aspect of rights holders is their capacity and autonomy to make rational decisions. Rights defend the rational and free choice of individuals. This theory, extremely influential in liberal thinking, excludes the possibility that children can be rights bearers. Minors, as immature and dependent individuals, are not able to make rational and free choices and, therefore, cannot have and exercise rights.

Children's rights have been used as a test case to demonstrate the inadequacy of choice theory. As Neil MacCormick claims, "at least from birth, every child has the right to be nurtured, cared for, and if possible, loved until such a time as he or she is capable of caring for himself or herself" (MacCormick, 1976, 305). Moreover, children, like every other human being, have the right to life (Brennan, 2002, 61). It seems, therefore, that children have some rights before being able to choose. From this assumption, it follows that children have rights; therefore choice theory is limited in its capacity to explain all existing types of rights.

If children cannot bear choice-protecting rights, they might have interest-protecting rights. The interest theory justifies the existence of children's rights as they have the right to have their interests protected (Bentham, 1987). The central point is the existence of interests, and not the capacity to choose. Under interest theory, children, as holders of interests, are bearers of rights in exactly the same way as adults. However, while interest theory may appear more attractive from a children's rights point of view, it presents one major problem. There is no clear way to determine what the children's interests are.

The problem is that being immature, individual children are not considered able to express their interests and this, therefore, should be done by adults. But how can adults identify children's interests? John Eekelaar states that they should guess what a child might want for its future (Eekelaar, 1986). This way of identifying children's rights is, however, inevitably vague and adult-centred (Campbell, 1992). Is guessing sufficiently impartial or will adults impose their own views on children? Will adults

tend to underestimate the sacrifices and sufferings made during childhood in the light of the advantages they later enjoy?

As Sonia Harris-Short and Joanna Miles note, the limits of Eekelaar's theory are common to any "substitutive judgment" method (Harris-Short and Miles, 2007, 634). Whenever someone exercises a right for another person there is a risk of paternalism. If some paternalism is inevitable in relation to children's rights, the problem is in deciding where the line justifying adult intervention should be drawn.

A model that tries to use paternalism in a way that does not restrict the possibilities of making choices is the "dynamic self-determinism" approach (Eekelaar, 1994). This method is intended to enable a child to reach adulthood equipped to make autonomous choices as an adult. This approach involves allowing children to make an increasing number of decisions as they grow up, but not one that would improperly restrict their life choices as adults.

A variation of this model is Joel Feinberg's right to an open future (Feinberg, 1980). He distinguishes between rights that only children normally possess and rights that are common to children and adults. He calls the former C-rights and divides them into two categories: dependency rights and rights in-trust. The former are rights that originate from the child's incapacity to fulfill his/her basic necessities, like food and protection. The latter are the rights that the child is not yet able to exercise, but that should be preserved so as to be exercised by the adult that the child will become. The rights in-trust are the rights that Feinberg calls "rights to an open future". These rights are violated when someone else decides for the child in a way that would close his/her future options.

The idea of "rights to an open future" is appealing but, upon closer inspection, reveals its limits. It is often impossible to leave open all the options. A famous American case, *Wisconsin v. Yoder*, 1972, exemplifies the problem. In this case, the court upheld the right of Amish parents to withdraw their children from school, for religious reasons, at the age of 14 instead of 16. Criticising this case, Feinberg

argues that the children should have been left in school since this decision would have guaranteed to them as many open opportunities as possible (Feinberg, 1980). He assumes that two more years of education would have provided the children with more opportunities than two years in the Amish community. Against this, Justice Warren Burger claims that the decision to require an additional two years of compulsory school, would influence the religious future of the children. Neither decision is, therefore, neutral. In this sense, the right to an open future is, in many cases, impossible, because the intervention, from parents or from the state, often reduces the future opportunities of the children.

The right to an open future is a version of interest theory as it protects children's interests in an open future. The choice and interest theories can also be used together to provide a gradualist account of children's rights. Children move gradually from having rights that primarily protect their interests, to having rights that primarily protect their choices. This transition would reflect the passage of the child from being a non-autonomous individual to being a creature who can choose for herself. The degree of capacity that children have depends on their age. It is easy to admit that a two-year-old child is not autonomous, while an adolescent is likely to have at least a certain capacity to make choices.

The *Convention on the Rights of the Child* illustrates the difficulty in finding a balance between the protection and autonomy of children<sup>2</sup>. The Convention emphasises the need to promote children's autonomy while, simultaneously, supporting the authority of parents over their children (Fortin, 2005, 41). Article 5 of the Convention, for instance, states that States Parties shall respect parents' duty and right to give appropriate direction and guidance to their children but, in doing so, parents have to take into consideration the evolving capacity of the child.

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<sup>2</sup> Various international conventions regulate children's rights. The 1989 *United Nations Convention on the Rights of the Child* (CRC) is, however, the most important piece of legislation in this field. It came into force in 1990 and is now ratified by all the countries in the world, with the exception of the United States, Somalia and East Timor. Unlike its precursors – the *Geneva Declaration on the Rights of the Child* from 1924, and the *Declaration of the Rights of the Child* adopted by the United Nations in 1959 – the *Convention on the Rights of the Child* is legally binding upon the ratifying countries.

Analysis of the different theories used to justify the position of children as rights bearers highlights the complexity of the situation of children and explains why, as Martha Minow notes, the liberal narrative on children is less straightforward than the one on women (Minow, 2002).

Another reason why children have been less studied in relation to the issue of minorities within minorities is the resistance to accord them the status of minority group. While women are now a well recognised minority group, it is still rare to read academic or non academic work talking about children as a minority group. This is a paradox, considering that the majority of the world's countries ratify the *Convention on the Rights of the Child*, and this Convention clearly indicates that children are vulnerable subjects needing protection. So the problem is not the vulnerability of the children but their capacity to form a minority group.

The history of women as a minority group can help clarify why there is some resistance to talking about children as a minority group. Many authors have noted similarities between the oppression and subordination of women and children (Cohen, 1980). In the history of western society, women have shared many characteristics with children's status. Women were described as similar to children since they were lacking qualities like independence, rationality and autonomy. Moreover, women were associated with children for their reproductive function: women as mothers were clearly linked to children.

At the beginning of the twentieth century, women in some countries obtained the right to vote and in that way differentiated themselves from children. At the same time, the first *Declaration of the Rights of the Child* was ratified. In this legal instrument, children were clearly associated with the idea of innocence, immaturity and vulnerability. So while women were gaining access to politics, children were still portrayed as passive and powerless individuals.

Since the first accomplishments of the women's movement, the position of women and children has become more and more dissimilar. Even though the ratification of

the *Convention on the Rights of the Child* was an important step forward towards the recognition of children as rights bearers, children are still not clearly identified as a minority group.

Jens Qvortrup argues that children should be recognized as a minority category, marked by marginalisation, paternalism, and lack of recognition of their capacities (Qvortrup, 2002). However, this opinion is not widely shared and it is not common to think of children in terms of a minority group. It seems that the quality missing for children to be considered a minority group is the capacity to advocate for themselves in the way the women's movements have done. Children, as dependent and immature individuals, have not been able to advocate for their minority status. The issue of autonomy and capacity of children seems to be the reason for this. Children have been considered mostly as vulnerable individuals instead of as a minority group. Giving someone the status of minority is a way to empower the group to which they belong. Lacking the recognition of their minority group status, children remain vulnerable individuals in need of protection.

The fact that the minority status of children is less recognised than the minority status of women may be one of the reasons why scholars, writing on minorities within minorities, have paid less attention to the position of children. Lacking the minority within minority status, the issue of children has been considered to be less relevant.

To sum up, the relative lack of autonomy in children is the key reason why there are some difficulties in talking about children as rights bearers and as a minority group. But the problem of autonomy also has an impact in relation to children and the debate on the minority within the minority, since scholars writing on this topic have used the autonomy of the individual as a central piece of their argument.

### ***1.3.2. Autonomy and the debate on minorities within minorities***

The issue of the ability to choose has dominated the debate on women's rights and multiculturalism and has been used both to defend and to oppose multicultural policies (Minow, 2004, 260). Indeed, the majority of scholars working on the paradox of multicultural vulnerability support their arguments by referring to the possibility of making a choice.

Defenders of women's rights, like Okin, claim that traditional cultures jeopardise autonomy and the rights of minorities within the group. Women should have the right to choose for themselves and when able to do so, she suggests, they would probably opt for liberal rights. Others, like Chandran Kukathas, claim that a state has little justification for intervening in a group's cultural affairs, even if in the group basic rights are being systematically violated (Kukathas, 1992, 2003). Kukathas states that in a liberal state, citizens have freedom of association, and the state has to respect these associations. Freedom of association is closely connected with the ability to choose, as the right to dissociate is the primary protection of the group's members. The right to exit, however, presupposes the capacity to choose.

The most recent attempts to resolve the problem of minorities within a minority also rely heavily on the individual's freedom to choose. Some scholars are in favour of a dialogic encounter between minority groups and mainstream society, and within minority groups themselves, in order to mediate conflicts between cultures (Benhabib, 2002; Deveaux, 2000). Monique Deveaux argues that the best way to resolve tensions between traditional cultural practices and liberal principles is to defend and strengthen deliberation and democratic legitimacy (Deveaux, 2000, 340). Her model values the participation of all group members in a democratic discussion that is likely to lead to more just and legitimate reforms. This outcome can be reached through the expansion of places of democratic dissent, and the inclusion of weak members of the group in the formal decision-making process. It assumes, therefore, that every member that takes part in the democratic decision is able to choose.



Even Ayelet Shachar's models rely on the capacity of the members to choose between the group's and the state's regulations (Shachar, 2001). Shachar argues for an approach to the problem of minorities within a minority consisting of a repertoire of accommodation methods, which can be used in different social settings.

Shachar argues for a new division of power between the state and minority groups. Sensitive legal issues are divided into sub-matters. As an example of sub-matters she indicates the case of marriage and divorce, where she identifies two sub-matters: the demarcating and the distributive functions. The former regulates the entitlement to membership of a group, i.e. become part of the group through marriage or leave the group through divorce. The latter defines the rights and obligations deriving from marriage and the economic consequences deriving from divorce. In Shachar's model, the two functions should not be regulated by the same entity: the state and cultural group should have power only over one function each. The group would have authority over the demarcating sub-matter, while the state would have authority on the distributive sub-matter, or vice versa.

In addition, Shachar's model includes the principle of transformative accommodation. This principle states that group members should have the chance to choose between the jurisdiction of the state or that of the group. At predefined stages they can oppose the original power authority and decide to be subject to the other entity. They can *opt-out* of a jurisdiction and choose the other if either the group or the state has failed to provide internal remedies for the individual's difficulties. Even in this model, therefore, the capacity to choose is a precondition and a fundamental part of the solution.

As the above indicates, all the solutions to the paradox of multicultural vulnerability are based on the possibility of individual choice, either by opting out/exit or by participating in a democratic process. The prominence of autonomy in the debate on minorities within minorities makes the proposed solutions unworkable in relation to children.

However, the lack of autonomy of children is not the only characteristic that influences negatively the possibility of finding a solution to the problem of children within minority groups: the idea of children's cultural identity is, itself, one of the reasons why children's issues are a difficult topic in relation to the paradox of multicultural vulnerability.

### ***1.3.3. Which is the cultural identity of a child?***

The idea of the paradox of multicultural vulnerability implies that individuals are part of specific cultures and that this culture can have damaging effects on some members of the group. The implication is that individuals have an identifiable cultural identity. However, the cultural identity of a person is a combination of different elements, and identity, like culture, is a fluid and ever-changing entity. Many scholars have highlighted the risk of essentialising cultural identities and portraying cultural groups as monolithic, well defined units.

As Sarah Song states:

“rather than assuming that people have strong attachments to cultural identity, we need to recognise that people have multiple identities with differing degrees of attachment to different identities.” (Song, 2007, 28)

In the case of children's cultural identity the situation is further complicated since childhood is the stage of life when identity is formed through a process of choosing between different values. In this process, the surrounding context - made of significant relationships, culture and language - is central. Even though the relevance of culture during childhood is not in question, problems arise when one has to determine what the child's culture is.

Avishai Margalit and Moshe Halbertal state that people have a right, not just to any culture, but to their own culture (Margalit and Halbertal, 1994, 491). This claim implies that what is essential is not the attachment to culture but the attachment to a particular culture. However, what is a child's own cultural identity?

This is particularly difficult to determine in relation to babies: in the case of older children the cultural identity formation through socialisation has already started, while in the case of newborns this process still has to begin. So is the cultural identity of a baby the same as the identity of his/her parents? Or do babies not yet have a cultural identity? In other words, do babies have a cultural identity from birth or will they create their own cultural identity while growing?

The above questions highlight the special place that babies have in relation to cultural identity and entail a further issue: do children/babies have a cultural identity or do they belong to a culture? This distinction between having and belonging to a culture is useful in relation to babies, because if the answer to the question is that children/babies belong to a culture, then it is clear that they belong to that culture from birth.

However, the distinction between having and belonging is less clear than it seems at first sight. To a certain extent, someone can have a culture only if they belong to that culture. The birth of a person within a culture is usually the easiest way to become part of that group and, therefore, belong to that culture. So having and belonging are two faces of the same coin: to feel as part of a culture you should ideally have both the "having" and the "belonging".

However, in the case of the children, the distinction between "having" and "belonging" to a culture is particularly important because babies and, in many cases, children, cannot state which culture they "have". Therefore, the culture to which they are said to "belong" becomes automatically the culture that they are also supposed to "have". In relation to children, therefore, the issue of belonging to a cultural group becomes in reality a matter of being owned by the cultural group. Children become

properties of a cultural group, and because children are symbolic elements of cultures representing the future of any cultural group, they become highly valuable properties.

The supposed dependency and lack of autonomy of children makes them subjects that can be “owned”. The battle over children’s cultural identity is often a battle over who “owns” the child. And the issue of “owning” a child is not just important symbolically but also influences the cultural identity that the child will develop during childhood: being “owned” by a cultural group means living within the group and therefore absorbing its culture. As noted by Janet E. Halley, raising a child in a culture implants not only the child in the culture but the culture in the child. (Halley, 1999, 103)

The issue of cultural identity of children is further complicated by the developing nature of children. Children’s right to culture should ideally include two aspects: the right “to be” and the right “to become” (Alston, 1994; Ronen, 2004). They need to have the right to maintain their cultural background and, at the same time, to have the possibility to develop a new independent identity.

However, this solution implies that identities can be multiple and that the attachment to each of them can vary. Arguing for the possibility of an identity that includes different cultural identities means rejecting cultural essentialism. In essentialistic terms, cultural identity is a clear-cut monolithic entity; arguing in favour of multiple cultural attachments means rejecting this approach.

Cultural essentialism is a common attitude towards cultural identities<sup>3</sup>. Cultures are often intended as well defined entities and double identities are often looked upon with suspicion. Cultural identity is connected with the notion of authenticity; the idea that only one specific version of a cultural identity is authentic while all the others

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<sup>3</sup> There are many definition of cultural essentialism, see Mason, 2007. In this context I use cultural essentialism as opposed to social constructivism. Cultural essentialism is the idea that cultures exist like an object independently for the context. In this sense cultures are not created but are discovered. This approach often presents cultures as separate, closed and internally uniform (Mason, 2007).

are inauthentic (Cheng, 2004). The problem, of course, is who can determine the authentic version of a cultural identity? People with multiple identities are at greater risk of being considered to have inauthentic cultural identities, because double identities often mean that the person has a different type and intensity of attachment to the various elements of his/her identity.

What is considered authentic and what is perceived as inauthentic depends on the cultural groups and the overall cultural context. Being born in a specific cultural environment brings a strong feeling of legitimacy: a child born to parents belonging to a certain group is likely to be perceived as a legitimate part of the group. It seems that cultural identities are commonly understood as quasi-genetic elements, inherited by children through blood.

However, if cultural identity is understood as a quasi-genetic entity that is passed from parents to children through blood, identity becomes automatically an essentialised notion. Refusing essentialisation means rejecting the idea that cultural identities follow an almost genetic destiny. Nevertheless, rejecting essentialisation does not mean overlooking the importance of the perceptions of people, as perceptions influence how cultural identities are developed. If blood is perceived as an important factor in the cultural identity of individuals, this element should be considered when studying issues related to cultural identity.

Identity is created through a double process: on the one hand, self-identification and, on the other hand, the identity given by others. Not only do the two attributions of identity take place at the same time, but they also influence each other. The binary aspect of identity creation is particularly relevant in the adoption cases analysed in this work.

Children are in the phase of life where this process starts to build the fundamentals of individuals' identity. To be able to put together all the pieces of the process, people create narratives that become their identity. The issues of narrative and identity are, therefore, closely linked and will have a major role in my research.

### **3.4. Children's narrative of identity: putting identity into context**

Many scholars have highlighted the relevance of narrative in the formation of identity. (Benhabib, 2002; Somers, 1994). According to Charles Taylor:

In order to make minimal sense of our lives, in order to have an identity, [we need to] grasp our lives in a narrative. In order to have a sense of who we are, we have to have a notion of how we have become and where we are going. [...] We understand ourselves [...] inescapably in narrative (Taylor, 1989, 51)

The idea is that people build a narrative of their lives and, in this way construct their identities. A narrative psychology of human lives began to emerge in the 1980s as social philosophers and social scientists argued that people make sense of their own lives in terms of self-defining life stories (Bruner, 1986; Cohler, 1982; MacIntyre, 1985; McAdams, 1988; Ricoeur and Pellauer, 1990).

The conceptualisation of narrative identity rests on the argument that narrating is an essential human activity. As Terence Cave states: "Without the narrative structure [...] our experience of the world and of ourselves would be unintelligible: it would only be a continuous given, in the way one supposes it must be for animals". (Cave, 1995, 112)

The use of the notion of narrative in relation to identity has many advantages: first, it puts people's agency in the centre of the process of identity narration; second, it situates the process of identity creation in a certain place and time; third, it recognises that different elements contribute to create one's identity, and fourth, it introduces an evaluative element that enables people to make qualitative distinctions between the different varieties of events of their lives. The process is, therefore, led

by a person in a certain place and time who narrates his or her own life by choosing and evaluating its different elements.

The notion of narrative identity is particularly useful in relation to children as it recognises the important role of children in the creation of their own narrative and, at the same time, recognises the existence of the powerful narratives that influence the way in which children are supposed to construct their identity. The lack of capacity of children does not limit their ability to create narrative identity, as everyone starts the process of identity formation as a child and begins his/her narrative during childhood.

A narrative identity should have a certain level of autobiographical coherence to be accepted by others. During childhood, children learn about society's expectations and rules. Different societies and different cultures hold different expectations about the life course.<sup>4</sup> The internalisation of this societal knowledge provides what Tilmann Habermas and Susan Bluck describe as a sense of autobiographical coherence, meaning an implicit understanding of the typical events of a life story (Habermas and Bluck, 2000).

People construct identities (however multiple and changing) by locating themselves or being located within a repertoire of emplotted stories; [...] "experience" is constructed through narratives; [...] people are guided to act in certain ways, and not in others, on the basis of the projections, expectations, and memories derived from a multiplicity but ultimately linked repertoire of available social, public and cultural narratives. (Somers and Gibson, 1994, 38)

The autobiographical coherence puts together our idea of our own and others' expectations. The issue of autobiographical coherence is closely linked with narrative intelligibility. As George C. Rosenwald notes:

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<sup>4</sup> Class and gender also influence these expectations (Stewart and Malley, 2004)

When people tell life stories, they do so in accordance with models of intelligibility specific to culture. Without such models narration is impossible. These models are consonant with the force that stabilizes the given organization of society. (Rosenwald, 1992, 265)

Narratives exist to be told, and every story is told within a given culture. Narratives are, therefore, located in a given context and should be understood and valued among people who live in a given culture. As Margaret R. Somers and Gloria D. Gibson note: “All of us come to be who we are (however ephemeral, multiple and changing) by being located or locating ourselves (usually unconsciously) in social narratives rarely of our own making”. (Somers and Gibson, 1994, 606)

Children start forming their narrative of identity in the early years of life, putting together all the elements of their story. In doing so, children are influenced by many social narratives about childhood, family and identity. The surrounding social narratives of identity and childhood are relevant in the formation of children’s narratives, as they make the child’s narrative intelligible. Narratives that are not intelligible risk being interpreted as inauthentic.

### **3.5. Conclusion**

In this chapter, I have analysed the reasons why the issue of minorities within minorities has not been sufficiently researched in relation to children as a minority group. Children, as individuals lacking autonomy and capacity, are problematic as rights bearers and as a minority group. Autonomy and capacity have been central in the solutions given to the issue of minorities within minorities. These models, therefore, cannot be used to solve the potential conflicts between children’s rights and cultural practices.

Children, however, should be at the centre of the debate on minorities within minorities. Representing the future of every culture, children are the object of many



cultural practices and have a symbolic importance for every cultural group. More research is, therefore, needed to understand how to solve the issue of the paradox of multicultural vulnerability for individuals, like children, lacking autonomy.

The complexity of children's cultural identity makes the issue of minorities within minorities in relation to children even more complicated. Childhood is the phase of life where identity is formed. Defining the cultural identity of a child is extremely complicated: is it the cultural identity of his/her parents or is it the cultural identity that the child is developing?

The paradox of children's situations is that even if they are not autonomous and their cultural identity is still unclear, they are in the phase of life where they form their identity. Even if they are not independent, they play an active role in the creation of their cultural identity. In developing their cultural identity, however, they are influenced by the surrounding context.

The concept of narrative identity is useful to explain how children, as non-autonomous individuals, can be at the centre of the identity formation process. During childhood, individuals start to put together the different elements of their identity by creating their own narrative. To create their own narrative identity, individuals do not need to be fully autonomous. The development of a narrative is influenced by the cultural narratives of the surrounding context.

The idea of narrative identity puts identity formation into context. Studying identities means analysing the cultural narrative that surrounds the individual. In the next chapter I present the cultural narratives that surround children, identity and adoption.

Chapter 2: Child adoptions across identity borders:  
embodying and symbolising contradictory social narratives

## 2.1. Introduction

Narrative has particularly strong links with the phenomenon of adoption across identity borders. In the last twenty years, adopted people and adopting parents have started writing and describing their experiences. Narrating has become a way to talk about the identity as adopted persons, especially as adopted children across identity borders. In England, for instance, in the book *In search of belonging* numerous adopted people narrate the complexity for black and minority ethnic children of being raised by a white adoptive family (Harris, 2006). Even in Germany and Italy, the adoptive children have narrated their experiences (Müller, 2009; Sogaro, 2010). In a similar way, adoptive parents have started narrating their adoption stories (James, 2006; Poma, 2008; Rothausen, 2011).

Narration is particularly pertinent in relation to families, as in this way they construct their history and pass it to the following generation. These stories contain the many elements that link individuals to their cultural group/s, their culture and their country/ies and tie them together in a meaningful way (Simmonds, 2000). The perceived importance of storytelling in the formation of individual and family identity is highlighted by the status that it has in relation to adopted children. Adoptive agencies often highlight the importance of narrative in the development of the adopted child's identity. In 2010, the international adoption agency of the Piedmont Region in Italy, for instance, organised a series of workshops on the value of narrative in the adoptive parents-child relationship (ARAI, 2010). Similarly, in the United Kingdom, Germany, Italy and many other countries, several books have been written to help parents narrate adoption to their children (Huainigg and Ballhaus, 2007; Katz, 2001; Milani, 2006).

The relevance of narrative in the context of adoption is, however, not limited to these examples of personal narratives. These stories are not told in a vacuum but are embedded in a context and influenced by numerous social narratives. These powerful narratives concern identity, family and childhood. Adopted children are forced to deal with these social narratives while developing their identity.

Adoption itself is a social construction that varies according to the social narratives of the context in which it is practised. Different cultures use diverse types of arrangements to help children without a family. The traditional Western concept of adoption in which the state assumes responsibility for safeguarding the child's best interest is only one of the different existing models. In the African context, for instance, informal foster care is the dominant system (Howell, 2006a, 50). In the Western model, by contrast, the adoption represents a new start in the life of the child and the relationship between the biological family and the child end. This model is based on the individualisation, and subsequently the institutionalisation, of the child (Howell, 2006a). Children are seen as vulnerable individuals in need of a family and adoption is perceived as the best way to help them.

Legal provisions and the debates surrounding their formulation provide important elements to analyse social narratives. Analysis of the international conventions on children's rights is, therefore, a privileged field of scrutiny that helps to highlight the major social narratives on childhood, family, identity and adoption. These narratives, however, are not always coherent, as multiple contradictory narratives can coexist in relation to the same issue. The public and academic debate on adoptions across identity borders provides a further way to investigate the social narratives surrounding identity and adoption.

The social narratives surrounding adoptions across identity borders concern four different aspects: the idea of childhood, the notion of identity, the concept of family and inequality. These four elements are often interrelated: the way in which childhood is narrated, for instance, influences the way in which the concept of identity is perceived and described.

This complexity is however rarely reflected in the public and academic debate on adoptions across identity borders. This dispute has been framed as an argument between people for or against adoptions across identity borders. This way of framing the issue is reductive. The debate should be reframed to reveal the

complexity of the social narratives involved (Patton, 2000, 189). Sara Dorow, in a similar way, notes

We need to move from asking whether we are for or against transnational or trans-racial adoption to asking what adoption, as practiced, is for and against. And this entails understanding how adoption is practiced in situ. (Dorow, 2006, 279)

The real task, therefore, is to analyse adoption as practice and see it in the different contexts, and which are the narratives on identity, childhood and family are reinforced.

In this chapter, social narratives incorporated in the international law on children's rights will be linked with social narratives on adoption, based on academic and public debate on this issue. This analysis will underscore how contentious and contradictory are the narratives related to childhood, identity, family and equality. It will also help to appreciate the situation of trans-culturally adopted children as individuals at the crossroads of numerous, often contradictory, narratives.

## **2.2. The best interest of the child: a concept in search of definition.**

The best interest of the child is the cornerstone of children's rights. Article 3 of *Convention on the Rights of the Child* states, in relation to children's rights, that the best interest of the child shall be a primary consideration.

International conventions and the majority of national legislation state that adoption should be allowed when it is in the best interest of the child. This principle is particularly relevant in relation to adoption, as Article 21 is the only provision where the best interest are said to be a 'paramount consideration' instead of a 'primary consideration'. In a similar way, Article 23 (2) of the

*Convention on the Rights of Persons with Disabilities* (CRPD) provides that: “States parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children, or similar institutions where these concepts exist in national legislation; in all cases, the interests of the children shall be paramount.” In both articles, the best interest of the child is the final determining factor in reaching a resolution. As stated by Geraldine van Bueren, “...in certain circumstances, such as adoption or for children living with disabilities, the higher standard is applicable” (van Bueren, 2007, 32).

Therefore, adoptions across identity borders should only be authorised when they satisfy that principle. The definition of ‘best interest of the child’ is the fundamental element of any decision on adoption.

The importance of this principle, however, collides with its vagueness. The Committee on the Rights of the Child has declared the best interest of the child to be the guiding principle of the Convention. The child’s best interest must be interpreted in the light of the specific rights protected by the Convention (McGoldrick, 1991). What is in the best interest of the child is not self-evident. Nigel Cantwell notes that the best interest principle is a solution that does not say anything about the substance of the solution. He describes it as a concept in search of definition (Cantwell, 2002).

David Johnson argues that the vagueness of the best interest concept was deliberate. He notes that in the writing of the Convention possible conflicts were avoided through the use of general formulations and vague formulas (Burman, 1996). The best interest principle was perceived, therefore, as an issue of possible conflicts. The debate on adoption and the best interest of the child has been particularly animated in relation to adoptions across identity borders and the identity of the child. The best interest of the child has been used both to support and to criticise adoptions across identity borders.

International Conventions on children’s rights include articles on the cultural identity of the adopted child; however, there is no article that determines the

weight that the cultural identity of the child should have in the adoption decision. For this reason, in the debate on adoption across identity borders, international law is used to corroborate opposing opinions. Undeniable is the influence that adoptions across identity borders has on the formation of the identity of the children. First adoption and its related issues of loss and pain become part of the child's history. Second, the change of cultural context shapes the cultural identity of the child.

More difficult is to determine if this influence goes against the best interest of the child or not. This decision depends on the ways in which the notions of identity, culture, adoption and family are constructed. These concepts, however, are not matters of fact but are socially constructed notions. Every society defines identity, culture, adoption and family in a distinct way. Powerful social narratives influence the ways in which childhood, identity, culture, adoption and family are defined. These social narratives are often so strong that they become implicit assumptions.

In the last thirty years much research has been conducted on the impact of inter-racial/ethnic/cultural and inter-country adoption on the wellbeing of children. The results of this research are often conflicting and do not create a body of knowledge sufficient to have a clear idea of the influence of adoption on the construction of children's identity.

The studies have primarily focused on African American children adopted by white Americans. Some studies demonstrate that trans-racial adoption does not impact the well-being of the children (Brooks and Barth, 1999; Fanshel, 1972; Seglow, Pringle et al., 1972; Shireman, 1988; Simon, Altstein et al., 1994). Others, however, underline that trans-racially adoptees experience problems related to their racial identity (Andojo, 1988; McRoy and Zurcher, 1983). The lack of homogeneity in the results creates a situation where the findings of the studies can be used both by scholars against trans-racial adoption and by those who support it.

Many authors have highlighted the deficit of methodological rigor of the research in the field of trans-racial adoption (Brooks and Barth, 1999; Courtney, 1997; Harrison, 1996; Wills, 1996). The main problems are small sample size, the reliance on volunteers for data collection and on reports of parents for the feelings of adoptees. The non-homogeneous results create a situation where both the advocates of trans-racial adoption and their opponents believe that the research supports their position (Courtney, 1997, 753).

A parallel situation exists in relation to the effects of inter-country adoption on children's capacity to adjust to the new context. However racial and cultural identity has been considerably less explored in inter-country adoption than in trans-racial domestic adoption (Kim, 1995, 152). Researchers have focused on inter-country adoption in the United States, England, Norway, Finland and Canada.

Again the studies have not given uniform results. Some scholars have suggested that inter-country adopted children are at risk of identity problems (Saeterdal, 1991; Versluis-den Bieman, 1995). Others have claimed that there is no significant difference between adopted and non-adopted children in relation to adjustment (Bagley, 1991; Bagley and Young, 1980; Kuhl, 1985). Anne Westhues and Joyce Cohen (1994) have attributed these non-homogeneous results to the small size of the sample used, the multiplicity of research methods used in the analysis and collection of data and to the difference of populations studied in terms of age, country of origin and country of adoption. Similarly to the debate on trans-racial adoption, the results of the studies have been used to support both the positions advocating for and against inter-country adoption.

Some research on inter-country adoption seems to recognize that adopted children have in general a good level of self-esteem, but that compared to children raised in a racially or culturally homogeneous family, they have a less strong sense of racial or cultural identity (Altstein and Simon, 1987; Andojo, 1988; Freundlich, 2000; McRoy, 1991).



The results of these researches, however, are not helpful in determining which is the best interest of the child. First, determining that children adopted across identity borders have a lower level of racial/ethnic/cultural identity does not imply that this goes against their best interest. The best interest of the child is not exclusively linked to cultural identity, but can comprehend many other elements: adoptions across identity borders could in theory produce negative effects in relation to cultural identity but at the same time improve the life of the children in many other aspects.

The determination of which is the best interest of the child is influenced by the social narrative on identity, family and childhood.

### **2.3. Narratives about childhood**

The sociology of childhood has made it clear that childhood is a socially constructed notion and that childhood is not universal but depends on the cultural context. The idea of childhood as a culturally conditioned notion does not imply that in some cultures there are no differences between children and adults (Jenks, 1992, 1996; Jenks, James et al., 1998). As Allan Prout and Allison James note

The immaturity of children is a biological fact of life, but the way in which this immaturity is understood and made meaningful is a fact of culture (James & Prout, 1997, 7)

Childhood, as a complex and culturally influenced notion, is extremely problematic in the context of rights. The article 1 of the *Convention on the Rights of the Child* defines children as

Every human being below the age of 18 years unless, under the law applicable to the child, majority is obtained earlier

The Convention therefore defines childhood as a precise time period of life. The *Convention on the Rights of the Child* is the cornerstone of children's rights as it has succeeded in universalising the notion of children's rights. The universalisation of rights has produced a universalisation of the definition of childhood.

The preamble to the *Convention on the Rights of the Child* states that children, by reason of their physical and mental immaturity, need special safeguards and care, including appropriate legal protection. This characterisation has been criticised as too western-oriented. Vanessa Pupavac, for example, states:

An examination of the provisions of the Convention reveals that the universal standards of the Convention are based on a western concept of childhood. [...] The western model of childhood is based on the idea that children should be protected from the adult world. [...] Childhood as a time of play and training for adulthood has become the universal standard to be enforced under the Convention to the age of eighteen. (Pupavac, 1998, 3)

During the drafting of the *Convention on the Rights of the Child* some African countries voiced strong objections to its universalised definition of childhood. As a result, in 1990 the Organization of African Unity created *The African Charter on the Rights and Welfare of the Child (ACRWC)*.<sup>5</sup> This Convention does not diverge much from the *Convention on the Rights of the Child* apart from a few articles. One of main differences is the definition of children as duty bearers. Article 31, entitled Responsibility of the Child, states:

Every child shall have duties towards his family and society, the State and other legally recognised communities and the international community. The child [...] shall have the duty:

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<sup>5</sup> The Charter entered into force in 1999 after having reached the 15 ratifications required.

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and assist them in case of need;
- (b) To serve the national community by placing his physical and intellectual ability at its service;
- (c) To preserve and strengthen social and national solidarity;
- (d) To preserve and strengthen the independence and the integrity of his country;
- (e) To contribute to the best of his ability, at all times, and at all levels, to the promotion and achievement of African Unity.

This article marks a major difference from the *Convention on the Rights of the Child*. Children are not presented as individuals in need of protection but as individuals with duties and responsibilities towards their society. Children are inserted in the family, social, national context to which they belong. Children are, therefore, presented as resources for their family/society/nation.

Comparison between the different definitions of childhood of the *Convention on the Rights of the Child* and the *The African Charter on the Rights and Welfare of the Child* confirms that childhood is not a universal notion but a socially constructed notion. It follows that childhood cannot be understood outside the context of variables, such as class, gender, ethnicity and culture. There are, therefore, different types of 'childhoods', rather than a single, universal, cross-cultural phenomenon (Freeman, 1998).

Recognition of the plurality of childhoods has consequences in the context of international children's rights. The intrinsic ambivalence of children's rights stems from an attempt to set universal standards to a phenomenon that is not universally definable (Douglas and Sebba, 1998). International law and children's rights discourses have adopted a hegemonic notion of childhood. In this dominant narrative, childhood is a transitional stage of life whose goal is adulthood. Children are presented as innocent creatures and their innocence implies their need of protection.

This kind of narrative is clearly mirrored in the debate about adoption. Children are often presented as victims and adoption is portrayed as a way to help them. This narrative is particularly clear in relation to inter-country adoption. Most books on adoption describe the history of adoptions across identity borders, especially inter-country adoption, as a humanitarian effort to rescue orphans and abandoned children. This narrative is based on the origins of inter-country adoption history. After the Second World War, Americans adopted many orphans. The same occurred after the Korean and the Vietnam Wars (Engel, Phillips et al., 2007; Masson, 2001; Selman, 2006; Triseliotis, 1993). Even now, inter-country adoption is constructed within much of the literature as a basically altruistic and humanitarian phenomenon that fosters a child's best interest.

This humanitarian narrative, however, is based on the origin of inter-country adoption in the United States of America. All the other countries currently involved in inter-country adoption as receiving countries, however, were not involved in this first stage of adoptions. Moreover, the motivations to adopt have now become more varied, both in the United States of America and elsewhere (Cahn, 2002; Ross, 1999). Inter-country adoption is rising increasingly in response to infertility and decreasing availability of children for adoption in many western countries (Bojorge, 2002). The humanitarian motivation for inter-country adoptions has been substituted by childless adults' desires for children (Selman, 2002; Triseliotis, 1993).

Alongside the humanitarian narrative, literature on adoption is dominated by narratives of child rescue (Dubinsky, 2007). Children are presented as victims in need of help, and adoption is described as a way to rescue them. Laura Briggs (2003) assesses the visual iconography of rescue evident within visual media. She notes that the ideology of rescue of non-white people by white people is fundamental to inter-country adoption. In a similar way, Lisa Cartwright (2003) analyses the images of orphans in the 1990s and underscores an analogous pattern of rescue iconography.

Children adopted across identity borders find themselves caught between multiple narratives on what childhood is in relation to adoption. These narratives

shape the way in which they are seen by others and see themselves. Besides the different narratives of childhood, the narratives on identity shape the issue of adoption across identity borders. ‘What is the identity of adopted children?’ and, more generally, ‘What is identity?’ are the questions to which these narratives reply.

#### **2.4. Narratives about identity**

There are two traditional narratives about adoption and identity. On one side, adoption is presented as a new start in the life of the child; he/she becomes part of a new family and (sometimes) receives a new name. As William Duncan notes, a story of loss and separation is transformed into a clean break that forms the basis of a new beginning (Duncan, 1993). On the other side, however, the biological narrative supplements the clean break narrative. It says that children’s identity is firmly placed in their family of origin. No clean break is possible, and the alienation of the child from his/her only true identity produces psychological suffering.

The clean break narrative paradoxically reinforces the biological one: the need of a clean break is due to the key role that the biological family is supposed to have in the identity of a child. When a child is given for adoption, it is said that he/she is ‘free for adoption’. The use of the word ‘free’ highlights the fact that the child should be freed from his/her past before being adopted by a new family.

Both narratives are versions of the same powerful concept of identity as an issue of exclusive belonging and authenticity. As Mike Featherstone noted, these narratives imply that it is only possible to belong to one genealogical tree (Featherstone, 1995).

International law tries to find a middle ground between the clean break and the biological narratives. Article 20 of the *Convention on the Rights of the Child* clarifies that when considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic,

religious, cultural and linguistic background. This article highlights the importance of the continuity of cultural, religious, ethnic and linguistic context. However, the article leaves open the problem of defining the grade of importance of these backgrounds. Saying that due regard should be given to the ethnic, religious, cultural and linguistic contexts, does not clarify how much these elements should count in reaching a decision on the future of a child.

Article 20, even though it does not explicate the weight that should be given to the ethnic, religious, cultural and linguistic context, clearly highlights the fact that these elements are important in the development of a child. Culture, religion, ethnic and linguistic backgrounds, however, are not listed as elements that constitute the child's identity. Article 8 states that: "it is the right of the child to preserve his or her own identity, including nationality, name and family relations as recognized by the law". This seeming inconsistency can be explained by looking at the origins of the article. It was introduced under the pressure of the Argentinean Delegation. In Argentina, between 1975 and 1983, 170 children disappeared during the period of the military junta. Many of them had been adopted by parents working with the militia. These children often did not know that they had been adopted. In the light of these experiences, common to other South American countries, such as Chile, Peru and Guatemala, the delegation of Argentina pushed for the introduction of this article.

The narrow formulation of Article 20 motivates interpreters to turn to Article 8 and claim that, even though not explicitly mentioned, culture is part of the identity protected by the article. Under this interpretation, the list of elements constituting the child's identity in article 8 is not comprehensive. The word 'including', therefore, implies that other elements, like culture, can be included.

The issue of inter-country adoption and identity is also considered by *The Hague Convention on Inter-country Adoption*.<sup>6</sup> This Convention marked the official shift in international law from the idea that a clean break is in the best interest of

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<sup>6</sup> This Convention came into force in 1995 and is now ratified by 84 countries (Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions, 1993).

the child to a more nuanced view. On one side, the Convention reaffirmed the principle that the child's legal connection to the biological family should be terminated so that the child could be fully integrated into the adoptive family. On the other side, however, for the first time it acknowledges the importance of preserving information about the adopted child and its biological parents.<sup>7</sup>

Acknowledgement of the need to conserve information about the child's identity highlights a new path to adoption. In this view, the child may wish to access the history of his/her origins. The Hague Convention puts forward an intermediate solution between the clean break and the biological narratives for children who may wish to access information about their biological family but whose identity is well established within the adoptive family. The way to regulate access to this information is, however, left to the state to decide how and when to give the adopted person the right to know about his/her biological parents. The inclusion of the duty to preserve information about the biological parents represents a clear step forward; a view of complex identities that considers both the information on the biological family and the development of an identity within the adoptive family.

According to Freeman, during the negotiation of the *Convention on the Rights of the Child* it was difficult to obtain consensus in relation to freedom of thought, conscience and religion, the need to respect traditional practices, and the specification of duties of the child besides rights and adoption (Freeman, 1996). All these issues share a common element as they concern the way in which children are perceived in relation to their context of origin.

The connection between these different issues is evident in the *African Charter on the Rights and Welfare of the Child*. This Convention, unlike the *Convention on the Rights of the Child*, states the duty of the children and, at the same time, clearly takes a more negative approach towards inter-country adoption than the *Convention on the Rights of the Child* and the Hague Convention. Even though the text of the the *African Charter on the Rights and Welfare of the Child* and the

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<sup>7</sup> Hague Convention 1993, articles 26, 30. (Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions, 1993)

*Convention on the Rights of the Child* is almost identical, the former uses the expression 'last resort' to underline the *extrema ratio* of inter-country adoption.

Article 24 of *the African Charter on the Rights and Welfare of the Child* states:

Inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, *as the last resort*, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

*The African Charter on the Rights and Welfare of the Child* represents children as individuals with duties towards their communities and therefore opposes adoption as a system that removes children from their communities. The relation between the different narratives of childhood and the approach to adoption is evident in the public and academic debate on adoptions across identity borders. The approaches that favour adoptions across identity borders tend to see children as independent individuals, while the approaches that oppose adoptions across identity borders have a tendency to describe children as individuals embedded in a cultural group from birth. At the same time, the approach that supports adoptions across identity borders tends to describe children as vulnerable individuals in need of protection.

The public and academic debate on adoptions across identity borders mirrors all these different narratives. This debate has been particularly intense in the United States and the United Kingdom. In these countries, dispute has particularly concerned trans-racial (TRA) adoption in the domestic context. This debate has been dominated by two different approaches; liberal colour-blind individualism, and colour and community consciousness. The former advocates the irrelevance of race and places the individual in the centre of any discourse concerning rights and interests. The latter values racial/cultural diversity and emphasises the interests and rights of the child as a member of a specific community (Perry, 1993-1994).



The liberal colour-blind position has been supported by a number of academic scholars, including Margaret Howard (1984), Elisabeth Bartholet (1991), Joan Mahoney (1991), Richard Banks (1998) and Randall Kennedy (1998). The latter, for instance, explicitly argues that race should not play any role in the adoption process. He states:

Race matching [...] harms the entire society morally and spiritually by reiterating the baneful notion [...] that people of different races should not be permitted to disregard racial distinctions when creating families. [...] A preference for same-race placement buttresses the notion that in social affairs race matters and should matter in some fundamental, unbridgeable, permanent sense. (Kennedy, 1998, paragraph 4)

Scholars arguing for a colour-blind position, state that in the adoption process there is no space for the interests of communities and the only interest that should be taken into account is the best interest of the child. Supporters of the more radical version of this approach argue that the race of a child is not an element that should be taken into consideration while assessing the best interest of the child (Bartholet, 1999).

Colour blindness is an ethical ideal that says the colour of the skin should not influence the way people relate to each other. The goal of this ideal is to erase discrimination and injustice between groups of people with different skin colour. The problem is that turning blind eye and deny the relevance of colour is not always the best way to approach racism and discrimination. As Drucilla Cornell writes:

What is not noted cannot be changed; thus by recognizing that, like it or not, we are white [...] because we are inevitably shaped by how we are seen, we are ethically respecting the need to call the attention

to the hierarchies as a first step in calling for their change (Cornell, 2000, 49).

Not being blind means, for instance, paying attention to the context in which adoption takes place. Inequality between groups is certainly a major factor increasing the likelihood of adoptions across identity borders. As Pamela Anne Quiroz states, “in an ideal world, adoption would not be needed, and certainly in a colour-blind world 7 of 10 adopters would not be white” (Quiroz, 2007, 64).

Moreover, not being blind means admitting that people are shaped by the ways in which others see them. Turning blind to the consequences of race and the colour of the skin in society does not work in the best interest of children adopted across a colour line.

However, maintaining a balance between recognition of the power that the colour of the skin and race has in society, and recognition of the agency of people in developing their own identity is extremely complex.

Opposed to colour-blind policies, some scholars in the United States and the United Kingdom, like Leon Chestang (1972), Amusie Chimezie (1975) and John Small (1984), have argued for the prohibition of transracial adoption from a colour and community consciousness perspective. This position is grounded on three distinct assumptions: first, children can develop a positive race identity only in families with a similar racial background; second, same-race adoption is the only system to ensure that adopted minority children are provided with the survival skills needed to live in a racist society; and third, that TRA is a form of cultural genocide. The first two assumptions are clearly interpretations of what is the best interest of the child, while the third one is related to the interests of cultural groups.

The first assumption is based on use of race and culture in an inescapable way. It is maintained that children have, from the beginning, a specific identity; that this identity cannot coexist with other identities; and that only parents with the same culture can help their children to develop a positive attitude towards it. The second assumption implies that only parents belonging to the same minority

group are able to teach children the ways to resist racism. In this context, therefore, the main issue is the minority status of children, not their specific culture.

The third assumption is that TRA damages ethnic groups and deprives them of their children. This opinion highlights a fundamental ambiguity embedded in the discourse of identity and belonging. The fundamental question is: do people have an identity, or do people belong to a group? This is particularly central in relation to children if they are, at least in the first years of life, to express their own opinion on their cultural identity. This kind of argument was the basis of the adoption in the United States of the Indian Child Welfare Act (ICWA) in 1978. The Act states that when adoption is sought for an American Indian, the child should be placed with a member of the extended family. If such a placement is not available, the child should be placed with members of the same tribe or, if that is impossible, with an Indian family belonging to another tribe. In the United Kingdom, the colour and community consciousness position has been advocated by Black Social Workers and Allied Professionals (ABSWAP).<sup>8</sup> In 1983, the ABSWAP claimed that TRA is a microcosm of the oppression of black people in society, which deprives the black community of its most valuable resource. John Small, the founder of the ABSWAP, claims that TRA is a new form of internal colonialism and slave trade (Small, 1991). This idea is closely related to the idea that children belong to their community of origin and that communities have a right to exist for an unlimited number of generations.

The colour and community consciousness approach implies that children belong to a specific culture and race by a natural link. From this point of view, as Ruth-Arlene Howe (1997) states, TRA adoption places children at risk of alienation from their *natural* reference group. The use by Howe of the word *natural* exemplifies well the fact that opponents of TRA often see race and culture as a natural and pre-political element of everyone's identity. This position disregards the fact that race and culture are flexible concepts and socially constructed notions.

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<sup>8</sup> A similar position was expressed in the United States in 1972 by the National Association of Black Social Workers (NABSW).

The supposed link between culture and race is not natural but is created by two parallel phenomena: segregation and racism. On the one hand, people of the same race are often forced, physically or due to discrimination, to live together, and therefore tend to develop similar customs and have a shared history. On the other hand, racist categorisations label other races as different in the way they think and act. Segregation and racism do not, however, produce a *natural* link between race and culture, which should remain distinct concepts.

Race classification is a flexible practice that differs in each country and changes over time. In the 1998 *Principles and Recommendations for Population and Housing Censuses*, the United Nations Statistical Division noted the difficulty of proposing a common, cross-national approach to racial and ethnic classifications.

The national and/or ethnic groups of the population about which information is needed in different countries are dependent upon national circumstances. Some of the bases upon which ethnic groups are identified are ethnic nationality (in other words country or area of origin, as distinct from citizenship or country of legal nationality), race, colour, language, religion, customs of dress or eating, tribe or various combinations of these characteristics. In addition, some of the terms used, such as “race”, “origin” and “tribe”, have a number of different connotations. [...] By the very nature of the subject, these groups will vary widely from country to country; thus, no internationally relevant criteria can be recommended. (United Nations, 1998, 169)

The history of the national census in the United Kingdom exemplifies the mutability of race/ethnic categorisation over time. Citizens have been asked to identify themselves as belonging to one of the possible racial/ethnic categories. These categories, however, have changed in every census since 1991, when a question on race/ethnicity was introduced for the first time.

The originally defined 1991 census categories proved insufficient. In the 2001 census, the originally defined groups were modified. Three sub-categories of White were introduced and mixed categories were included. In the 2011 census, ‘gypsy or Irish traveller’ and ‘Arab’ categories were added.

Ethnic categories in the UK census are clearly identity categories. These classify the ways in which people identify themselves and others. As such they vary, as people change the way in which they categorise themselves and others.

<b>CENSUS 1991</b>	<b>CENSUS 2001</b>	<b>CENSUS 2011</b>
White	White-British	White-British
	White-Irish	White-Irish
	White-Other	White-Other
	Mixed-White/Black Caribbean	Mixed-White/Black Caribbean
	Mixed-White/Black African	Mixed-White/Black African
	Mixed-White/Asian	Mixed-White/Asian
	Mixed-Other	Mixed-Other
Black- Caribbean	Black/Black British- Caribbean	Black/Black British- Caribbean
Black- African	Black/Black British- African	Black/Black British- African
Black-Other	Black/Black British- Other	Black/Black British- Other
Indian	Asian/Asian British- Indian	Asian/Asian British- Indian
Pakistani	Asian/Asian British- Pakistani	Asian/Asian British- Pakistani
Bangladeshi	Asian/Asian British- Bangladeshi	Asian/Asian British- Bangladeshi
Other Asian	Asian/Asian British- Other Asian	Asian/Asian British- Other Asian

Chinese	Chinese	Chinese
		Gypsy or Irish Traveller
		Arab
All other Ethnic Groups	Other Ethnic Group	Other Ethnic Group

**Figure 1: Ethnic categories in UK census**

Analysis of the UK censuses highlights another important issue. The identity categories included are a combination of race, skin colour, ethnicity and nationality. Even if these are distinct notions they all function as identity categories.

As the above indicates, there is little consensus on the meanings of race and ethnicity. Each is often used with different meanings. Race, for instance, can be used to identify a presumed biological difference between people or can refer to a sociological construction<sup>9</sup>. It can be used as a synonym of colour or as an alternative culture. The same is true for the term *ethnicity*: this term is sometimes linked with a notion of blood connection, while at other times it is defined as a group that shares a common culture. It is noteworthy that whereas in the US and the UK the debate over the importance of the child's background in adoption has mainly concerned race, there is no mention of the child's racial background in either the *Convention on the Rights of the Child* or the *Hague Convention on Inter-country Adoption*.

Even the relationship between race and ethnicity is unclear. Morris, for instance, defines ethnic group as a distinctive category of people whose members are, or feel themselves to be, or are thought to be, bound together by common ties of

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<sup>9</sup> As Stephen Cornell and Douglas Hartmann state, most contemporary scholars dismiss the entire idea of race as a meaningful biological category (Cornell & Hartmann, 1998). Even if races, in the biological sense, do not exist, racial categories maintain relevance in social studies as race is the way in which people identify themselves and others. As Glenn C. Loury writes, "to establish the scientific invalidity of racial taxonomy demonstrates neither the irrationality nor the immorality of adhering to a social convention of racial classification.... [T]he social convention of thinking about other people and about ourselves as belonging to different 'races' is such a longstanding and deeply ingrained one in our political culture that it has taken on a life of its own" (Loury, 2004, 76)

race, nationality or culture (Morris, 1968). On the other hand, the Race Relations Acts in the United Kingdom describe a racial group as a group of people defined by reference to colour, race, nationality or ethnic or national origins. The former definition implies that race is an element of ethnicity, while the latter entails that ethnicity is an element of race.

Numerous questions remain unanswered in relation to race and ethnicity to the point that it is logical to have reservations on the utility of these categories as analytical tools (Baumann, 1996). A more useful way to look at social identity is to distinguish between ascriptive and voluntary association. This distinction, and the relationship between voluntary and ascriptive associations, plays a key role in the trans-racial/ethnic/cultural/religion adopted children.

Some aspects of identity, like the colour of the skin and sex, are clearly independent of agency. Other aspects, however, necessitate the more active role of the individual. Culture, intended as shared customs and traditions, requires people to participate in the communal life to learn and absorb these aspects. The ascriptiveness or voluntariness of identity association is particularly relevant in relation to children as they belong to the former by birth while they belong to the latter by the will of their parents.

Generally, for an association to be voluntary, like for instance a trade union, it should involve the possibility for an individual to exit and change association. The voluntary characteristic of identity association, however, does not always guarantee an exit option. This is due to the fact that voluntary and ascriptive associations are often linked: the colour of the skin, for instance, is often perceived to be associated with a certain culture. At the same time, the ascriptiveness or voluntariness of cultural associations is itself a matter of disagreement. Religious associations illustrate the importance and the difficulties of this distinction.

The nature of religion remains controversial. Are religions voluntary associations or do people belong to a certain religion from birth? The issue is particularly relevant in relation to children: if religion is a voluntary association, then very

young children are not able to decide to be part of a religion; if, however, religion is an ascriptive identity, children belong to the religion of their biological parents from birth.

Analysis of the international Conventions regulating the issue of children's religious rights highlights the ambiguity of the law and the number of different interpretations that still exist. Article 14 (1) of the *Convention on the Rights of the Child* provides that:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

The formulation of this article raises some interpretation problems (Kilkelly, 2009). It differs from the equivalent article 18 of the International Covenant on Civil and Political Rights (ICCPR), which states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The absence of the right to choose and exercise one's religion in the *Convention on the Rights of the Child* raises questions about the extension of the right to



religious freedom guaranteed to children. On the one hand, the interpretation could be that children's right to religion is limited to the corresponding right of adults. On the other hand, an alternative interpretation maintains that the right to choose and exercise one's religion is implicitly part of article 14. This line is certainly supported by Belgium, which, while ratifying the Convention, declared:

The Belgian Government declares that it interprets article 14, paragraph 1, as meaning that, in accordance with the relevant provisions of article 18 of the International Covenant on Civil and Political Rights of 19 December 1966 and article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, the right of the child to freedom of thought, conscience and religion implies also the freedom to choose his or her religion or belief. (Belgian Government, 1991)

In the *Travaux Préparatoires*, however, there is no evidence of this interpretation. While the first drafts submitted by the Scandinavian countries proposed a very broad text that contained the right to choose and change religion (United Nations, 1983), in the latter drafts, due to the objections of many Islamic States (United Nations, 1989), the article was changed and the right to choose and change religion was not included. Bangladesh, for instance, contended that:

[the article] appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents (United Nations, 1986).<sup>10</sup>

The solution of the conflict between these different views was the formulation of article 14: the final decision was to exclude the right to choose religion from the article. The formulation of the article seems, therefore, to reject the idea of a children's right to choose or change religion. However, the UN Committee on

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<sup>10</sup> Similarly, Morocco declared: "on the question of religion, the rule adopted in Morocco legislation is that the child shall follow the religion of his father. In this case, the child has not to choose his religion, as the religion of the State is Islam." (United Nations, 1987).

the Rights of the Child, the body monitoring the application of the Convention, has clearly stated that in its view:

Freedom of religion includes freedom to choose and change one's religion. No interpretation of such freedoms could restrict it to the possibility of holding one specific religion (United Nations, 1996).

It seems, therefore, that Article 14 (1) of the *Convention on the Rights of the Child* has been interpreted in very different ways by the State Parties and that ambiguities remain.

The special nature of religion is also confirmed by the special place that parents have in relation to the religious education of their children. Article 14 (2) of the *Convention of the Rights of the Child* provides:

States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

The role of parents in the child's religious upbringing is clearly recognised: this is the only provision in the Convention that talks about parents' rights in relation to children. The reason why parents are explicitly mentioned only in relation to religion is unclear: if the reason relates to the young age and connected difficulties in making autonomous decisions, this reason should apply to any other right.

Many reservations and declarations have been made to Article 14 (2) by the States Parties: on one side, Poland has declared that the article should be interpreted in a way that respects parents' authority (Kilkelly, 2009), and Algeria and Iran, for instance, have reserved the application of Article 14 only when consistent with Shari'a (Unicef, 2002). On the other hand, Iceland and Austria have specified the age at which children can choose their religion and in Germany children at the age of ten have the right to be heard before a change of

religion, and from the age of twelve cannot be forced to take religious instruction against their will.<sup>11</sup>

Controversies over children and religion highlight the importance of children for identity groups. Keeping the children within a religion is, in fact, a guarantee that it will have a future. For this reason, religions have general rules on the status of the children. Jews, for instance, adopt a matriarchal line: sons or daughters of a Jewish mother are Jewish. Other religions put an obligation upon the parents to raise their children in a specific religion. Catholics, for instance, promise during the wedding ceremony to educate their children in the Catholic faith.

Even in relation to adopted children, religions have rules. In Islam, only Muslims can 'adopt' Muslim children. In Judaism, a non-Jewish child who is adopted by Jewish parents retains his or her status as a non-Jew unless he or she undergoes conversion to Judaism. Children may be converted if they are presented to the community by the biological parents for that purpose, or they can carry out the conversion on their own initiative. The child retains the right to renounce the conversion upon reaching the age of twelve years for a girl and thirteen years for a boy. If the child renounces, he or she returns to the status of non-Jew (Pollack, 2004).

As the example of religion proves, the distinction between ascriptive and voluntary identity association is contentious. The issue is even more complicated because belonging to an identity association depends both on self-identification and hetero-identification. Identity is formed through a double process: on the one hand self-identification and on the other hand the identity that is given by others. Not only do the two attributions of identity take place at the same time, but they also influence each other.

Two interesting examples illustrate the complexity of this process. The first is an episode reported by an eleven-year-old Irish boy to the *New York Times*. The boy

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<sup>11</sup> In Iceland the age is 14 years, while in Austria the age is 16 years (Unicef, 2002).

was an Irish citizen since, at the time of his birth, Ireland, alone in Europe, still gave citizenship to everyone born in its territory. His mother and father were illegal black immigrants from Nigeria. After some years in Nigeria, the family went back to Ireland. Not long after their arrival, a classmate told the boy that he disliked black people. "But I'm black," the boy recalls answering, "No," the classmate said, "You're Irish" (DeParle, 2008). In this case, the classmate identified the boy by his national identity and decided to ignore his racial identity.

In another case, a Moroccan immigrant to France, who migrated when he was eight, told a journalist: "You're French on your identity card, French to pay taxes and to go into the army, but for the rest, you're an Arab" (Smith, 2005). He was formally French and therefore expected to contribute to the wellbeing of the country, but otherwise he continued to be identified by his race.

These two cases underline the double process of identity: on the one hand self-identification, and on the other hand the identity given by others. The binary aspect of identity creation is particularly relevant in the adoption cases analysed in this work: in assessing the best interest of the child the judges should take into account the two aspects; on one hand the cultural identity of the child, and on the other hand the best interest of the child. They have, therefore, to consider how the outside world will react to the child.

Adopted children can find themselves in the paradoxical position of not having experienced a certain identity, but at the same time feeling they belong to it or may have been perceived as belonging to it. Black children adopted by a white family, for instance, can feel they belong to, or can be perceived as belonging to, a 'black culture' even if they always lived in a white environment. Or an inter-country adopted child born in China can feel he/she belongs to, or can be perceived as belonging to, a 'Chinese culture' even if he/she has never experienced it. This paradox is particularly powerful when one of the identities is a 'visible identity category', like the colour of the skin or bodily features.

Again, trans-culturally adopted children are trapped between numerous narratives and expectations about their identity. Developing their identity requires strong navigation skills to find their way between these different stories.

The concept of identity is closely linked with the notion of family. The narratives on what is and should be a family are important elements influencing the way in which adoption and adoptees' identities are constructed.

## **2.5. Narratives about family**

The preamble to the *Convention on the Rights of the Child* states clearly that the family is the fundamental group of society and the natural environment for the growth and wellbeing of children. Family is presented as the locus where children should live.

The history of domestic adoption can be read as a response to the different narratives of families. The idea that adopted children should be similar to the adoptive parents informed the first adoption laws in Europe and the USA in the nineteenth and early twentieth centuries (Presser, 1971). Adoption was meant to be hidden, since adoptive children were often the result of sexual relations outside marriage, and the infertility of the adoptive parents was the main reason for adoption. These two elements were considered shameful and therefore adoption was hidden. The best way to hide adoption was to match adoptive parents and adoptive children on the basis of their appearance.

This situation is progressively changing. With the increased acceptance of infertility and the growth of inter-country adoption different narratives have emerged. Narratives of multi-cultural families and rainbow families are becoming more and more evident in the adoption context. These narratives tend to be linked with the rescue narratives.

Trying to match adoptive families on the basis of bodily similarities can also be a way to facilitate the integration of the child in the adoptive context. This way of matching children is, however, based on a fiction: adoptive families are equated to families linked through genetics. This narrative of family is linked to the narrative of identity as blood. The perceived importance of kinship has played a large role in the history of adoption, not only in relation to the identity development of adopted children, but also in the history of adoption regulations. As Signe Howell notes, “Adoption is a practice that challenges those kinship ideologies that base themselves upon the constituting value of biological connectedness” (Howell, 2006a). However, Barbara Yngvesson claims that adoption also reinforces the same ideologies (Yngvesson, 2010). She states that the legal regulation of adoption is filled with fictions that underpin the importance of kinship. In this sense, she cites the voluntary consent of the birth mother to the child’s relinquishment, the legal status of the child as an orphan, and the system of close adoption. The creation of sealed records and secrecy are also part of the reinforcement of the importance of blood. Blood relationships are perceived to be so strong that they should be legally deleted to allow a successful adoption.

Identity is often perceived as linked with genetics and blood. Kinship is, therefore, presented as a key element influencing people’s identities. Children are expected to give prominence to their genetic/blood relationships in the creation of their identities. Referring to kinship in the United States (although this quote could be used in the context of Western societies), David Murray Schneider wrote:

A blood relationship is a relationship of identity. People who are blood relatives share a common identity, they believe. This is expressed as “being of the same flesh and blood”. It is a belief in common biological constitution, and aspects like temperament, build, physiognomy and habits are noted as signs of this shared biological makeup, this special identity of relatives with each other. Children are said to look like their parents, or to “take after” one or another parent or grandparents; these are confirming signs of the common

biological identity. A parent, particularly a mother, may speak of a child as “a part of me”. (Schneider, 1968, 25).

The link between identity and kinship is also enshrined in international law. Article 8 of the *European Convention on Human Rights* has been used in relation to adults’ right to know their parents’ identity. This article, however, does not talk explicitly about identity but only about family. It states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *Jaggi v. Switzerland*, for instance, the European Court of Human Rights (ECHR) considered that the right to identity, and hence to know one’s origins, belongs to the inner core of the right to respect for one’s private life (*Jaggi V. Switzerland*, 2006, 38).

The link between kinship and identity is also enshrined in Article 8 of the *Convention on the Rights of the Child*. In this article, ‘family relations’ are clearly inscribed as part of a child’s identity:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

The perceived relation between blood and identity has consequences for the creation of children’s identity (Carsten, 2004). Children, in the creation of their narrative identity, are expected to give special weight to their blood relationships. This expectation is particularly problematic in the case of adopted children; these

children are separated from their genetic parents but are supposed to create their narrative identity in a context where blood is one of the key elements of identity.

Numerous studies on adopted people looking for their biological parents have highlighted the perceived relationship between identity and biological parents. Janet Carsten, for instance, asked adopted people about the reasons why they were seeking their biological parents. People typically answered “to be complete” or “to find my real identity” (Carsten, 2004). The importance that blood relationship has in Western society is clearly reflected in this need.

Trans-culturally adoptees are in the difficult position of trying to narrate a story that is in large part already told by others. Narrating their own story means recognising the social narratives that influence adoptions across identity borders and trying to navigate them. This navigation however, does not occur in a vacuum: on the contrary, it takes place in a world where inequality is one of the major elements related to adoptions across identity borders.

## **2.6. The last element: adoption and inequality.**

Adoptions across identity borders is not only related to narratives on childhood, identity and family, but is also linked with the problem of inequality. Adoptions across identity borders is often the result of a situation of strong inequality between racial/ethnic groups or nations. The removal of a child is often linked to a marginalized and unprivileged position of his/her biological family. At the same time the adoption is related to the privileged position of the adoptive parents. These underprivileged and privileged position are in many cases the mirror of the power relationships present in the society at large: between majority and minority groups and between the West and the rest of the World. The anthropologist Shelee Colen describes adoptions across identity borders as a form of “stratified reproduction”: a system of power relations that enables privileged parents to adopt children while disempowering those who are subordinated (Colen, 1986).



The relationship between inequality and adoption has consequences in the life of adopted children. Barbara Yngvesson, for instance, describes how in Norway inter-culturally adopted children are mistaken for immigrants. They are not only seen as having a different identity but as victims of racism as they are identified as belonging to a discriminated group of people (Yngvesson, 2010).

The issue of inequality has been presented in different ways. The supporters of the colour-blind position, for instance, have argued that disregarding race is the only way to give every child the opportunity to find a family. Colour blindness, therefore, goes beyond inequality and guarantees to a child a better life. The supporters of the colour conscious approach, on the contrary, argue that adoptions across identity borders perpetuates inequality and is a method to maintain the existing hierarchies.

The issue of inequality has been used to both support and oppose inter-country adoption. This practice, for instance, has been presented as a way to diminish the damaging effects of inequality. For Elizabeth Bartholet adoptions across identity borders is a way to improve the life of children and in this way address poverty and social injustice in the sending countries (Bartholet, 2007, 183). Other scholars have argued that inter-country adoption has a negative impact on the improvement of services for children in the states of origin (Smolin, 2007, 413). Some scholars have claimed that inter-country adoption raises the number of children in institutional facilities (Chou and Browne, 2008, 40). More generally, scholars opposing inter-country adoption claim that it is a way to steal the only remaining resource, the children, from unprivileged parents/countries.

Adoptions across identity borders is closely linked with a world divided into privileged and underprivileged. Adopted children find themselves between these two worlds and try to make sense of their adoption history.

## 2.7. Conclusion

In this chapter, I have presented some of the different narratives that surround adoptions across identity borders. The social narratives on childhood, identity, culture, adoption and family play an important role in the context of the development of the cultural identity of the trans-culturally adopted. These narratives coexist in a context where inequality is the major factor leading to adoptions across identity borders.

An adopted child does not develop his/her identity in a vacuum but in this specific context surrounded by these powerful narratives. The social narratives state how childhood, identity, family and adoption should modify the way in which a trans-culturally adopted child sees him/herself and is seen by others.

In the dominant narratives on adoption, children are vulnerable individuals who need to be saved through adoption. At the same time, a narrative of identity implies that they are expected to develop their identity taking into special consideration their genetic and blood links. Adopted children are trapped in the middle of powerful narratives and need to navigate within them to create their own identity.

The analysis of the different narratives on adoption highlights the complexity surrounding adoptions across identity borders. Sara Dorow states that children adopted across identity borders face some “impossible” contradictions (Dorow, 2006, 16). These contradictions are impossible because they can neither be ignored nor resolved. However as Dorow states the impossible contradictions are not dead ends but rather an invitation to think in new ways about identity, identification and family (Dorow, 2006, 22). Children adopted across identity borders force us to address the issue of identity in a less dogmatic way and recognise that social narratives have a major influence in the development of identity.

In this chapter I have presented the social narratives on adoption, identity, family and childhood that may play a role in the formation of the identity of the adopted children. These narratives are not universal but to some extent play a role in many western countries. Scholars like Dorow (2006; 2009), Briggs (2003), Howell (2006b, 2006a) and Yngvesson (2002, 2010) have identified the social narratives that can play a role in the context of adoption in the United States, Norway and to a certain extent in other Western countries. However in every national context the social narratives and the way in which they influence the adoption process and the adopted children's identities may vary.

That social narratives related to adoptions across identity borders are context specific arises clearly from the public and academic debate on this issue. The debate has been concentrated in some countries while in other contexts the issue has not been the object of extensive discussion. These differences between countries is in part related to their adoption histories but is also related to the way in which childhood, identity, family and adoption are constructed.

The analysis of the public and academic debate on adoptions across identity borders in the different countries highlights one of the central problems related to adoptions across identity borders, i.e. its definition. As demonstrated by the North American and the English debate, adoptions across identity borders can overlap with trans-racial adoption. Adoption across identity borders, however, is not limited to that: trans-religious and trans-national adoptions are clearly also adoptions across identity borders. The common element of all these types of adoptions across identity borders is that they are cross-border adoptions. Trans-culturally adopted children cross identity borders: in the case of trans-racial and trans-religious adoptions the borders crossed are symbolic borders while in the case of trans-national adoption they are physical borders<sup>12</sup>.

The significance of these borders is not universal but depends on the context. In some contexts, for instance, racial borders are extremely relevant while in other

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<sup>12</sup> In the academic and public debate, inter-country adoption and domestic trans-racial/trans-religious adoption have been often analysed separately. An important exception to this tendency is the work of Rita James Simon and Howard Altstein, entitled *Adoptions Across Borders* (2000) where they underline the similarities between these different types of adoptions.

religious borders are more important. The situation is further complicated since borders often intersect: different nationalities, for instance, may correspond with different racial backgrounds or religions.

This study compares how adoption across borders and the right to cultural identity is constructed in three different countries. The comparison is a central element in the research because the social narratives heavily influence the practice of adoption on childhood, family and identity and these are in large part context specific. It is therefore crucial to study the phenomenon of adoption, and in particular the situation of adoptions across identity borders, in close relation with the national context in which they take place.

The ideas of nation and family have intertwined relationships. Citizenship is often passed from parents to children and nations are frequently rhetorically compared to a family. These links are particularly relevant in relation to the phenomenon of adoption. Children adopted internationally become citizens of the country of destination and are therefore integrated both into the family and the nation. Even the ways in which domestic adoptions are performed are closely linked with the nation as they depend on the narratives of family that are prevalent in the country. For these reasons, the aim of this research is to contextualize the study of adoption across identity borders and to highlight the difference between three national contexts.

## Chapter 3: Belonging to the nation in England, Germany and Italy

### **3.1. Introduction**

This study is a comparison of three European countries: England, Germany and Italy.

Why Europe? Studies of inter-cultural adoption have mainly been undertaken in the United States and Canada. In continental Europe, this issue has received less attention. Some noteworthy exceptions are the works of Barbara Yngvesson and Signe Howell (Howell, 2006b, 2006a; Yngvesson, 2002, 2010). In the United Kingdom the problem of adoptions across identity borders has received more attention and this issue has been the centre of animated debate.

The particular focus on the United States and Canada is related to the existence of numerous national minorities and a long history of adoption of children belonging to them. In the United States, for instance, the Indian Adoption Project lasted from 1958 to 1967 and, in an era dominated by racial matching, allowed the adoption of many Native American children by white American families. In the late 1960s and early 1970s, Native American activists denounced the project as the most recent in a long line of genocide policies on native cultures. These objections led to the passage of the Indian Child Welfare Act, which made it extremely difficult for Native American children to be adopted by non-native parents. Native Americans now have jurisdiction over adoptive and foster care placements of Native American children. Nothing similar exists in Europe, where no cultural group has obtained autonomy in this field.

In addition to the adoption of Native American children, many studies have addressed the issue of adoptions across identity borders in relation to trans-racial domestic adoption in the United Kingdom and the United States of America. Racial identity is central to the history of the United Kingdom and the United States and has, therefore, become crucial in family disputes. Racial diversity is a long-standing reality in the history of the United Kingdom and is part of the origins of the United States. However, on the European continent, this phenomenon is more recent.

The second step in deciding the focus of the research was to determine which European countries would be analysed and compared. I decided to study England,<sup>13</sup> Germany and Italy. The comparison of these three countries is particularly significant. All have become multicultural societies, but have experienced different migration histories and have adopted varied approaches to diversity.

Nation and family have close relationships that serve to reinforce each other and their reproduction. Nations are often imagined as families: the use of words like motherland or fatherland highlights the tendency to compare nation with family. Like the elements of a family, citizens are expected to share some common characteristics. Citizenship is the way in which countries formalise the criteria upon which people consider themselves to be part of the country.

In all three countries, adopted children become citizens of the country of their adoptive parents. However, the relevance of the issue of citizenship is not limited to the acquisition of the adoptive nationality: the citizenship regime of a country mirrors the way in which the country sees itself and perceives the others. Citizenship history reflects national narratives, and these narratives influence the way in which adoption is perceived and practised, and may influence the way in which adoptive children see themselves and are seen by others.

### **3.2. England, Germany and Italy: Different histories of migration and citizenship.**

England, Germany and Italy have all become multicultural societies. Each country, however, has experienced different patterns of migration and has reacted to cultural

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<sup>13</sup> This study concerns adoptions across identity borders in England. However, in this chapter, I will talk about the history of British citizenship and the United Kingdom, since England is part of the United Kingdom. British citizenship comprises all citizens of the United Kingdom, including English people.

diversity in a distinctive way. These different approaches are closely linked with the idea of national identity. One possible way to explore different attitudes towards “others” is to analyse the history of the citizenship laws of these three countries. Citizenship laws usually determine who belongs and who does not belong to the nation. Analysis of the citizenship history of each of these three countries highlights different attitudes to national identity in relation to issues of race, ethnicity and difference.

### ***3.2.1. British citizenship: from ius soli to cultural citizenship passing through race***

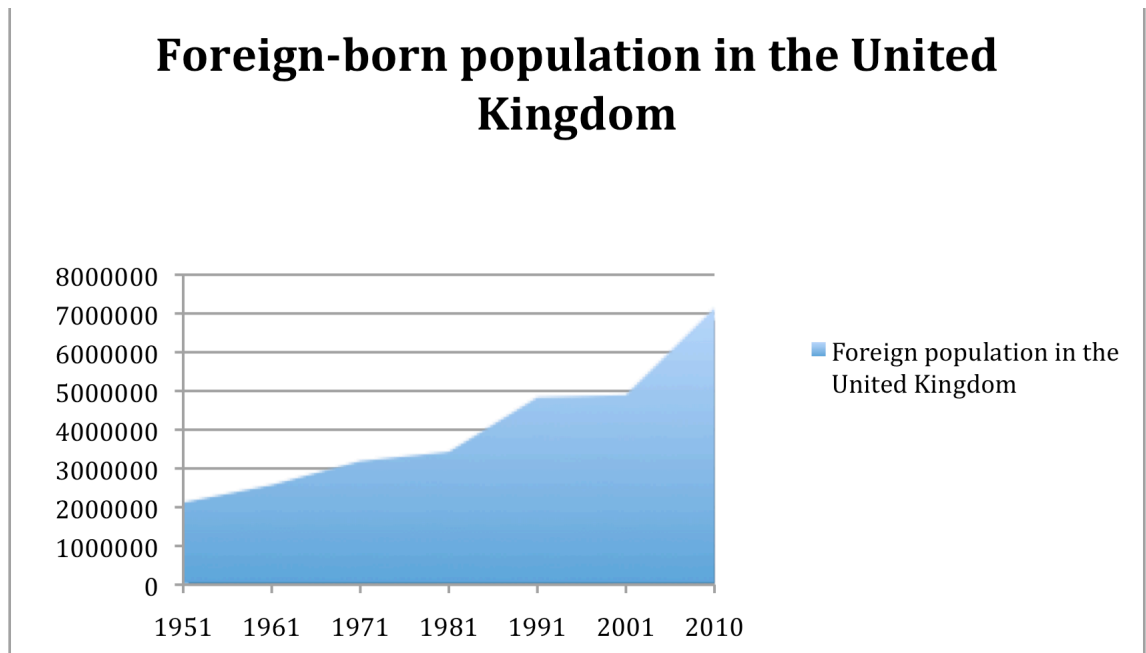
The evolution of British citizenship differs greatly from the other two citizenships.<sup>14</sup> This is due to the distinct way in which Britain has played its role as a colonial power. Under the Nationality Act of 1948, British citizenship was granted to anybody born in the British Empire. All citizens could move and settle freely within the territory of the Crown (Dummett and Nicol, 1990, 131). This legislation was passed immediately post World War II, when the idea of the Empire was still a central part of British identity. Moreover, the colonies had contributed immensely to the war effort, and Britain was continuing to recruit labour from the colonies, therefore, the thought of imposing restrictions on immigration was considered neither desirable nor appropriate. However the history of British citizenship changed profoundly in the 1960s, when citizenship began to be used as a way to reduce the number of commonwealth migrants in the United Kingdom.

The post war labour shortage encouraged hundreds of thousands of people to move to the United Kingdom (see figure 1). Initially, no specific provision was made to facilitate their integration into society (Satzewich, 1991, 29).

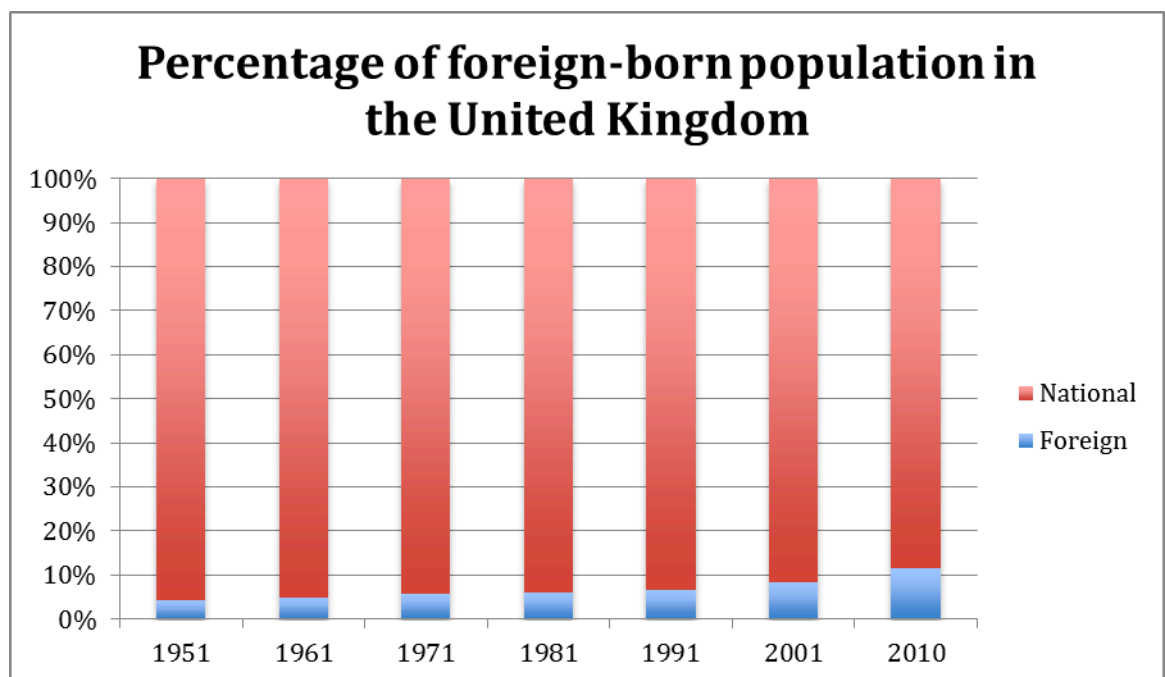
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<sup>14</sup> See in general (Dummett and Nicol, 1990; Favell, 1998; Hampshire, 2005; Hansen, 2000; Joppke, 1999; Karatani, 2003; Paul, 1997)





**Figure 2: Foreign-born population in the United Kingdom (UK National Statistic Office, 2005)**



**Figure 3: Percentage of foreign-born population in the United Kingdom (Office for National Statistics, 2005)**

By the early 1960s, the attitude towards immigrants from the Commonwealth changed. Increasing hostility resulted in the Commonwealth Immigrants Act (CIA) of 1962. The CIA imposed entry restrictions on individuals from states that had become independent of the United Kingdom and on citizens of the colonies and the United Kingdom. This Act marked the end of imperial citizenship and started a phase of progressive exclusion of immigrants. As Rieko Karatani notes, after the 1962 Act, immigration law rather than citizenship law became the way to define who belonged and who did not (Karatani, 2003, 144).

The government started to focus both on the restriction of immigration and the integration of immigrants already in Britain. The Labour government, which came to power in October 1964, aimed to make immigration controls more acceptable by linking them with positive measures for integrating migrants (Hansen, 2000, 128). Roy Hattersley famously summed up the rationale behind this approach: “Integration without control is impossible, but control without integration is indefensible,” (cited in Favell, 1998, 104).

In 1965, a White Paper on immigration from the Commonwealth was published and made clear this new emphasis on integration, stating:

The good name of Britain, our relations with other members of the Commonwealth and, above all, justice and common humanity, demand that Commonwealth immigrants in this country should be absorbed into our community without friction and with mutual understanding and tolerance. (White Paper, 1965, 18)

In 1965, the first Race Relations Act (RRA 1965) was passed. This Act proscribed racial discrimination and established the first public body to enforce non-discrimination. Although limited in its scope - only discrimination in public places was outlawed - the Act was important in setting the principle of anti-discrimination. Broader and more effective legislation on race relations was passed in 1968 and 1976.

In 1968, a new Commonwealth Immigration Act was passed. This Act was rushed through Parliament in response to the large number of Kenyan immigrants of Asian descent. These people held passports issued under the authority of London and were therefore exempt from controls. This Act restricted the right of entry to the United Kingdom. The further limitation of immigration corresponded with the growing concerns of British people in relation to immigration. A public opinion poll showed that 70 per cent of Britons wanted further control (Hansen, 2000, 161).

Under the 1968 Act, exemption from immigration control was granted only to citizens of the United Kingdom and colonies who were born, naturalised or adopted in the United Kingdom or who had at least one parent or grandparent who was born, naturalised or adopted in the United Kingdom. The Home Secretary, James Callaghan, argued for the introduction of this limitation, claiming that an influx of immigrants greater than the country could absorb would jeopardise support for the forthcoming Race Relations Act and the general integration project (Hampshire, 2005, 35).

Immigration control became explicitly linked with integration policies. The logic was that effective limitation of immigration would restrain the number of immigrants, making easier the integration of those already in Britain. As a result, the Immigration Act 1971, which further tightened immigration control, and the new Race Relations Act 1976 were adopted (Solanke, 2009, 58).

The progressive closure of immigration law culminated in the British Nationality Act (BNA) of 1981. The passage of this Act marked the end of imperial citizenship and the introduction of British citizenship. Three new categories of citizenship were created: British Citizenship, British Dependent Territories Citizenship (BDTC) and British Overseas Citizenship (BOC). Under the new law, only British citizens had the right of abode. The 1981 Act ended a period in which immigration law, instead of citizenship law, had been used to determine who belongs to Britain.

The BNA of 1981 replaced the tradition of *ius soli* (citizenship by territory) with *ius sanguinis* (citizenship by descent). This principle still applies in the current legislation. British citizenship is acquired if one parent is British.

In recent years, there has been growing political interest in the meaning of citizenship and Britishness. In 2005, the Commission for Racial Equality published a report entitled *Citizenship and Belonging: What is Britishness?* (CRE, 2005).

The prominence of the idea of common values and Britishness is clearly linked with the rise of opposition toward multiculturalism. In England Multiculturalism was never adopted as official policy, however public policies have increasingly taken into consideration cultural diversity. Though the years a substantial body of legislation and case law accommodating practices associated with minority ethnic, religious and cultural groups has been produced. Among the three countries analysed, England is certainly the one that has adopted the most multicultural approach towards ethnic minorities. In the last years, however, multiculturalism has been heavily criticized for what is said to be its failure to create a integrated society and its support of the creation of separated worlds (Dustin and Phillips, 2008, 406) . The Prime Minister, David Cameron further confirmed this retreat from multiculturalism in 2011 when he said: “Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We’ve failed to provide a vision of society to which they feel they want to belong. We’ve even tolerated these segregated communities behaving in ways that run completely counter to our values.”(Cameron, 2011)

The emphasis on the shared values of Britishness has become more prominent since the 2005 London bombing. On 7<sup>th</sup> July 2005, four British citizens - three from Pakistani Muslim families born and brought up in England and one born in Jamaica and converted to Islam in his teens - killed themselves and fifty-two others on the London public transport system. A few weeks later, Gordon Brown stated:

We have to face uncomfortable facts that while the British response to July 7th was remarkable, they were British citizens, British born apparently integrated into our communities, who were prepared to maim and kill fellow British citizens irrespective of their religion. (BBCNews, 2006)

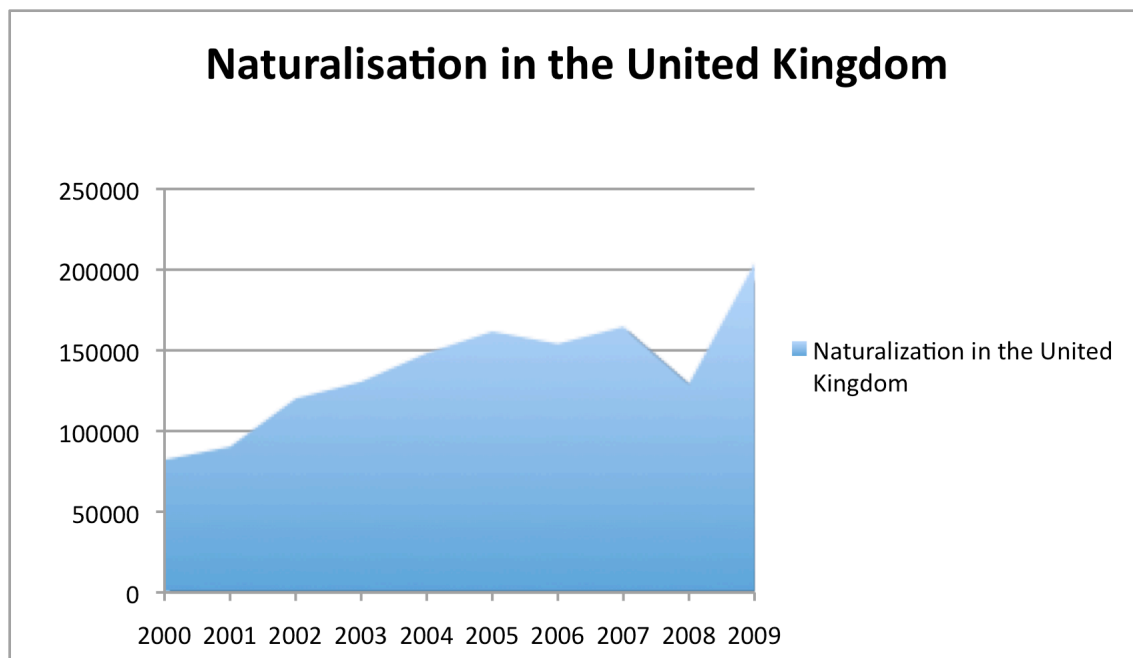
He suggested that British values demanded a new constitutional settlement and symbols to represent a modern form of patriotism. He suggested the introduction of a new young community service scheme and the establishment and celebration of a British national day (BBCNews, 2006).

At the same time, new legislation made it clear that there should be a connection between obtaining British citizenship and sharing common knowledge, if not values. Discussions of naturalisation requirements were conducted in terms of immigration policy, with ministerial claims of ‘making migration work for Britain’ closely intertwined with increasing the requirements for naturalisation (Hansard, 2009, 174).

In 2002, the Immigration, Asylum and Nationality Act established new requirements for people to be naturalised. They would have to show sufficient knowledge of life in the UK, either by passing the “life in the United Kingdom” test or by attending combined English language and citizenship classes. The requirements for sufficient knowledge of English and knowledge about life in the United Kingdom have been seen as “instrumental in fostering and renewing the social fabric of our communities and rebuilding a sense of common citizenship” (Home Office, 2002, 10). In April 2007, these requirements were extended to settlement in the UK and, in late December 2007, the government proposed an extension to the domains of family reunification and entry into the United Kingdom.

Even though the criteria have become slightly more stringent, in the last ten years naturalisations in the United Kingdom have continued to grow (see Figure 4). The introduction of the Life in the United Kingdom test and English language

requirements in 2005 do not seem to have altered the tendency for increasing numbers of naturalisations (Blinder, 2011).



**Figure 4: Naturalisation in United Kingdom 2000-2009 (Danzelman, 2010)**

In 2008, a Green Paper titled *The Path to Citizenship: Next Steps in Reforming the Immigration System*, was published (Home Office, 2008). The basic principle of the Green Paper was that migrants have to ‘earn’ both their stay in Britain and British citizenship. In 2009, the Borders, Citizenship and Immigration Act was introduced in the House of Lords. Part 2 of the Bill (clauses 39 to 42 and 49 to 50) amend the provisions of the British Nationality Act 1981 relating to naturalisation as a British citizen, thereby bringing to fruition the ‘earned citizenship’ proposals. The Bill received Royal Assent on 21 July 2009. It includes the new scheme of “probationary citizenship”, which is a limbo period of one to three years, during which time citizenship-bound immigrants have to prove that they work and respect the law.

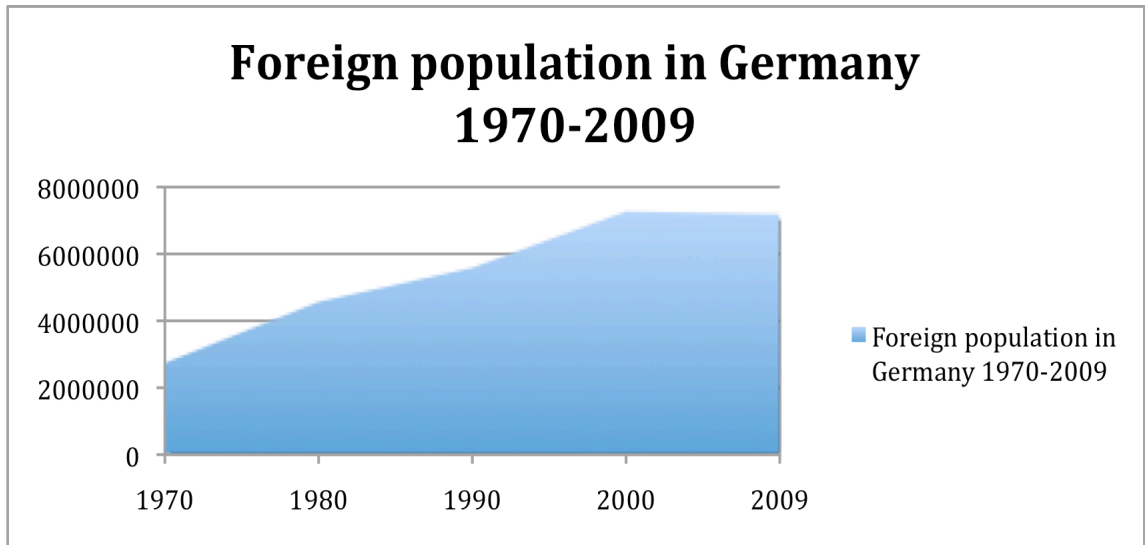
These recent developments have produced a significant change in the idea of British citizenship. From a very open idea of citizenship, which included every person born in the empire, Britain has moved to citizenship based on *ius sanguinis* and cultural

integration. This change has resulted from a progressive amendment of immigration and citizenship law: this progressive closure has been clearly connected with increasing immigration to the United Kingdom and the related decision to exclude some immigrants from the right to abode or to become citizens. In British history, race has been an important criterion of inclusion and exclusion. As Christian Joppke noted:

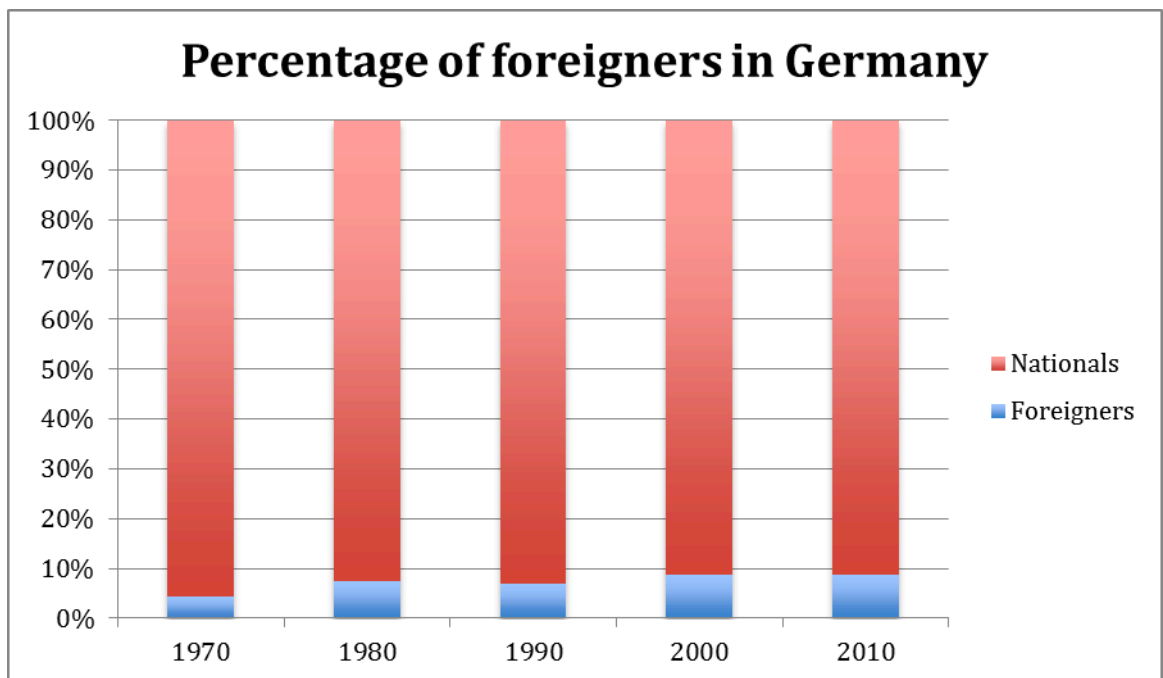
Immigration policy is usually premised on a meaningful concept of citizenship, which divides the world into those who belong and those who do not, and in which legal status overlaps with identity. In the absence of a meaningful concept of citizenship, British immigration policy had to operate on a proxy. This proxy has been race. (Joppke, 1999, 101)

### ***3.2.2. German citizenship: from ethnic citizenship to cultural citizenship while avoiding race***

Unlike Britain, Germany was an emigration country until the beginning of the 20<sup>th</sup> century when many Polish migrants arrived in Germany to work. Since the mid-1950s, however, Germany has become one of the preferred destinations of migrants.



**Figure 5: Foreign-born population in Germany (Statistische Bundesamt Deutschland, 2010)**



**Figure 6: Percentage of foreigners in Germany (Statistische Bundesamt, 2011)**

There are two main streams of immigration to Germany: ethnic German returnees and foreigners coming to Germany to work. The former arrived in Germany after 1945; at the end of the Second World War 12 million Germans from former German



territories moved to Germany. Two thirds of them went to West Germany while the rest went to live in East Germany. Integration of this first group of people was relatively easy due to the common ethnic origins and the economic boom following the end of the war. Between 1950 and 1987 almost 1.4 million ethnic Germans moved to West Germany. After reunification in 1989, 3 million ethnic Germans returned to Germany from former communist countries. Integration of ethnic Germans became more and more difficult in the 1990s. Jochen Welt, the past federal government's Commissioner for Aussiedler affairs, imputed this lack of integration to insufficient knowledge of the language. In 2003, in fact, only 20 percent of the people who came under the category of ethnic German migrants were ethnic German, while the remaining 80 percent were dependants of ethnic Germans that did not speak a good German. (Oezcan, 2004).

Besides ethnic Germans, several groups of foreign migrants made Germany their destination. Along with many other European countries, after the Second World War Germany was faced with the problem of labour shortages. The German government started recruiting foreign workers in the mid-1950s (Meier-Braun and Kilgus, 1996). The system of selection and recruitment was managed by a state agency on the basis of employers' demand. Social and workplace treatment was regulated by bilateral agreements between Germany and the sending countries. The guest-worker system was set to supply a large number of low-skilled workers who could be sent back as soon as the employers' need was fulfilled. Since the mid-1950s, bilateral agreements have been signed with other European countries and with Turkey. Between 1969 and 1973, the daily influx to Germany amounted to between 500 and 1000 migrants (Dale, 1999, 130).

German authorities made little effort to integrate guest workers as their stay in the country was supposed to be transitory. The "immigration problem" became a public issue for the first time during the recession of 1966 and 1967. However, the need for foreign workers returned as soon as the recovery of the economy started in 1968. By 1973, the federal government had imposed a stop to work permits. The official reason was the difficult economic situation due to the oil embargo. However, the halt

coincided with an unprecedented incidence of labour unrest amongst foreign workers (Castles, Booth et al., 1984, 29). The ending of the granting of work permits did not achieve the government's goal: the size of the foreign population actually increased due to the reunification of children with parents and the high birth-rate among foreigners. From 1973 to 1989 the foreign population increased by 22 percent (Beaufragte der Bundesregierung für die Belange der Ausländer, 1997, 19).

In 1977, the Federal Minister for Labour and Social Order declared, "The federal Republic of Germany is not a country of immigration." This statement was repeated often during the 1990s: the former Interior Minister Manfred Kanther, for instance, reiterated this in 1996, and during the debate on immigration law in 2000 this statement was often repeated (Hell, 2005, 81; Kanther, 1996). Many scholars have highlighted the absurdity of this claim (Bade, 1997; Brubaker, 1992; Marshall, 2000).

This statement should be interpreted in relation to the citizenship tradition of Germany, based on ethnic communality. German citizenship was, until very recently, based on the notion of ethno-cultural community and constituted a notable exception in the European context. Unlike Britain, people from the German colonies did not have any special position in relation to German citizenship. Even though German law applied to the colonies, the citizens of these countries were people belonging to a German protectorate rather than citizens (Oguntoye, 1997, 15).

The notion of citizenship was based on *ius sanguinis* and excluded all people not born of Germans. The status of people belonging to German protectorates changed after the First World War when Germany lost all colonial possessions and those living there became foreigners to Germany. The citizenship law was therefore clearly linked with common ethnicity.

The first German codification of national citizenship was the *Reichs und Staatsangehörigkeitsgesetz* of 1913.<sup>15</sup> In order to include all Germans living abroad in the colonies and to exclude the growing immigrant population in Germany (mainly immigrant workers from Poland settling in the industrialising region of the Ruhr Valley), the law bore the marks of a nationalistic and ethno-cultural notion based solely on descent. This law remained in force during the Weimar Republic.

During the Nazi dictatorship, in 1935 the *Reichsbürgergesetz* was added to citizenship law (*Reichsbürgergesetz*, 1935). This introduced a distinction between people enjoying full membership and those having mere state-membership. The former had political rights while the latter simply belonged to the protective association of the German Empire (Brubaker, 1992, 167). Jews were excluded from full membership and by 1940 they automatically lost state-membership if they took (or were forced to take) residency abroad (defined broadly and including in concentration camps).

After the end of the Second World War, both West and East Germany passed their own citizenship laws. In both countries the issue of German citizenship became a sensitive issue. Article 16 of the Constitution of the Federal Republic of Germany stated that a German was whoever possessed German citizenship or was accepted as a refugee or displaced person of German Origin. This article was clear in declaring that there was only German citizenship and not a Western and Eastern citizenship. Citizenship recognised by the Federal Republic of Germany always included citizens of the Democratic Republic of Germany. Not wanting to validate the division of Germany, the Western authorities refused to recognise the existence of two citizenships. Race and ethnicity continued to be a category for exclusion in the German Democratic Republic (Behrends, Lindenberger et al., 2003).

Even East Germany kept the idea of a single citizenship until 1967 when it introduced its own citizenship law. East German citizenship was no longer related to

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<sup>15</sup> On German citizenship see in general (Brubaker, 1992; Eley and Palmowski, 2008; Faist, Triadafilopoulos et al., 2006; Klopp, 2002; Münch, 2007; Nathans, 2004).

ethnicity and, in theory, was open to anybody who lived in its territory and who participated in the community (Palmowski, 2008, 552). In reality, however, when confronted by foreign nationals, socialist officials often displayed racial stereotypes.

The fall of the Berlin Wall in 1989 triggered a process of mass migration that modified the demographics of the Federal Republic. Between 1989 and 1993, 1.4 million people migrated from former East Germany to West Germany (Göktürk, Gramling et al., 2007, 13). The end of the Communist block brought new waves of immigrants to Germany. Many ethnic Germans went back to Germany and received German citizenship. At the same time, due to rising anti-Semitism in the Soviet Union, the German government decided to grant unrestricted residence, and ultimately citizenship, to Soviet Jews (Göktürk, Gramling et al., 2007, 14).

In 1993 and 1999, Germany passed a reform of the citizenship law that changed drastically the rules of nationality and naturalisation. There were three main elements of the new legislation: birthright citizenship (*ius soli*), prohibition of dual citizenship and change in the naturalisation procedure. Under 1999 legislation, children born in Germany of foreign parents would automatically obtain German citizenship if their parents had lived in Germany for eight years and had had an unlimited residency permit for at least three years. The Act recognised that:

Children born in Germany to foreigners living here permanently are to be given the chance to grow up in Germany as German nationals from the outset [...]. The acquisition of nationality marks the beginning of social integration. If children born in Germany go to nursery school here and receive all their schooling and vocational training in a German environment and already grow up in the awareness of being Germans with all the rights and obligations this entails, they will develop important bonds and feelings of identification with Germany and the German way of life. (Bundersministerium des Innerns, 2000, 54)

Even though limited by some conditions, the introduction of the principle of *ius soli* in German citizenship has proved revolutionary. The law states that new citizens should give up their previous citizenship. However a special rule introduced to children born on German soil: they could decide at the age of twenty-three whether to remain Germans or take up the citizenship passed down to them by their parents. The 1999 law made possible dual citizenship for citizens of other European Union countries as long as German citizens enjoyed a similar right in their country. The citizenship law had severe shortcomings, due to an administrative impasse; as a result, the right to dual German citizenship up to the age of 23 applied only to 40% of foreign nationals born in Germany (Green, 2005). Aside from the introduction of the *ius soli* and some element of dual citizenship, the naturalisation process has also been facilitated. Opposition to naturalisation was clearly stated in section 2.3 of the Federal Naturalization Guide of 1977:

The Federal Republic is not a country of immigration; it does not strive to increase the number of German citizens by way of naturalization [...]  
The granting of German citizenship can only be considered if a public interest in the naturalization exists; [...] personal desires and economic interest of the applicant cannot be decisive (Anil, 2005, 454).

Until the 1990s, Germany had the most restrictive naturalisation laws in West Europe (Kanstroom, 1993, 183). Before 1992, the naturalisation process was totally under state discretion and required complete cultural assimilation as a precondition. With the new law, naturalisation became a right and the assimilation condition was converted into a number of years of residency. Naturalisation criteria were further relaxed in 1999; after 8 years of residency a foreigner could be naturalised. The following five conditions had to be met: expression of loyalty to the German Constitution, ability to support oneself and one's family, no criminal convictions, adequate command of the German language and renunciation of previous citizenship.

Adoption of the new citizenship law was preceded by a debate on “German identity”. Discourse on national identity has been characterised by the notion of *leitkultur* (Pautz, 2005). This term can be translated as guiding culture or common culture. In 1998, this word was used for the first time in relation to immigration and integration (Sommer, 1998). However, this concept became influential in national politics only in 2000 when Friedrich Merz wrote an article advocating the control of immigration and compulsory integration (Merz, 2000). *Leitkultur* supporters argued that German identity was constituted by its values and claimed that immigrants should adhere to these. According to Joeg Schonbohm, right-wing CDU (Christian Democratic Union) politician:

Immigrants have to aspire to [German] culture, which has developed since Otto the Great, wholeheartedly, and not just because of the personal benefits [to them] of migration. (Schönbohm, 1997)

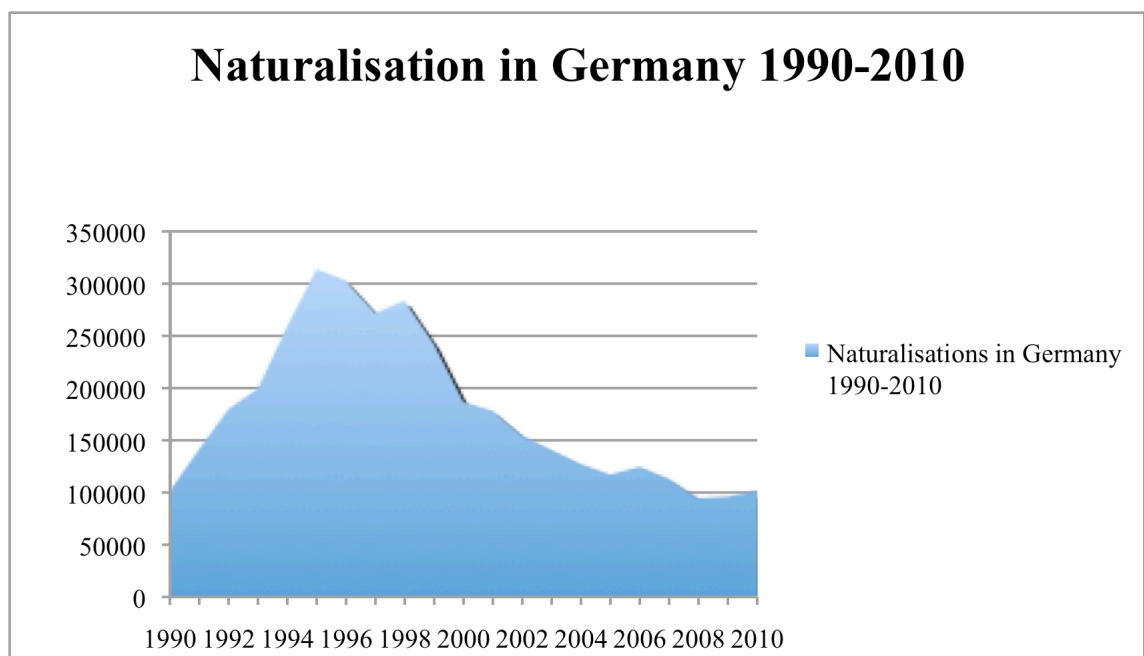
The debate on *leitkultur* changed quite rapidly and references to German history were replaced by European history and values. European culture has since become the element upon which *leitkultur* is constructed. The most relevant aspect of the *leitkultur* debate is the way it redefined German identity. It did this by superseding the outdated blood definition of German identity with a more flexible, yet still arguably racist, definition of cultural belonging as distinguishing the German nation. As Hatwigt Pautz noted in the debate on *leitkultur*:

The notion of race was replaced by that of culture, as cultural belonging was essentialised. Culture, as a vague and broadly interpretable changing cluster of meanings, was able to perform the same exclusionary function as race. (Pautz, 2005, 40)

The debate returned in 2006 when Norbert Lammert, the speaker of the German parliament, published a book in which he demanded a debate on national identity and a lead culture. He believed that there could not be one single definition of common culture, but argued that the lead culture should consist of a set of values

(Lammert, 2006). Following the implementation of *ius soli* and the reduction of the residence requirement from 15 years to 8 years, there was an assumption that German citizenship and nationality would be expanded. This resulted in renewed anxiety about safeguarding “German” values and traditions.

The debates about a German *leitkultur* have been closely linked to the proposed introduction of tests for immigrants and aspiring citizens. The issue was forced onto the public agenda by proposals from individual, conservative-governed states for the introduction of citizenship tests. Since 1 September 2008, legal residents wanting to become German citizens have been required correctly to answer at least 17 out of 33 multiple-choice questions drawn from a catalogue of 300 questions on German history, culture, and politics, plus ten province-specific questions. The introduction of this test, however, does not seem to have reduced naturalisations: after a drop between 1994 and 2008, the number of new citizens has slowly started increasing again.



**Figure 7: Naturalisation in Germany 1990-2010 (Statistisches Bundesamt, 2010)**

The delay and reluctance to recognize Germany as a country of immigration and the traditional restrictiveness of citizenship law are consistent with the way in which the State has approach multiculturalism. Germany has not adopted national policies to recognize and promote ethnic pluralism (Klopp, 2002; Rostock and Berghahn, 2008; Schonwalder, 2010). At the local and regional level, however, some multicultural policies have been adopted: in the sector of education, for instance, specific regions have adopted school curricula that contain elements of multiculturalism. In many localities there are bodies to consult with ethnic minorities. These policies, however, are not so widespread and coherent to be considered a national multicultural programme. Even so in 2010 the German Chancellor, Angela Merkel, said that multiculturalism had utterly failed in Germany and claimed that more integration of migrants is needed. With this declaration she gave voice to increasing arguments condemning multiculturalism across Europe (Vertovec and Wessendorf, 2010).

One characteristic of the postwar debate on German identity is the lack of explicit reference to race or racial identity. Even though until the 1993 reform citizenship law remained based on race/ethnicity and shared blood, the issue of race remained excluded from the public debate. This can be easily explained by reference to the use made of race in the Nazi period and the trauma that resulted from it in Germany. As Cengiz Barskanmz noted:

The concept of “*rasse*” was taboo in the post-war Germany, and about taboos you don’t speak. [...] “*rasse*” in the German legal doctrine [...] was hence reduced to a mere symbolic element. (Barskanmz, 2007)

While words like *rasse* (race), *erbe* (biological inheritance) and *blut* (blood) were in common use during the Nazi period and were the foundation of the regime’s racist policy, after the Second World War race became unmentionable (Fehrenbach, 2009, 5). During the 1950s, the use of the word race became taboo, even if clearly racist thinking had not disappeared. The avoidance of race was particularly evident in German official and academic circles (Fehrenbach, 2005, 7). Post Second World War Germany introduced many legal provisions prohibiting racial discrimination

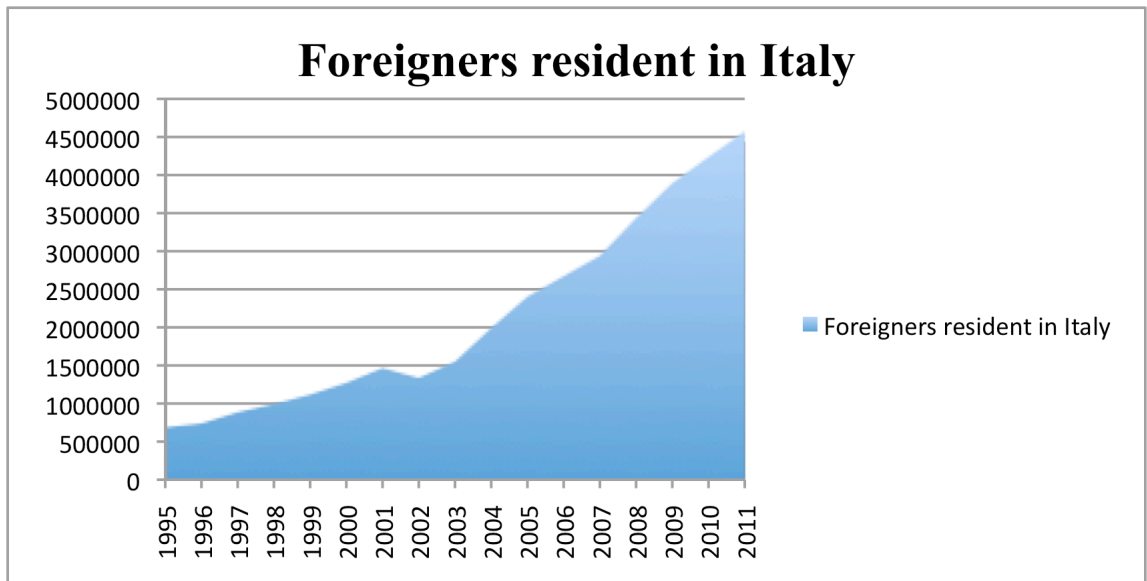


(both at constitutional and legislative levels), but in the country's history they were rarely used (Solanke, 2009, 79). Absence of the use of race as an explicit category in the German context contrasts clearly with the British experience. The German reticence to talk about race does not mean, of course, that race has not had, even in recent years a major influence in the German context. As demonstrated, German citizenship at least until the nineties was clearly based on shared ethnicity and blood.

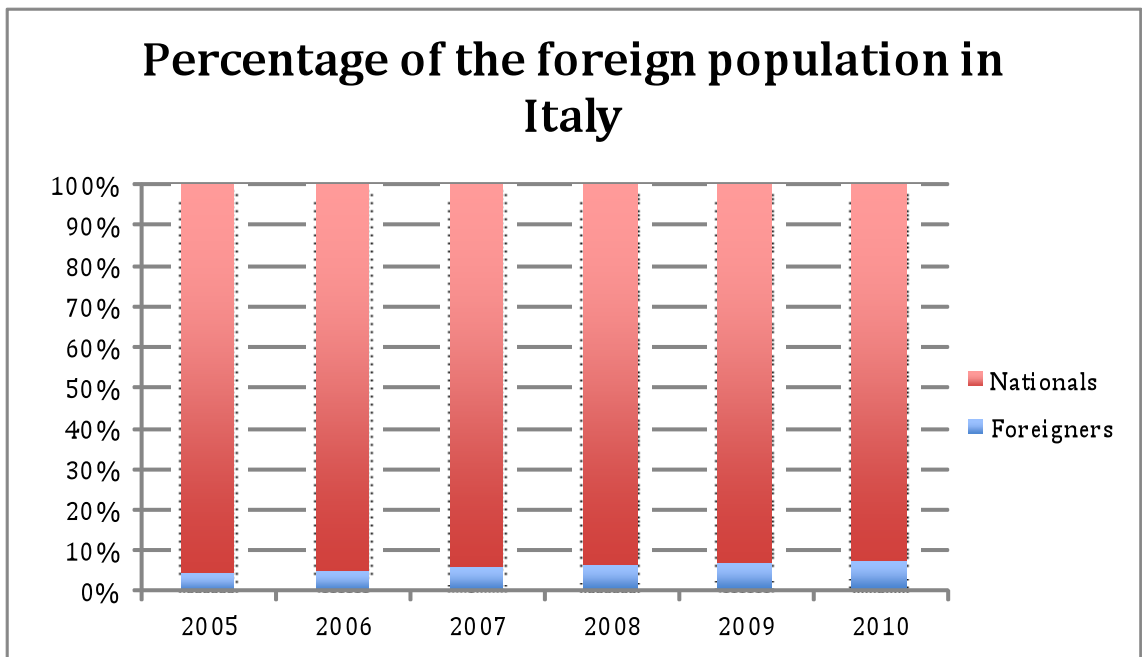
Throughout its history, German citizenship has experienced major evolution. From citizenship based on *ius sanguinis* and severely restricting naturalisation, it has evolved into citizenship with some elements of *ius soli* and more open to naturalisation. However, since 2008, the new law on naturalisation has introduced elements of cultural communality/integration as a precondition to citizenship. Naturalisation in Germany, as in the United Kingdom, now requires knowledge of the language and the culture. In German history, citizenship has changed from ethnic citizenship to cultural citizenship, avoiding any reference to race.

### ***3.2.3. Italian citizenship: still based on the past and family***

Until recently, Italy has been a country of mass emigration. From 1861 to 1990 roughly 28,700,000 Italians emigrated to other countries. Between 1945 and 1975 more than 7 million Italians emigrated, mainly to northern Europe, the United States of America and South America. Francesco Paolo Cerase calculated that at least half never returned to Italy (Cerase, 2001, 115). Since the 1980s, however, Italy has become a country of immigration. In 1985, only 423,000 foreigners were living lawfully in Italy; ten years later this increased to 1 million. Between 2000 and 2004 the number of foreigners doubled. The largest foreign communities are Moroccans, Albanians and Filipinos.



**Figure 8: Number of foreigners (without Italian citizenship) resident in Italy 1995-2011 (Istituto Nazionale di Statistica, 2011)**



**Figure 9: Foreign population as a percentage of the total population (Istituto Nazionale di Statistica, 2011)**

In Italy, immigrants are still mainly first generation, but the second generation is increasing every year. In 2003, only 12% of the foreign population (without Italian citizenship) was born in Italy, by 2010 the second generation represented 22% of the foreign population (Istituto Nazionale di Statistica, 2011).

The 1865 Civil Code was the first Italian citizenship legislation after unification in 1860. This legislation was drafted following the example of France, which, at the time, was applying *ius sanguinis* (Zincone, 2010, 18). In accordance with this principle, article 4 of the 1865 Code stated that a child born to an Italian national would be Italian. The nations to which Italians emigrated generally facilitated the acquisition of citizenship, therefore many Italian emigrants received another citizenship. The 1865 Civil Code did not permit dual citizenship; however, the government always considered the principle of *ius sanguinis* to be superior to any other provision, including the prohibition of dual citizenship. As result, it was almost impossible to lose Italian citizenship transmitted by *ius sanguinis*.

The mass emigration experienced by Italy clearly influenced Italian legislation on citizenship.<sup>16</sup> Like other European countries with many nationals living outside the state borders, Italy increasingly favoured the transmission of citizenship by *ius sanguinis* abroad, in order to maintain ties with external nationals (Waldrauch, 2006).

The 1921 Citizenship legislation was also intended to promote the return of emigrants and to maintain strong links with them. Prior to this legislation, special government authorisation was needed to reacquire Italian nationality. The new legislation abolished authorisation and created an automatic procedure. During the Parliamentary debate concerns were expressed that not allowing dual citizenship could weaken the links between emigrants and Italy and create a disincentive to the shipment of remittances (Prato, 1910; Tintori, 2006). Dual nationality became formally accepted if the acquisition of the second nationality was automatic or

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<sup>16</sup> For Italian citizenship in general see (Arena, 2004; Corsi, 2001; Grosso, 1992, 1997; Zincone, 2006).

inevitable. Italian citizenship became, in Rolando Quadri's words, a sort of "spare" nationality (Quadri, 1959, 323).

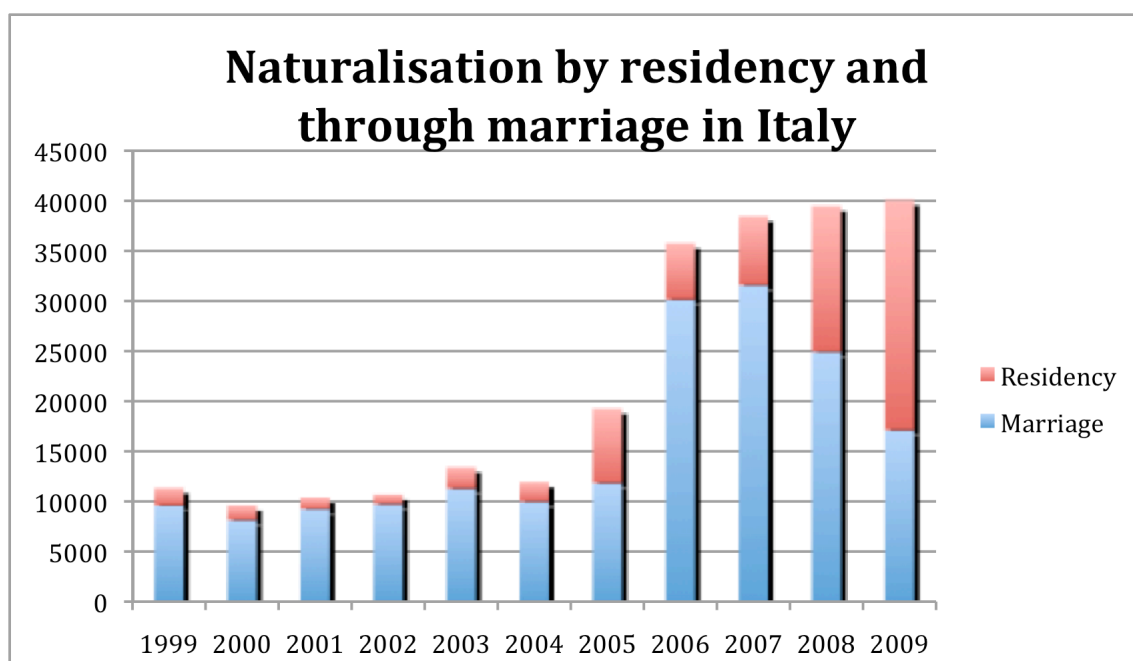
From the beginning of the colonial experience to the twenties, children born of Italian fathers and African mothers were provided with Italian citizenship when acknowledged by their Italian fathers. The subsequent racist attitudes in the colonies were strictly connected to the general racist turn taken by the Fascists after their alliance with the Nazi regime. In 1938, 'Special Regulations towards Foreign Jews' were introduced. They deprived foreigners of Jewish race, even if not practicing (art.2), of the right to reside in the Italian Kingdom and its colonies (art.1) and forced them to leave these territories (art. 4), but also retrospectively deprived of Italian nationality those who had acquired it after 1st January 1919. The regulations also prevented Italian colonists from intermarrying with the inhabitants of the colonies and declared these marriages void (art. 1). Marriages with any alien were submitted to authorisation, infringements were punished with imprisonment and fines (art.2), and marriages with foreigners were forbidden for military, civil servants, union members, members of organisations connected to the Fascist party and employees of state controlled enterprises.

In Italian East Africa, the law assigned the status of subjects to all those, who were not Italian citizens or citizens of other states. The legislation also introduced a strong racist element: it accepted the declaration of Italian citizenship for the children of unknown parents only 'if it can be reasonably inferred from his or her features and other traits that both parents are of white race'.

With the end of Fascism a new constitution was adopted. One of the major intentions was to avoid the return to a dictatorship. The constitution prohibited the loss of citizenship for political reasons (art. 22) and forbade discrimination on racial, religious, political, social or gender grounds (art. 3). Citizenship law was not modified until 1992. The 1992 legislation remains the main piece of legislation on citizenship. This Act is still shaped by Italy's past as an emigration country. In relation to immigrants, the Act is intrinsically ethnocentric. It reduces the length of

residence required before application can be made for naturalisation from five years to three for people of Italian descent and to four for EU nationals. The requirement of five years provided by the 1912 law was maintained only for stateless applicants and refugees, but was increased to ten years for non EU foreigners.

As a result, in 1999 only 15 percent of naturalisations were based on residence and 85 percent were based on marriage. In 2008, due to the fear of seeing immigrants' rights restricted, naturalisation increased by up to 40,000; the majority still being due to marriage. In 2009, for the first time, naturalisation based on residence reached 57 per cent of all concessions for citizenship.



**Figure 10: Naturalisation by residency and through marriage in Italy 1999-2009 (ISMU, 2011)**

The Security Act 2009 included a reform of citizenship acquisition by marriage. To prevent marriages of convenience, the duration of marriage required for couples resident in Italy was raised from six months to two years and evidence of the persistence of the bond was made explicit. The possibility for an illegal immigrant to marry an Italian citizen was abolished. As a result, the number of naturalisations by

marriage is expected to further decrease. However, the differences between the requirements for naturalisation by residency and by marriage are clearly evident in Italy: 10 years for residency and 2 for marriage. The clear preference for spouses highlights one of the characteristics of Italian citizenship that Giovanna Zincone calls *familismo* (Zincone, 2006). Family links are the bases of a citizenship that implements *ius sanguinis* and facilitates to the highest degree the acquisition of citizenship through marriage.

The 1992 law restricted the application of the *ius soli* principle by adding continuity and legality of residence as further requirements for children born in Italy. In 2007, the centre-left government passed two circulars that relaxed these supplementary requirements. But the current centre-right government intends to reintroduce them and to add more restrictive measures. While it is still difficult for minors born or educated in Italy to become citizens, descendants of a single emigrant can keep Italian citizenship and add it to that of the place where they reside.

The 1992 Act also triggered a long series of reacquisition programmes for expatriates and their descendants who may have lost Italian nationality unintentionally. The last was approved in 2006. The 1992 Act also favoured Italians abroad by definitively establishing the principle of dual nationality. The 2006 Reacquisition Act introduced a language and cultural knowledge requirement for the first time.

In the last twenty years, citizenship has become a contentious issue. The law of 1992 was voted unanimously, both in the Senate and the House of Deputies, as at that time citizenship was not an issue. The same unanimity occurred for the subsequent provisions concerning the reacquisition of citizenship by aliens of Italian origin residing abroad who had lost their Italian citizenship. The naturalisation of immigrants, however, has become a territory of conflict and the parliament has not been able to approve any major legislation on this issue.

The idea of reforming nationality law had some resonance in the press in 1999, when the then Minister of Social Affairs made an attempt to change the law (Garbesi, 1999). According to the proposal, immigrant parents would be able to request that their children born in Italy could acquire Italian nationality when they reached the age of five. It was proposed that parents should also be required to have eight years' legal residence in Italy at the time of the application. The project at the end was not approved.

In 2006, the Minister of the Interior proposed reforms to the nationality law. The proposal on the one hand reduced the residency requirement to five years, but on the other hand introduced a language requirement and reinforced the formalisation of the oath of allegiance. The same minister created a commission in charge of drafting a chart of shared values (*Carta Dei Valori, Della Cittadinanza E Di Valori*, 2007). The project of legislation on citizenship included the possibility of acquiring Italian nationality after ten years without any language requirement. The end of the centre-left government concluded the parliamentary path of this bill.

More recently, in 2009, a bipartisan bill was presented (Saburri and Granata, 2009). The bipartisan bill was subscribed to by 50 MPs from all parties in parliament, with the exception of the right-wing Northern League, which strongly opposed the reform. This bill aimed to reduce the residency requirement, facilitate the acquisition of nationality by minors born and/or educated in Italy, and introduce in Italy some elements of *ius soli*. As a response, however, another bill has now been presented by the *Popolo della Libertà* (party of the Prime Minister). This bill is much more restrictive: it increases the preconditions for children born in Italy to foreign parents to become citizens. At the age of 18 a person born in Italy to foreign parents can ask for citizenship only if he/she has attended, in a satisfactory way, recognised Italian schools. Moreover, it states that for foreigners to become Italians they should, among other things, take part in a course on Italian history and be integrated into Italian society. At the present time, the Parliament has not approved any reforms and the issue remains a territory of conflict.

Italian citizenship continues to be based on *ius sanguinis*. The country's history of emigration seems to influence citizenship more than its present and future position as a country of immigration. The family remains central in the construction of Italian citizenship: *ius sanguinis* and the smooth process for naturalising spouses demonstrate that family links provide the main routes to citizenship. The history of Italian citizenship highlights also the importance that ethnicity and common blood plays in the construction of the Nation.

The Italian citizenship legalization is still mirroring an emigration past that is however far from the current reality. In a similar way the presence of a large number of immigrants has not led to the adoption of coherent multicultural or integration policies. Only at the local level some multicultural policies have been adopted but they appear more a collection of examples than a multicultural policy (Allievi, 2010; Grillo and Pratt, 2002).

### **3.3. Conclusion**

Analysis of the citizenship histories of the United Kingdom, Germany and Italy highlight the different elements that constitute national identity in these three countries. In the United Kingdom, during the time of the British Empire, citizenship was based on *ius soli*. When the Empire ended, a progressive history of exclusion of commonwealth migrants from citizenship started. This practice has been clearly linked to race. In recent years, British national identity has been described as an identity based on common values. The introduction of a knowledge and language test to acquire citizenship marks the adoption of a form of cultural citizenship. British citizenship has moved from imperial citizenship to a restrictive cultural citizenship, passing through an attempt to exclude people on the basis of race.

In Germany, citizenship has been historically based on *ius sanguinis* and common ethnicity. In recent years, however, citizenship has become more open and some



elements of *ius soli* have been introduced. Like the United Kingdom, Germany has recently introduced tests on culture and language to assess the cultural integration of prospective citizens. Germany has moved from ethnic citizenship to cultural citizenship.

Italian citizenship has remained tied to Italy's emigration history and continues to be based on *ius sanguinis*. Various attempts to reform it have not been successful. Neither bills that have tried to introduce *ius soli* nor ones that were intended to introduce culture and language tests have succeeded. Italian citizenship seems to be trapped in the past, and if and how it will change is still unclear. The family remains central in the construction of Italian citizenship: either through *ius sanguinis* or through marriage. Citizenship in the Italian context seems to be grounded in the country's past, focused on family and ethnic similarity.

In the next chapter, links between these different national identities and adoptions across identity borders will be explored. Analysis of the ways in which adoption has been and is regulated in the three countries, and examination of the different approaches to the identity of adopted children will be presented in the light of the diverse national identities of these countries.

Chapter 4: Adoptions across identity borders and the right to  
cultural identity in England, Germany and Italy.

## **4.1. Introduction**

In this chapter, I present the development of adoption legislation in England, Germany and Italy and the social narratives that have influenced it. At the same time I analyse the origins of the right to identity in the three contexts. I then examine how adoptions across identity borders have been regulated and debated in these three countries.

## **4.2. The legal development of adoption in England, Germany and Italy: different social narratives and different rights**

Adoption is a social phenomenon that has been practised well before acquiring a legal recognition. Every country has its own history in relation to the legalisation of adoption. Analysis of the development of adoption legislation underscores the ways in which social narratives on children, identity, families and solidarity have changed during the years. The history of English, German and Italian adoption legislation highlights the profound social changes that have occurred in the last 100 years. The study of this legal development helps to put into context the issue of the right to cultural identity. Only recently, the problem of children's right to identity, both personal and cultural, has become part of the debate on adoption.

Throughout history adoption has been used to fulfil different aims, the interests of the child being just one of them – and for many decades, not the prevailing one. Jack Goody, in his research on the history of adoption, identifies three main reasons why adoption is used: to provide homes for orphans, illegitimates and children of impaired families, to provide childless couples with descendants and to provide an individual or couple with an heir to their property (Goody, 1969, 57). These three functions can overlap.

Analysis of the history of adoption legislation in the three countries considered underscores how these three reasons have shaped the development of legal adoption and how adoption laws reflect the current social narratives about children and family. The issue of the right to identity of children started to be discussed in correspondence with a change of social narratives about children and family. In England, Germany and Italy, the ways and the extent to which this phenomenon has happened varies greatly. This variety stems from multiple elements, such as the immigration history of the countries and the social narratives on children, identity and family.

#### ***4.2.1 Early 20th Century: the origin of legalised adoption.***

In the three countries analysed, the origin of legalised adoption is diverse. In England, adoption has been legalised since 1926 to protect adoptive parents from biological parents' demands. In Germany, adoption was legally recognized for the first time by the Civil Code of 1900. In this context, the aim of adoption was to provide adoptive parents with an heir. Similarly, in Italy, adoption was introduced in the Civil Code in 1865. At that time, adoption was used only for people above the age of 21. As in Germany, the aim of adoption was to provide heirs for childless families.

In England, common law did not recognise adoption (Brosnan, 1922; Huard, 1965). E. Wayne Carp argues that opposition to the practice derived from a desire to protect the property rights of blood relatives and a moral condemnation of illegitimacy. Other systems, such as apprenticeship and voluntary transfer, allowed the movement of children from one family to another (Carp, 2002, 3). In reality, however, *de facto* adoptions were happening, and by the late 1800s, children's charities had started to organise some kinds of adoption. These informal practices were meant to provide homes for orphaned or abandoned children and to provide children for childless families. The National Children's House and Orphanage, for instance had started

approving families to take care of children living in residential centres by 1892. By 1920, over 260 adoptions had taken place (Turner and Elliott, 1992, 7).

During the 1920s, the first two adoption societies were created: the National Children's Adoption Association (NCAA) and the National Adoption Society (NAS). Adoptions were still made in a context of absence of legislation, and adoptive parents were, therefore, without any legal protection. The associations openly stated that, although the biological parents were asked to sign a document to certify the fact that they were giving up their child, in reality no parent could legally do that (Keating, 2009, 47). Children's health was controlled before they were admitted for adoption, and secrecy and discretion were emphasised throughout the process.

The lack of legal recognition resulted in the absence of rights for the adoptive parents. This deficit of protection resulted in many adopted children being removed by their birth parents for the purpose of gaining peculiar advantages. In 1920, a special committee chaired by Sir Alfred Hopkinson was instituted to reflect on the need for legal provision on adoption (Hopkinson Report, 1921). The Committee observed that the practice of *de facto* adoption would continue irrespective of the legal recognition of adoption. However, the committee noted that many suitable people were deterred from coming forward to adopt a child for fear of subsequent claims by the biological parents. In the end, the committee concluded that adoption was a growing phenomenon that was best regulated.

The publication of the Hopkinson Committee report was followed by a long period of legislative inaction. In 1924, the Government decided to appoint another Committee to report on the need for an adoption law.

The Tomlin Committee reported in 1925. The new report was less positive about the need to regulate adoption. It doubted that lack of regulation could be a deterrent for people willing to care for a child. It also assumed that the increase of *de facto* adoption was a transitory phenomenon due to the post war situation. The committee,

however, recommended modifying the law to enable a parent to transfer to another his parental rights. At the same time, however, it warned that adoption, if introduced, should be used with caution.

The Hopkinson and Tomlin reports differed in relation to the general attitude towards adoption: more positive in the former and more negative in the latter. The Hopkinson Committee recommended that the child should have full succession rights to the properties of his/her adopting parents, while the Tomlin report suggested that no succession rights should be guaranteed. Moreover, the Hopkinson report included court powers to dispense with parental consent in cases of neglect or where the child was being brought up in circumstances likely to result in serious detriment to the child. The Tomlin Committee was, on the contrary, more prudent in relation to the possibility of prescinding from the biological parents' consent.

The Tomlin report was the basis for the 1926 Adoption of Child Act. This Act marked the birth of English adoption law. The 1926 Act essentially provided, as Stephen Cretney notes, a process whereby, with minimal safeguards supervised by the court, a civil contract was registered and recognised (Cretney, 1998). There was no change to the child's legal status, but the adoptive parents gained some protection from claims by the biological parents. In this sense, adoption was analogous to guardianship<sup>17</sup> (Lowe, 2000, 313). Adoptions remained a transaction between natural and adoptive parents, in which the court's task was to register the agreement.<sup>18</sup>

In this first phase of adoption, adoptive parents could choose the child they wanted

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<sup>17</sup> The adoption order did not affect rights of property or succession. The origin of legal adoption in England was not related to the adoptive parents' interest to have an heir to their property. This marks a profound difference from the history of adoption in Germany and Italy, where guaranteed succession was the main aim of legal adoption. In England, freedom of testation allowed people to arrange financial provision for a child independently of his or her legal parentage. In this way, for instance, illegitimate children could be provided for even if they were not part of the family. The succession rights of adopted children were introduced only with the Children Act 1975.

<sup>18</sup> The 1926 Act was not very successful in changing the situation of *de facto* adoptions. Ten years after the Act came into force, only one third of adoptions was given legal effects through the 1926 Act (Cretney, 1998, 190). Both the number of *de facto* and legal adoptions increased. From 1927 to 1968 the number of adoption orders continued to rise, increasing from 2943 in 1927 to 24,831 in 1968.

to adopt. Physical similarity between the child and the adoptive family was often the main criterion for the selection (Keating, 2009, 158). Adoptive couples were often sterile, and adoption represented their opportunity to create a family. Secrecy and the selection of children that could appear to be their biological children allowed adoptive parents to be perceived as “normal” families with biological children.

In Germany, the first piece of legislation dealing with adoption was passed in 1900. Adoption was constructed as a contract between biological and adoptive parents (Bosch, 1984). Under the German Civil Code of 1900, however, an adoption order did not terminate the relationship with birth relatives, and adoptive children could be excluded from inheritance by the relatives of their adoptive parents. Moreover, the law stated that only people without legitimate descendants could adopt and fixed the minimum age for adoptive parents at fifty years (Brosnan, 1922, 334).

The first adoption legislation in Italy was the Civil Code of 1865. The introduction of adoption into the legislation provoked intense debate. The Minister Pisanelli, for instance, stated that adoption should not be allowed, as he contended that it was irrational to change, through the law, the real status of a person (Gianzana, 1887, 29). Under this legislation, the adoptive parents were required to be at least 50 years old and to have no descendants, and the adoptee had to be at least 18 years old. Adoption was, therefore, excluded for children, and it was designed as a contract between two adults, i.e. the parent and the adopted person. The adoptee was not presumed to have terminated ties with his/her biological family. As in Germany, the main aim of adoption was to provide an heir for people without legitimate descendants.

In this first phase of adoption laws, the interests of adults were at the centre of the adoption procedure. In England, protecting the interests of the adoptive parents from the biological parents produced the first legislation. In Germany and Italy, adoption was a procedure intended to make possible the passage of properties from childless persons to the adopted. The security of properties was the main aim of adoption. In all three countries, adoption was a contract between adults. In this phase children

were still seen as properties that biological parents could pass to adoptive parents. Even if children were passed from biological parents to adoptive parents the adoption did not change their status nor their relationship with the biological parents: blood ties remained central. In Germany and Italy, the relationship between an adopted person and his/her biological family was not interrupted. In England, even though the adoption contract provided some protection for the adoptive parents against interference by the biological parents, it did not change the status of the child. In all three countries the prevailing social narrative was that the blood relationship between parents and children could not be cancelled. Even in England, where the need to avoid the stigma of illegitimacy and the interest of infertile couple to have a child caused the emphasis on children's resemblance to the adoptive parents, adoption did not change the legal status of the child.

#### ***4.2.2. Mid 20th Century: between the orphans crises and ideology.***

During the First and Second World Wars, the adoption legislation of England, Germany and Italy was changed. In England and Italy, parliaments changed the adoption law to face the increasing numbers of war orphans and rising illegitimacy. In England, the adoption process became more structured, and consent to adoption started to be given without the identity of the adoptive parents being known. In Italy, children began to be adopted, but adoption did not change its fundamental nature. Adoption remained a contract between biological and adoptive parents and did not cancel the relationship between the biological parents and the child. The aim of adoption continued to be to grant an heir to childless people. In Germany, adoption was transformed by the Nazi regime. Racial criteria became decisive factors influencing the adoption process (Mouton, 2007).

In England, illegitimacy became particularly acute, and adoption started to be seen as a way to solve what was perceived as a social problem. Illegitimate children were usually adopted as babies: in 1951, 36 % of the adopted children were babies under 1 year of age. By 1968, this percentage had risen to 51 per cent of all adoptions.



Besides illegitimate children, other adoptions were by step-parents: this number remained constant throughout this period; in 1951 there were 3,606 step adoptions, while in 1968 there were 4,479. A small percentage of children were adopted from local authority care. In 1952 these amounted only to 3.2 per cent (Lowe, 2000, 318).

Increasing numbers of adoptions produced the need for an adoption service. In 1939, the Adoption Child Regulation Act amended the adoption legislation, creating the first adoption service structure. The 1949 Act further expanded these provisions and, most importantly, provided that the adoption order could be given without the biological mother knowing the adoptive parents' identity. This change marked a major shift in the importance of the birth mother and her ability to assess the suitability of the adoptive parents. As noted by Stephen Cretney, the diminishment of the role of the birth mother in relation to the identification of the adoptive parents, lessened the idea of adoption as a contract (Cretney, 1998, 192).

The adoption process continued to be pervaded with secrecy, and adoption families were intended to mirror birth families. As Erica Haines and Noel Timms have noted, secrecy served to preserve certain social standards of morality and to protect the reputations of individuals (Haines and Timms, 1985, 77). Adoption was used as a way to escape the stigmas of infertility and illegitimacy (Wegar, 1997, 37).

In Italy, the increasing numbers of war orphans and illegitimacy led to the modification of adoption. The 1942 code included the possibility of adopting a person under 18 years of age.<sup>19</sup> The adoptive parents had to be more than 50 years old and be without other children. The biological parents of the child were asked to give their consent to the adoption (Trabucchi, 1988, 9). Adoption maintained its contractual nature. The adoption of the child did not interrupt the relationship between biological parents and their child. Some obligations and rights between them remained, as, for instance, the biological parents' obligation to provide for their

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<sup>19</sup> Even before the adoption of the new Civil Code, the legislator had to allow some adoption of children in response to the increasing number of war orphans. In 1917, 1919 and 1940, laws were passed to permit the adoption of war orphans (Baviera, 1965, 203; Cicu, 1954).

children continued. The child continued to use his/her surname, and the adoptive parents could decide to revoke the adoption if the child behaved in an ignoble way (Ruperto, 1958, 598).

To confront the increasing number of children in need of a family due to the war and illegitimacy, the Italian legislator introduced *l'affiliazione*. The 1942 code introduced this new procedure as a way to provide assistance to children in need. Affiliation was also called “small adoption”, as it did not have the same effects as adoption. The aim was to provide children in need, often illegitimate children, with some sort of protection. The child did not change his/her status and the *affiliazione* ended when the child reached the age of 21. Between 1942 and 1961, 43,463 “small adoptions” were made, and in the 1950s, every year more than 2,500 “small adoptions” took place (Santosuosso, 2005).

In Italy, during the period between the two World Wars, the nature of adoption did not change. Even though it was extended to children, the adoption process retained its contractual nature and its aim remained to provide an heir for childless people. Secrecy was not part of adoption, and adopted children did not interrupt their relationship with their biological family. The dominant social narrative was still related to the supremacy of blood relationships in the creation of families so that adopted children continued to retain relationships with their biological parents.

In Germany, prior to the First World War, adoption was scarcely used, as around 100 adoptions per year were taking place. Moreover, the majority of these adoptions were among relatives (Lange, 2000, 74; Leggewie and Sichtermann, 2003, 54). The high number of orphans created by the war brought adoption to the nation’s attention. This interest, however, did not last long, and the number of adoptions remained very low (Mouton, 2007, 246).

Generally, couples interested in adopting were helped by religious organisations, which took care of single mothers wanting to give their children to another family. Both Catholic and Protestant churches had adoption centres. In Dortmund, the

Central Authority for Jewish foster homes and mediation of Jewish Adoptions worked to facilitate the adoption of Jewish children. Religious organisations in the adoption process emphasised religious matching.

When the Nazis came to power in 1933, the regime modified the adoption system. They cut the state funds to all religious and secular charities working in children's welfare. At the same time, they centralised and monopolised child welfare programmes. The National Socialist policy of unifying and controlling adoption did not, however, succeed in attaining a complete monopoly over adoption procedures. Religious organisations continued to arrange adoptions, putting emphasis on the religious elements (Mouton, 2007, 270).

The 1939 adoption law created an adoption system based on racial discrimination. Jews and other "racial inferiors" were excluded from adoption (Runderlass des Reichs Minister des Innern, 1937). New requirements were added to the adoption process to guarantee that the adoptive parents and the child were "racially pure". The process became a lengthy and very elaborate procedure.

After the end of the Second World War and the defeat of the Nazi regime, the legal system of adoption remained unclear. It was not clear if the 1939 adoption law was still in effect. The Military Government's Law Number One abrogated all the laws that were Nazi in character or content. However, no list of the abrogated laws existed and the status of the adoption law remained ambiguous. After some time, the U.S. Military Government announced that the 1939 law remained in effect. The decision to keep the Nazi law reflected the current situation of adoption in the United States, where racial matching was the norm (Fehrenbach, 2005, 138).

### ***4.2.3. Late 20th Century: the best interest of the child and adoption.***

The 1960s, 1970s and 1980s were years of immense social change in all Europe. The attitude towards illegitimacy, the legalisation of abortion and the use of contraceptives, changed completely the world of adoption.

In England, the number of illegitimate children available for adoption decreased dramatically. In 1970, the adoption of babies represented only 39 per cent of the total number of adoptions, and in 1998, the number dropped to only 4 per cent (Lowe, 2000, 319). The major change, however, happened in relation to the adoption of children in care. The continued demands by infertile couples for children to adopt and the realisation that many children were spending most of their childhood in institutions made local authorities and adoption agencies willing to use adoption as a means to secure a family for children in care. In 1952, the percentage of adoptions from care was 3.2 per cent of all adoptions, while in 1968 this percentage rose to 8.7 per cent.

In 1969, a new committee to review the law and policy on adoption was created. The Houghton Committee affirmed for the first time the centrality of children's welfare in the adoption process and encouraged the use of adoption as part of the child's protection system. Further recommendations were that statutes should prescribe basic conditions for eligibility of adopters, and that biological parents should be entitled to remain anonymous so far as the adopters were concerned. It also suggested the introduction of a new procedure of freeing a child for adoption. The freeing order enabled biological parents to renounce their parental rights before the child was placed for adoption. The Houghton Committee advised the introduction of custodianship orders, which were intended to provide an alternative to adoption in cases where the absolute and exclusive effects of adoption were not deliverable.

The Children Act 1975 and the Adoption Act 1976 put into effect most of the recommendations of the Houghton Committee. The Adoption Act 1976 represented a radical change in adoption legislation. Section 3 of the Children Act 1975 stated that in reaching any decision relating to the adoption of a child, the court or an adoption agency should have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child through his childhood. For the first time, the interest of the child became central in the adoption process.

Adoption developed into a public procedure, and adoption placements with non-relatives directly, or through a third party between biological parents and prospective adopters, were prohibited.<sup>20</sup> Already, the 1926 Act had given the courts discretion to dispense with the consent of a person if he or she was a person whose consent ought, in the opinion of the court and in all the circumstances, to be dispensed with (The Adoption of Children Act, 1926, s 2 (3)). However, the courts made limited use of their authority to order adoption without the agreement of the parents: the First Report to Parliament on the Children Act 1975 reported that only 6 per cent of orders were made in this way (HMSO, 1979, 268). However, with increasing public interest in adoption, the requirement for parents' agreement changed, making it easier to make adoption orders without their agreement. In 1949, the law changed to allow the courts to make an adoption order when the biological parents were withholding their agreement unreasonably. The Adoption Act 1976 provided that an adoption order could be made if each parent freely, and with full understanding of what was involved, agreed unconditionally to the order. Judges were provided with the power to make an adoption order in the absence of the agreement of the parents.

The Children Act 1975 also changed the procedure through which biological parents gave their consent. The Adoption Act 1958 provided that parental consent be given only in relation to a specific adoption. In 1975, this procedure was changed and a

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<sup>20</sup> These types of adoption were relatively common before this Act. A survey of adoption applications in 1966 discovered that 11 per cent of the adoptions were arranged directly between biological and protective parents, and 6 per cent were arranged through third parties. The remaining 82 per cent were agency placements (Grey and Blunden, 1971).

new procedure of freeing for adoption was introduced. The freeing order enabled parents to relinquish their parental rights at an early stage in the adoption procedure. The child could be “freed” for adoption, and only subsequently could an adoption order be made, without any further evidence of parental consent. Biological parents lost their right to consent to a specific adoption. The change in position of biological parents reduced the concept of adoption as a contract between biological and adoptive parents. For the first time, adoption was constructed as a protection measure for children,

Section 12 (6) of this act allowed courts to attach conditions to adoption. This enabled judges to moderate the effects of adoption by granting continued access to biological parents or other members of the family of origin. At the same time, it introduced the right of an adopted person to obtain a copy of their original birth certificate, marking an important step in recognising the right to identity of adopted people. Since the Children Act of 1975, all adopted persons over 18 years of age have had the right to access their original birth certificates. The Adoption Act 1976 was implemented only in 1988. After the Children’s Act 1975, adoption lost part of its contractual nature and the interests of children became more relevant. The increased relevance of the interests of the child corresponded with recognition of a right to personal identity.

In Germany, the end of the Second World War led to the separation of the country. Following the occupancy, the Deutsche Demokratische Republik (DDR) and the Federal Republic of Germany (FRG) returned to the 1900 Civil Code. In the DDR, adoption law was subsequently changed in 1965 and 1975. As a result of these changes, adoption altered the status of the child who was to become the child of the adoptive family, and the consent of the biological parents was needed. In reality, however, numerous adoptions were made without the consent of parents: adoption was used as a method to dissuade biological parents from escaping from the DDR or from opposing the regime (Rolff, 2010).

In FRG, adoption law remained regulated by the 1900 Civil Code until 1976. Already in 1950 the minimum age of adopting parents had been lowered from 50 to 35. In 1973, the age of adoptive parents was further lowered to 21. Adoption, therefore, changed from a system providing adults with an heir, to a system providing a family for children.

The main change in German adoption law arrived in 1976. Full adoption replaced simple adoption and therefore, through adoption, children obtained the same status as children of the adopting parents (Hoffman-Riem, 1990). The 1900 Civil Code was also amended to dispense with parental consent for the adoption of children who had been abused or neglected (Bürgerliches Gesetzbuch (Bgb), Book I, Part II, Title VII). Adoption lost its contractual nature and became a way to provide a child with a family. Secrecy remained part of the adoption process, and adoption families were constructed to mirror birth families.

In Italy during the 1960s, public opinion started to perceive the situation of children in institutions as something that should be modified. In this context, new legislation for adoption was approved in parliament with the vote of all the parties. The Adoption Act of 1967 revolutionised the concept of adoption. The law stated that a child had a right to a family and introduced the *adozione speciale* (special adoption), which allowed married couples to adopt children under eight years of age and lacking material and moral assistance. For the first time, adoption was clearly linked with the concept of creating a family. The *adozione speciale* ended every legal relationship between the adopted child and the biological parents. The law was intended to resolve the terrible situation of children in orphanages and institutions.

Adoption was further modified in 1983, when the first regulation for inter-country adoption was introduced and the *adozione speciale* was extended to all children and renamed *adozione legittimante*. The introduction and then expansion of the *adozione speciale* marked a fundamental change in the history of adoption in Italy. Adoption became a way to provide a child with a family, and the interests of children became

the focus of the adoption process. Secrecy remained a central aspect of adoption and the relationship between the biological parents and the child was interrupted.

During the 90s and first decades of the twenty-first century, adoption legislation in the three countries experienced further development. In England, Germany and Italy, the issue regarding the adopted child's right to identity became more evident. The extent to which these rights have been recognised in the three countries varies significantly.

In England, the right to access the birth certificate and information about adoption had already been granted in 1976. In 1989, however, the 1989 Children's Act established the Adoption Contact Register. In this register, adopted adults and biological parents could have their names and addresses recorded: in cases in which both parties decided to have their information registered, the adopted person would gain access to the name and address of the biological parents. Later on, the Adoption and Children's Act of 2002 gave limited rights to biological parents to seek information about their adopted children, subject to the consent of the adopted person.

In Germany, according to the Civil Code, no information about the adoption of a person can be released without the agreement of the adoptees and the adopted person. Birth certificates mention only the names of the adoptive parents. The secrecy rule has been relaxed for adoptees. In Germany, the Federal Constitutional Court in 1989 stated that each person has a constitutional right to know his or her biological origins (*Bverfge 79, 256, 1989*). Therefore, a 16-year-old person may access the public register to look for information about his/her biological parents and may see his/her adoption file.

In Italy until 2001, adopted persons did not have any rights to know their biological identity. Finally, in 2001, an amendment of the adoption law recognised the child's interest in tracing his/her origin. Adoptees may, upon reaching the age of 25 years, have access to such information. The 25-year age limit is quite curious, since the age



of majority is reached at 18; the legislator, therefore, considers the issue to be so significant that the normal age of majority is not enough. If the adoptee can show serious grounds pertaining to his/her physical or mental health, he/she may have access to the records upon reaching the age of majority. To obtain access to the records, the adoptee must always apply to the juvenile court. However, no information can be provided if the child was not recognised by his/her biological mother, or if one of the biological parents has agreed to the adoption under the condition of anonymity.

The right to information about biological parents is now regulated in all three countries analysed. However, England has been the first to give adopted children the right to obtain the original birth certificate. Compared with the English and German experience, in Italy recognition of adopted children's right to know has been slower and more limited.

The diverse histories of the recognition of adopted children's right to know the identity of the biological parent mirror the ways in which adoption is perceived. Secrecy is closely linked with the idea of adoption as a legal fiction through which a child would be integrated into a family "as if" he/she were the biological child of the adoptive couple.

The issue of the right to know the identity of biological parents and to make contact with them was the first legal step towards recognition of the importance of cultural identity in the development of children's identity. In England, the campaign for same race adoption and the right to cultural identity in the 1980s resonated with the early movement for the "right to know" (Cohen, 1994, 59). Both rights are based on a genealogical model of identity based on inheritance and blood.

Paradoxically, however, even the idea of secrecy in relation to adoption is based on the supposed importance of blood relationships. As noted by Barbara Yngvesson (2010, 175), the legal fiction of adoption as a clean break between the child and the biological parents, and a new birth in the adoptive family, reinforces the idea that

blood ties are so strong that adoption is possible only if links with biological parents are completely removed.

### **4.3. Adoptions across identity borders in England, Germany and Italy**

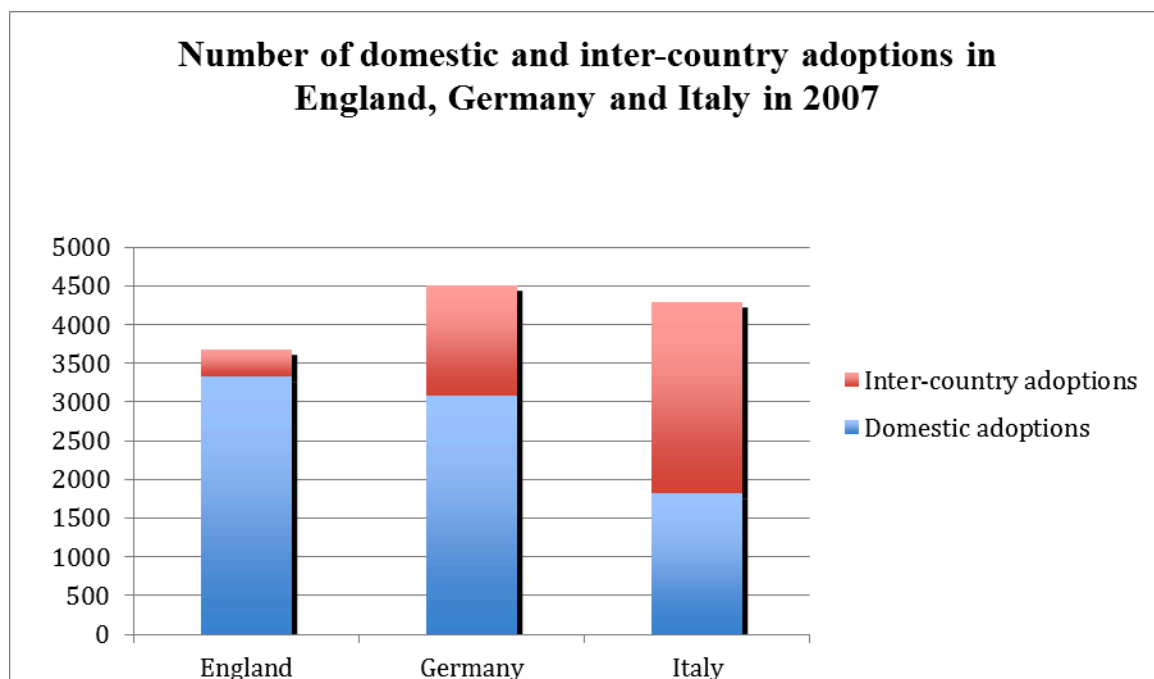
The history of the legal development of adoption and the right to personal identity in England, Germany and Italy demonstrate the fact that in all three countries children's interests have been, for many decades, at the margin of adoption. Similarly, the right to identity has only recently become part of the adoption discourse. England was the first of the three countries analysed to give the right to access information about biological parents; Italy, on the contrary, has been the last and the one that imposes more limitations on this right.

In England, Germany and Italy, the phenomenon of adoption, and particularly adoption across identity borders, has diverse histories. In these three countries, adoption has developed in different ways, and the number and types of adoptions across identity borders varies. In England, the majority of adoptions are domestic: in 2007, 3,330 adoptions were domestic, while only 356 were inter-country adoptions. In England, the great majority of adoptions are domestic adoptions of children in the care of the state. In Germany, the majority of adoptions are still domestic, but the number of inter-country adoptions is higher. In 2007, domestic adoptions totalled 3,077, while inter-country adoptions came to 1,432.<sup>21</sup>In Italy the majority of

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<sup>21</sup> In Germany, the statistics do not differentiate between domestic and inter-country adoption. Adopted children are categorised as children with German citizenship or children without German citizenship. Statistics for adoption of children without German citizenship are generally considered to be the number of inter-country adoptions. However, prior to the citizenship reform of 2000, the second generation of migrants did not have German citizenship. It is, therefore, possible that non-German children lived in Germany for many years and were, at least in part, culturally German. It is necessary to keep in mind the extreme restrictiveness of German citizenship in the past when interpreting this data. In the German legal system, adoption of a foreign child resident in Germany is a national adoption. The principle of residency is used by the majority of the countries, and it is also employed by the Hague Convention on Inter-country adoption, which, for instance, uses residency as a criterion to determine if an adoption is domestic or inter-country (Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions, 1993). I will also use the statistics of Germans, and not Germans' children, as a proxy for domestic and inter-country adoption,

adoptions are inter-country adoptions. In 2007, inter-country adoptions totalled 2474, while domestic adoptions came to 1815.



**Figure 11: Number of domestic and inter-country adoptions in England, Germany and Italy in 2007 (Department for Education, 2012; Istituto Nazionale di Statistica, Istituto Nazionale di Statistica; 2007b; Office of Statistics, 2010a; Statistisches Bundesamt Deutschland, 2007b)**

The diverse percentages of domestic and inter-country adoptions in these three countries correspond to the different availability of children for adoption and attitudes towards inter-country adoption. In Germany and Italy, the reduction in availability of children for domestic adoption has resulted in an increase in inter-country adoptions. England is atypical, and the number of inter-country adoptions has remained low, even when domestic adoption has decreased. One possible explanation for the limited number of inter-country adoptions in England could be the heated debate arising from trans-racial adoption in this country, and the related possible hostility to this practice on the part of social workers (Hayes, 2000).

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remaining aware that adoption of German children is clearly domestic adoption, and that the majority of adoptions of non-German children are likely to be inter-country adoptions.

The phenomenon of inter-country adoption in the three countries analysed has gone through enormous changes in the last 40/50 years. After the Second World War, many children from these three countries were sent to the United States for adoption. As late as 1967, adoption of English, German, and Italian children amounted to 40 per cent of all inter-country adoptions by Americans (Altstein and Simon, 1991, 14). By 1969, Italy stopped being a country of origin of adoptions by Americans, and England followed in 1971. German children continued to be adopted in the United States of America until 1975. Since the 1980s, England, Germany and Italy have become countries of destination for inter-country adoptions.

As noted at the end of chapter 2, both domestic and inter-country adoption may involve crossing identity borders. Inter-country adoptions habitually cross identity borders. Domestic adoptions cross identity borders only when the country is not homogeneous and adoption takes place across the borders of different groups.

Among the three countries analysed, England is the only one where the issue of the right to cultural identity of adopted children has been discussed, largely in relation to domestic adoptions. Since the 1950s, the issue of the adoption of ethnic minority children in England has triggered intense and heated debate.

In England, the number of ethnic minority children in care is quite high. In 2009, for instance, 12% of the children adopted domestically belonged to an ethnic minority, while the remaining children were classified as white (Department of Children Schools and Families, 2009).

Ethnic group	% Children looked after in 2008	% Children under 18 in the general population in 2008
<b>White</b>	<b>74</b>	<b>86,5</b>
<b>Mixed heritage</b>	<b>8</b>	<b>3,2</b>
<i>Caribbean/white</i>	<i>3</i>	<i>1,2</i>

<i>African/white</i>	<i>1</i>	<i>0,3</i>
<i>Asian/white</i>	<i>1</i>	<i>0,9</i>
<i>Other mixed</i>	<i>3</i>	<i>0,7</i>
<b>South Asian</b>	<b>5</b>	<b>6,6</b>
<i>Indian</i>	<i>1</i>	<i>2,4</i>
<i>Pakistani</i>	<i>1</i>	<i>2,5</i>
<i>Bangladeshi</i>	<i>1</i>	<i>1,0</i>
<i>Other Asian</i>	<i>2</i>	<i>0,6</i>
<b>Black/black</b>	<b>8</b>	<b>3,0</b>
<b>British</b>		
<i>Caribbean</i>	<i>3</i>	<i>1,2</i>
<i>African</i>	<i>4</i>	<i>1,4</i>
<i>Other black</i>	<i>1</i>	<i>0,4</i>
<b>Chinese</b>	<b>0</b>	<b>0,4</b>
<b>Other Ethnic Group</b>	<b>2</b>	<b>0,4</b>

**Figure 12: Ethnic origin of children looked after in England in 2002 and of children under 18 in the general population. Source (Department for Education, 2008)**

The figures of children looked after in 2008 demonstrate that mixed heritage and black children are clearly over-represented in the care population (see Figure 12). However, ethnic minority children are clearly under-represented in those adopted from care (Selwyn and Wijedsa, 2011, 276). In 2005, for instance, only 14 per cent of adopted children belonged to a racial group other than white, although they represented 21 per cent of children in care (Department of Children, Schools and Families, 2007, Annex G).

Analysis of ethnic minority presence among looked after and adopted children is possible only in England.<sup>22</sup> In Germany and Italy, similar statistics are not available.

<sup>22</sup> The obligation to record the ethnic identity of these children was introduced in 2000. Ethnicity is the only identity element reported, while other elements, like religion or language, are not required.

In Germany, statistics register the citizenship of children but not their ethnic origins. Adopted children are classified as with or without German citizenship. In Italy, the only distinction made is between domestic and inter-country adoptions, without specifying the ethnic background of the children.

The numbers demonstrate that in England adoptions across identity borders take place both at domestic and inter-country levels. In the other two countries, adoptions across identity borders certainly take place in relation to inter-country adoptions, while there is no information available to indicate whether similar adoptions take place at a domestic level since no statistic on the ethnicity of children looked after and adopted is collected. However, both Germany and Italy have become multicultural countries due to immigration, and it is therefore probable that a certain number of domestic adoptions across identity borders take place, even if they are not recorded in the statistics. Since immigration to Italy is more recent than immigration to Germany, it is likely that the number of children of ethnic minorities adopted domestically is lower in Italy than Germany. However, in the absence of any statistical evidence, it is impossible to draw any firm conclusions.

Differences in statistical data reflect the diverse approaches to race/ethnicity in the three countries. As discussed in the previous chapter, race/ethnicity has played a major role in the history of British identity and remains an important element of the classification of people. The history of Germany is also closely linked with the issue of race and ethnicity, but after the end of the Second World War and the defeat of the Nazi regime, talking about race became taboo. In the case of Italy, the absence of registration of ethnicity/race of children is probably due to the fact that Italy has more recently become a country of immigration.

#### ***4.3.1. Adoptions across racial/ethnic and religious borders in England.***

England is the only country among the three analysed where the right to cultural identity has been at the centre of heated debate and where legislation has regulated the relevance of race/ethnicity and religion in the adoption process. Section 1 (5) of the Adoption and Children Act 2002 states:

In placing the child for adoption, the adoption agency must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

This article follows section 22 (5) of the 1989 Children's Act, which declares that local authorities, in relation to children looked after by them, should take into consideration the religion, race and cultural and linguistic background of the children. Section 1 (5) of the 2002 Act should be interpreted in relation to section 1 (3), which states that courts and adoption agencies should always bear in mind that any delay in the decision is likely to prejudice the welfare of the child. It is therefore clear that the attempt to match children with adoptive parents of the same religious, racial or cultural and linguistic backgrounds should not result in a major delay in the adoption. The 2002 Act has been reinforced by National Standards, which require preference to be given to ethnic matching as a determinant of placement choice, all other factors being equal.

In the early phase of the history of adoption in England, the issue of religious identity of the adopted child was central in the matching process (Keating, 2009, 52). The common law rule is that the child should follow the same religion as the father or, in the case of illegitimacy, the religion of the mother. The 1926 Adoption Act stated that the father or the biological mother of an illegitimate child could give consent to the adoption subject to a condition concerning the religion in which the child would be brought up.

The conditions of birth parents were considered crucial as the *In re Carroll* (1931) case demonstrates. In this case, an unmarried Roman Catholic mother gave birth to her second illegitimate child and tried to have her adopted. The Catholic adoption agency was not very responsive, and since she needed to return to work as soon as possible, she decided to speed up the procedure. She contacted the Protestant Rescue Society, which made her sign a document confirming the permanent relinquishment of her maternal rights, and gave the child to a protestant couple who signed an agreement that the child would be brought up in the Protestant Evangelical Faith.

The Catholic agency made clear to the biological mother the implications of the adoption and she decided to ask the judges to return the child and place her with a foster mother selected by the Catholic Agency until school age, when she would start her education in a catholic school. The mother would retain the right to have contact with the child. The Protestant Rescue Society opposed the request, and asked for the child to stay with the adoptive family.

The lower court decided that it was better for the child to stay with the adoptive family instead of being placed with a foster mother. The Court of Appeal, however, decided to return the child to the mother, as her wishes with regards to religion were relevant.

The Adoption Act 1976 eliminated the possibility to subject the adoption to conditions. Section 7, however, states that adoption agencies should have regard, as far as is practical, to any wishes of the biological parents or guardians. Under the 2002 Act, the child's religious persuasion had to be taken into consideration when placing a child with an adoptive family.

In cases relating to adoption and religion, judges have to determine whether the religion of a child in the context of adoption is a matter of "blood" or/and a matter of faith.



The case *Re P (A Minor) (Residence Order: Child's Welfare)* (1999), in which a child was placed in foster care with a non-practising Christian couple, exemplifies the ambiguity of religion in relation to children. The placement was expected to be short-term, three to six months at most, and there was no suitable alternative foster placement. The term of fostering lasted for seven years, and the child developed a strong attachment to the foster family. At the time of separation from the biological family she was one year old.

The child was the fourteenth child of an Orthodox Jewish Rabbi and his wife. The father was a survivor of the Holocaust and was detained in concentration camps with his family, many of whom died. The family had a strong tradition of religious and cultural beliefs, which permeated the lives of all its members. The mother expressed it as: "Our religious and cultural heritage is our way of life [...] It is very much at the core of each of our identities." (*Re P (a Minor) (Residence Order: Child's Welfare)*, 1999, 11)

The child had Down's syndrome. The foster parents expressed a wish to adopt the child, but the biological parents objected, wanting a Jewish family to adopt the child. The application by the biological parents was refused by the judge on the grounds that, since the child did not have the ability to appreciate or understand her religious heritage, the benefit to her of a Jewish upbringing did not outweigh other considerations, namely the exceptionally strong attachment of the child to her foster parents and the risk of harm inherent in a move. This decision was reconfirmed in appeal.

Even though the child stayed with the foster family and, therefore, the religious identity of the child was not considered important enough to break up the relationship between the child and the foster family, in the appeal judgment the judge stated that:

No one would wish to deprive a Jewish child of her right to her Jewish heritage. If she had remained with a Jewish family it would be almost

unthinkable, other than in an emergency, to remove her from it. [...] [The child's] birthright is to be Jewish and to live her life in the practice, enjoyment and ultimate fulfilment of her Jewish faith. I accept that as her birthright. She is, and will forever remain, a Jew in this life and hereafter, whatever this court may determine. (*Re P (a Minor) (Residence Order: Child's Welfare)*, 1999, 494)

The above quote highlights the fact that in this case religion is considered a form of genetic inheritance: the child is and will always be Jewish even if she will never fully understand what being Jewish means. It is therefore clear that the fact that the child has developed a strong attachment to the foster parents, and that she had lived with them for many years, was the key element in the judge's decision.

In the English debate on cultural identity and adoption, religion has played a smaller role compared with the predominance of race and ethnicity. Since the 1970s, the debate on adoption across identity borders has been framed as trans-racial adoption, even when differences of religion between adoptive parents and the child existed. On one hand, the term race has been used to indicate all the groups regulated by the Race Relations Act. This definition, as interpreted by the judges in case law, is quite comprehensive. Sikhs and Jews, for instance, have been classified as racial groups (see *Mandla v Dowell Lee*, (1982); *Morgan v Civil Service Commission and the British Library*, (1990)). On the other hand, the racial aspect has often been used to describe adoptions that are also inter-religion adoptions. For instance, the adoption of the child of a mother defined as British Pakistani by a British white couple was presented by The Guardian as a trans-racial adoption, while presumably, it was also an inter-religion adoption (McVeigh, 2008).

Trans-racial adoption has been, and still is, a controversial issue in England. Until the 1970s, black children were generally regarded as unsuitable for adoption or long-term family placement (Thoburn, Norford et al., 2000, 20). However, trans-racial adoption existed. By the mid-1960s, a number of examples of adoption of non-white children by white couples existed, accounting for 3.4 per cent of agency adoptions

nationally, and 7.5 per cent in London (Raynor, 1970, 168). The majority of these were adoptions by foster parents with whom the children had been placed.

By the end of the 1950s, the increasing number of ethnic minority children in care placed trans-racial adoption on the political agenda. The 1958 Adoption Act, for the first time, placed emphasis on the need to extend adoption of “hard to place children”. This category included disabled, older and ethnic minority children. In 1962, the Adoption Committee of the International Social Services of Great Britain started to raise concerns about the number of children of ethnic minorities in care. As a result, they decided to create the British Adoption Project for the purpose of finding permanent homes for these children. This was the first attempt to place black children for adoption. The starting assumption of the Project was recognition of the importance of race matching. The central principle was that children should be placed, whenever possible, in families of the same racial background (Raynor, 1970, 26). The real possibilities, however, were quite limited, and white couples adopted the majority of the children.

Even though some children were placed trans-racially, general opposition to trans-racial adoption remained and many white couples were still being told that there were no children available for adoption. For this reason, in 1971 a group of adoptive parents and prospective adoptive parents formed the Parent-to-Parent Information on Adoption Services, with the aim of acquiring and sharing information on the availability of children for adoption (Gaber and Aldridge, 1994, 17).

In 1973, Jane Rowe and Lydia Lambert published their research on children in care. Their book, *Children Who Wait*, clearly demonstrated that the longer children waited in care the less likely they were to return to a family (Rowe and Lambert, 1973). They also analysed the data on ethnic minority children in care and found that they accounted for one quarter of the total. Trans-racial adoption began to be seen as a way to solve the problem of ethnic minority children in care. At the same time, however, ethnic minority groups, especially African-Caribbeans, started to argue

against trans-racial adoption and to state the importance of keeping children within their racial/ethnic groups.

In 1970, the Home Office gave its official approval to trans-racial adoption in its Guide to Adoption Practice (Home Office Advisory Council on Child Care, 1970). The positive attitude towards this practice was promoted by the increasing relevance of permanency: influential studies pointed to the damage of remaining in the care system without a clear plan for the future (Rowe and Lambert, 1973) and of the instability of foster care (George, 1970). At the same time theories of parenting started to emphasize the importance of psychological over biological parenthood (Goldstein, Freud et al., 1973). These two elements contributed to create the move for permanency that weakened the importance of blood and emphasized the need of stability.

The positive opinion towards trans-racial adoption was also influenced by the lack of ethnic minority adoptive parents, and a number of studies that showed the general success of trans-racial adoption.<sup>23</sup> Theories of child welfare increasingly highlighted the relevance of psychological parenting over biological ties. As a result, the 1975 Children's Act and the 1976 Adoption Act tried to increase the number of adoptions by facilitating the process.

At that time, trans-racial adoption did not generate much opposition due to the fact that the number of social workers of ethnic minority origins was still very low (Kirton, 2000, 17). It has been estimated that 80% of adoptions in the United Kingdom in the early 1980s were ethnic minority adoptions (Charles, 1992, 13). While the official position was clearly in favour of trans-racial adoption, some ethnic minority groups started to make their voices heard. The African-Caribbean community was particularly vocal, and by 1973 there was an increasing tendency for birth mothers to specify that they wanted their children to be adopted by people from the same ethnic background (Gaber and Aldridge, 1994, 18). However, the number of African-Caribbean couples willing to adopt was extremely limited. The

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<sup>23</sup> For instance (Raynor, 1970)

inadequate number of prospective adoptive parents was in part due to lack of information. Moreover, African-Caribbean families were often not fully established in England, and not in a situation to enable the adoption of a child.

In the 1970s, some attempts were made to inform ethnic minority communities about the adoption process, and in 1975 the first campaign to recruit ethnic minority families was launched. The Soul Kids Campaign was meant to persuade West Indian families to put themselves forward as prospective adoptive parents (Coombe and Little, 1986, 170). The campaign managed to find a number of families willing to adopt, but the campaign had a more significant impact on the debate on adoption. It demonstrated that with resources and commitment ethnic minority families could be persuaded to see adoption as an option.

At the same time, the issue of children's identity and the right to know the identity of the biological parents became a central issue in the public debate over adoption. As a result, in 1975 the Children Act allowed adopted children to access their birth certificates. The reasoning of the advocates for the right to know the identity of the biological parents would later be used by supporters of same race adoption.

Between the 1970s and 1980s, race and ethnicity became a focal issue in social work literature. The American position against trans-racial adoption started to echo among English ethnic minorities. Social workers such as John Small argued against trans-racial adoption as a viable solution to the number of ethnic minority children in care (Small, 1982). In the 1980s, trans-racial adoption became subject to open criticism by social workers. In particular, The New Black Family Unit launched an initiative in relation to the recruitment of adoptive parents: the new approach was more ethnically sensitive and less bureaucratic. The experiment had relative success and was used to claim that the lack of ethnic minority adoptive parents was due to institutional racism (Small, 1982, 35). In the same years, the Association of Black Social Workers and Allied Professionals (ABSWAP) started its fight for same-race adoption. It was the beginning of a general attitude against trans-racial adoption among social workers (Fitzgerald, 1981).

The social workers' negative attitude towards trans-racial adoption is proven by numerous studies. In 1999, Suzette Waterhouse and Edwina Brocklesby surveyed foster care practice in five local authorities. The researchers noted that three-quarters of the placements were with foster parents of a racial/ethnic background similar to that of the children (Waterhouse and Brocklesby, 1999). In 1997, Fiona MacCallum indicated that only 24 per cent of the adoptions of ethnic minority children were made trans-racially (MacCallum, 1997). In 1999, Nigel Lowe et al. surveyed the placement of 1557 children over the age of five: 15 per cent of the children were of ethnic minority origins. Only a small proportion was placed trans-racially, and 31 per cent of the total agencies taken into consideration in the study declared that they would not place a child trans-culturally (Lowe and Murch, 1999, 164). In 2000, Ivaldi conducted a similar survey and confirmed that the majority of the children were ethnically matched with adoptive parents (Ivaldi, 2000). Mary Hayes and Catherine Williams noted that social services departments take the view that it is always in the best interest of the child to live with parents of the same racial/ethnic background (Hayes & Williams, 1999, 291). It seems, therefore, that the overall attitude of social workers is – or at least, was - against trans-racial adoption.

A recent report from the Office of Standards in Education, Children's Services and Skills (Ofsted) describes a different situation (Ofsted, 2012). The study is based on nine authorities, where 53 adoption cases were analysed in detail. The study argues that the key factor causing delay in tracked cases was the length of time for care proceedings to be concluded before an adoption plan could be confirmed. A high number of cases had been subject to repeat or late assessments of parents or members of the wider family. The study reports that 11% of the cases analysed (six adoption placements out of 53 tracked cases from four separate local authorities) had been with adopters that did not match the children's ethnic or cultural background. The report states that there is no evidence that local authorities are looking for the 'perfect' or exact ethnic match. In nearly all cases analysed by the study, the racial/ethnic or cultural background of the child did not cause delays (Ofsted, 2012, 33). The report states that the majority of delays are attributable to finding suitable,

or interested, adopters for children with complex needs, or children who were part of larger sibling groups. It seems, therefore, that the delays are mainly due to the length of time of care proceedings, and to difficulties in finding adopters for children with complex needs or children of larger sibling groups. The social workers' attitude towards trans-racial/ethnic adoption appears to be less influential than suggested by previous studies.

The 1989 Children Act gave the first formal recognition to issues of race in relation to children's protection. The Act required the authorities to give 'due consideration' to the 'religious persuasion, racial origin and cultural and linguistic background of the child (Children Act, 1989, s 22, (5), (c)). The meaning of 'due consideration' has been subject to different interpretations: advocates of same-race adoption have interpreted the expression as the legal base of same-race policy, while supporters of trans-racial adoption have claimed that the 1989 Act, in giving due consideration, does not mean excluding trans-racial adoption.

In the English context, the issue of trans-racial adoption has often been discussed in courts. These are cases where the birth parents, the prospective adoptive parents or the social workers are challenging the adoption. Many cases concern children who have already lived for some years with white foster parents and whom the social services or the biological parents want to have removed and placed with families with a similar ethnic/racial background. In the majority of cases, the courts seem to value the stability of the child's situation more than the racial/ethnic factor<sup>24</sup>. This was true before and after the 1989 Act and the legal recognition of the issue of race/ethnicity and religion in relation to children's protection.

In 1983, for instance, in *TL v Birmingham City Council* (1983), the court decided to leave a child of Chinese origin with white British foster parents. W was born in 1974 of Chinese parents in Hong Kong. Just after W's birth, her parents went to

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<sup>24</sup> A striking unusual case is *Re M (A Minor) (Child's Upbringing)* (1996) where a black child from South Africa was sent back to his biological family after having spent some years with his foster mother in the UK.

England and her grandmother (TL) took care of her for six years in Hong Kong. In 1980, the grandmother and W went to England to live with W's parents. However, the reunion with the parents was not successful. As a consequence, the local authority placed W with long-term foster parents. W remained in contact with her biological family, including the grandmother, until 1982, when the local authority decided to end the contact. An adoption procedure was started: the grandmother began wardship proceedings while the biological parents did not oppose the adoption.

During the two years in foster care, W had been exposed to English influences and had responded well, losing most of her Chinese language skills. However, the grandmother had not succeeded in learning the English language.

The Judge held that it was in the best interest of W to live with the foster parents. Therefore there were no grounds for interfering with the local authority's power of decision by recourse to wardship jurisdiction.

Similarly in 1990, *Re JK (Adoption: Transracial Placement)* (1991) an unmarried Sikh mother placed her daughter for adoption at birth. The girl was placed with white short-term foster-parents for three years. She became strongly attached to them. During this time the local authority, in accordance with its policy, tried to place the girl in a family with a similar racial background, but was unable to find a suitable family since in the Sikh community adoptions are rare. The foster-parents applied to adopt. The court had to decide whether the girl should be left in her present foster placement or moved to another family of a similar cultural background, as yet unidentified.

The court held that the girl was to remain with her foster-parents with a view to adoption since the child's welfare was of first and paramount consideration. The foster-parents were a sensible couple who would assist her to follow her Sikh traditions and culture. There was a risk that if she were moved from a secure and



happy home, into which she had fully integrated, the child would be irreparably psychologically scarred.

Another time in *Re A (a minor) (cultural background)* (1987) for instance, the court decided to leave the child with the foster parents and allowed contacts with the biological grandmother .

In 1978, a mother sent a one-year-old Nigerian girl to live with her grandmother in England after the death of her father. The grandmother could not properly care for the child and therefore decided to place the girl in a foster home with an English family. The girl remained with the foster parents for five and a half years and came to regard them as her parents. During that time the child received some visits from the grandmother. The foster parents and the grandmother were in a good relationship until the summer of 1985 when there was a problem related to contacts. As a result, the grandmother requested to have the child back, arguing that to bring her up in an English family and to remove her from Nigerian culture would inevitably lead to problems for the child's identity.

The child, who was nine at the time, said that she wanted to stay with the foster-parents; her wishes were not a determinant in the decision. At that time the girl was nine years old. Even though the child was adamantly clear that she desired to live with the foster parents, the judge stated:

One must, of course, approach the statement of young children with a degree of caution. It is right, as was pointed out in the course of the evidence, that children very often will say that they wish to stay where they are. It is also important that decisions in relation to children's future should not be dictated by the children themselves. Having said all of that, none the less the views expressed to an experienced welfare officer of a 9-year-old child are of considerable importance. When the court welfare officer says, as Mrs L has done in her report, that the child herself is quite adamant that she wishes to remain with Mr and Mrs N [the foster

parents], any court would be bound to hesitate very long before making an alternative placement. (*Re a (a Minor) (Cultural Background)*, 1987, 436)

The judge underlined the importance of the child's Nigerian culture and acknowledged the possibility of difficulties for a child of different cultural background being brought up in England by an English family. However, the court decided that in this case there were a number of other issues to be considered to determine the best interest of the child. Her removal from the foster-parents would have a harmful effect on her after living five and a half years with them. During her stay with the foster family she had become distant from her grandmother. Although the foster-parents had not sufficiently understood the significance of the child's cultural background, it seemed that they were becoming progressively more alert to it and were willing to promote the child's contacts both with the Nigerian culture and her biological family. The court decided that in this case the child's best interest was to remain with the foster parents with continuing contacts with the grandmother.

A similar decision was taken in *Re N (A Minor) (Transracial Placement)* (1990). A girl born in England in 1984 to Nigerian parents was placed in foster care three weeks after her birth. Her parents were not married to each other and the foster parents were white people of British nationality. Both parents went to the United States of America and left the child with the foster parents. The mother did not care for the child and did not maintain contact with her. The father continued to send money for the upbringing of the child. In 1985, the father visited the child for a few days and asked the foster parents to take the child to the United States. However, he did not send the tickets and later on informed the foster parents that at that time he could not care for the daughter. The foster parents reported to the local authority their wish to apply to adopt the child. The father asked the court to give him leave to take the child out of the jurisdiction to the United States. The adoption proceedings were transferred to the High Court.

The local authority and the *guardian ad litem* declared that the girl could not be moved from the foster parents without harm to her psychological development. Evidence was given that she had lived with the foster family in harmony and that the child had not known any parents other than the foster parents.

The *guardian ad litem* claimed:

N is emotionally bonded with Mr and Mrs P. They are her psychological parents. [...] Whilst in Nigerian culture the needs of the child would not be more paramount than those of the parents, N has been raised in a western society. It is impossible to draw a curtain over her initial years of emotional and physical development. (*Re N (a Minor) (Transracial Placement)*, 1990, 66)

The father asked for the transfer of the child to his care. Otherwise, he recommended that the child be moved to live with short-term foster parents, preferably black, to prepare the child to live with her family in the United States. To support his claim the father presented witnesses who were of the opinion that black children should never be placed with white foster parents.

The Judge stressed the importance of distinguishing colour from culture. He stated:

In my view, and I have no wish to enter into what is clearly a political field, the emphasis on colour rather than cultural upbringing can be mischievous and highly dangerous when you are dealing in practical terms with the welfare of children. Also, the fact remains that this child has been placed with white foster parents and they have been the only real family she has ever known. I do not for one moment think that the father subscribes to this dogma. He does not have to be condescended to because he is black; he has made his way and his children will make their own way in the world because of intelligence and flair. To suggest that he and his children need special help because they are black is, in

human terms, an insult to them and their abilities. [...] There is, of course, a very important question, which relates not so much to colour as to national origins. The father and mother are Nigerian. (*Re N (a Minor) (Transracial Placement)*, 1990, 61)

The court stated that the child could not be moved from the foster parents without immense harm to her psychological well-being. The local authority and the *guardian ad litem* opposed the adoption on the grounds that contact with the father could be important for the child. Moreover, an adoption would, in Nigerian culture, result in the whole family feeling ashamed. The court stated that it would clearly not be in the child's interests for her father to feel the shame and distress that in his culture an adoption order would bring, since adoption is not accepted in Nigerian society.

The court therefore decided that in this situation it would not be right to make an adoption order. The court held that the wardship should continue and that care and control should remain with the foster parents. The father should have access as a way to keep the child in touch with her origins.

In all the above cases, the courts have valued the advantages of permanence over same-race/ethnicity matching. In these cases, the children had already established a strong and long relationship with the foster parents and removing them would break these important relations. In a few other cases, the courts have decided that the right to a positive racial or ethnic identity was more important than maintaining the *status quo*. In these cases, the courts have applied the same-race presumption: they have decided that the child should stay with the family of origin or with another foster care family with a similar racial/ethnic background.

In *Re P (A Minor) (Transracial Placement)* (1990) the child was of mixed race: his mother had West Indian and African-Caribbean ethnic origin and his father was of white European origin. The mother had a long history of mental problems. The father was detained at the time of the child's birth, and had played no part in the boy's life. In 1988, immediately upon the birth of the child, the local authority placed

him with a foster mother as a short-term foster parent. After a few months the foster mother told the local authority that she wanted to adopt the child, but the adoption and fostering panel rejected her as a potential adopter.

The foster mother was a white European and had five children by her first marriage. She subsequently divorced and remarried. It was proven that she had cared very well for the child and that he had a good life with her. The child was attached to her and considered her his mother.

The local authority claimed that every child should be brought up by a family of the same race and ethnic group. Only when it was impossible to achieve this without unacceptable delay would other substitute families be considered. A mixed race child should be regarded, as "black", and therefore the council would seek to place such a child with a black or mixed race family. By the time the dispute came to court the local authority had found a suitable family as prospective adopters.

The court stated that the desirability of a child of mixed race being brought up by a black or mixed race family was understandable and that adoption would be in the child's best interest. The judge observed that the foster mother had just remarried and that some time should pass before she and her new husband could adopt. He said he was satisfied that the child's cultural and identity needs would be better met if he became part of the family of the prospective adopters. He ordered that the local authority should have liberty to place the child with the prospective adopters who should commence adoption proceedings.

The foster mother appealed (*Re P (a Minor) (Adoption)*, 1990). She claimed that in carrying out the balancing exercise the court was wrong since the risk to the child's stability by removing him from the only home and mother he had ever known prevailed over all other considerations. The appeal court observed that in favour of leaving the child with the foster mother was the stability he had achieved with her while against that was the local authority's policy that a child should be brought up by a family of the same race and ethnic group.

The judge held that a court of appeal could not interfere unless the judge's decision was so plainly wrong that the only legitimate conclusion was that he had erred in the exercise of his discretion; the only relevant principle of law was that the welfare of the child was the first and paramount consideration. In the application of this principle a judge would have to weigh many conflicting factors. One of those factors would often be the importance of maintaining the status quo when the evidence was that the child was thriving in a stable home. This was so obvious that it hardly needed to be proven. In this case the judge had clear evidence of the importance of the status quo. He also had evidence as to the advantages of bringing up a child of mixed parentage in a black family.

He was entitled to give such weight to that evidence as the circumstances of the case required. It was not possible to say that the judge was plainly wrong.

The appeal was dismissed but the judge ordered that the foster mother should continue to be a party to the wardship proceedings. The local authority would have to return to the court in wardship for further directions, if the placement with the prospective adopters should fail. The judge stated that the foster mother should be reconsidered as a possible adoptive parent if the placement with the adopters of the same racial/ethnic background of the child should fail. He added that the foster mother's claims should be reconsidered because they were at least as strong, if not stronger, than those of the child's biological parents.

In this case, the judge seemed to apply the same-race presumption: the best interest of the children is to live with parents of the same race. However, it seems that the overriding issue was the qualifications of the foster mother to become the adoptive parent. Her recent marriage was considered an obstacle to the adoption. Once the foster mother was excluded as a possible adoptive parent, the judge applied the national policy that requires an attempt to find an adoptive couple of the same racial/ethnic background as the child.

In another case, two children were constantly mistreated and wounded by their mother of Vietnamese and Chinese origin (*Re H (Minors)*, 1987). She was born in North Vietnam into a large family of Chinese descent. The local authority intervened and placed the children with foster parents. As a result, their situation improved dramatically. The local authority applied to the judge in wardship proceedings for directions.

The court stated that the welfare of the children should be placed above any other interest. In relation to the possible return of the children to their mother, the court declared that the need to live with the biological mother to develop their cultural identity should be protected as long as the culture did not conflict with the minimum standards set by the British society. Judge Callman stated:

In this case I must consider the case against the reasonable objective standards of the culture in which the children have hitherto been brought up, so long as these do not conflict with our minimal acceptable standards of child care in England. [...] There is evidence before me that in Chinese culture, as applied to the lower social and cultural levels of society, in some rurally based societies, such as North Vietnam and perhaps some parts of China, chastisement with sticks, of a nature and degree which is not acceptable in western society, is practised. Such conduct may wholly offend the more educated Chinese society, as it does other sections of western society (*Re H (Minors)*, 1987, 18).

In this case the mother's conduct was regarded as incompatible with the minimum standards. The court noted that the children themselves did not wish to return to their mother. The court, therefore, stated that the local authority should proceed to find foster parents (preferably Vietnamese or Chinese) for the children. Even though the judge clearly censured the conduct of the mother and linked it to her culture, the court ordered a search for an adoptive family of the same ethnic background as the children. The judge declared:

I think that these children are damaged and that it is in the interests of these children to have the most secure long-term setting that they can find, especially in view of the very sensitive need to find a foster family that has the right ethnic combination. I regard the ethnic background as important and every endeavour should be made – and I so direct – to find either a Vietnamese or Chinese family (it may be more easy to find a Chinese family on the evidence before me) or at least one where there is a mixed Chinese and English parentage. (*Re H (Minors)*, 1987, 28)

In both cases, the judges applied the same-race rule. In the first case, the rule has been applied only after it was decided that the foster mother was unable, for reasons unrelated to her race, to care for the child. The court had therefore decided that a new family should be found: in doing so, the local authority had to apply the same-race rule. In the second case, the biological mother was considered unable to care for her children, therefore the court decided that an adoptive family should be selected; in the selection process the same-race rule must be applied. It is therefore clear that judges applied the same-race rule only if the relationship with the foster parents could not continue, or in the case of the adoption of a child who has not lived with foster parents. In the majority of cases where the child has already formed a relationship with a foster family of a different racial/ethnic background the courts have usually decided to maintain the relationship with the foster parents.

The analysis of the case law on adoption across identity borders seems to demonstrate that there are two main narratives used to determine the best interest of the child. When the child has developed a strong relationship with the foster parents, judges tend to apply the narrative of permanence. This narrative states that children need a stable family to develop. However when the child has not developed any stable relationship with foster parents or when foster parents are not considered able to continue to foster or to adopt the judges tend to apply the same race narrative that states that children need to live with people sharing their same identity.



Examination of the above judicial cases underscores one relevant aspect: the majority of children looked after are placed in foster care. In 2010, 73 percent of children looked after were in foster placements. Use of foster care has increased considerably in the last twenty years. Between 1990 and 2000 there was an increase of approximately ten per cent in the number of children looked after placed in foster care (Wilson, Sinclair et al., 2004). In 2006, foster placements represented 69 percent of all placements, while in 2010 it increased to 73 per cent. Increase in the use of foster care influences adoption, since many adopted children have been in foster families before being adopted. The issue of the racial/ethnic and cultural background of the children should be taken into consideration when matching foster carers and children, however shortage of foster parents sometimes makes trans-racial/ethnic/cultural foster placements the only option (Sinclair, Baker et al., 2007). There are no national statistics on the number of trans-racial/ethnic foster placements, but it is presumable that they are quite numerous. A report from the Social Services Inspectorate in 2002 found that five out of the seven councils analysed had had difficulties matching foster parents with children (Social Services Inspectorate, 2002).

During the 1990s, adoption became to be viewed as the best way to solve the problem of children in care. Progressively, the Government and the legislation put emphasis on the interest of the child to limit his/her time outside a permanent family and to find, as soon as possible, an adoptive family. The attempt to match the race/ethnicity or religion of the child and adoptive parents should not go against the child's right to find a family. In 1993, the White Paper, *Adoption the Future*, acknowledged the importance of ethnicity, but argued that it was often given unjustifiably decisive influence (Department of Health, 1993, Par. 4.32). The Paper clarified that ethnicity and culture were not to be given excessive significance. The Secretary of State for Health introduced the White Paper saying "There should be no place for ideology in adoption. We want common-sense judgments, not stereotyping. There are, for example, no good grounds for refusing on principle to contemplate trans-racial adoptions or adoption by parents over a prescribed age" (Bottomley, 1993). The issue of common sense remains a common argument in the recent

position on adoption; even in 2011 the Children's Minister, Tim Loughton, argued that adoption matching should be based on common sense judgments. He said: "The assessment process for people wanting to adopt is painfully slow, repetitive and ineffective. Dedicated social workers are spending too long filling out forms instead of making sound, common-sense judgements about someone's suitability to adopt" (Harrison, 2011, par. 9).

The 2000 White Paper, *Adoption: a New Approach*, clearly stated that the child's welfare is paramount and no children should be denied loving parents solely on the grounds that the child and the parents do not share the same racial or cultural background (Department of Health, 2000).

The 2002 reform was clearly made with the intent to accelerate the adoption process and increase the number of adoptions made. In this view, the race/ethnic and religious identity of the child should not be an impediment to finding an adoptive family. Lord Hunt of King Heath in the House of Lords summed up the approach of the reform:

"Of course the best adoptive placement for a child should reflect his/her religious persuasion, racial origin, cultural and linguistic heritage, but only if that can be found without unnecessary or harmful delay. What counts, and what the Bill enshrines, is that the interests of the child come first (Lord Hunt of King Heath, 2002)."

In 2011, Prime Minister David Cameron called for a cultural change in relation to adoption; he argued that the system should become more pro-adoption (Ross, 2011). In 2011, the government announced that it was going to review the guidance for social workers. Martin Narey said "This was no urban myth. Black children are three times less likely to be adopted than white children. Over time, a practice has developed where there is great emphasis on finding a cultural and ethnic match for non-white children. This, despite the fact that Tony Blair issued guidance to local authorities in 2000 asking for no ethnic considerations to be made." (Ramesh, 2011)

The reviewed guidance warns about labelling children and over-estimating the importance of ethnicity/race:

The structure of white, black and minority ethnic groups is often complex and their heritage diverse, where the race, religion, language and culture of each community has varying degrees of importance in the daily lives of individuals. It is important that social workers avoid 'labelling' a child and ignoring some elements in their background, or placing the child's ethnicity above all else when looking for an adoptive family for the child. (Department of Education, 2011, 83).

The guidance further clarifies that children can be matched with adoptive parents with whom they do not share the same ethnicity, provided that the parents can meet the child's other identified needs. The central issue is what qualities, experiences and attributes the prospective adopter has, and their level of understanding of the discrimination and racism the child may confront when growing up. The guidance states that this applies equally whether a child is placed with a black or minority ethnic family, a white family, or a family that includes members of different ethnic origins.

In the last few years, the government has repeatedly stated that social workers should not interpret the law as requiring same race matching or wait for the perfect match while children remain in care. In 2010, the children's minister, Tim Loughton, said that there was "no reason at all" why white couples should not adopt from different racial backgrounds. "If it is a great couple offering a good, loving, stable permanent home, that should be the number one consideration," he said (Pidd, 2010). In a similar way, in 2011 the Education Secretary Michael Gove stated that "Too many social workers are holding out for the perfect match, so suitable couples are turned away and children are staying in care for years as a result" (Quinn, 2011).

The social narrative behind this position is that adoption is the best solution for children in care. The best interest of a child is to find a family and therefore the government should work to increase the number of adoptions. A loving and stable home is paramount for the wellbeing of a child. A capable family can provide the child with its identity needs, even if adoptive parents and the child do not share the same race/ethnicity. This position does not deny that the perfect adoption family would be a loving and caring family of the same ethnic background as the child: same race adoption is still presented as the better solution. However, the search for same race adoption is presented as a factor increasing the waiting time of the child.

Analysis of the history of adoptions across identity borders in England, and the public policies and debates on this issue highlight the fact that concerns about the right to cultural identity emerged when the number of social workers from ethnic minorities became relevant. Moreover, opposition to same race policy has been argued as a way to increase the number of adoptions and thereby solve the problem of children in the care of the state. Both supporters and opponents of the same race policy agree that the best match is one where the child has a similar race/ethnicity/religion as the adoptive parents. The opponents, however, claim that looking for the perfect match must not make children wait indefinitely without a family.

The most recent research demonstrates that the issue of ethnic and racial background is not the main barrier to adoption. Instead, the problem seems to be attributable to difficulties in finding suitable, or interested, adoptive parents for children with special needs or children who are part of larger sibling groups (Ofsted, 2012, 33). Changing the policies related to race/ethnic and cultural matching would not impact on refusal to adopt difficult children. In the political debate on adoption, the low number of adoptions of ethnic minority children has been mainly framed as a problem of social workers' negative attitudes towards trans-racial/ethnic/cultural adoption. The political debate has been too narrow: many elements can influence the reason why children are not adopted (e.g. age, special needs, etc.). Suggesting that race/ethnicity is the only reason why children are waiting is misleading. The

preferences of adoptive parents, for instance, could also be an element influencing the low number of adoption of ethnic minority children.

#### ***4.3.2. Adoptions across racial/ethnic and religious borders in Germany***

The history of adoption in Germany is unhappily connected with the issue of race: the Lebensborn project was one of the most undisclosed and horrifying Nazi projects (Clay and Leapman, 1995). Heinrich Himmler founded the project with the goal of reversing the decline of the Germanic/Nordic population of Germany. With this aim, the SS and Wehrmacht officers were encouraged to have children with Aryan women. The mothers, who were deemed “racially pure”, had the possibility to give birth to a child in secret and their children were then given to the SS, who took charge of the child’s education and adoption. Both mother and father needed to pass a “racial purity” test.

The Lebensborn project included the kidnapping of “racially pure” children from the eastern occupied countries after 1939. Thousands of children were transferred to the Lebensborn centres in order to be “Germanised.” Up to 100,000 children may have been stolen from Poland alone. In 1946, it was estimated that more than 250,000 were kidnapped and sent by force to Germany. Only 25,000 were found after the war and sent back to their families. Several German families refused to give back the children they had received from the Lebensborn centres and sometimes the children themselves refused to go back to their original families. During the ten years of the programme’s existence, at least 7,500 children were born in Germany and 10,000 in Norway as a result (Clay and Leapman, 1995).

As indicated in the first part of the chapter, the adoption law approved during the Nazi regime was based on racial/religious criteria. Jews were excluded from adoption and rigorous racial checks were made before granting an adoption. But the link between adoption and race in Germany goes beyond the end of the Nazi regime.

Following the American occupation, the German authorities identified some 94,000 occupation children, fathered by Allied militaries (Campt and Grosse, 1994; Fehrenbach, 2005, 74). A small percentage was children of African American soldiers. The number of these children amounted to less than 3,000, but the media and political reaction to their presence was extreme.

By 1947, African American press in the United States started to cover the story of the German *Mischlingskinder* (mixed children). German authorities started to advocate for the inter-country adoption of these children by African American families. Finding difficulties in locating German families willing to adopt these children, the authorities identified inter-country adoption to the United States of America as the perfect solution.

Later on, in the early 1960s however, inter-country adoption to the United States was actively discouraged by the German authorities. With the restart of the economy, the domestic demand for white children for adoption increased. Since Americans also demanded white children for adoption, the authorities made the criteria for inter-country adoption more rigorous. The official reason for the change was the suffering of adopted children in a context where racial segregation was the rule (Fehrenbach, 2009, 48).

The decision to discourage international adoption to the United States did not end the story of the adoption of the mixed-race children by foreigners. The social services and politics started to encourage the adoption of these children in Denmark. The new destination was publicised by German commentators as a country where racial prejudice did not exist (Fehrenbach, 2005, 163).

In 1960, with the reinvigoration of the economy, the *Mischlingskinder* disappeared from public discourse and ceased to be an object of social policy. The practice of keeping separate statistics for the black population ended and reports of successful integration of black children were often presented by the media. The integration of

the *Mischlingskinder* was in reality limited to integration into the work force of the country.

As Heide Fehrenbach noted:

As *Mischlingskinder* disappeared as a racialised object of social policy, the use of the word Rasse and reference to things “racial” were rendered taboo, at least as applied to contemporary German society. (Fehrenbach, 2009, 53)

In the current public debate on adoption, the issue of race and ethnicity is still missing. Even though Germany has now a relevant number of inter-country adoptions every year, the question of the racial/ethnic identity of these children has seldom been analysed (Guelich, 2006; Moller, 2006). Scholars like Wolfgang Kuhl (1985), Margot Weyer (1992) and Martin Textor (1991), for instance, have studied the integration of adopted children from foreign countries. These studies, however, have not specifically addressed the issue of racial/ethnic identity.

Inter-country adoptions in Germany have, for many years, been a private affair. In 1988, Rolf Bach analysed 300 inter-country adoptions and reported that in only 45 per cent was a state agency or an agency approved by the state involved in the process. In all other cases the adoptive parents obtained the children through private contacts or with the help of a mediator. Out of the 300 cases studied, 70 involved a commercial trade or illegal behaviour (Bach, 1988). This situation changed with the Ratification of the Hague Convention; private adoptions are now officially prohibited even though a recent report from *Terres des Hommes* claims that the phenomenon has not disappeared (Lammerant and Hofstetter, 2007). In this context, the issue of cultural identity of children did not receive much attention.

In Germany, guidelines on adoption state that the religion of the child should be taken into consideration, while race and ethnicity are not mentioned. The absence of legal provision on the race/ethnic identity of the adopted child is a further indication

of the irrelevance of racial ethnicity in the official discourse on adoption. Since no legal requirements are established in relation to race and ethnicity of the adopted child, it is extremely rare for judicial courts to have to decide on the cultural identity of an adopted child. Furthermore, biological parents can only oppose the decision to free a child for adoption, but cannot oppose the adoption by specific adoptive parents. For this reason there are no judicial cases of biological parents opposing the adoption of a child on the basis of the religious or racial/ethnic identity of the adoptive parents.

Analysis of the only German case I could find relating to racial/ethnic identity supported the idea that in the judicial discourse, issues related to race and blood ties tended to be avoided, and other elements, i.e. culture and language, were favoured. In this case, an orphan from Afghanistan was living with foster parents in Germany (*Lg Hamburg*, 1998). She had lived for seven years with her German foster parents when her uncle, resident in a refugee camp in Pakistan, appealed against the appointment of the foster parents as legal guardians of the child. He argued that the Code of Honour of the linguistic-religious group of *Pashtuns* rules that in the case of the parents' deaths, parental powers pass to the oldest male relative of the child. He therefore asked for the return of the child to Pakistan where he and his family now lived.

The court decided on the basis of Article 3 and Article 8 of the *Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of the Infants*. Article 3:

A relationship subjecting the infant to authority, which arises directly from the domestic law of the State of the infant's nationality, shall be recognised in all the Contracting States.

While Article 8 states the exception to Article 3:

Notwithstanding the provisions of Articles 3 and 4, and paragraph 3 of



Article 5 of the present Convention, the authorities of the State of the infant's habitual residence may take measures of protection in so far as the infant is threatened by serious danger to his person or property.

The court held that the child was threatened by serious danger to her person and decided to act to protect her. The *Landgericht* Hamburg decided that the Code of Honour should not be applied, as the cultural identity of the child had changed and that it was against the child's best interest to send her back to the uncle. As evidence of the change, the court applied a language test: the child no longer spoke the *Pashtun* language, while she was able to understand and speak German. Thus, the court ruled against the uncle, and the child remained in Germany.

In this case, the judge clearly highlighted the importance of cultural identity as a flexible concept. The court evaluated the child's identity as it was after seven years of life in Germany with German foster parents: in this way the judge rejected the idea that children are born with a certain cultural identity, i.e. an Afghan child has, and always will have an Afghan identity. The court argued that the child, during her seven years, had become "German" and had lost her "Afghan" identity. The problem of blood ties with the uncle and the right to live with biological relatives were not considered by the judge. In the same way, the child's interest to keep her Afghan origins was not taken into account. It was only noted that a return to her biological family would create a cultural shock that was not in the child's best interest.

Overall, the information available seems to demonstrate that in Germany the racial/ethnic/religious identity of adopted children has not been part of the debate on adoption. Few scholars have analysed this issue in relation solely to inter-country adoption and the possible consequences of integration of the child in Germany. In this context, the issue of the right to racial/ethnic identity of the child has not emerged.

### ***4.3.3. Adoptions across racial/ethnic and religious borders in Italy***

In Italy, the majority of adoptions are inter-country adoptions. Between 2000 and 2006 the number of inter-country adoptions in Italy continued to increase. This phenomenon has been accompanied by enthusiastic approval of the generosity of Italian couples. In Italy the dominant social narrative related to inter-country adoption is a narrative of solidarity. In the annual statistical report of the *Commissione per le Adozioni Internazionali* the large number of adoptions has often been linked with an elevated level of solidarity (Commissione per le Adozioni Internazionali, 2010, VII). Even the Minister for International Cooperation and Integration, Andrea Ricciardi, has recently stated that inter-country adoptions by Italian couples demonstrate the impressive generosity of the Italians (AIBI, 2012). Since 2006, the number of adoptions has diminished, even though the total number is still very high compared with many countries. Even the decrease of numbers has not modified the perception of Italians as generous: the media has explained the decrease as a consequence of the costs and complexity of adoption and not as a change of attitude of adoptive parents (De Luca, 2012).

In Italy, article 1 paragraph 5 of the 1983 Adoption Act states that the cultural identity of the child should be protected. In a similar way the 1994 bilateral agreement between Italy and Peru on inter-country adoption highlights the importance of respecting the cultural identity of the child. The law, however, does not regulate how the race/ethnicity or religion of child should be taken into consideration while deciding on the placement of a child in an adoptive family.

Recently, the racial/ethnic/religious identity of adoptive children has received some attention from the Courts and the press. In Italy, the courts issue a decree of suitability (*decreti d'idoneita'*) after assessing that a couple is suitable to raise a child. A few years ago some courts started to write more detailed *decreti*

*d'idoneita*.<sup>25</sup> In the analysed cases these judges have identified some characteristics that the child should have in order to be adopted by a particular couple, such as age, ethnic background, colour or national origin. This technique has been heavily criticised (AA.VV, 2003; Orlandi, 2002; Perrino, 2000, 2001; Scarpati, 2001).

Many international adoption agencies have raised doubts, arguing that, as declared in the adoption law, every child has the right to grow up in a family, regardless of race and ethnicity.<sup>26</sup> Moreover, it has been argued that this practice can produce a system where the adoptive parents choose the child.

However, the courts that have issued the analysed decrees, have argued that the law<sup>27</sup> required the judge to take into consideration the preference of the adopting couple and to point out in the decree the characteristics that the child should have to guarantee a good adoption (Istituto degli Innocenti, 2001, 63; Vaccaro, 2000, 72). Moreover, in some pronouncements, the court has underlined that the reason why adoption of a child of different racial background was not desirable was that the social context of the prospective adopting family was not ready to accept a black child.

The issues that this practice raises should be analysed carefully. On one side, opponents argue that the child should not be discriminated against, therefore adoptive parents should be ready to accept any child, without considering race or ethnicity. On the other side, it is argued that a child's race/ethnicity can have an impact on the success of the adoption, either because the parents are not equipped to react to the challenges linked to trans-racial adoption, or because the social context of the family is not ready to accept a child of a different ethnic/racial background.

The *Corte di Cassazione*, answering a question from a lower court, in 2010 declared that the *decreto di idoneita* ' should not contain any reference to the race/ethnicity of

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<sup>25</sup> See (*Decreto 377/2000*, 2000; *Decreto 416/2000*, 2000; *Decreto 472/2000*, 2000; *Decreto 729/2000*, 2000; *Decreto 765/2000*, 2000; *Decreto 219/01*, 2001; *Decreto 1239/01*, 2001)

<sup>26</sup> See in particular the position taken by the Associazione Amici dei Bambini (AIBI).

<sup>27</sup> On the basis of art 29 bis, comma 4, and art 30, comma 2 of Act n. 476/1998.

the child (*Cassazione, Sezioni Unite 1.6. 2010, N.13332, 2010*). The court stated that the inclusion of racial/ethnic characteristics into the decree is against the principle of non-discrimination. It also added that the fact that prospective adoptive parents limit their availability to children of certain race/ethnicity raises doubts about their capacity as adoptive parents. The Court noted that social services should help future adoptive couples to realise the nature of solidarity of adoption and help them overcome difficulties related to parenting children from a different race or ethnicity.

More recently the Corte di Cassazione confirmed the decision of the Appeal Court of Bologna that stated that a couple who declared themselves willing to adopt only Catholic children is not suitable for inter-country adoption (*Corte Cassazione Ordinanza 29424/2011, 2011*).

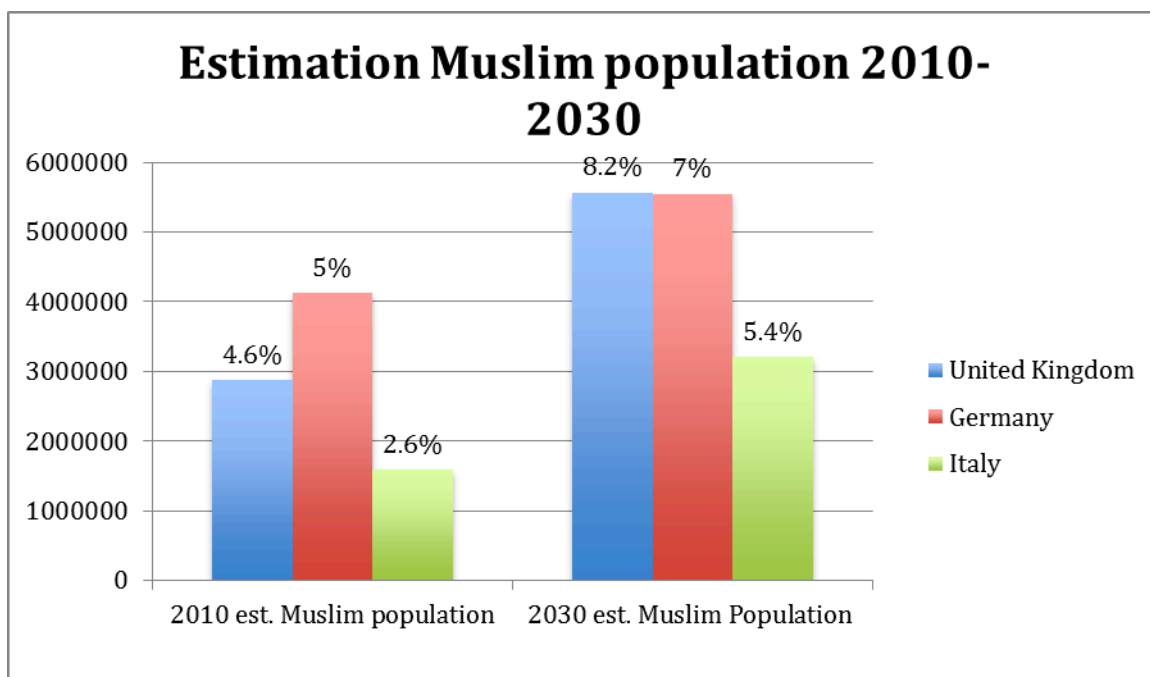
The Italian approach to the problem of racial/ethnic identity of adoptive children confirms the general attitude towards inter-country adoption as a practice of solidarity, where adoptive parents should be ready to welcome any child, regardless of colour, race, ethnicity and religion. The issue has been framed as a matter of acceptance and solidarity, while the problem of the child's right to racial/ethnic/religious identity has not emerged. This attitude is confirmed by the document *Carta dei diritti del bambino adottato* (Provincia di Milano, 2007). The *Carta* was presented in 2007 by the authorities of the Milano Province with the intention of encouraging debate on adoption. The document states the ten rights of adopted children. The right to racial/ethnic/religious identity is not included in the list.

The narrative behind this approach portrays children as individuals who just need the love of a family, and adoptive families as being able to love any child. This narrative oversimplifies the situation of adopted children, and demonstrates a limited appreciation of the importance that racial/ethnic and religious identity can have in the lives of adopted children. This risk is particularly relevant in a context where the age of adopted children is increasing, and children adopted by Italians have the highest average age in the world (6,1 years in 2012) (De Luca, 2012).

#### ***4.3.4. Adoptions across legal/cultural borders in England, Germany and Italy.***

Adoption is a social phenomenon that exists in various forms in the majority of societies. The way in which this phenomenon is regulated, however, varies from culture to culture. As seen in the first part of this chapter, adoption has served diverse aims and has changed throughout history. With the increase of immigration and movements across national borders, countries are often asked to recognise adoptions made in different cultural and legal systems. In all three countries analysed the issue of adoption across cultural/legal borders has attracted less public attention than, for instance, adoption across racial/ethnic identity borders.

The problem of recognition of diverse cultural ways to care for children is not only a problem across national borders but has become an issue within countries. The rising presence of Muslim minorities in Europe (see Figure 13), for instance, has posed the problem of the recognition of the *kafalah*.



**Figure 13: Estimation and percentage of Muslim Population in the United Kingdom, Germany and Italy 2010-2030 (Pew Research Center, 2011)**

Islamic law does not recognise adoption: the Koran explicitly forbids adoption. As a result, many Islamic countries prohibit adoption: i.e. Algeria, Libya, Syria and Morocco. Other countries, like Tunisia, have introduced national adoption, but their attitudes towards international adoption remains quite negative.<sup>28</sup>

Absence of a system of adoption does not prevent parentless children from finding a safe home. *Kafalah* is usually defined as “the commitment to voluntarily take care of the maintenance, education and protection of a minor, in the same way as a father would do it for his son”.<sup>29</sup> The system of *kafalah* provides children with a *kafil* who is responsible for taking care of children until they reach adulthood. The children, however, do not acquire the *dahir*'s name or have any inheritance rights. They remain part of the biological family, keep their original name and inherit the biological parents' properties. The Koran requires Muslims to care for people in need, especially orphans.

<sup>28</sup> The statute n. 91-92 of 29<sup>th</sup> November 1991 allows national adoption but does not regulate inter-country adoptions. The law requires adoptive parents to be Muslims.

<sup>29</sup> Art. 116 Family Code of Algeria.

The *kafalah* is a system that shares some similarities with the way in which adoption used to be in England, Germany and Italy. In these three countries, at an early stage, adoption did not change the status of the child and did not rescind the relationship with the family of origin. This resemblance confirms the mutability of the concept of adoption: at present, England, Germany and Italy employ an adoption system based on a definitive change of the status of the child, which is totally different from *kafalah*. As a consequence, all three countries have experienced difficulties in recognising the effects of *kafalah* in their legal system.

Normally a child should be declared abandoned before someone can ask to become his/her *kafil*. The *kafalah* is permanent, unlike foster care; the *kafil* is the person who will take care of the child until he/she reaches adulthood. Normally the *kafil* is of the age of majority and Muslim (Orlando, 2005).

The *Convention of the Rights of the Child* cites *kafalah* at Article 20 as a possible alternative care method. The article makes clear that when considering different solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

To respond to the increase in cases of Muslim children in need of care, the UK has decided to follow a legislative way by introducing special guardianship. The White Paper of 2000 proposed the introduction of this new concept and explicitly referred to “some ethnic communities having difficulties with adoption”. This was officially instituted in the Children Act 2002: new parents receive the responsibility for raising a child but the child does not become a full member of the new family. Menski has observed that with the introduction of special guardianship the institution of *kafalah* has been “smuggled” into English law (Menski, 2009). The introduction of special guardianship has certainly made it possible to legalise situations of *kafalah*. In the majority of cases, however, it has been used to give the guardianship of a child to family members (e.g. grandparents) in cases where adoption would not be possible

or desirable. The number of special guardianship orders has increased from 1,290 in 2010 to 1,740 in 2011 (Oareford, 2011).

Since 1983, Italian law has included procedure similar to special guardianship. The *adozione in casi particolari* (adoption in special cases) does not change the status of the child and does not interrupt the relationship between the child and the birth parents. The *adozione in casi particolari* can be used only in specific circumstances: if the child is an orphan and the adoptive person is a relative; if the request for adoption is made by the wife/husband of the parent of the child and if the *adozione legittimante* is not deliverable (Dogliotti, 1999, 316). The latter case occurs when the child could be damaged by the effects of the *adozione legittimante*, as when interruption of the legal relationship with his/her biological parents is negative for the development of the child. The law does not explicitly name the case of ethnic minorities having difficulties with the concept of adoption since the law was passed in a period where the presence of immigrants in Italy was still extremely limited. It is, however, clear that the case of a child coming from a Muslim family could well be solved using the *adozione speciale*.

Until now, however, the issue of recognition of other cultural/religious forms of adoption has mainly been related to immigration. In England, Germany and Italy courts have often decided to recognise the foreign adoption of a child in relation to family reunification. The issue is particularly interesting, because in this area there is the need to balance the protection of the children with the necessity to avoid dishonest use of immigration law.

In England, the majority of cases have concerned South Asian children coming from India, Bangladesh and Pakistan being adopted through religious ceremonies. These three countries are not included in the list of designated countries from which adoption is automatically recognised in the UK. Even though India is now part of the Hague Convention and therefore Indian adoptions are automatically recognised in the UK, religious adoptions are not automatically recognised.



British courts have started to use the concept of “*de facto*” adoptions. In 1982, the *Manjit Singh* case rejected this concept. The court stated that “De facto control of a child arising only from an agreement between the natural parents and those assuming control is not adoption in the strict sense since the legal relationship between the child and its natural parents has not been broken and replaced by a similar relationship between the child and those assuming control”. Only one year later, however, a de facto adoption was recognised for the first time (*R. v Immigration Appeal Tribunal Ex p. Ali (Tohur)*). The case involved an orphan child from Bangladesh. In *Tohur Ali* the judge recognised the adoption of a Bangladeshi child, stating that a “de facto” adoption should be recognised “if the adoptive parents have decided permanently to treat the child as their own and to accept all the responsibilities that this involves, and the child in turn regards himself as being the child of the adoptive parents and part of the family to the exclusion of his natural parents”.

Meanwhile, immigration rules have been modified to include “*de facto*” adoptions. For the purposes of immigration a de facto adoption takes place if, at the time immediately preceding the making of the application for entry clearance, the adoptive parents have been living abroad for a minimum of 18 months. During their time abroad the adoptive parents should have lived together with the child and have assumed the role of the child’s parents, so that there has been a genuine transfer of parental responsibility. The rule is intended to, on one hand, avoid the use of *de facto* adoption to bypass immigration limitation, and on the other hand, to recognise genuine adoptions.

Beside the article on *de facto* adoptions, the immigration rules state that in order to be recognised an adoption should have taken place due to the inability of the original parents or current carer to care for the child. The requirement is stricter than the one applied by domestic law, where the best interest of the child is used (Cohen, 2001, 91). The adoption must have produced a genuine transfer of parental responsibility, and the child must have broken his ties with the family of origin. This last requirement seems particularly controversial since nowadays in England a large

number of adopted children maintain some contact with the family of origin.<sup>30</sup> The immigration rules describe a traditional type of adoption, while in practice within the country adoption is losing its character of exclusivity.

In practice, the recognition of *de facto* adoptions, or adoptions from non-designed countries, remains quite difficult (Mortimore, 1994). However, a case from 2004 appears to adopt a more liberal interpretation of immigration restrictions (*Pawandeep Singh v. ECO, New Delhi*, 2004). The case concerned the application of family reunification of a child adopted following the religious law and practice of the Sikh religion. The adoptive father was the cousin of the natural father of the child. The adoptive parents lived in the UK, the mother being an Indian citizen with indefinite leave to remain in the UK, and the father a British citizen. When the child was three months old, the adoption took place according to the religious laws and practices of the Sikh religion. The adoption was later recognised by an Indian civil court as a legal and genuine document.

The case had a long and complicated judicial history, with many appeals and decisions. The final decision was reached in 2004. The court decided that the child should be allowed to enter the UK, basing its decision on the breach of Article 8 of the *European Convention of Human Rights*.<sup>31</sup> This article states that everyone has the right to respect for his private and family life, his home and his correspondence.

In this case, Judge Munby noted that:

there have been enormous changes in the social and religious life of our country. The fact is that we live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society, which is at one and the

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<sup>30</sup> In 1993, thirty adoption agencies in Northern England reported that 14 per cent of the children adopted between April 1993 and March 1994 had direct contacts with the family of origin. A further 41 per cent had maintained indirect contacts. Only 31 per cent did not have any contact with the family of origin (Department of Health, 1995).

<sup>31</sup> Since the Human Rights Act 1998, the European Convention of Human Rights is binding on public authorities, including immigration authorities, in the UK.

same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Our society includes men and women from every corner of the globe and of every creed and colour under the sun (*Pawandeep Singh V. Eco, New Delhi, 2004, 61*)

He continues, stating that the law must adapt itself to these realities, not least in its approach to the proper ambit of Article 8 (*Pawandeep Singh v. ECO, New Delhi, 2004, p. 65*).

Even though successive cases have not followed the liberal interpretation given by the court in the Singh case,<sup>32</sup> this decision remains very important as it highlights how international law can be successfully used to solve legal problems where cultural differences play a relevant role (Shah, 2009). A similar role of international law is evident in the case law of Germany and Italy on *kafalah*.

In Germany, the courts have confronted the issue of recognition of *kafalah* many times (Menhofer, 1997). In the majority of cases, the German courts had admitted adoption of a Muslim child living in Germany (Jayme, 1999, 6). The *Amtgericht* in Hagen, for example, stated that the Islamic prohibition of any kind of adoption is against German public order (*Ag Hagen, 1984*).

A case decided by the *Oberlandersgericht* Karlsruhe in 1996 opted for a different solution from the majority of the German cases . (*Olg Karlsruhe, 1996*). The facts concerned a Moroccan child who had lived with a German couple for some time. The wife was Moroccan while the husband, previously Moroccan, was a German citizen. Under German law, in the case of adoptive parents having different nationalities, the law of the country of the last common nationality regulates the adoption. In this case, the relevant law was the Moroccan law, which, following the Koran, did not allow adoption. Instead of declaring the prohibition of adoption against public order, the Court cited Article 20 of the *Convention on the Rights of the*

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<sup>32</sup> See for instance (*Sk (Adoption Not Recognised in the Uk) India, 2006; Mn (India) V. Entry Clereance Officer, 2008*)

*Child*. This article, as already noted, mentioned *kafalah* as a possible method to care for children in need, and highlights the necessity to give due regards to the child's ethnic, religious, cultural and religious background. The court decided, therefore, to send the case back to the lower court and mentioned *kafalah* as a possible way to provide a home for the child.

Unlike the *European Convention of Human Rights*, in Germany the *Convention on the Rights of the Child* is not self-executing. The country, while ratifying the Convention, has made a reservation stating that:

The Federal Republic of Germany also declares that domestically the Convention does not apply directly. It establishes state obligations under international law that the Federal Republic of Germany fulfils in accordance with its national laws, which conform with the Convention

Even though not directly applicable, the Convention has been used to find a solution to a situation that involved diverse cultures and interest in the religious identity of a child.

In the Italian context, many courts have been required to decide on the possible recognition of *kafalah* in the Italian legal system.<sup>33</sup> The majority of cases are related to Moroccan citizens wishing to enter Italy with a child in their care through *kafalah* (Campiglio, 2008; Gelli, 2008; Long, 2003, 2007, 2008; Miazzi, 2008; Mondino, 2008; Orlandi, 2007; Piscitelli, 2007).

The decision n. 19734 issued on July 17, 2008 is one of the most recent Italian decisions on the issue of *kafalah* (*Corte Di Cassazione*, 17.7.2008, N. 19734, 2008).<sup>34</sup> The *Corte di Cassazione* with this judgment, recognised the applicability of

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<sup>33</sup> See for instance (*Tribunale Di Reggio Calabria*, 10.10.2006, 2006; *Tribunale Di Biella*, 26.4.2007, 2007; *Corte Appello Di Torino*, 18.7.2007, 2008; *Tribunale Di Torino*, 26.2.2009, 2009).

<sup>34</sup> Two other recent judgements of the *Corte di Cassazione* have decided for the recognition of the *kafalah*, citing the United Nations Convention on the rights of the child. (*Corte Di Cassazione*,

the Islamic institution of *kafalah* in the Italian legal system. The case concerns two Moroccan citizens, legal immigrants in Italy, who applied to the Italian Consulate in Casablanca for a visa to allow the child to join the couple in Italy. The Consulate did not issue the visa, arguing that the *kafalah* was not recognised in Italy. The Court of Appeal in Turin recognised the right of the child to the issuance of the visa, considering the *kafalah* similar to the Italian institution of foster care, and therefore allowing the family reunion. The Ministry of Foreign Affairs appealed against the decision before the *Corte di Cassazione*.

Art. 29 of the Italian Legislative Decree n. 286/1998 lists the circumstances permitting the reunion of a child. Among those circumstances, the article lists foster care. In the Ministry of Foreign Affairs' view, this list should be considered with strict interpretation. The Ministry of Foreign Affairs' challenge was opposed to consideration of the *kafalah* as a form of foster care. Indeed, in the Ministry's perspective, the *kafalah*, unlike foster care, is a mere contractual obligation, which does not require any control by a judicial body in order to become effective.

The *Corte di Cassazione* decided to recognise *kafalah*. The Court argued that non-recognition of the *kafalah*, would penalise children coming from Islamic countries, and therefore would violate the principle of equality.

The *Corte di Cassazione* stated that *kafalah* is also expressly recognised by art. 20 of the *Convention of the Rights of the Child*. The judges added that in most Islamic countries, Morocco included, *kafalah* is applied under judicial control or through an agreement sanctioned by a judge. The *Corte di Cassazione* clarified that the *kafalah* sanctioned by a judge is similar to foster care. For all these reasons, the *kafalah* sanctioned by a judge can be included in the circumstances allowing for a family reunion.

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2.7.2008, N.18174, 2008; *Corte Di Cassazione*, 17.7.2008, N. 19734, 2008; *Corte Di Cassazione*, 20.3.2008, N.7472 2008)

In its decision, the *Corte di Cassazione* states that the circumstances listed in art. 29 of Legislative Decree n. 286/1998 must be read in a “constitutionally adequate” way. When contrasting constitutional values come into play, the correct interpretation should reach an adequate balance between those values. Here, the opposing values are the protection of minors and the protection of the boundaries of the state from illegal immigrants. Consistent with the jurisprudence of the Italian *Corte Costituzionale*, the *Corte di Cassazione* states that prevailing importance must be accorded to the best interest of the child.

The issue of adoption across cultural/legal borders in Britain, Germany and Italy poses the difficult problem of finding a balance between different rights and interests. On one hand, states should implement their immigration policy, and on the other hand, the best interest of the child should be the main consideration. Analysis of the three cases presented highlights how the application of international law by national judges can help to find flexible solutions that guarantee the best interest of the child. In this case, international law seems to be more able to adapt to situations where there is an issue of cultural identity.

#### **4.4. Conclusions**

In this chapter, the issue of adoption across identity borders in England, Germany and Italy has been analysed. The statistics about adopted children in all the three countries highlight that the age of the children at the time of adoption is increasing. The number of children adopted as babies has become infinitesimal while the number of children adopted at 6/7 years is rising. The adopted children are now adopted when they have already built a heavy baggage of experiences and when their identity is already forming. In this context the issue of the right to cultural identity of the child becomes even more relevant but also more complex.

The origin and development of adoption laws in England, Germany and Italy have followed different patterns. However, a common aspect is that the centrality of the best interest of the child in the adoption process is a recent development in all three

countries. At the same time, the right to identity has become part of the discussion about adoptive children and has been included in the legislation only in very recent times.

Beyond these common aspects, the three countries analysed have taken different approaches in relation to the right to cultural identity of adopted children. In England, the debate has mainly focused on adoptions across racial borders. The debate started when people from ethnic minorities started to work as social workers and began to question the practice of trans-racial adoption. While many English studies seem to confirm persistent opposition by many social workers to trans-racial adoption, analysis of the case law gives a more balanced picture. Analysis of English case law seems to highlight that courts have generally been more preoccupied with the permanency and stability of the child than with adherence to the same race principle. Both opponents and supporters of same race adoption in England seem to agree that the best adoption is the one that matches people of similar racial/ethnic backgrounds. The difference is that the former argue that the search for this perfect match should not take too much time. The importance of race, ethnic and religious identity, however, is not contested.

It is interesting to note that England is the only country among the three analysed where the issue of the right to cultural identity has been discussed in the context of domestic adoption. This is an important difference and should be considered in relation to the question of when the right to cultural identity of adopted children emerges in public debates and is regulated by the law. The English experience highlights the importance of the presence of people from ethnic minorities in social services and their impact on domestic adoption. In England, social workers belonging to ethnic minorities have often promoted the right to cultural identity of domestically adopted children. The campaign against trans-racial adoption has been, in part, an expression of identity politics: ethnic minorities have, in a way, “fought” for their children. This element could, to some extent, explain why in Germany and Italy the right to cultural identity has been explored to a lesser degree. In these two

countries, the issue of race/ethnic/religious identity has been discussed only in relation to inter-country adoptions. In this context, it is more difficult to find, within the country of destination, a group of people willing to campaign for the right to cultural identity of the children. This difference between domestic and inter-country adoption highlights one of the problems affecting children's rights and children as a minority group. Children are not the one who fights for their rights: adults define what is the best interest of the child and argue about which are the rights of the children.

Unlike England, in the German context the issue of the racial/ethnic identity of adopted children has been given minimal importance. This lack of interest can be linked with the history of Germany and the consequent reluctance to talk about issues of race and ethnicity. This could explain why there are no statistics on the ethnicity of children in care or adopted and it is, therefore, impossible to have an idea of the presence of adoption across identity borders at the domestic level. As a consequence, as in Italy, the issue of cultural identity has been discussed only in relation to inter-country adoption; and in this context, as already mentioned, it is more difficult to find within the country of destination a group of people willing to campaign for the right to culture of adopted children.

In the case of Italy, inter-country adoption has been perceived as a positive phenomenon, reflecting the good attitude of Italians and their solidarity. In this context, the racial/ethnic and religious identity of adopted children has been considered only in relation to their right not to be discriminated against. The idea is that every child has the right to a family, independently of their racial/ethnic or religious identity. This position, however, risks underestimating the importance of ethnic racial and religious identity and overestimating the capacity of families to welcome children.

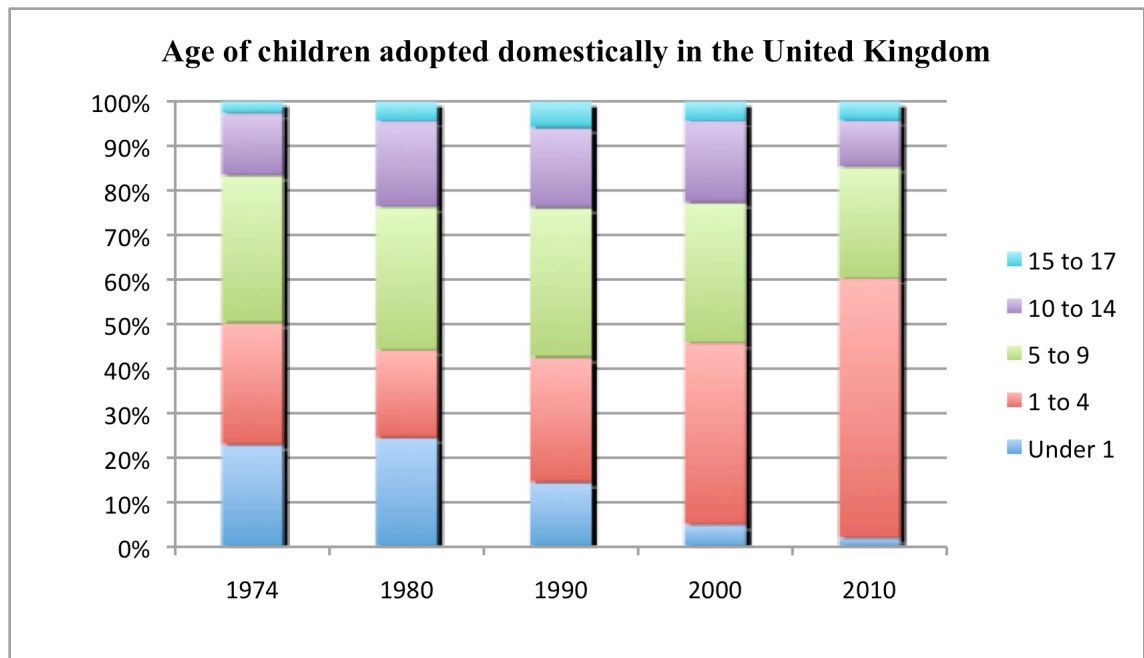


## Chapter 5: Conclusions

### **5.1. The increasing relevance of the cultural identity of the adopted children.**

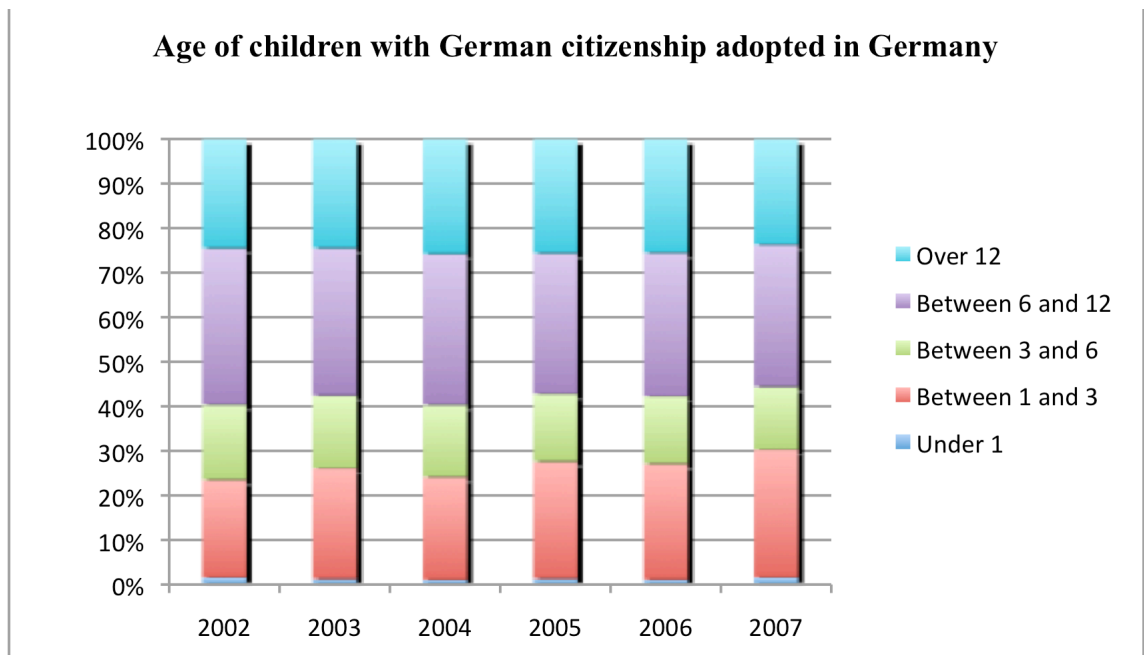
Analysis of the statistics on adoption in the three countries highlights a common trend of adoption: the increasing age of adopted children. Among the different elements that influence the identity of adopted children, the age of the child at the time of adoption is particularly relevant. If a child is adopted at the age of 6 years, he/she has already had many more life experiences than a child adopted as a baby. One main development in the last 40 years is the age of children at the time of adoption.

The change in the average age of adopted children has been particularly evident in the case of domestic adoptions in the UK. Adoptions of babies have virtually disappeared. At its peak in 1968, 12,641 babies were adopted, amounting to 51% of all adoptions. In 2010, there were only 95 adoptions of children below one year of age, representing 2% of all adoptions. Currently, the majority of domestically adopted children are aged between 1 and 4 years (70%) (see Figure 14).

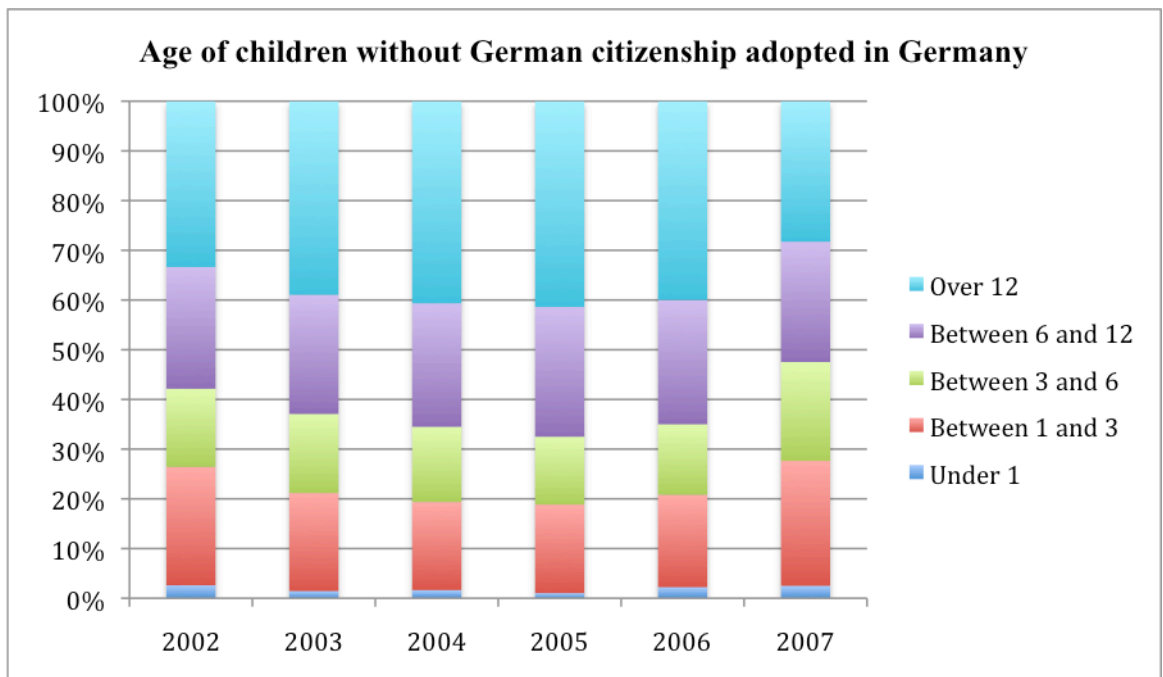


**Figure 14: Age of children adopted domestically in the United Kingdom 1974-2010 (Office for National Statistics, 2010b)**

Most domestically adopted children in Germany are aged between 3 and 12 years. Only a small number are less than one year old, and a consistent number is over 12 (see Figure 15). In the case of inter-country adoptions in Germany, the situation is similar: the number of children below one year of age is extremely small (see Figure 16). The majority of adopted children in Germany, both domestically and internationally, are more than three years old, however, more than half of all inter-country adoptions are adoptions by step-parents, and these children tend to be older. In 2002, almost 84% of the children adopted by step-parents were at least 6 years of age, compared with 19% of the children adopted by unfamiliar people. Therefore, the average age of inter-country adopted children by unfamiliar people is lower than the average age of domestically adopted children (United Nations, 2009).

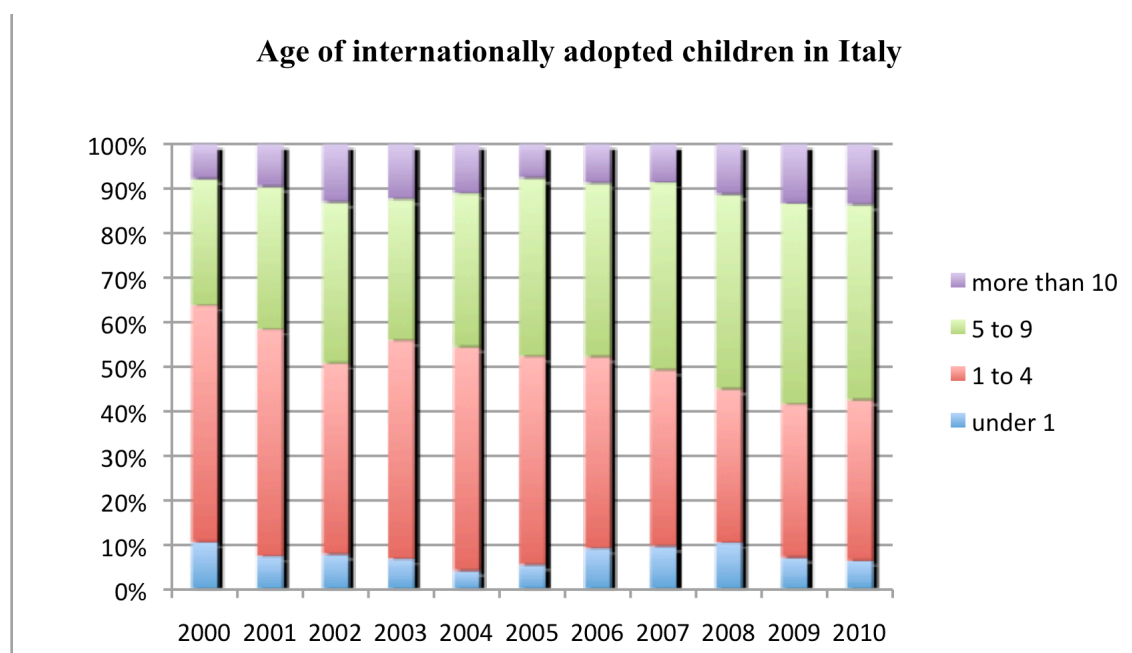


**Figure 15: Age of children with German citizenship adopted in Germany 2002-2007 (Statistisches Bundesamt, 2007b)**



**Figure 16: Age of children without German citizenship adopted in Germany 2002-2007 (Statistisches Bundesamt, 2007b)**

In the case of Italy, the majority of statistics concern inter-country adoption. Figures on domestic adoptions are more rare, but there are some statistics at local level. At the Tribunal in Milan, for instance, between 120 and 140 national adoptions are made every year. Of these only 15-20 are children below the age of 1 year (Chierici, 2007). In the case of inter-country adoptions in the last 10 years, 7.7% of the children were under one year of age, 41.8% were between 1 and 4 years and 39.6% were between 5 and 9 years. The remaining 10.9% were over 10 years.



**Figure 17: Age of internationally adopted children in Italy 2000-2010 (Commissione per le Adozioni Internazionali, 2011)**

Analysis of the age of adopted children in the three countries being considered highlights the fact that the majority of children have lived for some years in a different context before being adopted. In the case of domestic adoptions in England, the majority of children have lived in foster families before being adopted. In 2010, for instance, 74% of the children who were looked after in England were in foster placements. In many cases, therefore, adopted children have experienced life in a

different family environment before being adopted. They usually spent a long time in care prior to their adoption; in 2003, for instance, 50% of adopted looked after children spent between 2 and 5 years in care before the adoption (Department of Education, 2003). This period of time would influence the way in which adopted children would adapt to life with the new adoptive family.

In Germany, many domestic adopted children have lived in their biological family before being introduced to the adoptive family. In 2007, for instance, before being adopted, 1792 of the 3,077 adopted German children were living with their biological family, while the others lived with foster families or in institutes. In the case of non-German adopted children, one third were living in their family of origin while another third were living in an institution (Statistisches Bundesamt, 2007a).

In the case of Italy, there are no statistics on the past of domestically adopted children. However, statistics show that in 2007 there were 32,400 children in care. Of these, 16,800 (51%) were in foster care and 15,600 (48 %) were in institutions (Belotti, 2007, 5). We can, therefore, presume that the majority of nationally adopted children have spent time in foster care and institutions before being adopted.

Even children adopted through inter-country adoptions have, in the majority of cases, spent time in orphanages and similar institutions. They have frequently spent many years in this type of residence and carry heavy baggage on their shoulders as a consequence of their experiences.

The increase of the age of children at the time of adoption makes the issue of the right to cultural identity even more relevant. A growing number of adopted children have lived a life (in many cases a number of years) before adoption and have already started to develop their own identity before being adopted. These children are not coming from nowhere and already have a long history that often includes their biological family, orphanages and/or various foster families.

## 5.2. Conclusion

The purpose of this thesis has been to locate the issue of adoption across identity borders and the right to cultural identity within the national context of England, Germany and Italy. The aim has been to identify how the right to cultural identity has been interpreted in these three countries and how the social narratives about national identity, identity, childhood and family have influenced this interpretation.

At the beginning of this study, I have discussed the position of children in relation to multiculturalism and the protection of a minority within minorities. The children have clearly been less studied than other minorities, particularly women. The reasons why the situation of children has received less attention can be explained by analysing the solution given to the problem of minorities within minorities. All the solutions suggested are based on the capacity of the individual to choose. Compared with adults, children have a significantly limited capacity to choose independently. Moreover, children has rarely been recognised as a minority group. Lastly, the issue of minorities within minorities is particularly difficult in relation to children, since, often, they have not developed a proper cultural identity and, therefore, defining the cultural identity of a child is particularly difficult. Do children have the cultural identity of their biological parents? Is identity something that is passed through blood or developed throughout life?

For all these reasons, the position of children in relation to the problem of minority within minorities has seldom been analysed. In this thesis, I have decided to focus on adoptions across identity borders since, in these cases, the consequences of the change of context is particularly evident and has extreme consequences for the children. Through adoption, the children are welcomed by new parents and inserted into a new culture. The experience of the new context influences the development of the child's identity.

Analysis of the nature of a child's identity highlights the risks of essentialisation. The right of a child to cultural identity should contain both the right to be and the right to become. The identity of children is, by definition, mutable and flexible, since childhood is a stage of life where identity is formed. In this thesis, I have adopted the narrative identity approach. This approach helps to highlight the mutable and flexible nature of identity. The narrative identity approach is particularly significant in relation to children, since it puts the individual at the centre of the identity creation process: children, even when not fully autonomous, are the key actors in the creation of their identity.

Individuals, however, do not create their identity in a vacuum but are influenced by the surrounding social narratives. These narratives make an identity intelligible and, therefore, easily acceptable, or non-intelligible and, therefore, more difficult to accept. Narrative identities are neither entirely freely created nor completely given (Whitebrook, 2001, 41). Children adopted across identity borders, like all other people, develop their identity, taking into account the perception of the surrounding world. However, more than other people, they find themselves in the middle of strong social narratives that influence the creation of their identity. Children adopted across identity borders are asked to create their narrative identity in a way that is consistent with these social narratives.

The phenomenon of inter-country adoption has, in part, universalised some of these narratives. The narrative of rescue, for instance, is often used to describe inter-country adoption in many countries of destination. In chapter 2, I have described some social narratives related to adoptions across identity borders. These narratives concern the ways in which identity, childhood and family are perceived and described. These narratives influence the perception and practice of adoption across identity borders.

Every national context, however, has its own approach to adoption across identity borders. These diverse approaches depend, in part, on the narrative of national identity and the histories of immigration and adoption of the specific country. For



this reason, this dissertation compares different countries. England, Germany and Italy have different immigration and adoption across identity borders histories, and have adopted diverse policies in relation to multiculturalism. Chapter 3 provides an analysis of these different histories.

Examination of the different histories of immigration and national identity of the three countries helps to understand the diverse approaches to adoptions across identity borders. Chapter 4 presents an analysis of these different approaches and provides an analysis of the legal development of adoption in England, Germany and Italy. Through history, adoption has changed immensely, and the best interest of the child has become, only very recently, the most relevant aspect of adoption. Throughout history, the practice and regulation of adoption has changed, mirroring the change of social narrative on family, children and identity. From a situation where adoption was a way to provide an heir for a person or a child to a family, adoption has become, at least legally, driven by the best interest of the child. In a similar way, the right to identity of the child has, only in recent times, become part of the debate about adoption.

Comparison of the public and legal debate on the right to cultural identity in the three countries analysed reveals a multiple situation. While in England, race and ethnicity have been at the centre of the debate, in Germany, this issue has not been discussed. In Italy, the issue of the race/ethnicity of children has only been considered in relation to inter-country adoption and the right of every child, regardless of his/her race, to find a family. In England, race has been largely discussed in relation to domestic adoption and the child's right to cultural/racial/ethnic identity.

Analysis of the three countries shows that immigration histories and narratives on national identity influence the way in which adoptions across identity borders are perceived and performed. In England, race/ethnicity has been at the centre of the debate on adoption just as it has been a central issue in the history of the country. Similarly, German reluctance to talk about race is mirrored in the lack of debate on

the right to racial/ethnic identity of adopted children. Even in the case of Italy, limited debate on the cultural identity of adopted children reflects the limited discussion on the cultural rights of ethnic minorities within the country.

The analysis also demonstrates that the issue of the right to cultural identity of children had become significant mainly when the adopted children were adopted domestically. In England, where the debate has been more relevant, it started in relation to domestic adoption of ethnic minority children, with some academics and social workers campaigning against trans-racial adoption. They presented a social narrative where racial/ethnic identity played a key part of the child's identity, and where same race adoption was the only adoption that could protect this fundamental part of the identity of the child. In Italy and in Germany, where the debate has been less significant, it has not been related to children adopted domestically. The number of ethnic minority children adopted domestically is probably lower than in England, and this may be because the number of social workers of ethnic minority origin probably is also quite limited.

Use of the word "probably" highlights another finding of this research. Official statistics and the types of elements that are recorded underscore the way in which identity is constructed. England is the only country among the three analysed that registers the race/ethnicity of children in care, while Germany and Italy do not record these elements. In these two countries, it is, therefore, impossible to know the number of domestic adoptions involving ethnic minority children.

The fact that the debate on the right to cultural identity of adopted children has developed more in context where the issue has been discussed in relation to domestic adoption requires some analysis. One possible explanation is that the debate on the right to cultural identity arises only when a group of adults start campaigning against trans-racial/ethnic/cultural adoption. This happens when there is a well-established group who feel the need to protect children's cultural identity. In England, the debate started when academics and social workers, mainly belonging to minority groups, started questioning the practice of adoption across identity borders. The

debate that has developed reflects the tension within English society. As Shafali Lal notes ‘battles over children have always involved forces far larger than the seemingly private life’ (Lal, 2002, 175). The more limited relevance that the debate on the right to cultural identity has had in Italy and Germany is not a sign that in this reality there are no tensions between groups. It is only a signal that in these domestic realities no minority group has been able to publicly argue successfully against trans-racial/ethnic/cultural adoption. In other words, a debate on the right to cultural identity of adopted children begins when someone starts to talk on behalf of the children (and instead of the children) defending their supposed right to identity. This happens in realities where minority groups are well established and have enough power to develop and defend their position against trans-racial/ethnic/cultural adoption.

Examination of English, German and Italian experiences reveals that in the social narratives surrounding the issue of adoption across identity borders, children are often portrayed as victims. Rescue narrative is used both by opponents and supporters of adoptions across identity borders. In the Italian debate on inter-country adoption, for instance, children are presented as victims; in this way, the salvation of children becomes the responsibility of the country of destination. The rescue lens is dangerous because it tends to commodify children. Children are seen just as victims in need, instead of as individuals with interests and rights.

Rejecting the rescue lens means recognising that the best interest of the child is often a decision between different rights/interests. Adopted children have numerous rights and interests, and in many cases adoption is a means to guarantee at least some of them. In the case of adoption across identity borders, the loss of the chance to live in their cultural context of origin should be considered against the chance to have a permanent family. Through adoption, children obtain a permanent family life and improve their economic and social position. Usually, adoption tremendously improves the lives of children who, typically, have come from very difficult situations. If the difference between life before and after adoption is enormous, it is easy to undervalue the interest of the child in keeping his/her cultural identity of

origin. The adoption system mirrors the inequalities present in society, and adopted children are forced to live within these inequalities. Any discussion about the adoption system should start with recognition that inequality is the terrain on which adoption takes place.

The aim of this dissertation was not to argue for or against adoptions across identity borders. As I have tried to demonstrate, this issue is too complex for that. The interests and the social narratives involved are too numerous to present a clear-cut position. Moreover, the determination of which is the concrete best interest of a determinate child does not always coincide with the abstract best interest of the children as a group. This research was an attempt to broaden the debate on adoption across identity borders and to contextualise this issue. The comparison of three different countries has demonstrated how the system of adoption, like the issue of race, culture, family and childhood, is a social construction deeply influenced by numerous social narratives.

These social narratives should be a prime field of investigation if we want to have a greater understanding of the issues connected with adoptions across identity borders. These narratives are important, not only because they influence the way the adoption system is constructed and works, but also because they implicitly mirror the power relationships of the actors involved in adoptions. The link between these social narratives and power is highlighted by the role that children have in all these narratives: they are the object of the narrative, but are not having any active role in it. In all these social narratives, the role of children is mainly passive.

Although the issue of adoption across identity borders cannot be easily resolved, giving to adopted people a more active role in the adoption system may help to create a system that better protects the needs of the children involved. The voices of children who have been through the adoption system should be heard in order to understand the experiences of people who have multiple defined narrative identities and who have crossed the imaginary borders of race/ethnicity/culture or religion.

With the rising age of adopted children, the issues related to their cultural identity and the consequences of adoption across identity borders are becoming ever more critical. The aim of this dissertation has been to contribute to the debate on adoption across identity borders providing useful elements to contextualised this issue and compare different national experiences.

## Appendix 1: List of acronyms

ABSWAP: Black Social Workers and Allied Professionals

ACRWC: African Charter on the Rights and Welfare of the Child

CRC: United Nation Convention on the Rights of the Child

CRPC: Convention on the Rights of Persons with Disabilities

ECHR: European Court of Human Rights

ICWA: Indian Child Welfare Act

TRA: Trans-racial adoption

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