Violations of women's human rights: birth mothers[1] and adoption.

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This paper was stimulated by research I undertook on the *Adoption Information Act* 1990 (NSW). The act gives a statutory right to information to adoptees and birth parents about a party separated from them by adoption. In essence, it opens up sealed adoption files so that birth parents can access the adoptive names of their relinquished children and adoptees can access the names of their birth parents. Access to names allows parties to search for one another and make contact.

My research involved reading the personal stories of many women who had relinquished children for adoption in the past sixty years. These stories revealed that the experience of relinquishement was often a harrowing one. At first glance it seemed no more than the unfortunate result of outdated social and medical policy. However, viewing the evidence as a whole, a pattern of abusive treatment emerged. What these individual women were describing were not isolated instances with atypical doctors and social workers; rather their experiences revealed systemic violations of human rights. The treatment they received from doctors, social workers charitable organisations and government departments violated their right to be free from cruel, inhuman and degrading treatment[3], free from discrimination[4], free from arbitrary interference with their family[5], as well as their right to be entitled to special protection

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[1] The term birth mother is used in this paper, although many women may understandably object to this term. Birth mother implies that a woman is only the mother of the child for the purposes of the birth, whereas it is rightly argued that the woman who gives birth to a child is its mother always, regardless of any subsequent adoption. The alternative terms are natural mother or biological mother. Many adoptive parents object to the first as it can imply they are 'unnatural ' parents. I prefer not to use the second, 'biological mother', because it sounds clinical and impersonal.

[2] BA, LLB (Hons). The opinions in this article are those of the author alone.

[3] UDHR art 5; ICCPR art 7; Declaration on the Protection from Torture art 1; ECHR art 3; IACHR art 5; Charter of African Unity art 3. The relevance of the latter three treaties is to show that the acceptance of this prohibition is such that it has been elevated to the status of customary international law. Australia is obviously not part to these treaties.

[4] UDHR art 7; ICESCR art 3; ICCPR art 2.

[5] UDHR art 12; ICCPR art 17.

as mothers[6].

Birth mothers' stories revealed that standard adoption practice throughout the twentieth century, in particular in the 1950s and 1960s, paid little or no regard for the rights of the birth mother. Women who were having children outside the sanctity of marriage were seen as irresponsible, unfit mothers who had to be punished for breaking the dominant moral code. Society would not tolerate women who attempted to deviate from the norm of raising children in the patriarchal nuclear family. Their children had to be taken from them and placed with families who did conform to the patriarchal norm. This was deemed best for the child and for the adoptive parents. What was best for the relinquishing mother was rarely considered.

This paper will detail the inhumane way in which birth mothers were often treated. Their own words will be used to expose many of the myths about adoption – in particular, the myth that women who relinquished children always did so voluntarily. The stories of birth mothers, who have so long been silent or ignored, cast the practice of adoption in a new light. These stories force us to acknowledge that not only is adoption highly problematic, but that its history has been a brutal one. So brutal, that it raises issues of violations of fundamental human rights.

Women and human rights

Before attempting to analyse the treatment of birth mothers as violations of human rights, we must question the adequacy of human rights law for this task. Recently human rights lawyers and academics have begun to acknowledge that human rights law, like all law, is seriously gender biased[7]. The declarations and conventions that supposedly protect the fundamental rights of all human beings in fact protect the rights of men.

> The term 'human rights' is a modern euphemism for the 'rights of man' which has meant, for most of their history, 'men's rights' in the literal, gender–specific, masculine sense of the word. The problem of 'men's rights' masquerading as human rights is not merely one of language, but is historically and culturally specific to the development of these rights in modern Western Europe. The substance of the rights, and the political/economic foundation on which they rest are also 'male' and not

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[6] UDHR art 25(2); ICSECR art 10(2);

[7] Noreen Burrows 'International Law and Human Rights: The Case for Women's Rights' in Campbell, Goldberg, McLean and Mullen (eds) **Human Rights Law: from rhetoric to reality** (1986); Charlotte Bunch 'Women's Rights as Human Rights: Towards a Re–Vision of Human Rights' (1990) 12 HUM.RTS.Q. 486; Hilary Charlesworth *et al* 'Feminist Approaches to International Law' (1991) 85 AM.J.INT'L L. 613; Shelley Wright 'Economic and Social Justice: A Feminist Analysis of some International Human Rights Conventions' (1992) AUST.Y.B.INT'L L. 241; Andrew Byrnes 'Women, Feminism and International Human Rights Law – Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?' *op cit* at 205; Marilyn Waring 'Gender and International Law: Women and the Right to Development' *op cit* at 177; Hilary Charlesworth 'The Public/Private Distinction and the Right to Development in International Law' *op cit* at 190.

'human'.[8]

This gender bias is a product of the fact that '*men* make the rules and law, and decide their scope and application. *Men* also determine the nature and scope of justice, whether from their overwhelming presence in academic, on the bench, in international tribunals, or on human rights committees'.[9] The consequence of this male dominance of human rights thinking is that women and their needs are inevitably overlooked.

At the most basic level, this means that the human rights that are protected by existing conventions deal with issues that affect the lives of men and not women. These rights are typically public rights, that is, civil and political rights, that govern the individual's interaction with the state. They protect the individual in the public domain. While these rights are no doubt fundamental, they are often only fundamental to men, the individuals who participate in public life. A woman's opportunity to participate in public life is often so circumscribed that the protection of her rights in that area is academic.[10]

The flip–side of this problem is of course that issues that affect women's lives are absent from human right's treaties. A reproductive right, something so obviously fundamental to women, has yet to be recognised as a right in international law. Rebecca Cooke in her article 'International Protection of Women's Reproductive Rights'[11] argues for a *composite* reproductive right made up of women's rights to be free from all forms of discrimination, their rights to liberty, security, marriage, foundation of families, private and family life, increased education and information, as well as their right to health care and benefits of scientific progress.[12] The fact that she has to resort to a composite of rights in relation to an issue so basic to women, is indicative of human rights inability to recognise women–specific rights as *human* rights[13].

In addition to the content of rights being weighted heavily in favour of men, the subsequent interpretation of rights in a androcentric way has exacerbated gender bias.[14] The gloss that male jurists, academics, treaty framers and lawyers have put on particular articles has lead otherwise broad provisions to be viewed in narrow and masculine ways. Cooke, for example, questions why article 6(1) of the International Covenant on Civil and Political Rights (the right to life) has traditionally been interpreted as imposing an obligation on states to ensure that due process is observed before capital punishment is carried out. She states:–

> [t]his understanding of the right to life is essentially male–oriented, since men consider state execution more immediate to them than death

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[8] Shelley Wright 'Economic and Social Justice: A Feminist Analysis of some International Human Rights Conventions' (1992) AUST.Y.B.INT'L L. at 241–2.
[9] Waring *supra* note 7 at 179.
[10] See Carol Pateman 'Feminist Critiques of the Public/Private Dichotomy' in Benn and Gaus (eds) Public and Private in Social Life (1983); Charlesworth *supra* note 7.
[11] (1992) 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 645
[12] *ibid* at 653.
[13] See also Sheila McLean 'The Right to Reproduce' in Campbell, Goldberg, Mclean and Mullen at 99, *supra* note 7
[14] Brymes supra note 7 at 213.

> from pregnancy or labor. It ignores the historic reality of women, which persists in regions of the world where almost 500,000 women...die each year from pregnancy related causes...[15]

Cooke is highlighting the fact that there are alternative, legitimate ways to interpret human rights treaties, that take into account the experience of women.[16]

This essay will engage in alternative interpretation of human rights declarations and treaties, in particular the Universal Declaration of Human Rights[17]. Although this Declaration has probably not been considered in relation to adoption practice, I believe that its articles are adequate to encompass the treatment that women have received at the hands of the State and its organs in the process of relinquishing their children. Looking at the Declaration in this way will involve novel interpretations of articles. However, I would argue that these interpretations are equally legitimate as traditional interpretations and further, that such interpretations (which consider women's experience) are crucial to human rights law, if it is to make any serious claims to universality.

Birth mothers' Experience of Adoption

The history of birth mothers' experiences of adoption is largely unknown. Most people, including members of the adoption community believe that adoption is a process whereby a a young woman or girl, willingly places her child for adoption and then puts the experience behind her, getting on with her life, free from the burden of a child. This picture of adoption, at least in relation to the period before the mid-1970s, is in fact grossly distorted. Women who fell pregnant outside marriage were stigmatised and isolated for having broken a strict social and moral code that only sanctions the birth of children within marriage. These women were treated harshly by their families, social workers, medical practitioners and government welfare agencies. They were judged as lesser citizens solely because they were unmarried and a mother. Inglis says that

> it is difficult to summon up the full range of both subtle and crude hostility drawn up against [the single mother] from almost all quarters. It extended from curious whispering to physical violence. She was the butt of lascivious jokes and speculations and the object of moral lessons for the 'good girls' from whom she was irrevocably separated. Her stock in the marriage stakes lowered and her stain on the family feared. She was represented as pitiful or remedial. In more liberal circles she

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15 (1992) 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 645 at 689.

16 This approach has been coined as 'asking the woman question'. See Katherine Bartlett 'Feminist Legal Methods' (1990) 103 HARVARD LAW REVIEW 829.

17 The Universal Declaration of Human Rights is the only relevant human rights treaty that was in force at the time most of the alleged violations occurred. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights did not come into force until 1976 and the Convention on the Elimination of All Forms of Discrimination Against Women did not come into force until 1981.

> was seen as a 'good' girl misled by the classic character from all the 'he done her wrong' mythology which accompanies a high valuation placed on asexuality or virginity on women'.[18]

The words of mothers themselves corroborate this picture of judgement, stigmatisation and abuse. Prue, a twenty year old mother in 1970 said that 'at no time did any person at all treat me as if I was a young mother in need of help. I was a girl who had gone wrong and you'd think everything depended on getting me back to being a nice girl...'[19] Another young mother recounts an interview with a social worker at a hospital when she was six months pregnant:-

> [The social worker] said, 'I'll make an appointment for you to see a social worker at the adoption agency, she's very nice.' And I said, 'Nice?' I don't know what I did wrong or whether I was insufficiently passive or what but she flew into this great diatribe. 'Yes, nice, these people don't have to be nice. You girls expect people to be nice to you and they don't have to be like that at all. They're only like that out of the goodness of their hearts...'[20]

This attitude to single mothers permeated every facet of hospital and adoption practice. It went beyond a question of whether health care and social workers were 'nice' to unmarried women – it substantially affected the medical treatment that women received. Single mothers were immediately treated as different to married mothers – they were less deserving of pre-natal care, less deserving of proper medical care during birth and their ante-natal needs were non-existent. The differential treatment they received raises questions of violations of human rights, not only because the treatment was discriminatory, but because some treatment, particularly that in the delivery room, was so appalling that there is a strong argument that it amounted to cruel, inhuman and degrading treatment.

Pre-natal care

Differential treatment in relation to pre-natal care is highlighted by this comment from Chris, a 19 year old mother in 1974:-

> Unmarried mothers didn't go to pre-natal classes, especially with babies for adoption. Bad enough to be unmarried, but for adoption, well! Single mothers don't get the same pre-natal care and people think it's because they're slack about it but it's this sort of thing that puts them off.[21]

Many young women spent their pregnancy in unmarried mothers homes run by the state and by charitable institutions. Most of these homes provided no pre-natal care. In addition to this they worked the young women extremely hard. Often they were treated as domestic servants and forced to do heavy cleaning work from early in the

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18 K.Inglis **Living Mistakes: Mothers who consented to adoption** (1984) at 9

19 Inglis at 28

20 Inglis at 115

21 Inglis at 116.

morning till night – work that was hardly appropriate for their pre-natal needs. One woman said that the home she was in was 'very, very punitive, absolutely awful. We didn't question how punitive it was at the time. We knew mother and baby homes were to punish you for being bad, so I knew it would be like that'.[22]

Lack of pre-natal care for mothers in and out of homes inevitably made deliveries much harder. Young women went into labour with limited knowledge of what was going to happen and what they should be doing. Consequently, deliveries were more frightening and difficult than they needed to be. Unmarried mothers experienced suffering and distress that could have been avoided were they accorded the same status and care as married women at the pre-natal stage.

Differential medical treatment on the basis of marital status amounts to a violation of article 25(2) of the UDHR which accords all mothers special care and assistance. The article does not guarantee only *married* mothers care and assistance – the status of 'motherhood' *per se*, is accorded this special treatment and all mothers, married or not, qualify. Further, the article expressly states that all children, whether born in or out of wedlock, shall enjoy the same social protection. The implication of this is that the marital status of the mothers is irrelevant for the purposes of this article. Article 2 states that everyone is entitled to the rights and freedoms in the Declaration regardless of any 'status' and Article 7 affords protection to everyone in relation to discrimination in violation of the Declaration. The combined effects of these articles is that if the state provides pre-natal care through its agencies to married mothers, it must do so for all mothers, or find itself in breach of the UDHR. Discrimination in relation to pre-natal care is a violation of unmarried mothers' rights to special care and assistance. It is a violation for which the state is responsible.[23]

Medical Treatment During Birth

The delivery room was the site of most abuses of birth mothers' human rights. Here treatment also amounted to a violation of article 25(2), article 2 and article 7 of the

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[22] D.Howe, P.Sawbridge and D.Hinings **Half a Million Women** at 52.

[23] States are responsible for the acts of their organs and for the acts of entities empowered to exercise elements of government authority: Articles 5, 6, 7 and 8 on State Responsibility, (1975) 2 YBILCN 60. *Public hospitals* are organs of the state, which include 'constituent, legislative, executive, judicial or other power[s], whether [their] functions are of an international or an internal character and whether [they] hold a superior or a subordinate position in the organisation of the State': article 6. *Charitable and private organisations that run unmarried mothers' homes and adoption services* still perform acts for which the State is responsible, either because they are empowered by internal law to exercise government authority (art.7(2)) or because they are in fact exercising government authority in the absence of the official authorities and in circumstances which justify the exercise of those elements of authority (art 8(b)). The former case (empowered by internal law) would include all the organisations that were specifically authorised by statutes such as the *Adoption of Children Act (NSW)* 1965 to run unmarried mothers' homes and adoption services. The latter case would include private organisations that were not necessarily included in a statute, but were providing a service, in which the State acquiesced, because it provided no similar service of its own.

UDHR, because unmarried mothers were treated differently to married women. However the abuse went much further than this – the treatment of medical staff often constituted inhuman, cruel and degrading treatment, in violation of article 5 of the Universal Declaration and customary international law.[24] At a time when women were most vulnerable and most in need of care, the staff who were entrusted with their care routinely abused their fundamental right to be accorded dignity and their right not to be degraded. The two stories that follow are typical of the experiences of single mothers.

Molly was 19 when she had her daughter in 1967:–

> I went to hospital and it was vile. There was a nursing sister there who was just brutal and she was quite open about the way she felt. She said things like, 'You girls get what you deserve.' I heard all these nightmarish stories from girls who came back from there. When I was having Anne I was holding on to the top of the bed and I was very confused, really didn't know what was happening at all. I kept getting up to go to the toilet and they kept pushing me back down on to the bed. I was desperately hanging on to the top of the bed and this woman, I'm sure it must have been the same one that had been so vicious to the other girls, kept coming and ripping my arms off from the top of the bed and told me not to hang on and she kept coming and ripping them off until I was finally screaming. This doctor came; he kept examining me and I didn't know why he was doing this and I just felt ghastly and here was this woman being so awful and this doctor poking his finger up my bum all the time, so I bit him. They knocked me out, injecting me with something that made me pass out. I woke up hours later and the baby had been born and I was all ripped and torn. I don't know if this was done on purpose or not but I wasn't given any tablets for my milk either. Two days later my breasts were huge and I was in absolute agony for days. The whole physical thing made me feel as if I had been drawn and quartered.[25]

Jeanette was also 19 when she had her son in 1968. Even though she was not due for another five days, the hospital staff induced her:–

> They took me up to the labour ward and I was lying down and a doctor was showing this young man how to break the water. I was so frightened I was crying for my mother. Then the young one went off and got his mate and said, 'Have a look at this one, she's a bit washed out now.' God that made me sick. They weren't looking at me in a medical way...[The induction] makes me very angry. I was young, single and scared and was probably going to be in agony anyway but this was so unnecessary. They didn't tell me that induction causes the

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[24] The prohibition on torture, inhuman, cruel and degrading treatment is included in the UDHR art 5; ICCPR art 7; Declaration on the Protection from Torture art 1; ECHR art 3; IACHR art 5; Charter of African Unity art 3. This level of state acceptance of the prohibition indicates that it has been elevated to the status of customary international law.

[25] Inglis at 57–8.

> strongest type of labour. I wasn't overdue. I don't know how they could do that to a young girl. There was enough pain to send you stark raving mad, incredible pain and coming constantly...After six o'clock in the morning the other mothers were demanding to know why something wasn't done for me so they came to take me to the labour ward. I was crippled with pain and out of my mind. I remember a nurse saying that if I couldn't get on the trolley by myself I wouldn't be going. I don't know how long it took to edge myself on, I was so exhausted and upset. As soon as I was in the labour room I grabbed a mask and then they left me on my own. I was screaming come back, come back. Eventually there was a nurse beside me and the room just filled up with people. There were so many you couldn't have fitted another person anywhere. There were all these eyes staring at me, most of them had masks on, just jammed together. Packed in, standing in the doorway, all looking at me. There must have been about forty. I was being used for teaching.
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> This was the worse thing of all. I'd been through all this and now the ultimate humiliation. This was the peak of all the lumps of shame building up. The ultimate humiliation to be here on public display while I have my baby. All these strangers, most of them men, and I was so embarrassed about my body in normal circumstances...[26]

These stories are not necessarily exceptional. The New South Wales Law Reform Commission, in its reveiw of the *Adoption Information Act* 1990, discovered that the experience of cruelty during labour was a common theme.[27] Young women were verbally and physically abused by nurses, doctors and other hospital staff, simply because their relation to the father of the child was not one of wife and husband. Medical staff seemed to believe their behaviour was justified because of the young women's unmarried status. Little thought was given to the fact that, conception aside, this was a young women giving birth, a painful and distressing experience. As one birth mother succinctly puts it '[it was] bloody stupid, I was there to have a baby not to have my marital status attended to!'[28]

It is suggested that the treatment unmarried mothers were subjected to amounts to a violation of article 5 of the UDHR, which prohibits 'cruel, inhuman and degrading treatment'. Limited illumination on what constitutes cruel, inhuman and degrading treatment can be found from the jurisprudence on the article. There are two reasons for this. The first is that there is no complaints mechanism under the UDHR so no body is entrusted with the interpretation of the articles.[29] The second is that the jurisprudence that does exist, from interpretation of similar articles in other treaties, is often 'masculine-oriented' jurisprudence. That is, it deals with cruel, inhuman and

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[26] Inglis at 90–1.

[27] New South Wales Law Reform Commission Review of the Adoption Information Act 1990 Report 69, 1992 at 127–8.

[28] Inglis at 27.

[29] The International Court of Justice does consider the UDHR from time to time in its judgments, as do municipal courts, eg Filartiga v Pena-Irala 630 F.2d.876 (1980).

degrading treatment in its 'traditional', masculine context – *the individual's interaction with the state as a result of activity in the public domain*. For example, much of the Human Rights Committee's interpretation of article 7 of the International Covenant on Civil and Political Rights (ICCPR) has focused on Uruguay's treatment of political detainees.[30] Similarly, the European Court of Human Rights' (ECt HR) jurisprudence on article 3 of the European Convention on Human Rights (ECHR) focuses on extradition/expulsion, conditions and duration of detention, interrogation methods, prisoner's medical treatment, solitary confinement and strict arrest and treatment by police and prison officers. While it is not questioned that these are valid concerns for human rights law, their narrow focus does present a challenge when trying to apply their related jurisprudence to inhuman, cruel and degrading treatment outside the traditional 'public' context.

Having said this however, it must be acknowledged that the Human Rights Committee (HRC) has stated that article 7 ICCPR is not restricted to persons arrested or imprisoned, as the majority of cases may suggest, but that it extends to 'pupils and patients in educational and medical institutions'.[31] Similarly, article 3 ECHR has been held to cover medical care, even though, like art 5 UDHR (and unlike art 7 ICCPR), it makes no express reference to medical treatment.[32]

In relation what constitutes inhuman, cruel and degrading treatment, the HRC has said that it is not necessary to draw sharp distinctions between cruel, inhuman and degrading, but that the distinctions depend on the 'kind, purpose and severity of the particular treatment'.[33]

The ECt HR in **Ireland v United Kingdom** said that

> ill–treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim...[34]

In relation to five interrogation techniques used by the British security forces the Court found that 'intense physical and mental suffering...[leading] to acute psychiatric disturbances during interrogation' amounted to inhuman treatment and that treatment which aroused 'feelings of fear, anguish and inferiority capable of humiliating and debasing...and possibly breaking...physical or moral resistance' constituted degrading

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[30] **Ambrosini v Uruguay** Doc.A/34/40 at 124; **Antonaccio v Uruguay** Doc.A/37/40 at 114; **Massera v Uruguay** Doc.A/34/40 at 124; **De Bouton v Uruguay** Doc.A/36/40 at 143; **Gilboa v Uruguay** Doc.A/41/40 at 128.

[31] GC 7(16), Doc.A/37/40 at 94

[32] Three cases which were unsuccessful in their claim under article 3, but not because medical treatment was held to be outside the ambit of article 3:– Dec.Adm.Com.Ap.8070/77, 9 Oct 1978 (unpublished); Dec.Adm.Com.Ap.8518/79, 14 March 1980. D & R 20 at 193 (194); Dec.Adm.Com.Ap.8465/79, 5 May 1981 (unpublished).

[33] GC 7(16), Doc.A/37/40 at 94

[34] Judg.Court, 18 Jan 1978, **Case of Ireland v United Kingdom**, 162 Publ.Court A, vol 25 at 65.

treatment.[35]

The European Commission of Human Rights has also attempted to define inhuman and degrading treatment in the **Greek Case**.[36] It said that 'the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable'. Degrading treatment was said to be that which 'grossly humiliates...before others' or drives someone to 'act against his [*sic*] will or conscience'.[37]

Analysing statements of birth mothers in light of these pronouncements, it is clear that the 'medical treatment' they received falls within the European Court's definitions and thus within article 5 of the UDHR. Firstly, the treatment occurred inside a hospital, an institution that has been recognised as a potential site for violations of this kind. Second, unnecessary induction, withholding of gas and tablets to dry up milk, forcing a woman in labour to move herself unaided onto a trolley and allowing women to tear constitutes treatment that 'deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable'. That is, it falls within the European Commission's definition of inhuman treatment. Third, telling young women 'you...get what you deserve', continually pulling a woman's arms off a bedhead and using a young woman without her consnt for teaching predominantly male doctors would arouse 'feelings of fear, anguish and inferiority capable of humiliating and debasing...' This treatment amounts to what the European Court has defined as degrading. Finally, it is suggested this ill-treatment attained more than a 'minimum level of severity' having regard to the age, sex and state of health of the victims.[38] They were young women, in the very vulnerable position of labour, at the mercy of older and often male medical staff.

The question of state responsibility needs to be addressed. Can the State be held responsible for violations of human rights by medical staff and social workers? States are responsible for the acts of their organs and for the acts of entities empowered to exercise elements of government authority.[39] Public hospitals, where many young women were treated, are organs of the state, which include constituent, legislative, executive, judicial and other powers, whether international or internal, or whether superior or subordinate in the organisation of the State.[40] Private hospitals, often church run, may also act in ways for which the state is responsible. If they are acting in the absence of the State in justifiable circumstances, then their conduct can be attributed to the State.[41]

The foregoing analysis is rather artificial in that it only deals with two examples. However, for the purposes of human rights law, which is very individualistic, it is

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35 *ibid* at 66.
36 Op.Com., 5 Nov 1969, **Greek Case** 2 YB XII at 186
37 *ibid*
38 **Ireland v United Kingdom** at 65.
39 International Law Commission's Articles 5, 6, 7 and 8 on State Responsibility, (1975) 2 YBILCN 60
40 Art 6.
41 Art 8.

necessary to identify specific acts that violate specific articles of treaties.[42] It must be emphasised however that the point of this paper is not simply to show that particular women, such as Jeanette and Molly have had their rights violated, but that these violations formed part of a widespread social and medical policy that affected all women who came into contact with it to varying degrees.

Denying women the right to see their child.

There was one practice during birth that was common in public and church run hospitals, if the mother was unmarried. This was the placing of a pillow or a sheet over the mother's face so she could not see her baby being born.[43] The practice conformed to conventional wisdom that is was better for the mother never to see the child so that she could 'forget' it more easily when it was relinquished. Jeanette was subjected to this practice during the birth of her child:-

> A pillow was put on my chest so I couldn't see anything. I knew something was going on down the end of the bed and I kept trying to push this pillow off so I could see. I wasn't even sure the baby was born yet. I pushed the pillow out of the way and a nurse picked it up and another older one said 'Put that back.' The nurse hesitated, and she said in a very hard voice, 'Put that back, nurse.' So back went the pillow and I didn't know what was going on.[44]

The idea that not seeing a child at birth will help a mother 'forget' her child is of course ludicrous. After carrying a child for nine months, experiencing the pain of child birth and being physically and psychologically prepared to care for the child, she is unlikely to forget its birth, no matter what 'precautions' are taken. The practice of placing a pillow on a woman's chest or alternatively, taking the child away immediately it was born, was nothing other than cruel. It is the most natural instinct in the world to want to see one's child when it is born - to see if it is alright, to see the reward of hours of labour and to finally meet the person you have been carrying around for nine months. Conversely, it is most unnatural and cruel to deny a woman this right. Women who were subjected to this practice describe the feelings in these terms:-

> Labour lasted six hours. I felt that someone was ripping my insides. My body, heart and soul were no longer whole. As soon as she was out, they whisked her away. I was so shattered. I figured I had no right to see her.[45]

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[42] I would question this whole process in that it limits our notion of what constitutes a human rights violation to those human rights recognised in existing declarations and treaties. This legalistic process is inherently conservative and imagination limiting. It is one of the main obstacles to the recognition of non-traditional rights and rights for groups rather than individuals. For discussion of the problems in our current conception of rights, in the domestic context, see generally 'Symposium: A Critique of Rights' (1984) 62 Tex.L.Rev. 1363.

[43] NSWLRC at 128.

[44] Inglis at 91.

[45] A.Sorosky, A.Baran and R.Pannor **Adoption Triangle** (1978) at 56.

> I didn't see the baby. I asked to and they said, 'No, it's our policy, it isn't a good thing if the baby is for adoption'. That upset me so much. I could hear babies crying and I hid myself under the bedclothes and cried too. No one took any notice.[46]

Many women were psychologically scarred from the experience of never seeing their children. They were beset with fears that the child was not healthy at birth and had suffered all its life as a result. Most simply felt that had they been allowed to see their child just once, this would have eased the pain of relinquishement.

Preventing a woman from seeing her child is further evidence of cruel, inhuman and degrading treatment. It caused 'intense physical and mental suffering...[leading] to acute psychiatric disturbances' (inhuman treatment) and aroused 'feelings of fear, anguish and inferiority capable of humiliating and debasing...and possibly breaking...physical or moral resistance', (degrading treatment). In the circumstances it was unjustifiable. This conclusion is bolstered by the fact that not allowing a birth mother to see her child was contrary to domestic law, under which she was the sole legal guardian of the child until consent to adoption was given. Women such as Jeanette did not even intend to adopt their children, but were still denied the opportunity to see them because they were single mothers.

The greatest violation of all – involuntary consent

As stated at the outset of this paper, the picture of adoption as a process whereby a young woman voluntarily gives up her child , happy to be freed of the burden of raising it, is grossly misleading in relation to many cases. Most women relinquished their children because of economic, social and moral pressures, that is, forces external to themselves. Very few women relinquished because they did not want their child.

It is crucial to analyse the reasons women relinquished so that we can better understand the reality of adoption. When a woman says that she placed her child for adoption because she could not afford to look after it or because she believed that it would be better provided for by adoptive parents, she is not saying that she did not want the child. What she is saying is that she lived in a society that did not provide the necessary means for women to keep their children. She lived in a society that was prepared to see women give their children away rather than give them the resources to raise their children themselves. In the clinical environment of a hospital, with social workers creating the impression of reason and benevolence it may be difficult to see, but a young woman adopting her child in the 1950s and 1960s is essentially no different to the pitiful picture of a Victorian woman leaving her child on a church doorstep, in the desperate hope that someone will be able to feed and clothe it when she cannot. She does this not because she does not love the child or because she does not care – she does it *because she has no choice*.

Until 1973, when the Whitlam government introduced the single mothers' pension in Australia, many women would have found themselves in an impossible predicament. If they had no support from the father of the child or their family, they would have no

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[46] Inglis at 27.

source of income. Without reliable, affordable child care, which was not readily available, they could not find employment. Like the Victorian woman, they had no choice but to give their children up. The only difference is that in the 1950s and 1960s, unlike Victorian times, society was more than eager to take that child and place it with a respectable, married couple.[47]

The assertion that women did not really want to give up their children but were forced to through economic circumstances, is borne out by the fact that following the introduction of the single mothers' pension in 1973, adoption rates declined dramatically. In the seven years from 1974 to 1981 the number of children placed for adoption in Australia each year halved.[48] Increased availability of abortion may have some significance, but it cannot be concluded that women who would have adopted their children in the past have abortions now, because the number of children born outside marriage has steadily increased since 1970.[49]

Economic reasons were not the only ones that women cited for relinquishing their children. There was enormous pressure, often from families to relinquish, as a child was a visible sign that you had had sex outside marriage, that you had broken a social taboo. It was a sign that you were tainted, a slut or bad girl. It was something of which to be ashamed.

> The shame was probably the biggest factor at the time – it was just overwhelming. It was something to do with the fact that it was obvious that I had had sex. And I was young, and I shouldn't have been having sex, and here was this protruding stomach telling the world. And they could all point at me and say 'Shameful hussy!'[50]

Parents often could not accept this shame and pressured their daughters to give the baby up.

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[47] There is not space to go into the whole history of adoption from the perspective of the child and the adoptive parents. Suffice to say that adoption has not always been favoured practice. Up until the 1940s biological determinism had a strong hold on social theory and there was a widespread belief that adopted children would always turn out bad – just like their natural parents. Consequently it was sometimes hard to find adoptive parents and governments were forced to publish propaganda pamphlets with titles such as 'Is it safe to adopt a child?' In the 1940s and 1950s this theory gradually began to change and the idea that children were the product of their environment took hold, that is, it does not matter who bears a child, put in a good, nurturing and moral environment, it will thrive. This change, coupled with the baby boom, meant that children for adoption were welcomed. Adoption came to be seen as a double solution to two social problems. Firstly, it was a cure for infertility. It provided children to couples who could not have their own – a significant service when two children in the suburbs had become a very persuasive norm. Secondly, it was a solution to the problems of the sexual revolution – all those single women threatening to raise children outside the clutches of the patriarchal family. If children were taken from these women and given to married couples without children, a nice piece of social engineering was achieved. Little thought of course was given to the feelings of these young women, or to the feelings of the children as they eventually expressed them when they grew up.

[48] Inglis at 17.

[49] In Britain 12 per cent of all children born each year are born to single mothers.

[50] J.Rockel and M.Ryburn **Adoption Today: Change and Choice in New Zealand** (1988) at 23.

> ...many of us [gave] up our child to please our families, because the families were putting pressure on us. So mothers give up their child; they lose their child but the relationship they have with their family before the child was born never comes back, so, in other words, it was a waste of time. You lost your child and your family, so you might as well have kept your child.[51]

There of course no question of the State being responsible for the actions of families and social pressures that came to bear on young women at this time. It is important to document this pressure however because it was replicated in the actions of social workers and hospital staff whose behaviour is attributable to the State.[52]

The pressure that came from social workers to relinquish children for adoption was a significant factor in many women's decisions. A common tactic was to tell the young woman that if she really loved her child she would give it up. Howe, Sawbridge and Hinings call it the 'pernicious double-bind: if you really love your baby you will give him or her up for adoption; if you keep the child then that is proof that you do not sincerely have his or her best interests at heart and therefore you are not a fit person to care for the baby'.[53]

The following recollections of birth mothers indicate some of the pressures that were brought to bear on them:

> ...the matron kept on saying, 'Stop thinking about yourself. Think of the baby. It should be brought up in a home with a mother and a father, and think of the joy he would give to this couple who adopt your baby. They can't have children, you can have plenty in the future'.[54]

> I didn't have any fight left in me. I mean, I'd done something wrong by having a baby; and now they were making me feel as though I was doing something worses by wanting to keep my own baby.[55]

> Some official person came with papers to sign and I said I hadn't had time to consider it all, sort myself out. She said,'You've had nine months to sort it out.' ...She was very pushy this new one and said,'Have you somewhere to live? Have you money? Have you any idea what happens to babies that girls keep because they can't make a decision? A baby deserves more serious thought than that,' and so on. Actually, now it seems impossible that anyone could say such things but that's

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[51] Howe *et al* at 63–4.

[52] Charitable and private organisations that run unmarried mothers homes and adoption services perform acts for which the State is responsible, either because they are empowered by internal law to exercise government authority (art.7(2) on State Responsibility) or because they are in fact exercising government authority in the absence of the official authorities and in circumstances which justify the exercise of those elements of authority (art 8(b)); see **supra** note 23.

[53] Howe *et al* at 65.

[54] Shawyer at 110.

[55] Inglis at 93.

my memory of it. I know what she said to me really brought me down....I didn't sign but they were back next day...Anyway, weakness, wanting to please, lack of judgement, whatever, not recognising pressure and guilt, guilt, guilt, and I signed the papers.[56]

The next day, in this strange place where I didn't know what was happening, this woman from the state welfare came and wanted to see me on the porch. I couldn't stand up straight, I was double over, all stiff, physically wrecked. I had a lot of stitches too. She said she had brought the adoption papers for me to sign and when I said I wanted to keep the baby she just said,'Oh.' I asked her if I was entitled to any benefits and she said she didn't know because she had only been in Australia a short time. She was Canadian. I said,'I don't want to sign papers,' and she said,'You won't be allowed to leave until you do.' I didn't think I could just leave, and anyway they had all my possessions. She said,'You'll have thirty days to change your mind. Because she said that I signed the papers.[57]

All they wanted was for me to adopt the baby out, that's *all* they wanted. Like a precious little commodity, it had somehow come out of my disgusting body and had to be protected from me. The sooner they could get some distance between me and this innocent baby, the better. All that came out loud and clear. Whenever I spoke to [the social workers] there was this sort of guarded thing. It's okay to talk to us; as long as you speak only of the adoption of the baby...They just expected me to feel nothing. I don't think people believed that we did feel anything. We were just silly little girls who had got ourselves pregnant without any consideration for the baby.[58]

No one suggested foster care, no one suggested possible ways I could continue to do what I was doing in a way that would make it easier. It was adoption or nothing.[59]

From these recollections it is clear that the picture of a young girl happily and voluntarily relinquishing her child, is quite inaccurate. The choice that many women made was no choice at all. The social and health workers who should have been guiding them and providing them with options, gave them one option only – adoption. The New South Wales Law Reform Commission's Review concluded that 'the majority of birth mothers consented to adoption in the circumstances which led them to see adoption as the only course open to them to serve the needs of their children'.[60] Their children were in effect taken from them, a suggestion which is substantiated by the words of one woman.

My baby was 'stolen' from me – I didn't give her up by choice. The

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[56] Inglis at 28.
[57] Inglis at 92.
[58] Inglis at 60.
[59] Inglis at 156.
[60] NSWLRC at 129.

system at that time was criminal. Like vultures they swooped...[61]

These stories represent just one level of coercion that was used against birth mothers in relation to relinquishement. The New South Wales Law Reform Commission received evidence of much more serious forms of coercion and even illegal practice in the course of it review.[62] Consent to adoption cannot be given before the passage of a set statutory waiting period designed to allow the woman to recovery from labour and consider the question of adoption now that she actually has a child. It is illegal to sign consent forms prior to birth. It seems however that it was common for women to be given consent forms to sign before the allotted time had passed when they were often in no fit state to make a considered or voluntary decision.

The Commission also received evidence of women who were drugged, taken to another institution in the middle of the night, made to sign consent forms and then taken back to hospital. Documents were misrepresented to women so that they did not know they were signing relinquishement papers. Even more extreme still, some women never gave their consent to adoption. They may have been under the age of 18 and their parents consented for them, they may have been told that their baby died when it had not or a court may have dispensed with their consent. There can be no question that in all these cases the consent was not voluntary and in most it was illegal under domestic legislation.[63]

Another statutory safeguard in relation to consent that was routinely dispensed with was the period in which a woman can change her mind before the adoption order is finalised. Many women who relinquished children insist that they were never informed of this period of grace. Other women, like Jeanette (above), were informed of the period but discovered that in practice it did not exist. Jeanette only signed the consent because she was told she had thirty days to change her mind. When she telephoned the welfare agency around the thirty day period she was told:

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[61] NSWLRC at 126.

[62] NSWLRC at 128.

[63] There is the additional problem of women who placed their children in foster care only to find that the children had been adopted when they tried to take them back. One of the most moving experiences I had during the Review was talking to a man in his seventies who was looking for his little sister who had been adopted during the Depression. His mother had put the three children in foster care while she had her fourth child. The elder two boys were fostered but the little girl who was only 18 months old was given to a family for adoption. The mother contested the adoption for 17 years but the daughter was finally legally adopted just before her 18th birthday. Her name was legally changed and her altered birth certificate was unavailable to the natural family to discover her new identity, according to the strict secrecy laws that have existed in all States in Australia until very recently. Over 60 years later, her older brother pulled a photograph from his wallet of three children sitting on a wall – two little boys with a baby girl between them. 'Help me find my sister' he said, pointing to the baby girl, 'My time is running out'.
Also see BBC/ABC Docu-drama *The Leaving of Liverpool* (1991) which tells the story of the 'children of the Empire'. Thousands of British children were sent to Barnardos and other charitable homes in Canada, Australia, South Africa, Zimbabwe and New Zealand as child immigrants. Their parents often did not consent to them being sent and only discovered what had happened when they came to take their children home. The children were often told their parents were dead or did not want them.

> 'Your baby went a long time ago'. I went into a state of shock and she said, 'Hang on while I get your file.' She said did I want to know about the parents and part of me was in shock that he had gone and part of me said, 'Yes'. She said the father was an accountant and that my son had a brother adopted two years before. I couldn't talk. I was crying. She said did you want to know anything else and I wanted to say 'Yes, where is he?'...I was really beginning to feel the grief now. But somehow I still felt the possibility of trying to keep him was there. I never accepted he was gone forever.[64]

The issue of involuntary consent, legally invalid consent and lack of consent raises serious questions of human rights violations. Taking a child away from a woman without her consent, so that she has no way of ever finding out where her baby is,[65] no chance of contacting her child in the future and nothing to even prove her child was born,[66] must be a violation of the mother's human rights. But what right? What article of any international treaty says that a woman has an inalienable right to keep her child unless there are very substantial reasons for taking it from her?[67]

The answer is that there is no such right. While human rights law is supposed to protect all fundamental human rights, it appears to have overlooked a right that is fundamental to women. Women have no protection from the abuse of having their children taken from them by the State.

The reasons for this go deeper than the fact that human rights law, like all law, is made by men, for men. Human rights law is conceptually incapable of recognising a right not to be separated from one's child, owing to its grounding in Western liberal philosophy and the latter's focus on individualism. A right to one's child, that is, a right to be connected to another human being, sounds like an anathema to human rights law. *Individuals* have rights which separate them from others. Rights create a magic circle in which the individual stands, free from the interference of others. They do not give individuals rights to be joined to others.

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64 Inglis at 96.

65 Adoption in all Australian states leads to the issuing of an amended birth certificate which states the name of the parents as those of the adoptive parents and the name of the child as its adoptive name. Until the *Adoption Information Act (NSW)* 1990, the birth mother was never entitled to receive a copy of this certificate. (The 1990 New South Wales Act now allows her to receive it as of right once her child is 18, but it is the only state in Australia to do so. Victoria, Tasmania, Queensland and South Australia give the birth mother access to the amended birth certificate if the adoptee consents. In Britain, birth mothers have no right to amended birth certificates.) Without the information on an amended birth certificate it is almost impossible to discover the identity of an adopted child or adult.

66 Birth mothers received no documentation in relation to the adoption, not even a copy of the adoption order. The adoptive parents received a copy and in New South Wales, until 1967, this order contained the birth mother's name. Birth mothers were not even entitled to receive a copy of their child's original birth certificate, which contains no more than their own name and the child's pre-adoptive name: see Inglis at 174-6.

67 A child now has a right not to be separated from his/her parents under art 9 of the Convention on the Rights of the Child, 1989 (entered into force September 1990).

This conception of rights and the primacy of individuality are essentially masculine. By virtue of our material existence women do not prize individualism to the same extent as men. Robin West in her article 'Jurisprudence and Gender'[68] develops this argument in relation to the Western liberal tradition and feminist theory. She claims that the Western liberal legal tradition, from Locke and Hobbes, through to Rawls and Dworkin is characterised by a 'separation thesis'. That is, liberalism assumes that we are all physically separate from one another and that we all experience this separation as freedom, a positive feeling. As a result, we value autonomy and fear annihilation and interference from others. In order to protect ourselves from others we create governments that will not only respect our right not to be interfered with, but will ensure that others respect this right too. The mistake liberalism makes is in assuming that all people have the same experience of separation and that valuing individual autonomy is a universal human condition.

Women, West argues, do not experience the world in these terms because we are actually or potentially connected to other human life through pregnancy, breast-feeding, intercourse and menstruation. Theory that recognises this, that is feminist theory, is characterised by a 'connection thesis' which is the antithesis of the liberal separation thesis. It argues that women have an experiential and psychological connection with other human life which leads us to value intimacy, community, responsibility and care. We fear separation and isolation from community and consequently do not value autonomy and individuality in the same way as men.

While West's argument may smack of essentialsim to some, I would suggest that in relation to the specific issue of childbirth and adoption, it holds much truth. Women separated from children by adoption vividly describe the pain of this separation.

> I miss him physically. I miss him. When I first came out of hospital I felt like I had my arm chopped off or something, it was a physical missing him, and I miss him now...I am aware that James is not there. I sort of look for him.[69]

> The pain of it! I didn't know what the pain of it was going to be like and I'm curious to know if it's the same for every person. I suspect it is because really it's exactly the same thing. I mean I felt exactly the same way a cat sounds that's lost its kittens, the way it walks around and around looking and crying. That's exactly the way I felt. My whole body was out of whack after she was adopted...the thirty days waiting. I couldn't sleep at *all*. I'd just sit up and...mourn, I suppose, feel lousy all night long. Then in the day I'd sleep, then from about four in the afternoon till night time I'd lie on the bed until it was dark; for weeks and weeks I would cry and cry and cry. Mum used to come and sit on the edge of the bed and stroke me. I'd never had an experience like that before, or since. The only possible time might be if one of my other children was killed...One result of all that on me is there has been no pain like it again. Nothing could hurt that much again - ever.[70]

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[68] (1988) 55 CHICAGO LAW JOURNAL 1
[69] Howe *et al* at 84.
[70] Inglis at 58-9

> ...the feeling of a child conceived in my body will never disappear. The sorrow of a lost child and the mother crying out at night is imprinted on my heart.[71]
>
> I still feel the hurt. I just can't get over what happened. It was the hardest and most painful thing that has ever happened to me and no one seems to understand.[72]
>
> I have felt empty – there has been this emptiness inside of me since she went. A part of me had gone.[73]

These testimonies suggest that through child birth women do have a fundamental sense of connection that the liberal separation thesis cannot account for. It fails to recognise that we are not all physically separate from other human beings and that we do not all experience separation as freedom. Rather, separation can mean acute and long–lasting pain.

The significance of the foregoing for human rights is that the mainstream conception of human rights is firmly rooted in the liberal tradition, so that the theoretical underpinning of human rights law is the separation thesis. Human rights law protects what men value – separation and autonomy – it does not protect what women value – connection and community. As a result, human rights law does not have the theoretical framework or discourse to recognise a right not to be separated from one's child. In 'MacKinnonesque' terms, human rights law cannot recognise separation as a *harm* or a *violation*, from which women should be protected.

Human rights law needs to broaden its theoretical basis beyond the protection of individualism, so that it can recognise harms other than those which interfere with individual integrity. Rights must be formulated to encompass more than the male Western experience of existence. That is, they must account for the fact that not all human beings value autonomy and experience separation as unquestionably good. Violations of one's humanity can occur through forced separation, particularly forced separation from one's child. Women need a right not to be separated from their children codified in an international convention. The Convention on the Elimination of All Forms of Discrimination Against Women gives women no such right. This is hardly surprising for a document that simply runs through the gamut of human/male rights, expressly granting them to women. It gives no serious consideration to the fact that women's needs may be fundamentally different to men's.[74] Human rights law

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[71] Sorosky *et al* at 56.
[72] Howe *et al* at 84.
[73] Rockel and Ryburn at 165.
[74] The Convention gives women the same right as men in relation to adoption, which is manifestly absurd for unmarried women. Fathers have no rights in relation to their children born outside marriage. Their consent is not needed for adoption. The whole Convention suffers from the fact that men are the standard by which women are judged. We are 'different' because we are different from men; this difference can be overcome if we are given the same rights as men; then we become the same as men and discrimination supposedly vanishes. This whole process is flawed because women do not necessarily need what men have; we are not 'deficient men'. We have needs of our own that must be recognised without comparison to

must recognise that women are vulnerable to harms by virtue of their gender. We need a convention that will label these harms as violations of human rights. Such a convention should include a right not to be separated from one's child.

Making do with existing rights

Much feminist legal writing, like the bulk of this paper, is aimed at making existing law stretch to encompass women's experience. After having concluded that human rights law is sadly deficient in recognising harms against women, we can still search for existing rights that may lead to some recognition of a violation of birth mothers' rights. Article 12 of the Universal Declaration is no substitute for a right not to be separated from one's child, but it does prevent arbitrary interference with the family. There is a strong argument that pressuring a woman into adopting or dispensing with her consent is an arbitrary interference with her family.

Like article 5 of the UDHR there is no jurisprudence on the article itself, but there is jurisprudence on similar articles in other treaties. The most valuable comes from the European Court of Human Rights in its judgments on article 8 of the ECHR. This article is different from article 12 of the UDHR, in that it guarantees a right to *respect* for family life and prohibits interference with this respect except in accordance with enumerated exceptions. Notwithstanding these differences the European Court decisions have some use.

Most importantly the Court has made it clear that 'family life' includes an unmarried mother and her child.

> Article 8 makes no distinction between the 'legitimate' and 'illegitimate' family. Such a distinction would not be consonant with the word 'everyone'.[75]

The Commission had already come to the same conclusion in its decision in the case:

> The Commission is unanimously of the opinion that the fact of birth, i.e. the existence of a biological bond between mother and child, creates family life within the meaning of article 8.[76]

This reasoning can equally be applied to article 12 of the UDHR. There is no reason to assume from the face of the article that it only applied to families where the parents are married and there is no logical reason to conclude that an unmarried woman and her child do not constitute a family. Further, even if the framers did not envisage the article protecting unmarried women, human rights treaties should be interpreted dynamically, i.e. the treaty should be interpreted 'in a way that advances its goals in

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men. For a full critique of the difference debate see Catherine MacKinnon **Feminism Unmodified**, (1986).

[75] **Marckx Case** at 14–5.

[76] Op.Com., 10 Dec 1977, **Marckx Case**, 69–71 Publ.Ct B vol 29 at 44

contemporaneous circumstances'.[77] While unmarried women may have been judged as lesser human beings in times past, that is no longer acceptable today and our interpretation of the UDHR should reflect this change.

The ECHR does not refer to 'arbitrary interference, but there can be no doubt that making or allowing a woman to sign a consent form in circumstances that were illegal under domestic law, amounts to arbitrary interference. The European Court has considered the question of arbitrariness in relation to article 5 of the ECHR and it seems that as well as meaning unlawful, 'arbitrary also includes action that *lacks reasonable justification*.[78] This is significant because while it may be difficult to argue that the varying pressures put on women by social workers to relinquish were unlawful under domestic legislation, it is not so difficult to argue that these pressures were without reasonable justification. The fact that a woman is unmarried is *not* reasonable justification to effectively take her child from her; it is *not* reasonable justification to offer her no choice other than adoption. That the women's marital status was foremost in the mind of social workers is clear from birth mothers quoted above:

> ...the matron kept on saying, 'Stop thinking about yourself. Think of the baby. It should be brought up in a home with a mother and a father, and think of the joy he would give to this couple who adopt your baby. They can't have children, you can have plenty in the future'.[79]

If there was no reasonable justification for pressuring women into relinquishing their babies, the behaviour of social and health workers amounts to an arbitrary interference with family. The actions of government workers and those from church run adoption agencies can be attributed to the State[80] and as such, the State is responsible for violating article 12 of the UDHR.

Conclusion

The question remains, what significance does the foregoing have for women who relinquished children for adoption? Enumerating human rights violations seems a rather academic exercise that will not change what has happened to birth mothers. The significance is three–fold.

Firstly, it is crucial to these women to have their suffering recognised. For years they have remained silent, never revealing that they had had a child, let alone revealing the suffering they experienced in the process. Many women were acutely ashamed of their pregnancy, internalising all of the judgemental values of the patriarchal society that condemned them. Like 'good girls' others tried to do as they were told and 'put it

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[77] Cooke at 665. Also see **Guzzardi v Italy** (1980) 3 ECHRR 333 at 363 and **Tyrer v United Kingdom** (1978) 2 ECHRR 1 at 10.
[78] See **Winterwerp v The Netherlands** (1979) 2 ECHRR 387 at 401.
[79] Shawyer at 110.
[80] See *supra* note 23.

all behind them', forget that they had ever had a baby. Of course they never managed to forget, but simply buried their feelings which often surfaced later in life.

In recent years, birth mothers have begun to 'find a voice'. As the birth mothers of the 1950s and 1960s have got older, as the feminist movement has developed and most importantly, as adoptees have begun to grow up and speak out, birth mothers have started to tell their stories.[81] The adoptees search for origins movement[82] serious questioned the philosophy of secret adoption and reminded the community that there was another, forgotten side to the adoption triangle – the birth mother. The stories that birth mothers told their children and later the wider community, revealed cruelty, pain and abuse at the hands of the medical and social work professions. Identifying these abuses as violations of human rights, as this paper has done, helps to legitimate the claims of birth mothers and gives weight to the voices of women who have so long been dismissed and ignored.[83]

Second, revealing the experiences of birth mothers is vital to the proper understanding of adoption. As we have seen through the stories women, the picture of a young girl voluntarily and painlessly relinquishing her child and then living happily ever after, is seriously misleading. It is crucial for the whole community to recognise what adoption really means for the woman who gave birth to the child. Perhaps more important than the community at large gaining understanding, the adoptee should understand the sacrifices his or her mother made for him/her. Many adoptees, particularly young adoptees, have no conception of the ramifications of their adoption for their birth mother, either because they have been given no information about their birth mother, or worse still, because they were given erroneous information. It has not been uncommon in the past for adoptees to be told by their adoptive parents that their birth mother 'did not want them' or that she did not love them. As we have seen from the statements of birth mothers in this paper, nothing could be further from the truth.

Finally, a proper understanding of adoption, gained through the revelation of human rights abuses against birth mothers, has a significant impact on the question of adoption information. In recent years various governments have given adoptees the right to receive their original birth certificate, thereby identifying their birth mother (birth fathers names were not recorded if the parents were unmarried).[84] Information

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81 L.Harkness **Looking for Lisa** (1990), Howe et al **Half a Million Women** (1992), K.Inglis **Living Mistakes** (1984), R.Winkler and M.Van Keppel **Relinquishing Mothers in Adoption** (1984).

82 J Treseliotis **In Search of Origins: the Experience of Adopted People**, (1973); P Toynbee **Lost Children: the Story of Adopted Children Searching for their Mothers**, (1985); A Sorosky, A Baran and R Pannor **The Adoption Triangle**, (1978); F Fischer **The Search for Anna Fischer**, (1973).

83 Of course there is something tragic about the fact that women's voices on their own do not carry weight and that we need the artificial process of fitting their stories into legal pigeon holes before they will be taken seriously. However, the reality of a male–dominated society is that women's voices are denigrated. Birth mothers in particular have been characterised as irresponsible, untrustworthy, hysterical and even psychologically disturbed. See Howe at 12–17 for a history of psychological models that attempted to describe birth mothers and their actions.

84 New South Wales, Tasmania, Victoria, South Australia, Western Australia, Queensland and England have all introduced such legislation. Interestingly, Scotland has kept open birth

rights for birth mothers have proved a more difficult issue and New South Wales is the only jurisdiction in the common law world that has introduced a right to information for birth mothers that is not dependant on the adoptee's consent.[85] The rationale behind this seems to be that birth mothers voluntarily gave up their rights to their children when they had them adopted, so they should not now expect to be able to contact their child. Adoptees on t he other hand, had no say in the adoption process and consequently cannot be bound by any notion of relinquishing rights or secrecy, to which they did not agree. This argument was one of the most common put to the NSW Law Reform Commission by people criticising the new legislation. It was most often put by adoptive parents.[86]

As we have seen however, the argument is fundamentally flawed because many women did not voluntarily relinquish their children. Some gave no consent, others gave invalid consent and the majority were subject to professional, social and family pressures. Unless these facts are acknowledged the issue of adoption information will continue to be discussed in an environment of misinformation and denial. Misinformation and denial work to everyone in the adoption community's disadvantage.

The question human rights violations in the 1950s and 1960s in relation to adoption remains significant today, not only for the women who experienced them, but for the other two sides of the adoption triangle – the adoptee and the adoptive parents. It affects their perceptions of birth mothers and their potential relationships with them. The recognition of human rights violations is also fundamental for the current practice of adoption. You cannot avoid making the same mistakes in the future if you do not acknowledge that you have made them in the past. Medical and social work professionals and governments need to take responsibility for the wrongs they have committed in the past and be vigilant against repeating them. Intra–country adoption may be declining in western countries, but inter–country adoption has been steadily increasing.[87] If young western women were vulnerable to the abuses of adoption through their age, sex and poverty, young women from developing and Eastern European countries must be doubly vulnerable. It can only be hoped that human rights law will do a better job of protecting them than it did protecting (or not protecting as the case may be) their western sisters.

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registers since the 1930s: see Treseliotis In Search of Origins (1973) and consequently had no need of remedial legislation.

[85] The *Adoption Information Act (NSW)* 1990 allows birth mothers to obtain information as of right. However, if the adoptee registers a contact veto, the birth mother will not be allowed to receive the information until she signs an undertaking not the contact her child.

[86] NSWLRC at pp159–164

[87] In Australia today children adopted from overseas outnumber children adopted locally.