

REDEFINING THE CHILD'S RIGHT TO IDENTITY

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ABSTRACT

This article proposes redefining the child's right to identity as a right to state protection of ties meaningful to the child. Its main arguments are, in essence: (1) Such a right should protect the development of an authentic individual by seeking the child's wishes and feelings concerning their ties. (2) Protection of an individualized identity necessitates exploration of culture as a context of personal meaning which cannot be equated with cultural sensitivity as commonly perceived. (3) Consequently, preferential protection of the child's ties to a minority culture or to individuals affiliated to it is seen as violating the proposed right. (4) The UN Convention on the Rights of the Child reaffirms commitment to a dynamic child-constructed identity. (5) Protection of the proposed right reflects, protects and creates a social reality in which children's lives may be imbued with personal meaning. A discussion of two English cases demonstrates these arguments.

1. INTRODUCTION

This article maintains that the state should have a positive duty to safeguard the child's right to identity as a right to protection of ties meaningful to the child.¹ It suggests that these ties delineate the child's identity. These are primarily ties to the human world, but they can also be ties to an animal, such as a dog or a horse, to an inanimate object, such as a book or a tree, or to a geographic place such as a village or a physical home.

It begins with an exposition of the main arguments and focus. This introduction is followed by a discussion of authenticity, of the child's legally neglected need for a meaningful existence and of culture as a context of personal meaning. This discussion forms the rationale for the

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proposed definition of the right to identity. A critical discussion of the right to identity in international law follows, clarifying and exemplifying the need to redefine the right in positive law. There then follows the essence of the stories of two children as told by the Lord Justices of the English Court of Appeal in two cases which exemplify some of the dilemmas related to identity that are discussed in the article. An analysis of the two court cases presented follows and ends with a concluding note exploring the key implications of the proposed redefinition of the right.

The main arguments of this article are:

1. The child's right to identity derivative of their human dignity should protect the development of an authentic self-actualizing individual which maintains psychological ties, primarily ties of interdependence to significant others. The state should protect a right to an individualized identity by seeking the child's wishes and feelings concerning their ties. In this way, a structured element of caution is introduced into child law policy and practice.

2. Protection of an individualized identity necessitates exploration of culture as a context of personal meaning and is founded on empathic understanding of an individual child's experience. Such respect cannot be equated with what is commonly perceived as cultural sensitivity.

3. Consequently, preferential protection of the child's ties to a minority culture or to individuals affiliated to that culture is seen as violating the right to identity. Such preferential protection signifying a politicized selectivity of compassion is an inappropriate tool to correct or counteract prejudices against such a minority culture.

4. Neither the UN Convention on the Rights of the Child (UNCRC) nor the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHRFF) explicitly uphold the right to identity as defined here. The child's right to guidance formulated in Article 5 of the UNCRC and their right to free expression and right to participation formulated respectively in Articles 12 and 13 to the UNCRC, as interrelated, implicitly reaffirm the commitment of international law to a dynamic child-constructed identity.

5. Legal protection of the proposed right not only reflects and protects a social reality in which children's lives may be imbued with personal meaning. It also creates such a reality through law's transformative educational impact.

The focus of this discussion is not any national law but rather international instruments, primarily the UNCRC. Though not incorporated into statute law in most jurisdictions (including England), the UNCRC is the most authoritative legal text on children in international law (Van Bueren, 1995:1–25). English Courts, like many other domestic courts worldwide, have recognized that domestic administrative and legal procedures absorb the UNCRC's expectations (Rosenblatt, 2003)

and therefore its minimalist and sometimes implicit references to identity are seen as deserving primary attention. The ECPHRFF, clearly bearing on the two cases discussed here, is also discussed.

Following cultural anthropologist Clifford Geertz (1983: 218), positive law, such as these two Conventions and case law, which should be guided by their imperatives, is seen here not only as reflecting social norms but also as constructing them through the articulation and enforcement of legal norms. Thus, law may influence both individual and community identity (Lukinsky, 1987; Post, 1995) through its transformation of local cultures (An-Na'im, 1994). Therefore, law is seen as a tool for the promotion of social change despite the fact that cultural values influence its implementation (Alston, 1994: 23) and irrespective of the fact that lawmakers sometimes deny its social impact.

2. THE RATIONALE FOR REDEFINING THE RIGHT TO IDENTITY

A. Facilitating the Development of an Authentic Self-actualizing Individual

Increasingly, the child is seen as a human being worthy of the protection of a human rights regime not only by international law but also by societies at large (eg Van Bueren, 1995: 6). Children are now often portrayed both in legal and in social science discourse as having a potential for self-actualization or self-realization (eg Rogers, 1989; Eekelaar, 1994: 49). Such a potential may be seen as enshrined within the concept of human dignity and justifying the attribution of human rights (eg Taylor, 1994: 41–2; Rockefeller, 1994: 87; Erbele, 2002: 256).

However, current legal protection of the child's right to human dignity does not guarantee protection of an individualized identity. Taylor (1991: 32–5) explains that the notion of individualized identity draws support from an ideal of authenticity, in the sense of being true to oneself and to one's particular way of being. It implies that if you are not true to yourself you miss what being human means for yourself.

The understanding of identity proposed here departs from the classical substantive, essentialist, conception of identity which emphasizes static, unchanging elements of identity (Taylor, 1991; Taylor, 1994; Lavie and Swedenberg, 1996:11). Identity should not be seen as developing in a vacuum, but rather always through dialogue and sometimes struggles with significant others – those persons who matter to the individual constructing their identity (Taylor, 1994; Eekelaar, 1994: 51; Wilson, 1997: 281; Eekelaar, 2004). Even as the individual outgrows some of these others, the internal dialogue with them continues throughout life and a contribution to the formation of an evolving identity in early childhood continues indefinitely (eg Taylor, 1994). Taylor (1994) writes of two spheres of recognition of identity.

First, the intimate sphere of recognizing an identity that is formed in dialogue and struggle with significant others, and second, a public sphere where a politics of recognition may protect the individual's identity. In adopting such a conception of identity, it is not difficult to accept the assertion of Lavie, Swedenberg and their colleagues that there is no objective immutable link between identity and a specific place such as, say, a place of birth (Lavie and Swedenburg, 1996: esp. 1, 2). An assumption of such a link is inherent in an abstract, decontextualized, understanding of identity rejected here.

Alongside the child's need 'to become', to develop and change, to fulfil dreams and plans, the need, in An-Na'im's words, 'to be different from others' (2002: 1–2) there is another need. This is often neglected by advocates of children's rights, though it is well embedded in social science literature. This is the child's need 'to be', to be his/her authentic self and to be recognized as 'somebody' when simply being that self (Feuerstein, 1982: 44–5; Feuerstein, 1984; Engel and Munger, 1996: esp. 48; Bilsky, 1997: 148–9; Deng, 2002:196). This ensures the child's psychological survival.

A children's rights regime should ideally be responsive to the complementing needs 'to be' and the need 'to become'. The granting of a right to autonomy, responding to the child's need 'to become' and overcoming adult paternalism, is often perceived as the most advanced and most problematic stage in the evolution of child law (eg Franklin, 1986: 27–38; Van Bueren, 1995: 15). A child who has not been empowered to develop a unique personal identity may see themselves simply in terms of their biological needs. Such a child may become indifferent to their human rights or misuse them in a reductionist way to satisfy only momentary desires and impulses (Feuerstein, 1982: 44–5) totally divorced from their noble purposes as envisioned and described in human rights theory and in case law (eg Cohn, 1991: 19–21; Eekelaar, 1994: 51).

Through an evolutionary process of choice between different identifications and values, the child constantly creates and recreates their own identity until, hopefully, it crystallizes in adulthood (Van Praagh, 1997: 366; Van Praagh and Wilson, 1997: 282; Van Praagh, 1999b: 1348). Classical portrayals of such evolutionary processes of changing identifications are found in the lives of Nelson Mandela and Mahatma Gandhi (Erikson, 1970; Mandela, 1994; Gandhi, 2001). Both individuals reached the stage of courageous commitment to a cultural identity despised and belittled by mainstream society only through lengthy processes of personal growth in their personal alliances and identifications. Both rejected sectarian conceptions of their identity often imposed or suggested by social and legal norms. Both allowed themselves to be themselves despite pressures to conform and to adopt a conventional identity.

B. Does Legal Recognition of an Individualized Identity Imply a Traditional Liberal Individualist Ethos?

A politics of equal dignity leads to the recognition of the individual's eligibility to a uniform set of rights and immunities. This article proposes that a politics of difference or identity is needed which would call for the recognition of a human being's unique individualized identity, and which sees the suppression of individual distinctness by a dominant or majority identity as the cardinal sin against authenticity, to use Taylor's (1994: 38) words. In her seminal essay, Carol Gilligan (1982) can be understood as developing this charge in relation to silencing a distinct, caring voice, which has been derogatorily constructed as a feminine voice by mainstream academic and popular discourse. I argue, using Taylor's wording again, that Gilligan can be understood as showing how mainstream discourse presenting an atomistic image of the ideal human being, 'sins' against both boys and girls. Such a model of humanness, often underlying public and legal discourse, denies or ignores a central psychological insight: human beings are naturally interdependent rather than independent (Gilligan, 1982: 2, 4, 74; Cohn, 1991: 19, 21; Freeman, 1997: 73;). Minow (eg 1986: esp. 15, 17–18, 24) utilizes this insight in articulating a theory of children's rights, departing from a traditional ethos of liberal individualism in which she emphasizes the centrality of the child's right to the protection of their relationships with significant others founded on an ethos of interdependence. Universal protection of relationships with significant others is in fact protection of the distinctness and the uniqueness in the individual. In this context, the universal and the particular converge.

Protecting the child's definition of their identity, ie protecting a child-constructed identity, may be construed as derivative of a commitment to their human dignity (Taylor, 1994; Raz, 1998: 200) despite the fact that human dignity politics has not yet been utilized for this purpose: As Taylor (1994: 39) explains this is an instance of a shift 'where a new understanding of the human social condition imparts a radically new meaning to an old principle'. To conclude, legal recognition of an individualized identity does not imply endorsement of a traditional liberal individualist ethos, as one might initially assume. It is founded on an alternative ethos of interdependence.²

C. Is Public Recognition of the Child's Individualized Identity Necessary in the Children's Rights Era?

Society often tends to see the child as property of the state or parents, to be moulded in another's image (eg Slaughter, 2000). Our recognition of the child as an individual, whose authentic identity is worthy of

respect, is meant to reaffirm our commitment to their unique humanness and counteracts such a tendency. One may doubt whether such commitment needs reaffirmation in an era in which – from the perspective of international law – children are seen as eligible for human rights. However, it is suggested here that law is only gradually moving away from serving those in positions of political and economic power as opposed to others, such as children and ethnic minorities, to universally safeguarding humane treatment and human rights for all (Nandy, 1990: 32–3; Minow, 1990a: 7–10, 297). Historically, one can observe a sad human propensity to allow exclusion, stigmatization and even victimization of the other and then to deny, rationalize, repress or disassociate the painful experiences of the other (Nandy, 1990: 32–3; Minow, 1990a: 4, 5–7; Minow, 1990b: 1673–4, 1684; Herman, 1992: 1–4). Society continues to withhold eligibility for rights and protection for self-actualization from those it sees as deviant, morally impaired or simply less than fully human. Communities, families and adults meaningful to the child may be seen in this way and therefore the child's ties to them are liable to be disregarded. Furthermore, though children are seen by international law as bearers of rights, in practice, they are very vulnerable and their participation in the determination of their futures through rights discourse is typically partial and unrelated to their actual competencies (Minow, 1990a: 285, 303–4). Tendencies to see the child as not fully human and as property of the state or parents to be moulded in another's image may be subtle, implicit, and even preconscious. Oppression, stigmatization, and social exclusion are seldom purposeful acts (Minow, 1990a: 62–5). Thus, children affiliated to minorities are in special jeopardy of social exclusion and silencing.

Admittedly, our moral commitment towards the child has grown since the Second World War through the assimilation of human rights norms into mainstream democratic culture (Alston, 1994; Van Bueren, 1995: 1–25); this has also served to improve the general level of tolerance to difference guaranteed by law. However, tolerance as understood in liberal theory does not necessarily entail a commitment to viewing different cultures, which children perceive as their own, as fundamentally equal in worth to mainstream culture: Not all that is tolerable is seen as of equal worth to ours (Raz, 1998: 204–5). Such a commitment, which may be seen as a commitment to multiculturalism (Raz, 1998) encourages us to see children as of equal worth despite their different cultural identities and because of their common humanity. It necessitates strengthening our capacity to identify and combat biases against the other embedded in our upbringing and in professional training (Minow, 1990b; Schon, 1991) and to publicly expose and overcome them. It is contended here that one such potential bias is the bias against culture as a context of personal meaning to the child.

A traditional ethos of liberal individualism commits us to avoid silencing minority opinion simply because it may be detrimental to the public good. In the same vein, when we protect a child's ties with both their social family and their community in as much as they relate to them with a sense of belonging, we may have to compromise the protection of conformity to values that mainstream or minority communities see as worthy. This is because the families and communities of such children may not conform to socially accepted values. Failing to respect difference in this arena may be seen as effectively treating children as objects and as inconsistent with regarding them as rights holders (see by inference Eekelaar, 1994: 51). For example, a child's family may promote middle class 'bourgeois' values in a socialist or Marxist society; it may promote pacifism or universalism in a patriotic or militaristic society. Similarly, it may advocate moral superiority of religious law or community law over state law.

It is suggested that, if our aim is to ensure that individual children are not, in effect, silenced, we must positively protect those elements that contribute to the moulding of an authentic self. It is not enough for law to ensure that a child is able to express preferences freely and that they are taken into account as Article 12 mandates (Eekelaar, 1994: 60, note 10). Law must positively ensure that the child's wishes *and* feelings are sought. Only if the law encourages the child's participation in defining who they are, can the child develop into an adult capable of expressing themselves authentically. A commitment by the state to an ideal of authenticity would introduce a structured element of caution into state intervention in the field of child law. The benefits of such intervention can be more lucidly balanced with its drawbacks made apparent through recognition of an individualized identity.

It is argued here that child law should challenge both mainstream and minority cultures to transform themselves by shouldering a commitment to the ideal of authenticity in relation to child rearing. This does not envision an abrupt, violent process of transformation, but rather an evolutionary one. Thus, for example the connotation of belonging may gradually change: As stated earlier, children are often perceived as belonging to their parents. Nevertheless, it is not suggested that we abandon the term 'belonging'. Rather, one can hope for the transformation of both the legal and common *usage* of the word belonging. Law's focus on protecting the *child's* sense of belonging may gradually modify social norms towards a greater commitment to the development of an authentic self.

To summarize: it is argued here that, despite wide *de jure* recognition of the child's eligibility to human rights, the legal recognition of an individualized identity is necessary to reaffirm society's commitment to the child as a human being in their own right.

D. How Can Law Protect Not Only the Child's Right 'To Become' but also Their Right 'To Be'?

I have introduced the child's needs 'to be' and 'to become'. The question remains how both can be practically protected. Self-definition can never take place in a vacuum. A child knows who they are only within a specific familial and community context (Wilson, 1997:281), however dull at times. Besides being cared for, a child needs a familial and communal environment, which they feel is theirs and which affords them a clear understanding of who they are and helps to give meaning to their life (Hassall, 1994). The child's family and community are their starting points in life. *Ideally*, these are their family of origin and community of origin. From within a family and a community a child naturally begins to create meaningful ties and develop an identity that evolves over time. Their experiences are gradually applied to new and widening fields beyond their family and community of origin as they mature biologically and emotionally.

The legal definition of family, however well informed by social science literature, is ultimately a cultural construction. Nevertheless, legal rhetoric sometimes erroneously gives us the impression that such a legal definition captures some eternal truths (Minow, 1987: 959–60). Thus, neither 'blood ties' nor 'legal ties' of parenthood necessarily signify psychological ties with a child, and in order to discover who fills the *role* of mother or father for the child, it is essential that recourse be made to the child's subjective perceptions. In practical terms, protecting the child's right 'to be' primarily means ensuring that they will not be forced to disown their authentic familial and communal identity, to the detriment of their sense of self and of their human dignity in order to gain recognition of their normalcy by mainstream society (Hassall, 1994: 2–3; Bilsky, 1997: 144–5).

An example of the need for such protection arises in cases of adoption. 'Closed' adoption, breaking all ties with biological kin, was regarded in the not too distant past as the ideal way to guarantee secure and uninterrupted parenting and family life. Nowadays, the child's loss of earlier relationships along with all traces of their pre-adoption identity is widely recognized as potentially damaging to some children and a movement to greater openness in adoption is drawing growing support (eg Eekelaar, 1994: 48; Hoelgaard, 1998: 232).

A helpful illustration of the unmet need 'to be' comes from recently conducted research into the long-term experiences of adopted adults (Howe and Feast, 2000). The research shows that having a name or maintaining stable ties with one's psychological parents, guaranteed under the UNCRC, is not enough. Adopted adults who were not seeking substitute psychological parents still wanted to meet their birth parents (Feast, 2000). Many reported that in this way they satisfied important concerns about their personal identity and filled a void that they felt

(Feast, 2000: 387). It is suggested that such searches express the adults' unmet need 'to be' in childhood and adolescence.

Feeling protected in being who they are, a child can then allow themselves to 'recreate' themselves in fantasy and in real life: to dream their own dreams, wish their own wishes and even implement their own plans, however small-scale they may be, at first. Through interdependent relationships with their environment they grow to be increasingly autonomous yet, as explained above, never fully independent (Gilligan, 1982: 74; Minow, 1990a: 301–3; Freeman, 1997: 73).

The strength and significance of children's ties to a family and community they define as theirs can vary. Some children are alienated from both their extended and nuclear families. These children often develop unique relationships, which may seem peculiar to the untrained eye. These may be ties to carers, teachers or therapists. These ties give us the opportunity to question the validity of rigid conventional boundaries defining who is considered as family and what is considered professional behaviour. They prod us to challenge the above-mentioned assumption that the legal definition of family captures some eternal truths. It is only possible to understand these relationships in light of the problematics of the children's upbringing and development. Atypical responses to abnormal circumstances are often the wisest and most creative. Thus, the law should respond cautiously to these relationships and avoid attempts to rigidly dictate that only preconceived relationships serve the child's best interests.

The definition of the right to identity should enable the decision-maker to understand that the little the child sees as their identity, should, in principle, be protected. This understanding of the child's circumstances will enable the decision to ensure that not only does the child maintain existing ties, but also that they can develop new ones arising from their personal world. The experience gained through approximately a century of state intervention in the name of the Welfare Principle teaches a lesson of caution. Fantasies of saving children may turn out to be painful for the children involved if they are not heard and understood as human beings possessing a unique identity. Ties to imperfect blameworthy carers were too often neglected (Kufeldt, 1993: 9–10; Hassall, 1994: 9–10; Van Praagh, 1999a: 156; Van Praagh, 1999b: 1348). The imposition of well-intentioned adult-minded plans brought about the result that children sometimes grow up to become alienated adults incapable of relationships of trust and care (eg Kufeldt, 1993).

If professionals and jurists listen attentively to children and understand what they consider meaningful in their personal world, children may succeed in challenging their exclusion and may thus grow up to trust future representatives of normative society and to identify with its norms (Minow, 1990a: 297–9). Respecting the child's sense of belonging may promote identification with society (Raz, 1998: 203–4).

Clearly, though the overall outcome of this approach would be greater legal protection to the child's ties to their family and community of origin, in certain cases law may protect significant ties a child has developed to a family and community which they were not born into, thus overriding the interests of biological parents and minority communities.

A classical example of such cases would be a situation in which foster parents who took into their home a neglected child through child protection proceedings are allowed to adopt that child despite rehabilitation of the biological parents. These biological parents may have had a history of drug abuse, criminality and homelessness. Their rehabilitation in such a case is undoubtedly morally admirable. Nevertheless, the parents' objections to the adoption may be outweighed by a child's clear cut wishes and feelings if the child is accorded a right to an individualized identity and law becomes responsive to their sense of belonging.

The new meaning of the right to identity proposed here offers the child state intervention that is not systematically available at present. It seeks to ensure that, by protecting ties that they hold valuable, children see themselves as neither the property of their parents nor of any other person or organ, such as a state welfare agency.

However, the legal system lacks the tools to fully safeguard the child's sense of belonging in each and every case. Law cannot accommodate all human sensitivities and is inevitably based on no more than an approximation of what the child experiences (eg Eekelaar, 1994: 46-7).

This notwithstanding, the proposed definition of a child's right to identity offers reinforcement for the safeguards protecting the child's human dignity. It rejects the notion of a 'normal' identity, which it does not replace with the endorsement of ethnocentrism, connoting the position that only black or white or brown is beautiful, a position regrettably associated with identity politics (Minow, 1996). Rejecting ethnocentrism while respecting the relevance of ethnicity in the construction and reconstruction of an individualized identity may minimize the exploitation of identity politics to promote community interests at the individual's expense (Alston and Gilmour-Walsh, 1996: 39; Deng, 2002:188-9). Indeed, for every 'we' there is 'them'. We are habituated to boundaries between friends and strangers and without these and other boundaries it is questionable whether we would have an identity (Sacks, 2002: 46). But the boundaries do not have to be static. We may, as individuals and as a society, see these boundaries as an invitation to continually expand our awareness of inequity to the other and to overcome a sense of threat when encountering difference. Identity and a sense of belonging do not have to exclude any specific unchangeable other from eligibility to rights (Nandy, 1990: 32, Sacks,

2002: 46–66). If we see otherness as an invitation to care for the other and thus respect their human rights, for example through the universally recognized Golden Rule (eg An-Na'im, 1994: 68; Cohn, 1991: 42), we become less alienated from them (Erikson, 1963). Identity – 'mine' and 'his', 'ours' and 'theirs' – can be dynamic and can become more inclusive. Ethnic distinctions may thus lose their significance as rigid personal boundaries that define identity (eg Eekelaar, 2004).

The child's right to identity, informed by an understanding of authenticity, offers to exchange the imagery of universal uniformity with an imagery of difference and uniqueness in the way children relate to their personal worlds (Minow, 1996; Van Praagh, 1999a: 203). A right to a cultural identity, relying on the child's definition of who they are, assumes the dialectic of change described above (Cooper *et al.*, 1995: 136–9; Van Praagh, 1997: 366; Van Praagh, 1999b: 1348). What the child defines presently as their identity may change in the future, as it continues to evolve. The state's commitment to upholding the child's human dignity, a commitment to their identity as a person developing towards autonomous adulthood, should 'accompany' the child in their personal journey. A possible derivative of the evolution in the child's identity is a change in commitment to different cultures including minority cultures.

To conclude, under ideal conditions, a child's nuclear and extended family, their culture, language and nationality are their 'birth right' (Hassall, 1994), which they enjoy without any intervention from the law. Thus their need 'to be' more than their need 'to become' is naturally protected. Family law should aspire to draw children's lives closer to the ideal, while recognizing its inherent incapacity, ever fully to achieve this aim. Having said that, the legal protection of the right to identity as outlined here, does have the capacity to safeguard a critical factor relating to the child's well being, namely personal ties that are significant to them.

E. Culture as a Context of Personal Meaning: Beyond Cultural Sensitivity

Which culture should a child be allowed to enjoy (for example according to Article 30 of the UNCRC)? which is *their* culture, say in the case of a child with multiple minority affiliations; biological parents from one minority, foster-parents with whom he/she lived from age two to six or adoptive parents? Is it the biological family's minority culture, ie, the culture into which the child was born, or is it the minority culture of the foster family, which raised him/her from ages two to eight? Perhaps, it is the minority culture of the adoptive family from which he/she is separated when he/she leaves for boarding school? Perhaps the peer culture at the boarding school?

The conception suggested here is that from a child-centred perspective, the culture that the child should be allowed to enjoy, whether mainstream or minority, is not an abstract derivative of the decision-maker's theoretical knowledge. From the perspective of the individual child, it is irrelevant how the tenets and lifestyle of Orthodox Judaism or Shiite Islam are described in any textbook. The child's lived experience may be very different from those descriptions. The child's culture as uniquely experienced by the individual child is defined here as a set of related meanings by which the child interprets the reality of their life and its unique circumstances (eg Kline, 1992). This uniqueness is a universal human condition: that as he/she grows, each child develops a unique cultural identity which brings into focus the commonality of children's experience of identity formation rather than the 'otherness' of the child's unique excluded culture or experience (Minow, 1999: 24).

Although it is important to understand the different stages of childhood development and children's psychological needs derivative of them, such understanding is, in itself, not enough to enable society to respond to children's needs. It may even serve to disempower the child (eg Eekelaar, 1994). Such understanding reflects only an approximation of the child's experience. Already from the first months of their lives, children have both the capacity and interest in giving meaning to events, although admittedly they are often immature decision-makers. We are therefore called upon to explore the relationship between the meaning the child gives to events in their life which influence their preferences and the legal decisions pertaining to those preferences. It is not suggested that the right to identity should guarantee the child a power of veto in decisions pertaining to them. However, *ignoring* the meanings the child gives to their personal world by imposing different meanings regarding what is good and valuable for the child, and by not offering protection for culture as a construct of the child, can be detrimental to the child's quality of life. Not only can this reduce the efficacy of our efforts on the child's behalf, but it can also cause them to experience life generally as duller and society as alienating (see also Eekelaar, 1994: 54).

The present proposal has not been advocated in the traditional manner by recourse to a commitment to cultural sensitivity. Furthermore, in light of the above discussion it is not difficult for us to accept the assertion that in conceptualizing culture as unchanging and timeless, one may in the name of cultural sensitivity re-incarcerate an individual (child) in 'their' culture (Lavie and Swedenburg, 1996: 3; Koptiuch, 1996, 215–33). The present approach calls for an empathic understanding of the individual child's experience, an understanding that is difficult to achieve within a legal setting, though not beyond the capacities of legal professionals.³

3. INTERNATIONAL LAW

A. Specific References to Identity in the UN Convention on the Rights of the Child

In Articles 7, 8 and 9, the UNCRC guarantees respectively the child's rights to a name, to citizenship, to know their parents and not to be separated from them. Article 8 leaves the impression that identity is an open-ended concept: the attributes of identity, viz., nationality, name and family relations, are mentioned illustratively (implied by the word 'including') (Hodgson, 1993: 265). The next article in which we find explicit referral to the child's identity is Article 29. This article states the aims of children's education, ie, that it should encourage the child to respect their own cultural identity and that of others from different cultures. Article 30 guarantees the right of the minority and indigenous child 'to enjoy his or her own culture'. Nothing in the UNCRC defines culture or what makes one a minority or indigenous child. No article in the UNCRC or the different sets of guidelines deriving from the UNCRC explicitly guarantees the child a right to preserve what they see as their cultural identity or to preserve ties that are meaningful to them as such, to respect their individualized identity or to ensure specifically their involvement in defining their identity.

Questions such as these arise. Do only minority children need law's protection? What of undemocratic regimes in which most of the political and economic power is in the hands of an elite belonging to an ethnic minority? Is the child born to a Jewish father and a Christian mother and descended from seven generations of Londoners to be considered a minority child whose right to enjoy their culture should be protected in England? Which culture is that? Their father's? Their mother's? Is a child born to a Jewish Mother and a Moslem Arab father in Israel to be considered a minority child in Israel, where Moslems are a minority? Both Judaism and Islam consider the child as 'theirs' and expect alliance from the child; the child is both Moslem and Jewish according to traditional religious laws but may have grown up feeling no sense of belonging to either of the traditional cultures. There is no explicit answer to such questions in the text of the UNCRC.

B. The European Convention on Human Rights and Fundamental Freedoms

The ECPHRFF contributes little to the definition of identity, beyond adopting a proactive approach to the duty of the state to protect family life (Bainham, 2000: 483–4). It does not explicitly mention the child's right to identity. There is an implied reference to safeguarding the child's right to identity in Article 8, which positively obliges ratifying states to uphold the individual's right to respect for family life. But, as Bainham (2000: 483–4) maintains, it is unclear what the child's right to family life implies. The European Court of Human Rights ruled that the

interest of knowing one's origins is protected by Article 8 (Frowein, 2002: 130–1⁴). However, much remains unclear. If knowledge of one's origins destabilizes the child's family life, which of the child's interests takes precedence and must be protected? How is the interest to be balanced with other interests protected by rights such as the right to state intervention on the child's behalf or the right to parental guidance, both of which may safeguard the child's emotional wellbeing? To what extent will the interest of knowing one's parents be protected? No answer is given in either the wording of the ECPHRFF or in the interpretation of the UNCRC offered by the jurisprudence of the European Court. To conclude, explicit referrals to identity in these key international legal documents do not provide a legal framework which may protect a child-constructed identity.

The next section examines the relationship between Articles 5, 12 and 13 of the UNCRC and suggests how the implicit references to identity-related rights that they contain can help us to develop a conceptual framework beyond the explicit references to identity in the UNCRC .

C. The UN Convention: The Overall Picture

As noted earlier, the provisions of the UNCRC relating specifically to the child's identity do not explicitly protect the child's individualized identity. One cannot however understand the UNCRC's position fully by relating solely to these provisions. It is suggested that the UNCRC as a whole shows that conceptually, it supports the meaning of the right to identity proposed here. The preamble states:

... (the parties to the convention are) convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

It should be noted that the preamble does not stop with a commitment to respecting family life, but goes further: it adopts a clearly proactive approach in advocating a positive duty by the state to support family life. The family the preamble envisages is clearly a social family, which nurtures the child's psychological wellbeing. It may well not be the biological family, but rather a foster family or an adoptive family. The preamble also ascribes positive value to cultural plurality, stating that member states have accepted the obligations in the UNCRC to take 'due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. Article 18. 2, for its part, enjoins the state to protect and support family life:

For the purpose of guaranteeing and promoting the rights set forth in the present convention, State parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and for the care of children.

Article 20, like the preamble, can be seen as seeking to protect the child's ties to a personal world. However, there is no mention of identity in the article:

When considering solutions (for children temporarily or permanently deprived of their family environment, or in whose best interests cannot be allowed to remain in that environment) 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.

Article 5 of the UNCRC, while also not mentioning the word identity, offers an important key to understanding its intended *de facto* protection of the child's identity. It reads as follows:

State parties shall respect the responsibilities, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention.

This article clearly frames a broad general principle, and also has a key role to play in the interpretation of the provisions of the convention. Importantly, it creates a new basis for the relationship between the child, the family and state that supports the psychological rationale for the definition of the right to identity proposed here, namely that the state's primary responsibility towards the child is to respect the role of the nuclear and extended family and of the community in the child's life, rather than to intervene in order to protect the child from them.

A tension exists between Article 5 and Articles 12 and 13, which grant the child a right to be heard, a right to participate in decisions relating to them and a right to free expression — rights that can override parents' wishes. It is not difficult to contemplate situations in which parents entrusted to guide the child in the exercise of their rights would be tempted to obstruct the child from exercising their rights because of the parents' selfish interests (Freeman, 1997: 68; Fortin, 1998: 42). However, it is suggested that Article 5, through its moderation, generality and relative ambiguity, can, when understood in combination with Articles 12 and 13, contribute to an evolutionary process, which will advance the child's legal status. It is suggested that the UNCRC thus encourages adults with whom the child maintains

meaningful ties to find culturally appropriate ways to respect the rights of the child including their right to participation in decisions relating to them.

As An-Na'im explains, delegates from the Southern hemisphere who took part in the drafting, adoption and implementation of human rights norms did not operate with concepts and mechanisms from their own political, cultural and ideological history and thus the universal human rights consensus reached is elusive (An-Na'im, 1994: 65).

It is suggested that, by trusting families and communities to respect children's rights and by not derogating from their cultures and traditions, the UNCRC (primarily through Article 5) offers families and communities a challenge which cannot easily be dismissed as patronizing, alien, imperialistic or Eurocentric, despite the fact that the terminology of human rights originated in Europe and was mainly developed by the West.⁵

It is contended here that the tension between Articles 5, 12 and 13, and the legal complexity it produces, is to be welcomed since it reflects the real-life complexity of responding to the child's conflicting needs 'to be' and 'to become'. Essentially, through this tension the UNCRC overcomes the temptation to entertain a crude atomistic vision of the child's interests. Our discussion illustrates that by endeavouring to reach a balance between protection rights and participation rights, the UNCRC is not a children's liberation manifesto. Clearly, it does not purport to free children subjugated by adults. I suggest that it does not abandon children to some of their rights. Children who exercise participation rights and civil rights and also enjoy protected adult guidance have a greater chance to develop into more rounded adults, who can not only exercise autonomy, but also function within relationships of commitment and responsibility (Freeman, 1997: 37-40; Smith, 1997:103).

This scenario, in which the child's evolving capacities are recognized within the guidance and protection of adults, may be threatened because of the inadequate protection offered to the child's right to identity. Adults are often tempted to dismiss what a child says. For example, they may describe their input as immature and an expression of ignorance, 'programming' or 'brainwashing' (Ronen, 1998). Thus, for example, through diagnosis of the controversial 'Parental Alienation Syndrome', some courts have been persuaded to order a child who is functioning well both emotionally and intellectually to live with a parent whom he/she hates, or in a state institution. This may happen even if the hated parent had been abusive towards the child and there are objective reasons for the child's aversion to him, as long as brainwashing against the hated parent by the other parent is proven (eg Bala, 1999: 194-5; Bruch, 2001). Thus, there is a real risk that Article 12 will be emptied of meaning through paternalistic notions of protecting

children from influence and coercion (Eekelaar, 1994: 56–7; Ronen, 1998: 257–9;).

If a child has legal recourse to a claim for consideration of their wishes or feelings because, beyond allowing them self-determination as proposed by Eekelaar (1994: esp. 52), these wishes or feelings indicate ties that are meaningful to them, their participation in decisions relating to them may become more visible and influential. In such circumstances, recognizing a child's right to be heard and to participate in decisions pertaining to them and to express themselves freely, may enhance the weight given to the child's definition of family, community and culture and may allow meaningful implementation of Article 12 in a manner that overcomes the *prima facie* tension with Article 5. If a child-constructed right to identity is recognized, the tension between Articles 5, 12, 13 may serve the development of the child's identity.

4. IDENTITY IN TWO CASES: THE STORIES AS TOLD BY THE COURTS

Two English Court of Appeal cases are now examined, introduced at the outset of this article, attempting to implement the proposed redefinition of the right to identity.

*A. Re M (Section 94 Appeals)*⁶

This case concerned a seven-year-old girl, whom the court called S. The girl's parentage was of mixed race, her mother being white and her father black. The parents never married and upon the breakdown of their relationship the father had unsupervised contact with the child, which was stopped by the mother from time to time. Proceedings before the Family Proceeding Courts ended in the magistrates granting the mother's application to terminate the contact between the child and the father. The father appealed under section 94 of the Children Act 1989 and Ewbank J. dismissed the appeal. The father then appealed against the decision to the Court of Appeal. The decision in the Appeal was written by Butler-Sloss LJ, Kennedy LJ concurring.

Butler-Sloss LJ explained that the appeal was remitted for rehearing because the judge did not advert at all in his judgement to the 'major' issue of race and to the failure of the magistrates to deal with it.⁷ The Judge linked the failure to deal with the question of race to other factors:⁸

The mother and her new husband are white and the father is black. The child whose photograph I have seen is clearly of mixed race. The court welfare officer was troubled by the ending of the contact when she felt that the child would wonder why she did not see her father, especially since she is a mixed race child. She had said she was getting a new white daddy. The court welfare officer felt the child was confused about her racial identity, and on my reading of the

reports and the oral evidence there was at least a hint of the mother and grandmother shutting their eyes to this important issue. The welfare officer asked for an adjournment for six months to enable contact at a contact center to continue and be monitored. The magistrates made findings adverse to the father in that he showed little interest in the child's schooling, had little insight in the child's emotional or developmental needs and did not meet his financial obligations. Although some of these findings were against the views of the court welfare officer, the magistrates were entitled to make their own findings...The child had said she did not want to see her father but the court welfare officer did not believe that such was the child's underlying view and gave reasons. The magistrates ought in my view at least to have indicated their disagreement with the court welfare officer on the issues of the child's behaviour and her wishes, which they clearly thought significant. The magistrates decided that the contact had not added anything positive to S's upbringing and the father had not shown sufficient commitment and dedication to deal with the complex situation, in particular the degree of hostility by the mother and grandmother towards him.

The reasoning of the decision given by Butler-Sloss LJ offers some substantive guidance to the judge re-hearing the case:⁹

Whether in the future this father will have any contact at all, frequent contact, infrequent contact or indirect contact, will be a matter for the judge rehearing the application. He or she will have to consider the significance of race and the hostility of the maternal family towards the father and place those and all the other factors for and against the father having contact to the child in the balance in coming to the decision on contact. But the child's racial origins and the concerns of the court welfare officer have to be carefully considered and it is for those reasons that I felt this appeal has to be allowed.

Below, I shall critically examine this reasoning leading to an outcome I consider as highly questionable from a children's rights perspective.

*B. Re M (Child's Upbringing)*¹⁰

In this case the care and adoption of a ten-year-old black African boy of Zulu parentage was contested between his biological parents and a white foster mother. The boy, called P by the court, was born in South Africa to a mother who worked as a nanny and cook/housekeeper in the house of the foster mother who had three daughters. The mother was not married to the father who also worked for the foster mother for a while. From the age of 18 months the boy lived with the foster mother in her home in a way that would enable him to remain there with his mother instead of being sent back to his mother's village according to apartheid regulations. The boy and the white employer became closely attached to each other. The father had only sporadic contacts with the child and his mother. It appears that at some stage during P's early years

the father had a relationship with another woman who bore him a child. In 1992, when P was six, the foster mother decided to leave South Africa for London because she regarded the political situation as unstable and was worried about possible violence. When the foster mother decided to leave, P's parents agreed that he move with her. It is noteworthy that, according to Thorpe J, who heard the case at first instance:¹¹

the appellant's first preference would have been to take both the mother and P with her to London, but the mother made it plain that she would not leave her homeland. . .the easiest course. . .in practical terms would have been to have left (P) behind with (the mother). But. . .she had by then a strong. . .attachment to the child. Those attachments led her to offer to continue to take care of (P) and to provide for him as though he were her own child. . .The only issue between the parties is as to the duration of the arrangement. (The appellant) asserts that it was an indefinite arrangement that would endure until the completion of (P's) education. (The father and the mother) assert that the arrangement was for five years precisely. It seems to me that reality lies somewhere between those poles.

On arrival in the UK in March 1992 the foster mother told the immigration authorities that she wished to adopt P and P was given leave to remain in the UK for three months. By May 1992 the foster mother had already reached a firm decision, unknown to the parents, that she wished to adopt P. In October 1992 she wrote to the mother the following:¹²

To keep (P) in this country I have to adopt him. If there is another way to do it, I will. I will never take him away from you, so that you won't be able to see him again. You are his mother.

Soon after that, the parents were visited by a social worker at the foster mother's request in order to establish their wishes as to P's adoption. The parents initially objected to the adoption and the mother spoke of not hearing from the child since July. A few days later the social worker wrote again to say that the mother's position appeared to have changed. She was proposing that if P stayed in England he should visit his biological parents each year for a month. Later, both parents expressed the opinion that if the foster mother wanted to take the child for ever – breaking the agreement with them – the child should return to them as soon as possible.

Between June and August 1993 the mother wrote ten letters, some of them dispatched within days of each other, in which the mother pleaded for the child's return to South Africa for a visit. In July 1993 the foster mother wrote a letter telling the mother that she could not send P to South Africa at that stage. The Judge described the letter as 'a surprisingly dispassionate response to what were moving appeals'.¹³ He

concluded that the father was an insubstantial figure in the child's life, as the only communication between him and the child was one Christmas card.¹⁴ His appraisal of the relationship between the biological mother and the foster mother, quoted by the Court of Appeal, is particularly noteworthy:¹⁵

The correspondence shows the closeness of the relationship between (the mother) and (the appellant's) family. It further shows the tragic evaporation of trust and affection, gradual but steady ... it is significant that the correspondence peters from frequent and intense to non-existent after the commencement of litigation.

In 1996, four years after the initial separation from his biological parents, the court gave its judgement. It could have chosen between three options deriving from the parties' contentions: adoption (as sought by the foster mother), immediate return to South Africa (as sought by the parents) and a return to South Africa at the end of the period agreed upon, whatever that period might be.

The court in fact decided to adopt a fourth option. It laid down a master plan for the child's return to South Africa after a period of two years in which the child would be reintroduced to 'his' family and 'his' country, to use the court's words. In two years' time the court would determine the dates and the circumstances of the child's permanent return to South Africa. The white foster mother was to pay for the travel expenses of the parents to England and of the child to South Africa. She could not afford most of her undertakings, as she became unemployed. She appealed against the order of the judge on the basis that the review should reopen the issue of the child's residence and upbringing during adolescence. The child's biological parents appealed contending that the child's return should not be further delayed.

An expert psychiatrist appointed by the court explained the dangerous consequences of forcefully and prematurely removing the child from the foster mother and her family:¹⁶

To remove him in the middle of turmoil of disagreement would be very profoundly damaging, to such an extent that the boy might never recover his poise and psychological well-being and confidence.

Although it was clear from the expert opinion that the child's mind was set very strongly against return, the court allowed the appeal of the parents. Ward LJ, quoting from another case, implied that allowing the child to remain in the UK would create a great danger of slipping into social engineering. The boy was returned to South Africa.¹⁷ The child 'was so unhappy' in South Africa that he was later returned to England, into the foster mother's care (Fortin, 1998: 357 note10). In this case, too, I shall re-examine judicial reasoning leading to an outcome I consider as highly questionable from a children's rights perspective.

5. ANALYSIS OF THE TWO CASES

A. Re M (Section 94 Appeals)

Although Butler-Sloss LJ says that the magistrates thought that the child's wishes were significant and that they disagreed with the court welfare officer as to the child's underlying views, we learn very little about how the girl saw her father or how they related to each other. The Court of Appeal does not instruct the judge rehearing the case to look into questions, which are fundamental to the child's psychological wellbeing. Does she love her father? Does she care about him at all? Does she feel sorry for him? Is she proud of him? Does she ever dream of living in her father's home or of her father looking after her? Without answers to these or similar questions, which relate to the meaning of the parent-child tie, we know very little of this facet of the child's individualized identity.

The judges are morally judgemental towards the father, disparaging his parental capacities, for apparently valid reasons. However, when deciding on parental contact, the child's sense of belonging and even the concept of psychological parenthood remain unmentioned. Nothing in the UNCRC or the ECPHRFF dictates a different outcome.

Nevertheless, the analysis offered here suggests that it is less significant that the child says she has a 'white' 'daddy' than that she says she has a 'new' 'daddy' (see also Eekelaar, 2004). Supported both by recognition of the child's need 'to be' underlying the child's right to identity and by psycholegal literature (eg Eekelaar, 1994: 48), the court should have asked – sceptically – how a seven-year-old child who has known her father from birth can be reconciled with the fact that she suddenly has a 'new father'. The Court should have explicitly assumed that a non-racially mixed child, a child who is not confused about her racial identity, would also be inclined to wonder why her father had disappeared.

The magistrates' choice of words is troubling. We learn that they terminated contact primarily because the father had not added anything to the child's upbringing. However, a father is part of the child's being. A child may see her father as emotionally belonging to her even if he does nothing intentional for her and even if one cannot point to anything specific, which he added to her upbringing. As an interdependent human being the child's needs her father and not a father even when he adds nothing visible to her upbringing.

Rosenblatt (1996), who is generally supportive of the Court of Appeal's decision, rightly points out that the nurturance of the 'ethnic child' toward sound psychological development could be more problematic than that of the white child, as the latter does not have to face a society which rejects their 'ethnic' parent. It is suggested that we go

beyond Rosenblatt's championing of the court's 'racial and ethnic awareness' (1996: 641). The court's reasoning reflects a colour conscious yet vague and impersonal image of the child's identity. It is suggested that this image is unsatisfactory from a child-centred perspective.

If the father has no significance in his daughter's life, if *she* perceives him as not caring about her emotional needs, then being entitled to an individualized identity, she should not be forced to see him only because of a similarity in skin colour. If this is her perception of him, and she is forced to see him, it seems doubtful that such meetings would bolster her self-esteem concerning her racial identity. If, on the other hand, the child's father is significant to her and she wishes to be in touch with him despite her mother's hostility towards him, it is not the similarity of their skin colour that should be the deciding factor. In the latter case, the court must strike a difficult balance between the child's right to participation and self-constructed identity and her right to a stable psychologically nurturing family life.

The mother and grandmother are hostile to the father and may be shutting their eyes to the child's confusion about her racial identity. Their hostility may be only to the father as an individual or it may amount to racial prejudice. The court could have made this distinction and suggested that in both cases the child's wishes and feelings may be harmfully influenced by their attitudes and that they have a right and duty to guide the child in the implementation of her rights, being loyal to her interests in this task.

The court's judgement misses the opportunity to draw attention to the fine line between the sphere of imperfect yet legitimate adult guidance and influence and what lies beyond such a sphere and amounts to violation of the child's rights through programming. It also does not clarify that, whether or not intervention is the least detrimental alternative from the individual child's perspective, it can also be deduced from the child's wishes and feelings.

To summarize, the Court of Appeal addresses the question of race in the abstract. Butler Sloss LJ does not direct our attention to the child's individualized identity, as perceived and constructed by the child, and does not see the court as duty bound to protect such an identity. Thus, the court's decision — I assume, unintentionally — serves ethnocentrism. The child's right to be in touch with the person she considers her father is overshadowed by efforts to ensure that the break of relationship with a black father will not adversely influence her feelings about being dark skinned. The Court's instructions to the Judge rehearing the case can be easily justified if one resorts to the common perception of cultural sensitivity or to the interests of the black community or black children at large. However, from the individual child's perspective, the pivotal question, which was neglected, was not that of 'the child's racial

origins' as such, but rather what the child sees as emotionally belonging to him. In practice, the difference between the two may be subtle, yet it is important to make the distinction.

B. Re M (Child's Upbringing)

Both Neill LJ and Ward LJ wrote detailed judgements. The concluding passage written by Neill LJ is revealing. In it he explains why the child must be returned:¹⁸

Anyone who has studied this case cannot fail to have great admiration for the appellant and for the love and affection, which she and her family have given to P since he was a baby. But he has the right to be reunited with his Zulu parents and with his extended family in South Africa.

The 'yes, but' dynamic of the above dicta of Neil LJ is interesting; it is similar to a passage in an American child abuse case (the DeShaney Case) discussed by Minow (1990b: 1674–5). The passage starts with an empathic response, deriving from an almost instinctual sense of human interconnectedness, and ends with what seems to be an inevitable rational decision, which must overcome the initial empathic response. It is suggested that, because we are conditioned, as jurists, to dichotomize reason and emotion, to ignore our common interdependence and to delegitimize empathy as a decision-making tool, the legal conclusion, in opposition to the judges' empathic response may seem even more inevitable. But we should carefully explore whether the solution is as inevitable as it seems. It is suggested that the answer is negative.

Neill LJ's seemingly straightforward implementation of the child's 'right' to be reunited with 'his' family may be questioned. His decision may be seen as an implicit unrecognized determination in a conflict of rights; between the right to be unified with one's biological nuclear and extended family and the right to remain with one's foster mother who is a psychological mother and with her family (Freeman, 1997: 13–14, note 87). It is suggested that by denying paramountcy to the psychological parenthood, the court may be denying the child the opportunity to grow psychologically towards adulthood through dynamically defining and constructing an authentic identity. Consequently the duty to give due weight to the child's wishes under Article 12 may be practically emptied of meaning. Jane Fortin accurately identifies the 'undercurrent' of the court's rationale (with which she apparently agrees) when she writes (1998: 357):

In *Re M (Child's Upbringing)* the Court of Appeal was effectively asked to redress the perpetration of racial injustice by a white South African woman who had produced a situation whereby P, a ten-year-old boy of Zulu parents, had stronger ties of affection for her and her family than he did for his own parents. The case was a complex one. In particular, there was the slightly unsavoury background which suggested that the white foster mother had deceived P's

birth parents over her true intentions when gaining their consent to her taking P with her when she came to England.

One can see no reason to doubt that Neil LJ sincerely attempted to be culturally sensitive. Furthermore, his decision is, strictly speaking, in accordance with both the UNCRC and the ECPHRFF, as analysed above. Nevertheless, one may well ask: does the 'official story' of a white woman perpetrating racial injustice against her black former employee reflect the authentic experience of the individuals involved? Was the resulting situation unilaterally or predominantly 'produced' by one individual? Does the official storyteller, namely the judge, go beyond trying to act in a way that is commonly perceived as culturally sensitive and seek to relate empathetically to the individuals involved? The answer suggested here to these questions is negative.

By highlighting and reinterpreting certain facts, I would like to offer a counter story, as lawyers often do in courtrooms (eg Ferguson, 1996: 86). In this counter story I attempt to expose and counteract an unintentionally politicized selectivity of compassion. Let me (re)start by pointing out that the child was raised in a Zulu environment only up to the age of 18 months. Since that age, the foster mother, with the biological mother's consent and approval, had brought the child up. This was in order to tackle an apartheid regulation mandating that the child return to his mother's village. The foster mother's family objected to her close ties with the blacks. She may have had to deceive both her family of origin, which was supportive of apartheid regulations and apartheid authorities in order to maintain de facto guardianship of the child. Deceit may have been a necessary ingredient for survival in the foster mother's world. If we find fault with the foster mother's deceitfulness, why not also consider her more politically correct deceitfulness? Could it be that deceitfulness becomes a coping strategy too easily sought once used by necessity? It was also not contested that the foster mother suggested that the boy's biological mother accompany her to England and that the mother refused because she would not leave her homeland. There was no clear agreement as to the duration of the child's stay in England. Even after the foster mother asked for the biological parents' consent to adoption, at one stage the biological mother was prepared to agree that the child 'live' in England if he would visit her every year for a month. The most remarkable fact to be emphasized in such a counter story would be the child's return to England with the consent of his biological parents after they gained full guardianship of him.

The efforts of this counter story to reach an empathic understanding of the individuals involved identifies no villain, but only imperfect human beings, not always fully cognisant of their interdependence, trying to act decently and even lovingly in a difficult social reality, and sometimes failing. The foster mother was not implementing a master

plan to break the ties between the child and the biological parents through her initially secret efforts to adopt the child. It was the mother's choice to remain in South Africa. However, at some stages, the foster mother's attachment to the child did not bring out the best in her – as noted by the court, her dispassionate response to the mother's painful letters indicates a blatantly insensitive attitude towards the child's biological mother. Nor did the parents have a master plan to first use the foster mother, a widow with three girls of her own, to raise their child and then turn their backs on the foster mother and betray her trust by demanding her separation from the child for good when it suited their personal marital plans.

They initially enjoyed the love and generosity the foster mother offered the child, but it was also her behaviour which manoeuvred them into a position of opposition. All parties seem to be struggling with difficult life situations. Human frailties seem to explain better than any other reason the breakdown of relations primarily between the two women who initially cared both about each other and for the child and were struggling to do their best in difficult circumstances.

What is remarkable in this case is what was created and not what was later ruined. Subtly, the case exemplifies how clear-cut racist definitions of otherness are challenged and overcome through care and trust between two women attached to the same child. For a while, familial, communal and ethnic boundaries are ignored. Bitterness and distrust between the two women could have surfaced only after alienation was initially overcome.

It is suggested that, as in Solomon's dilemma, the court must identify the solution that holds most compassion for the child. I suggest that Solomon attempting to identify the psychological mother was aided by the fact that one of the women was ready to give up the child to save his life. Through her decision she demonstrated her greater compassion for the child.²⁰ The English Court was aided by the biological parents, especially the more involved mother, who gave several hints that the child's best interests lay with the foster mother. Though her pain at being torn away from her son moved her to disagree in the hearing to his adoption, her compassion for him is mirrored in her ambivalence. After voicing her objection, she is, at one stage, before any litigation, ready to concede to adoption if the child visits her for a month each year. If the foster mother had acted in a more caring and trust-inspiring way towards her, the litigation might have been avoided. The child finally returned to England, not because of a court order, but probably due to the recognition by the 'victorious' biological parents that he was very unhappy in South Africa with them and with his community of origin.

The case illustrates the abyss between respect for the child's culture as a context of personal meaning and cultural sensitivity as commonly

perceived. Using abstract notions of culture and ancestry and neglecting culture as a context of personal meaning, the court ignored the significance of the biological parents' choices. The parents identified the child's best interests as *not* growing up in the Zulu village of his mother. They *preferred* him to grow up in the home of a white Afrikaner woman and they later *preferred* offering him a rare opportunity to actualize his – human – potential through an English education, first in South Africa and then in England, to educating him in a Zulu environment, most probably, with very meagre resources and very limited educational opportunities. Finally, I would suggest that the parents were *forced* by the outcome of the proceedings, ignoring their hints, to take the initiative to break away from their offspring in order to respect the child's sense of who he is and ties that he would most like to maintain. At the end of the day, it seems that the child's painful struggle and the responsiveness of his biological parents to his suffering ensured protection of an individualized child-created identity. It is conceivable that the parents' implied conception of identity is not inexorably tied to a place. Proponents of ethnocentric identity could have found fault in the parents' actions, especially if motivated by such a conception of identity.

To conclude, had the court recognized the child's right to an individualized identity as proposed here, the child's wishes and feelings would have been given due weight in the first place, and would have allowed the court to protect an authentic child-constructed identity radically different from any clear-cut notion of Zulu or Afrikaner identity. The court could have utilized the child's input as to his identity to navigate a course between the child's wishes and the responsibilities of the different adults in his personal world. Such a course would have been in accordance with Articles 5 and 12 of the UNCRC. Article 5 is significantly open-ended in its wording and would have enabled consideration of the responsibilities of the foster mother, undoubtedly a significant person in the child's life.

The case is, in my eyes, a classical example of the assertion that ethnic distinctions do not indicate the personal boundaries one sets between oneself and others, nor how society could respond to the child's sense of belonging. It clearly exemplifies the distinction and tension between cultural sensitivity as commonly perceived and respect for the child's individualized identity.

6. CONCLUSION

The right to a self-constructed identity may be seen as deriving from the child's fundamental human dignity, though it goes well beyond what has been traditionally deduced from a legal commitment to the child's human dignity. The two cases examined here demonstrate how the proposed concept of identity can radically change the outcome of

child-centred deliberations. A self-constructed identity is the product of the child's experience rather than an adult imposition or a general approximation of children's experiences, wishes and feelings. Legal recognition of such an identity leads child law into new ground.

Children may need proactive state intervention in order to maintain relationships meaningful to them. These needs are not guaranteed under the UNCRC, which instead now offers an ambiguous concept of identity. It mandates that the child be educated to respect their own cultural identity and that of others, but not that this cultural identity be protected by the law or that the child's feelings be consequential to the definition of their identity.

Proactive state protection may at times imply ensuring survival of a distinct cultural identity through indefinite future generations, mirroring authentic aspirations of minority children. Traditional liberal theory cannot justify such measures, and indeed theorists adhering to such an ethos, such as Kymlica (1989) and Tamir (1993), did not advocate proactive state action. The scope and substance of such state action, not discussed here, may justify further research.

Every society that is committed to human rights should see its way to granting clear and unequivocal recognition of the child's right to a self-constructed identity. For this purpose an Optional Protocol to the UNCRC may be drafted. Once the right gains recognition, child law jurisprudence will have to develop the judicial tools needed to ascertain a child's authentic identity while overcoming law's tendency towards the abstraction and objectification of culture and while protecting the child from premature autonomy.

Redefining the child's right to identity has wide implications beyond those exemplified in the two cases discussed. For example, in a guardianship dispute, when the court rules on a child's disputed exposure to different religious and cultural traditions, greater weight would have to be given to the child's wishes and feelings in order to protect their sense of belonging. Choosing between the Tender Age Test, the Primary Caretaker Test and Psychological Parenthood/Emotional Bonding Test (eg Eekelaar, 1994: 46; Sexton, 2002), it would be almost impossible not to give paramountcy to the child's emotional bonding. Greater consideration will need to be given to the preferences of a child's biological parents regarding the cultural, religious and ethnic identity of the couple who adopt their offspring, since such preferences may protect the evolving construction of an identity by the child. Open adoption would be preferred in cases of some older children due to the infringement of closed adoption on the child's right to an individualized evolving identity.²⁰

Returning to the question of social engineering raised by Ward LJ in *Re M (Child's Upbringing)*, I suggest that framing decisions concerning individual children in line with ethnocentric identity politics and

purporting to correct group wrongs through court decisions relating to ties of individual children is a subtle yet dangerous form of well meaning social engineering. Whereas affirmative action always aims to serve the interests of the individual minority child, here the child pays a price for correcting group wrongs. Such decisions while often purporting to express cultural sensitivity, may perpetuate the re-creation of insulated discrete identities competing with each other within a social arena which champions group differences and silences the individual child in their efforts to chart their own way as a creator of meaning. A static conception of identity, tying identity to place of birth may serve such a trend (Lavie and Swedenburg, 1996) and may thus jeopardize the ties some children develop to their places of residence. These may be, for example, children of asylum seekers, children of foreign workers or children abducted by a parent from their place of birth because of abuse unrecognized in the country of origin.

Recognition of the child's experiences through the right to identity leads to legal responses to child law dilemmas that may be more authentically compassionate towards the child. Protection of ties between a marginalized parent, who has strayed from mainstream norms of child rearing, and his child may be at odds with public sentiment typically keen to classify, marginalize and exclude some 'other' and yet be authentically responsive to the child's needs. Thus, compassion towards the child may be less easily politicized.

Such legal responses may be less effective in serving the public interests of retaliation and deterrence of abusive parents. However, as exemplified through the two cases, it would be wrong to conclude that recognition of the child's right to an individualized identity will necessarily strengthen the legal status of biological parents. In the competition between biological parents and adoptive parents or between biological parents and fosterparents, recognition of such a right would clearly undermine the centrality of blood 'ties' when these do not correspond with ties that are meaningful to the child.

NOTES

¹ Following the UNCRC, a child is defined here as any person from birth to the age of 18 years.

² For further critiques of an atomistic vision of the child, leading to recognition of the child's dependency needs see Minow, 1990: 306; Glendon, 1991: esp. 47-8, 66-75; Brooks, 1996; Mutua, 2002: 80-1. For a rather pessimistic appraisal of the UNCRC's potential to promote the rights of the child as an interdependent human being see Freeman, 1997: 73-4.

³ For detailed discussions of jurists' ambivalence towards recourse to empathic understanding in legal analysis see Henderson, 1987; Massaro, 1989; Minow, 1990b; Wexler, 2002.

⁴ Citing *Gaskin v United Kingdom* (1989) 160 Eur. Ct. H.R. (ser. A.) p 25.

⁵ For a general child-centered critical discussion of cultural relativism see Freeman, 1997: 129-35, 137-40, 147.

⁶ [1995] 1 FLR 546.

⁷ See n 2 at 550.

⁸ *Ibid* at 550.

- ⁹ Ibid at 550.
- ¹⁰ [1996] 2 FLR 441.
- ¹¹ See n 3 at 479.
- ¹² Ibid at 492.
- ¹³ Ibid at 480.
- ¹⁴ Ibid at. 479.
- ¹⁵ Ibid at 479.
- ¹⁶ Ibid at 493.
- ¹⁷ Ibid at 454.
- ¹⁸ See n 3 at 454.
- ¹⁹ My interpretation of Solomon's Dilemma assuming that the child's guardianship was determined according to responsiveness to emotional needs and not biology is certainly not beyond dispute. See eg Woodhouse, 1994: 1526.
- ²⁰ In an earlier article on the right to identity (published in Hebrew) I examined New Zealand's Children, Young Persons and Their Families Act of 1989 and Israeli legislation and case law. I examined there the implementation of the right to identity in the contexts outlined in the text focusing on Israeli case law. See Ronen, Y. (2003) 'The child's right to identity as a right to belong' (Hebrew), 26 *Tel Aviv University Law Review* 3, 935–84.

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