

# **The Child's Right to Identity: Do Adopted Children have the Right to know their Parentage?**

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*“I seem to have a compelling need to know my own story. It is a story that I should not be excluded from since it is atleast partly mine, and it seems vaguely tragic and somehow unjust that it remains unknown to me.”<sup>1</sup>*

## **Introduction**

Steve Jobs in his famous commencement speech at Stanford University in 2005 spoke about his biological mother, who was a young unwed college graduate. She decided to give him up for adoption and wanted him to be adopted by college graduates.<sup>2</sup> While it is known that Steve Jobs was not reunited with his biological parents, in his reflections on his education and college life, one can see how significantly he is shaped by his identity as a person who was adopted and that his biological identity is as much a part of his life as is his adopted identity.

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<sup>1</sup> R.S. Anderson, ‘Why Adoptees Search: Motives and More’, (1988) 67 Child Welfare, 15-19.

<sup>2</sup> Stanford Report, ‘‘You’ve got to find what you love’ Job says’ ( 14 June 2005) available at: <<http://news.stanford.edu/news/2005/june15/jobs-061505.html>>



Jobs was one of the few adopted persons who knew the identity of his biological parents. Knowing one's parents' is something most of us take for granted. However, this information which is critical to the formation of our identity is often inaccessible to most adopted children, who do not know who their biological parents are.<sup>3</sup>

My paper attempts to raise and answer the question – does the child have a right to know her biological identity? As Samantha Besson's states, the child's right to know her biological or genetic origins raises some of the hardest legal and ethical issues to have arisen over the last 20 years.<sup>4</sup> This question arises not only in the case of adopted children, but also in cases of abandoned or displaced children, children conceived by artificial insemination or of children born out of wedlock. It opens up, in the words of van Beuren, "a whole Pandora's Box"<sup>5</sup> – the principle of the best interests of the child and her right to know very often conflicts with other competing rights such as the mother's right to privacy and autonomy and the rights of the adoptive parents.

Children who seek information of the identity of their biological parents, articulate this need as a right to know their origins. The right to know one's origins means the right to know one's parentage, i.e. one's biological family and ascendance and one's conditions of birth. Internationally, this right is widely perceived as the Right to Know – and is considered as an integral part of one's Right to Life and Right to Privacy. It protects each individual's interest to identify where she came from. The right to know one's identity has also been guaranteed in the 1989 Convention on the Rights of the Child, the 1993 Convention on the Protection of Children and Cooperation in respect of Inter-country Adoption and recent case law of the European Court of Human Rights. The novelty of the CRC has been that in Article 7 and 8 it protects the child's right to know her parents as a child and not only later as an adult.<sup>6</sup>

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<sup>3</sup> S Besson, 'Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137.

<sup>4</sup> S Besson, (n 3)..

<sup>5</sup> G Van Beuren, 'Children's Access to Adoption Records: State Discretion or an Enforceable International Right' (1995) 58 *Modern Law Review* 37.

<sup>6</sup> S. Besson (n 3 ).



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This right to know is not yet universally accepted or acknowledged as being sufficiently fundamental or vital to give rise to a human right in India. In India, the Right to Life is guaranteed under Article 21 of the Constitution, which states that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The right to life has been expanded by the Supreme Court in many important judgments to include the right to privacy and dignity.<sup>7</sup> In India, the question of identity and privacy have not been raised substantially till date. To some extent concerns of protection of identity and privacy are being raised with respect to the Unique Identification project (UID), but they are not articulated in terms of seeking one’s right to identity where such information is not available.<sup>8</sup>

The question I will examine in this paper is whether the constitutional right to life guaranteed under Article 21 of the Indian constitution is broad enough to encompass within its ambit the child’s right to identity and the right to know one’s parentage. I will argue that such a right should be recognized under Article 21 as it is derived from the right to privacy and dignity, which has been recognized under Article 21’s guarantee to the right to life.

My paper will address the issue of whether in India in the case of adopted children we can recognize such a right to information of one’s biological parents and what should be the principles guiding the enforcement of this right in practice. My paper would attempt to unpack the conflict between the child’s right to know and others’ rights especially the mother’s right to autonomy or privacy. None of these interests and rights can be regarded as absolute and my paper would suggest ways in which they can be balanced against each other and propose principles and guidelines that would enable the recognition of the child’s biological identity without negating the importance of her social ties. Finally, my paper suggests that a comprehensive child-centric adoption law is needed in the country which will address all

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<sup>7</sup> *People’s Union for Civil Liberties v. Union of India* (1997) 1 SCC 301.

<sup>8</sup> U Ramanathan, ‘A Unique Identity Bill’ (24-07-2010) 45(30) *Economic and Political Weekly*



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issues arising out of adoption in a holistic manner, including the important issue of the right to identity and its protection to the adoptive child.

## I. Background to Adoption law and guidelines in India

Before addressing the adopted child's right to identity, it is important that we address the legal background to adoption in India. In India, there is no legislation that addresses adoption in a complete and holistic manner, and which addresses the interests of the adopted child. There are legislations that merely **provide** for adoption but these legislations do not address any concerns or the rights of adopted children to know the identity of their biological parents, nor do they lay down any guidelines about the process of adoption.

The Hindu Adoptions and Maintenance Act 1956 covers adoption by Hindus and lays down parameters as to who can adopt and under what conditions<sup>9</sup>. The Guardians and Wards Act 1890 covers adoptions for persons from all religions and permits the taking of 'guardianship' of a child through a court order.<sup>10</sup> The Juvenile Justice Act was enacted in 2000, which provided for adoption of neglected and abandoned children<sup>11</sup>, but even this legislation does not address the rights of the adopted child such as her right to identity.

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<sup>9</sup> The Hindu Adoptions and Maintenance Act, 1956, Chapter II.

<sup>10</sup> Guardians and Wards Act 1890, s 7: *Power of the court to make order as to guardianship (1) Where the court is satisfied that it is for the welfare of a minor that an order should be made- (a) appointing a guardian of his person or property, or both, or (b) declaring a person to be such a guardian, the court may make an order accordingly.*

<sup>11</sup> The Juvenile Justice Act, 2000, s 41 "*Adoption.- (1) The primary responsibility for providing care and protection to children shall be that of his family.*

*(2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods.*

*(3) In keeping with the provisions of the various guidelines for adoption issued from time to time by the State Government, the Board shall be empowered to give children in adoption and carry out such investigations as are required or giving children in adoption in accordance with the guidelines issued by the State Government from time to time in this regard.*

*(4) The children's homes or the State Government run institutions for orphans shall be recognised as an adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued under sub-section (3).*

*(5) No child shall be offered for adoption-*



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Supreme Court Guidelines:

Due to the complete lack of a statute governing the process of adoption, detailed guidelines for adoption, especially for inter-country adoption of children were first laid through the Supreme Court. This was done in a series of decisions in a public interest petition initiated on the basis of a letter addressed by an advocate called Laxmikant Pandey, complaining of malpractices indulged by social organizations and agencies engaged in offering Indian children to foreign parents in adoption. This petition resulted in the landmark judgment of the Supreme Court in *Laxmikant Pandey v. Union of India*<sup>12</sup> in which detailed guidelines relating to all the precautions for both in-country and inter-country adoptions were formulated. This judgment laid down norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for such adoption, keeping the best interests of the child in mind.

The Supreme Court in framing guidelines for adoption relied upon several international treaties and instruments that addressed the rights of the child during adoption. This judgment for the first time in India even addressed the needs of adopted children to know about their biological parents. The Court first relied upon some of the principles enshrined in the Draft Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption, Nationally and Internationally,<sup>13</sup> which states in Article 9 that the

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*a. until two members of the Committee declare the child legally free for placement in the case of abandoned children,*

*b. till the two months period for reconsideration by the parent is over in the case of surrendered children, and*

*c. without his consent in the case of a child who can understand and express his consent.*

*(6) The Board may allow a child to be given in adoption-*

*d. to a single parent, and*

*e. to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters.”*

<sup>12</sup> AIR 1984 SC 469.

<sup>13</sup> UN General Assembly, *Draft Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.*, 13 December 1984, A/RES/39/89, available at:

<http://www.unhcr.org/refworld/docid/3b00f00228.html>



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need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests.

The Court directed that in every case of adoption, a child-study report must be prepared by the recognized agency and such child study report must contain as far as possible all details on the child's identifying information, information about biological parents including their health and details of the mother's pregnancy and birth.<sup>14</sup>

On the question of whether the adopted child has the right to know about his / her biological parents, the Supreme Court held that adoptive parents,

***“..from the child study report would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when , to inform the child about its biological parents.....But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child has attained maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.”<sup>15</sup>***

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<sup>14</sup> *Lakshmi Kant Pandey v. Union of India*, (n 9) , para16.

<sup>15</sup> *Lakshmikant Pandey* (n 9) , p. 493, para 23.



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The Supreme Court while recognizing the need that adoptee children may have to know about their biological parents, put the burden of releasing such information to the adoptive parents, to decide based on their discretion as to when such information can be released to the child. The Court, interestingly, did not qualify the release of such information to an adult, but instead mentions that it could be released even to a “*child*” who has reached maturity. It mandates that the adoption agency releases such identifying information to the adoptive parents, who would then be free to release this information to the child, once the adopted child is mature and old enough to deal with the same.

The Supreme Court recommended the constitution of a central agency- Central Adoption Resource Authority [CARA] to set up guidelines for adoption safeguarding welfare and rights of children at the time of adoption, in terms of the observations of the Supreme Court. The CARA was set up and it has framed guidelines, however these guidelines are silent on the rights of adopted children to know information about their biological parents and make no provision for finding out such information.<sup>16</sup>

Thus, despite the observation of the Supreme Court that when an adopted child is mature the records relating to her biological parents can be released, this is not done in practice. Now, after more than 25 years of the *Laxmikant Pandey* judgment, there are hundreds of adult adoptees who were given for adoption abroad who are coming back to India, looking for information about their birth parents and such information is not being given to them by adoption agencies. Several have approached the courts for orders to release identifying information where it is available and the courts are not sure how to handle such petitions because adoption in India is still generally shrouded in secrecy.<sup>17</sup>

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<sup>16</sup> Central Adoption and Resource Authority, Ministry of Women and Child Development, *Guidelines for Adoption from India* (2006) available at: <<http://www.adoptionindia.nic.in/adoptionfromindia.htm>>

<sup>17</sup> P Malik, ‘Child Adoption Process Needs to be Transparent’, *CNN-IBN*, (October 21, 2007) available at <<http://ibnlive.in.com/news/child-adoption-process-needs-to-be-transparent/50909-3.html>>; ‘Adopted Boy Comes Back for Mother’, *The Times of India*, (Mumbai, January 28, 2004) available at <[http://articles.timesofindia.indiatimes.com/2004-01-28/mumbai/28337574\\_1\\_arun-dohle-adoption-agency-indian-child](http://articles.timesofindia.indiatimes.com/2004-01-28/mumbai/28337574_1_arun-dohle-adoption-agency-indian-child)> .



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What about the rights of adoptees and more importantly what about the rights of the adopted child? Can we articulate a fundamental right to identity that can enable an adopted child to seek information about her birth parents? If so, what would the contours of this right be? In order to address this, we first need to understand what is the true need to find out one's parentage and roots.

## **II. The Right to Identity and the Need to Know One's Origins:**

The need to know one's parentage and background is crucial to children and adults who do not have this information. This right to know one's origins means having the information and identity of one's biological parents and conditions of birth.

The right to know stems from the desire to know the identity of self.<sup>18</sup> Social scientists have considered the meaning of identity to be determined by three main aspects: self-definition, coherence of personality and a sense of continuity over time.<sup>19</sup> Identity is thus seen as essentially "self-in-context".<sup>20</sup> This means that identity is often determined by social changes and one's definition of self is affected by how a relationship is seen in the social context.

As Yngveson commented, "adoption transgresses our notions of identity"<sup>21</sup> and the journey of identity development is complex and problematic for adopted persons.<sup>22</sup> Since adoption is governed by different kinds of social arrangements, these arrangements have implications on the development of the identity of the child.<sup>23</sup> Therefore, in case of adopted

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<sup>18</sup> H D. Grotevant, N Dunbar, J K Kohler and A M. Lash Esau, 'Adoptive Identity: How Contexts within and beyond the Family Shape Developmental Pathways', (Oct., 2000) 49 (4) Family Relations, 379-387.

<sup>19</sup> Id .

<sup>20</sup> Id

<sup>21</sup> B Yngveson, 'Geographies of Identity in Transnational Adoption' (Mine, Yours, Ours & Theirs-Adoption and Changing Kinship and Family Patterns Conference, Oslo, May 1999).

<sup>22</sup> Grotevant et. al (n 18).

<sup>23</sup> Id



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persons, “adoptive identity” means how an adopted individual “constructs meaning out of his/her adoption”.<sup>24</sup> In order to do this, many adopted persons feel the need to know information about their birth parents. This need translates to an assertion of the right to know one’s origins.

According to Katherine O’Donovan there are three main needs to have this information - <sup>25</sup> “First there is often the desire to know one’s medical and health history and for this purpose knowing the medical history of one’s parents and ancestors becomes important. The second interest is one’s legal interest in property, which blood relationship may confer on children. These two interests are subsidiary interests. The primary interest really is the third, which is a psychological need for identity”. The psychological need to know one’s roots or identity is found to be the most important reason as to why adoptees want to know about their biological parents. While medical and legal interest in knowing one’s identity may act as contributing factors which motivate an adopted child to know his/her roots, psychological presence or absence of a member in the relevant network can determine the nature of social interactions that an adolescent will have.<sup>26</sup> Therefore the psychological need to know is placed at a level of higher importance since this underlies the need to know and can shape the identity of an adopted person.

Triseliotis in his well-known study of 1984 with adoptees, documents that *“It can now be claimed with some confidence from the available evidence that there is a psychological need in all people, manifest principally among those who grow up away from their original families, to know about their background, their geneology, and their personal history, if they are to grow up feeling complete and whole”*.<sup>27</sup>

I would therefore like to focus a little more on the psychological need to know one’s parentage and how crucial this is to form one’s sense of self and to have an identity. Following Triseliotis’ study in 1984, another study done by

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<sup>24</sup> Id

<sup>25</sup> K O’Donovan, ‘A Right to Know One’s Parentage?’ (1988) 2 *International Journal of Law and the Family* 27.

<sup>26</sup> Grotevant et. al (n 18).

<sup>27</sup> J Triseliotis and L Russell, *Hard to Place: The Outcome of Adoption and Residential Care*, (Heinemann Educational Books 1984).



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Toynbee in 1985 found that the “idea of the importance of blood ties and genes is common to most people and they feel profoundly deracinated if brought up with no knowledge of their blood origins.”<sup>28</sup>

This psychological need to know one’s origins has now been recognized as “sufficiently fundamental or vital to give rise to a human right”<sup>29</sup>. Many researchers have agreed with this that it is indeed an important element in one’s psychological balance to know where one comes from and that everyone of us has a right to know the truth about one’s origins.<sup>30</sup>

Adopted persons who do not have information about their roots often have difficulty establishing a personal identity. Problems with identity formation are particularly acute during adolescence and at crisis points in adulthood.<sup>31</sup> Thus, adoptees claim that sealed records deny them full autonomy and the means to develop a sense of self which is essential to a healthy and satisfying life. A diminished sense of self is also related to “genealogical bewilderment’.<sup>32</sup> Genealogical bewilderment may occur as Sants has argued, when children either do not have any knowledge of their biological parents or possess only uncertain knowledge and argues that the resulting state of confusion and uncertainty ‘fundamentally undermines children’s sense of security, thus affecting their mental health.’<sup>33</sup>

In addition to the psychological need, medical crises also often precipitate the need for information about biological relatives. Ranging from allergies to searches for transplant donors, medical needs can leave adoptees without sufficient information to get proper treatment. Short of a crisis, impending marriage and childbearing lead to concerns about genetic disease and hereditary traits.<sup>34</sup> Other reasons for open records advanced by adoptees

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<sup>28</sup> P Toynbee, *Lost Children*, (London Hutchinson 1985)

<sup>29</sup> M Freeman, ‘The New Birth Right?: Identity and the Child of the Reproductive Revolution’ 4 (3) *International Journal of Children’s Rights* 273.

<sup>30</sup> Id.; See also Toynbee (n 28).

<sup>31</sup> Grotevant et. al (n 18).

<sup>32</sup> The term was first used by Wellisch as a significant factor in adoption stress: Wellisch, ‘Children without Genealogy: A Problem of Adoption’ (1952) *Mental Health* 13(1).

<sup>33</sup> Sants, ‘Genealogical Bewilderment in Children with Substitute Parents’ in Bean (ed), *Adoption: Essays in Social Policy, Law and Psychology* (London Tavistock 1984) p. 67.

<sup>34</sup> Grotevant et. al (n 18).

include inheritance rights,<sup>35</sup> religion,<sup>36</sup> and simply a longing to meet their birth parents.<sup>37</sup>

### **III. International Recognition of the Child’s Right to Identity:**

This psychological need to know one’s identity has been articulated as a right in the Convention for the Rights of the Child 1989 (CRC) in Articles 7 and 8. The CRC for the first time protects this right to know for a child and not just as an adult. The CRC states as follows:

#### ***“Article 7***

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.***
- 2. States parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”***

#### ***“Article 8***

- 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.***
- 2. Where the child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide***

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<sup>35</sup> Id

<sup>36</sup> Id

<sup>37</sup> Id



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***appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”***

The CRC has gone on to protect several rights of the child, such as the right to identity that were not recognized as fundamental human rights before. The fact that the right to identity was eventually accepted and included in the CRC goes on to show that that the members agreed that it was a right worthy of international recognition.<sup>38</sup>

“Identity” is not defined under the CRC and only instances of identity such as nationality, name and family relations are listed. Article 8 was particularly meant to address unusual conditions such as natural parents versus adoptive parents and other such conditions.<sup>39</sup> Article 8, therefore imposes an obligation on the State to not only preserve the identity of a child i.e. to preserve all the information relating to the biological parents of the adopted child, but also not to deprive the child of such information and to assist the child in getting such information.

The CRC thus affirms my argument that a ‘child’, being a person under the age of 18 in India, can seek a right against the State for providing him/her information about her identity and about her biological parents.

In addition to the CRC, the child’s right to know her identity is also protected in the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 1993 which India has ratified. In Article 30, it requires State authorities to ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved and that the child or his or her representative has access to such information, under appropriate guidance, in so far as it is permitted by law in that State. It states as follows:

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<sup>38</sup> George A. Stewart, ‘Interpreting the Child’s Right to Identity in the U.N. Convention on the Rights of the Child’, 1992-93, 26 Family Law Quarterly, 221.

<sup>39</sup> Id

**“Article 30**

- (1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.**
- (2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.”**

Thus, Article 30 provides that even a child or her representative can have access to information relating to her identity, as far as it is permitted by law of the State. This is an interesting proposition, since India has ratified this Convention and the existing law governing adoption under the Supreme Court guidelines clearly permit the release of such information to an adopted child when she is mature.

The child’s right to know his or her origins is derived from the general right to privacy guaranteed under Article 17 of the International Covenant on Civil and Political Rights 1966. Article 17 states as follows:

**Article 17**

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.**
- 2. Everyone has the right to the protection of the law against such interference or attacks.**

The right to privacy would include the right to know and receive information of one’s family and private life and guarantees against arbitrary interference with the same. The right to privacy and family life is also guaranteed under Article 8 of the European Convention of Human Rights, which states as follows:

***Article 8 – Right to respect for private and family life***

***1. Everyone has the right to respect for his private and family life, his home and his correspondence.***

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

And finally, this need of the child to know about her background was recognized in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally in Article 9 which states that the need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care, unless this is contrary to the child's best interests.

So the question that arises in the Indian context, is whether in the best interests of the child, the information of her background and the identifying information about her biological parents can be released? Can this be articulated as a fundamental 'right' guaranteed under Article 21 of the Indian constitution? If so, then what should be the parameters for guiding the authorities or the courts while ordering such release or enforcing this right? Before proceeding to answer these questions, I conducted an Expert Consultation to get views on this point from various people and the outcome of this consultation follows.

**IV. The Expert Consultation on the Right to Know:**

In furtherance of this research, I organized an expert consultation on the 24<sup>th</sup> of November 2010 in Bangalore to get views from different people involved in the entire adoption process to get a view as to whether the right to know should be articulated as a fundamental right under Article 21 and whether it would be capable of being protected as such. The Consultation also sought to discuss the need for a legislation to govern the process of adoption and holding of records.

### **Participation**

Participants of the consultation included a member of the Central Adoption Resource Authority (“CARA”), adoptive parents, representatives from adoption agencies, child rights activists, women’s rights activists, lawyers and academics. Thus, various sectors which were involved with child rights and child welfare were invited in order to adequately explore and capture the multi disciplinary perspectives on the issue.

### **Agenda**

The Consultation consisted of four main sessions. Session I explored the question of whether adopted children in India have the right to access birth records. In Session II, the discussion extended to the rights of the child in cases of artificial reproductive techniques. Session III and IV witnessed a debate on the rights of the child versus the veto rights of the birth parents how the legal framework in India should be set up so as to address these issues. While Session I and II was mainly participated by heads of child welfare organizations and adoption agencies, Session III and IV saw an active debate involving voices of adoptive parents, lawyers who have participated in root searches and women’s rights activists.

### **Findings**

The inputs and findings obtained from this Expert Consultation were interesting and illuminating. All the participants unanimously agreed that adopted children would indeed have a right to know their origins and to get

information about the identity of their biological parents and their conditions of birth. This was the opinion given even by representatives from adoption agencies, who would normally be thought to be opposed to divulging this information. Even adoptive parents agreed that almost all adoptive children from their network had at some point of time raised the issue of finding out about their identity and that this information should be made available.

The difficulties that were raised with regard to obtaining such information were interesting. It was pointed out by the adoption agencies that in most cases such information was not available from the biological mother. In several cases, the babies given up for adoption were either abandoned or were “cradle babies”<sup>40</sup> where there was no possibility of finding out any information of their origins.<sup>41</sup> In such a situation there would be no information at all with the adoption agencies. In other cases where the biological mother came herself to give up her baby for adoption it was mostly under extremely stressful and secretive circumstances where the representatives from adoption agencies could only have the opportunity to ask for her basic identity and information and could not probe too much. If there was too much probing, there was the danger that the mother would leave and abandon the child in unsafe or dangerous situations, which would affect the child’s life. In cases where the birth mother was in a relationship or was a victim of rape and had come to give up the child that was born out of such relationship or rape, the child’s life would also be threatened. In those cases, secrecy was said to be the best way to secure both the child’s and the mother’s

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<sup>40</sup> The term ‘cradle babies’ was created after the cradle baby schemes that were started by most States in India. It was pioneered by in 1992 by the Tamil Nadu government primarily in response to reports of female infanticide in certain pockets of the State. Studies showed that there were about 3,000 cases of female infanticide every year in Tamil Nadu, adding up to a fifth of all female infant deaths in the State. The government launched the cradle scheme under which parents who did not wish to keep their girl babies could leave them in cradles kept at government reception centres, PHCs and major government hospitals. Now most adoption agencies also have this practice of keeping cradles outside their centres and the babies left in these cradles are commonly referred to as ‘cradle babies’. See A Krishnakumar, ‘The Cradle Babies’, *Frontline*, (Vol. 22, Issue 11, May 21-Jun 3 2005) available at <<http://www.hinduonnet.com/fline/fl2211/stories/20050603006301600.htm>>

<sup>41</sup> There were a few reservations that many participants had with regard to abandoned children whose origins were not known. Some participants felt that most of the abandoned children stories were untrue, as there were several cases where children allegedly abandoned were in fact stolen and given up for adoption, especially for inter-country adoption.



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right to life.<sup>42</sup> In many cases the agencies also reported that the information given by the birth mother with respect to her identity would be false and these details could not be verified by the agencies, again for the sake of maintaining the right to privacy of the mother. In such situations, the agencies would be helpless and had no other means of obtaining vital information relating to the identity of the biological parents and would be unable to assist the adoptee when he or she came looking for such information.

Another interesting fact brought out in this expert consultation was that the search for identity by adoptees was mostly being done by children/adults who were given up for inter-country adoption and not often by adoptees who were in India. It was not denied that adoptees in India also at one point or another in their life wanted to know about their biological parents, but their quest did not often lead them to continue in a long search for such information. The adoptees who persisted, despite all odds in trying to obtain this information were mostly Indian children given up for adoption to foreign parents and the participants felt that their need to find their roots was more crucial for building their sense of identity as they were in a foreign country, were being raised by families of a different race, origin and culture and hence the need to have one's own sense of identity and roots was greater.

The one area where all members of the expert consultation seemed to agree was at what age should adoptees have access to their adoption records and records which contained information about their biological parents. All the participants were of the opinion that adoption records should not be released unless the person is an adult and is 18 years old. One participant who had been working in the field of adoption since the last 30 years even felt that access to adoption records should not be given till the person is around 20 or 25 years old, since such access could be difficult to handle, unless proper counseling is provided to the adoptee. It was unanimously felt that children below 18 should not have access to adoption records keeping their best interests in mind.

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<sup>42</sup> S Besson (n 3).

Some experts quoted incidents of disclosure to some adoptees who came to the adoption agencies in search of their biological parents and felt that the process of disclosure was an extremely emotional phase for the adoptee and any disclosure should be made carefully with both pre and post disclosure counseling.

#### **V. Does Article 21 of the Indian constitution include the Child's right to know its Identity? Best interests of the child vs. Rights of Others**

The quest for the right to identity is based on the child's right to privacy or respect for her private life, to autonomy and freedom of expression.<sup>43</sup> Under the Indian constitution, Article 21 protects the right to life to every citizen. Article 21 states "No one shall be deprived of his life or personal liberty except according to procedure established by law". The right to life has been expanded considerably to include the right to privacy. In *Mr. X v. Hospital Z*, the Supreme Court held that, "*The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. .... A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters.*"<sup>44</sup>

This is similar to Article 8 of the European Convention of Human Rights, which guarantees the right to respect for his private and family life, his home and correspondence. The right to know one's origins has been held to be an essential part of the right to respect for one's private life.

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<sup>43</sup> S. Besson (n 3).

<sup>44</sup> AIR 1999 SC 495.

The European Court of Human rights in *Gaskin v. United Kingdom*, interpreted Article 8 of the ECHR to cover the right to know one's parents' identity as well as circumstances of one's birth.<sup>45</sup>

Thus, the right to know one's parents can be understood in relation to the right to one's family and generally the right to preserve one's identity. As Samantha Besson argues, the right to family should be interpreted more broadly, to include not only one's social or legal parents but also one's biological or genetic parents to give a true meaning to the child's right to identity and privacy.<sup>46</sup>

Such an interpretation of Article 21 of the constitution, would not only be in consonance with the current jurisprudence on the right to privacy, but would also be in consonance with the international acceptance of the right to identity. Article 7 and 8 of the CRC clearly guarantee the right to identity to children. This was even accepted by the Supreme Court in the *Laxmikant Pandey* judgment wherein it held that when a child reaches maturity, she can be given information relating to the identity of her birth parents, although it was not articulated as a fundamental right at that time.

I would argue that such a right can indeed be carved out of Article 21 – the right to identity can be understood to be a fundamental right under Article 21 guaranteeing the right to life. By reading Article 21 in light of Articles 7 and 8 of the CRC and the observations made by the Supreme Court in the *Laxmikant Pandey* judgment, it can fairly be argued that the every adoptee has the right to know her identity and the right to receive information relating to her birth, if it is in her best interest. Such 'best interests' can be decided by the child, if she is of mature age, as provided by the Supreme Court, or if so decided by her guardians on her behalf.

It is important that a child's right to know is recognized even under the age of 18 or adulthood. Although, the main consensus in the Expert Consultation was that no child below 18 years should be allowed to access

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<sup>45</sup> *Gaskin v. United Kingdom*, (1989) 12 EHRR 36.

<sup>46</sup> S. Besson (n 3).

his/her birth records, the underlying concern for this view was that a child who is below 18 may not be able to face the trauma of disclosure.

This view however goes against the Supreme Court Guidelines in Laxmikant Pandey which permit the release of information of the child's biological parents if the child is mature enough. These Guidelines thus provide for situations where a mature child, under 18 would request for such identifying information and if found to be in its best interest, the same may be released. This right is also guaranteed to 'children' under Article 7 and 8 of the CRC, which protect the right to identity of children and not of adults.

Further, the psychological issues of disclosure are not wholly dependent on age and therefore the best interest of the child as regards disclosure cannot be determined by a blanket age prescription. Adoptive identity is developed by a variety of factors such as the degree of openness in the adoption process, the child's perception of the practice of adoption, the age at which the child was adopted and even the way the child is brought up to view the practice of adoption. It is seen that even in cases where a child is adopted as an infant and brought up with a certain view on adoption, the reasoning capabilities which are developed on reaching adolescence leads to adopted children often exploring the "legal, societal, relational and sexual meanings in adoption".<sup>47</sup> This can be a definitive stage in the formation of the self identity of a child. Therefore, what information and means of access to information is available to the child becomes very important. A blanket prohibition on access to identifying information to all children who have not reached adulthood may not always be in the best interest of the child as the child may be mature enough to know his/her true identity. Therefore, a legal entitlement to one's identity should be restricted on the sole basis of age.

Unless such a legal entitlement to obtain this information is created, it would be difficult to enforce the duty of informing the child by the adoptive parents, as required by the Supreme Court and therefore the recognition of a child's right of access to birth records is essential. Indeed, this has been

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<sup>47</sup> Grotevant et. al (n 18).

accepted as a fundamental right by the Karnataka High Court in *Maria Chaya Schupp v. The Director General of Police and Ors* where Justice Anand Byra Reddy held, “...the petitioner is seeking to enforce a right which is well recognized. The right to know one’s origin is a dimension of the broader right to ascertain and preserve one’s identity.”<sup>48</sup>

It has been difficult to recognize and enforce a legal right to know because of concerns on confidentiality and secrecy which was characteristic of an adoption arrangement prior to 20<sup>th</sup> century.<sup>49</sup> Adoption processes were often connected to the “illegitimacy” of the child which in turn led to stigmatization of the child in the society. Therefore there was a practice of severing ties between the birth parents and the adopted child since this was thought to ensure better ties between the child and the adoptive family.

Secrecy and confidentiality in the practice of adoption led to a practice of non-disclosure of even the fact of adoption to the child. This form of a closed adoption arrangement was challenged in the 1960s and 70s leading to several arguments that adoptive parenting required a disclosure of the fact of adoption.<sup>50</sup> Further, several movements emerged arguing for the rights of adopted children to search for their roots. Developments in the medical field on the importance of genetic linkages also accelerated this movement and several arguments citing medical, legal and psychological interests for opening records of adoption gained strength.<sup>51</sup> Another interesting argument advanced by van Beuren is that non-disclosure of genetic information to adoptee children amounts to discrimination against particular groups of children, particularly adopted children who do not have this information.<sup>52</sup>

The big question in this debate for declaring such a right to identity is the concern for the rights of privacy of the biological mother or even the rights of the adoptive parents. The rights in conflict with the child’s right to know include the rights of the biological mother, the biological father, the mother’s

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<sup>48</sup> W.P. No. 8664 of 2006 (judgment dated 14 October 2009)

<sup>49</sup> Grotevant et. al (n 18); See also Ronen, ‘Redefining the Child’s Right to Identity’, (2004) 18(2) Int J Law Policy Family, 147.

<sup>50</sup> Id

<sup>51</sup> K O’Donovan, (n 25).

<sup>52</sup> Van Beuren (n 5)

husband and the adoptive parents. The issue of the right to privacy of the biological mother however, is not insuperable. These very concerns were raised in Parliament in the UK when the Children Act was to be enacted in 1975 and access to birth certificates of adopted children was provided. Despite fears of blackmail and harassment of biological mothers, Triseliotis found in his study ten years later in 1985 that there was no evidence to substantiate these fears.<sup>53</sup>

For adoptive parents, it has often been held that confidentiality also must be promoted to protect the right of the adopting parents.<sup>54</sup> Adoptive parents could have a similar interest to protect their ties to the child and would not want any interference by identification of the child's biological parents.<sup>55</sup>

In addition to the competing rights of the biological parents and adoptive parents, several American courts have held that the public has a strong interest, too, in preserving the confidentiality of adoption records and public attitudes toward illegitimacy and parents who neglect or abuse children have not changed sufficiently to warrant disclosure of the circumstances leading to adoption.<sup>56</sup> Such public policy considerations include a fear, as Geraldine Van Beuren articulates, "that if access is allowed, children will be abandoned rather than given up for adoption and that such access to the birth records may have a negative effect on the willingness of parents to adopt."<sup>57</sup> However, none of these assumptions have been factually proven.

With these competing interests being played out in the debate for the right to identity, States are obligated to ensure that the 'best interests of the child' shall prevail over all interests of all other parties. Unless a child-

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<sup>53</sup> Triseliotis (n 27).

<sup>54</sup> *In re Roger B.*, 418 N.E.2d 751 (Ill.App. 1981); *In re Christine*, 397 A.2d 511 (1979); *In re Sage* (1978), 21 Wn. App. 803, 806, 586 P.2d 1201, 1203; *Mills v. Atlantic City Department of Vital Statistics* (1977), 148 N.J. Super. 302, 307-08, 372 A.2d 646, 649; *In re Adoption of Spinks* (1977), 32 N.C. App. 422, 427, 232 S.E.2d 479, 483.)

<sup>55</sup> S Besson (n 3)

<sup>56</sup> *In Re Roger B* (n 54); Confidentiality is perceived to promote the efficacy of the adoption process in States, where the statutes provide for sealed birth records *Alma Society, Inc. v. Mellon* (2d Cir. 1979), 601 F.2d 1225, 1235.

<sup>57</sup> Van Beuren (n 5)



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oriented approach is taken, it is unlikely that the argument for the child's right to access to its birth information under the Article 21 right to privacy would succeed. Only a child centered approach can decide as to whether in a particular case, a denial of access to birth information would be required to protect the rights of the birth parents or of the adoptive parents.

Several adoption laws all across the world have now moved towards recognizing the rights of adoptees and adoption policy generally is moving from secrecy to openness, especially with regard to adoption records. Supporters of Section 26 in the Children Act 1975 in the British Parliament argued for it on the ground that "it is a basic human right that every child should know his origins".<sup>58</sup> Similarly all jurisdictions which have given open access to birth records to adoptees have refused to take seriously the objections based on the invasion of privacy rights of third parties.

## **VI. Working out the Right to identity of the Child in Practice and Imposing a Duty of Disclosure on the State:**

Presently in India, there is a complete vacuum in the field of law governing adoptions. We do not have any legislation such as the Children Act 1975, which would govern adoptions and give rights to adopted children such as giving access to their birth records. The CARA Guidelines are a poor substitute for legislation and they do not have any provisions for protecting the right to identity of the adopted child. The CARA Guidelines have created a multi-level scrutiny system composed of several authorities like the voluntary co-ordinating agencies, scrutinizing agencies etc. and armed all of them with wide powers, thus creating a whole complicated procedure for adoption, in which the welfare of the child takes a back seat.<sup>59</sup> Thus, a critical examination

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<sup>58</sup> Mr. L. Abse, HC Deb, 20 June 1975, Hansard, Vol. 893, para 1862.

<sup>59</sup> S. A Anand, P Chandra, 'Adoption Laws: Need for Reform' (21-09-2002) 37(38) *Economic and Political Weekly* 3891.

of the existing laws and guidelines is needed to see also if they are working effectively.

Although the Guidelines require that the Home Study Report of the Child should contain information about the biological parents,<sup>60</sup> the same is often not done. In the absence of legislation, the adopted child (who is under 18 years of age) has no rights of any kind to seek her birth records and find information relating to her birth parents despite the Supreme Court making an observation on this issue. Even adult adoptees have no option but to approach the courts for court orders directing adoption agencies to release such records if they have them and courts are grappling with these issues.

There have been attempts in the past to bring about a uniform legislation to govern adoption. In 1972, there was an attempt to introduce an Adoption Bill in the Rajya Sabha. However, this was not fruitful due to opposition by religious groups against a uniform law on adoption.<sup>61</sup> Therefore there was another attempt in 1980 through the Adoption Bill, 1980 which exempted the Muslim community from its application.<sup>62</sup> However even this did not attain fruition as it was criticized and eventually it lapsed. Since then, although there has been a constant call for a uniform legislation, no further attempt has been made to introduce it.<sup>63</sup> Even the legislations which were proposed did not contain any provisions to regulate the procedure as regards the disclosure of birth records to adopted children.

As other scholars have written, “what is needed is a paradigm shift in attitudes as a result of which children themselves are brought from the fringes of the adoption process to become arbiters of their own destiny.”<sup>64</sup> The only

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<sup>60</sup> See CARA, *CARA Guidelines for Family Adoptions of Indians Staying Abroad*. Annexure III requires the following details: Name; Date of Birth; Occupation and employment particulars; Annual Income; Permanent Address; Present Address; Reasons for relinquishing the child; Relation with Prospective Adoptive Parents; Observations of the authorized individual verifying the documents. The guidelines also require the recording of the biological family name of the child.

<sup>61</sup> S A Anand et al (n 59).

<sup>62</sup> See Law Commission of India, One Hundred and Fifty Third Report on Inter Country Adoption 1994.

<sup>63</sup> There have been some measures to amend the personal laws on adoption. See Personal Laws (Amendment) Bill, 2010 which aims to introduce changes to Guardians and Wards Act, 1890 and Hindu Adoptions and Maintenance Act, 1956 to include adoptions by single mothers.

<sup>64</sup> S A Anand et al (n 59).



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way forward would be to have a comprehensive legislation covering adoption and the giving of children in foster care that would address the rights of the adopted children and would protect their right to seek access to their birth records.

In India, such a legislation has been discussed since the *Laxmikant Pandey* decision, but even till date no such statute has been enacted. In the absence of such a statute, the CARA guidelines do a poor job of substitution. The right to identity of the adopted child is not addressed under the CARA Guidelines, nor is any duty cast on the State to preserve information relating to the child's origins as mandated under the CRC and the Hague Convention. The creation of a legal entitlement may in fact make it more likely that adopted children would learn the information from their adoptive parents because the adoptive parents would realize that children could obtain the information through other means.<sup>65</sup>

In several jurisdictions, adoption legislations have been enacted, permitting adoptees the access to their genetic information. The Children Act 1975 in England and Wales, under Section 26 extends to adult adoptees the right of access to one's original birth certificate. In Finland and Scotland, adopted children at the age of 17 are entitled to access their birth records.<sup>66</sup> In the US, several states permit the release of birth records.<sup>67</sup> In many other states, adoption laws provide release of birth information on showing of "good cause", this is ultimately left to the courts to decide.

In India, if we were to enact a legislation protecting such a right, how would this right be practically implemented? If a right to protect, preserve and to know a child's identity is accepted, the main duty bearer would be the State. It would then impose a duty of the State for the collection of all relevant data pertaining to the child's biological parents and other information. It would require legislation that would also impose a duty on the adoption authorities and agencies to procure this information and preserve the same. However,

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<sup>65</sup> Van Beuren (n 5).

<sup>66</sup> Adoption of Children (Scotland) Act, 1930.

<sup>67</sup> Id



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there may be cases where there may be no available information such as where a child is abandoned at birth or where the father is unknown to the mother. In such cases, the legislation should clearly provide for positive steps to be taken by the State and the adoption agency to make serious attempts at finding out the origins of the child and the conditions that led to her abandonment. Article 8 (2) of the CRC emphasizes on positive duties of assistance and protection by the State to speedily re-establish the possibility for a child to preserve her identity.

Once such information is obtained and preserved, the release of such genetic information would also raise concerns. Protecting a child's interest, differs from protecting an adult's right. Release of information to children would have to be done on a case by case basis and would have to be dependant on the child's best interest and in accordance with the principles of the CRC. Such legislation would have to mandate that the best interests of the child would be of paramount consideration, when considering the release of the birth information of the child vis-vis the rights of other parties. There can be guiding principles on how the best interest of the child should be decided, but the first step in reaching there would be to enact a legislation that makes the right to know a legal right and entitlement to adoptee children.

## **Conclusion**

For a long time the right to know one's origins concerned only a small number of people and mostly adults. But now with the number of adoptees increasing and more and more adoptee children seeking to know the information about their birth parents, this question becomes more pressing. I argue that such a right to identity and to know information about one's biological parents and conditions of birth does indeed deserve protection as a fundamental right to life and privacy under Article 21. This guarantee deserves to be granted to adoptee children and not only adults since the CRC protects the right to identity of children. This right would require to be articulated in a

comprehensive legislation that would address the rights of children during adoption and would also impose positive duties on State authorities to preserve and protect a child's right to her origins.

Unless such a comprehensive legislation is passed, it is unlikely that adoptee children will get their rights effectively implemented. Such legislation will also pave the ground for addressing rights of children from even more complicated backgrounds such as children born out of surrogacy and artificial insemination, whose rights will pose more difficult challenges. The most important factor in such legislation would be that it has a child-centered approach, which puts the best interests of the child as paramount, and paramount to all other interests.



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