

*A Failure of Proportion: Non-Consensual Adoption in England and Wales.* By SAMANTHA M. DAVEY [Oxford: Hart Publishing. 2020. x + 204 pp. Hardback £60. ISBN: 9781509929139.]

Adoption, as it is understood in English Law, is a process whereby a child acquires new legal parents, usually in place of the previous ones. While every country in Europe has a mechanism for permitting adoption without parental consent in certain circumstances, few allow it to the extent that it occurs in England and Wales (C. Fenton-Glynn, *Adoption without Consent: Update 2016* (Brussels 2016)), where it is used as a child protection measure. Samantha Davey opens her impressive book by referring to web-based accounts illustrating “many troubling stories alleging that the making of a care order and a subsequent non-consensual adoption have been disproportionate measures” (p. 1). This is a striking if somewhat populist beginning, and while conceding that adoption can sometimes be appropriate, Davey’s thesis is that “adoption orders are sometimes made in England and Wales in circumstances where less intrusive and equally effective measures are available to protect children from harm” (p. 3). In other words, some such orders are disproportionate. In Davey’s view, while proportionality is rightly considered important by appellate courts where parents seek to challenge adoption orders after they are made, it is given insufficient consideration when such orders are being made in the first place.

In the first substantive chapter of the book, Davey engages in a detailed discussion of the nature of, and interrelationship between, children’s welfare, children’s rights and parents’ rights (including under the European Convention on Human Rights). This is a well-worn topic, but the somewhat adoption-specific nature of Davey’s analysis adds utility. She makes the case that the UN Convention on the Rights of the Child can and ought to form an important part of the process when the courts determine the proportionality of non-consensual adoptions, with reference *inter alia* to some of this reviewer’s own work (see, e.g., B. Sloan, “Conflicting rights: English adoption law and the implementation of the UN Convention on the Rights of the Child” [2013] *Child & Family Law Quarterly* 40).

Much of the rest of the book’s main body is taken up with analysis of adoption case law, first that of the European Court of Human Rights and then that of the courts in England and Wales, albeit that consideration of the legislative framework is also required in the latter case. The temptation must have been to focus heavily on the right to respect for family life under Article 8 in the chapter on the Strasbourg court, and Davey does engage in admirably close analysis and critique of the particularly pertinent cases of *YC v United Kingdom* [2012]

2 F.L.R. 332 and *R and H v United Kingdom* [2011] 2 F.L.R. 1236 (albeit that the latter involved the distinctive adoption law of Northern Ireland rather than that of England and Wales). She also, however, pays considerable attention to Articles 2 (the right to life), 3 (the right to be free from torture and human and degrading treatment) and 6 (the right to a fair hearing), and how the first two of these might clash with Article 8 rights. This adds a distinctive element to the book. Moreover, her suggestion that the adoption process might in some instances itself engage Article 3 is an interesting one, turning on its head the more obvious suggestion that adoption might *secure* Article 3 rights. Davey invokes Article 8 to argue that the state owes positive obligations to provide assistance in enabling children and families to stay together, in preference to the severance of family ties through adoption. She also convincingly advocates greater consideration of relevant CRC rights by the European Court in adoption cases, as well as expressing concern that the Court's test of "exceptional" circumstances to justify removal and adoption of children is not difficult to overcome in cases where a measure short of adoption might have been sufficient.

Davey goes into considerable detail on *Webster v Norfolk CC* [2009] EWCA Civ 59, [2009] 2 All E.R. 1156 when analysing the relevant domestic case law, and refers to it again in the conclusion. *Webster* was a tragic case where three of a couple's children had been adopted on the basis that one of the children had been non-accidentally injured in their care, but it later transpired that the injuries were likely a result of scurvy consequent on the following of medical advice. While it is more than arguable that the case is an instance of serious injustice, and it by no means *detracts* from her thesis, it is not necessarily the best example to advance Davey's argument. It was fundamentally a case about the finality of adoption and what should happen if there is a possible error in the ostensibly objective factual basis for the eventual adoption decision. It was held that the adoption orders could not be set aside, but it seems doubtful that they would have been made if the new medical evidence had been available at the time. Davey's view, on the other hand, is apparently that adoption should not occur in some instances where it does so even where no similar error is likely to have been made. Her argument that children's rights *per se* are given insufficient explicit analysis by domestic courts is, however, well made.

In the final substantive chapter of the book, Davey usefully analyses in depth the non-adoption alternatives whose greater use she has been advocating. These are: state assistance, foster care, kinship care and special guardianship orders. She also considers adoption with direct contact. This last phenomenon is clearly not strictly speaking an alternative to adoption, albeit that it does run very much counter to the prevailing adoption "culture" in

England and Wales. Without seeking to argue that any of the alternatives should wholly replace adoption in general, she points out that *in some cases* each of them may be just as effective as adoption in ensuring “protection, security and permanence for children” (p. 186), while providing greater “protection of children’s and parents’ relationship rights under the ECHR and the UNCRC” (p. 161). The difficulty, of course, is ascertaining in *which* such cases that will be true, but it is Davey’s thesis that “these alternatives may be ruled out too quickly or might not be considered at all” (p. 176), for reasons including an absence of adequate state spending. This is despite the Court of Appeal’s anxiety in *Re B-S (Children) (Adoption: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 W.L.R. 563 and related cases that judges should assess all the options that are realistically possible for a child, compare them with each other in a non-linear fashion and make the most proportionate permissible order that will secure a child’s best interests, treating adoption as a last resort. This is controversial territory. For example, while Davey argues that “in some cases, long-term foster care may be equally effective as non-consensual adoption” (p. 161), in *Re LRP (A Child) (Care Proceedings: Placement Order)* [2013] EWHC 3974 (Fam), [2014] 2 F.L.R. 399, at [39], Pauffley J. described such foster care as an “extraordinarily precarious” legal framework that certainly did not provide the same “legal security” for a child as adoption.

Davey concludes the book *inter alia* by emphasising that the state is required to “use financial and practical resources to attempt to reunite children and parents, where this is possible”, even if it is difficult to ascertain precisely when a state might breach an international obligation to do so (p. 188). She advocates greater investment in, and attention to, alternatives to adoption and concurrent planning. She makes a strong case for the view that “the existence of good reasons for removing children from the family home and for deciding that they should not be returned into the care of their parents, does not mean that a non-consensual adoption can necessarily be regarded as a proportionate measure (p. 194).

Some of Davey’s assertions and assumptions may well be open to challenge. For example, while she at times implies that consideration of proportionality is effectively limited to the appellate level in England and Wales, such that it is retrospective, it is certainly possible to find apparent counter-examples where proportionality is given explicit attention before an adoption order is made at first instance. This is particularly true in the aftermath of the seminal decisions in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33, [2013] 1 W.L.R. 1911 and *Re B-S*, and Davey concedes that it is “difficult to gain reliable evidence and form a clear picture of the scale of the problem” she has identified (p. 115). In *Re N (Adoption Order)* [2014] EWFC 1491, at [46], for example, Moor J. specifically held in the context of a

detailed analysis that, “[n]otwithstanding the draconian nature of the order, adoption is necessary and proportionate given the huge advantages that it provides to [the child concerned] for the rest of her life”. While Davey apparently regards the frequency and/or extent of such consideration to be inadequate, such that only lip-service is paid, some readers may find themselves alleging exaggeration in parts of the book.

To be clear, however, the fact that Davey’s work is at odds with relatively recent Government policy on adoption, and in some instances judicial approaches to it, is by no means *per se* a problem. On the contrary, this well-researched volume is an important corrective to the dominance of adoption as a solution for children in need in some policy circles. As a book-length analysis of adoption in the context of both domestic and international human rights law, Davey’s monograph is very valuable.

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