THE INTERNATIONAL SURVEY OF FAMILY LAW

2007 Edition

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THE INTERNATIONAL SURVEY OF FAMILY LAW

2007 Edition

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THE INTERNATIONAL SOCIETY OF FAMILY LAW

A THE HISTORY OF THE SOCIETY

On the initiative of Professor Zeev Falk, the Society was launched at the University of Birmingham, UK, in April 1973. The Society's first international conference was held in West Berlin in April 1975 on the theme *The Child and the Law*. There were over 200 participants, including representatives of governments and international organisations. The second international conference was held in Montreal in June 1977 on the subject *Violence in the Family*. There were over 300 participants from over 20 countries. A third world conference on the theme *Family Living in a Changing Society* was held in Uppsala, Sweden in June 1979. There were over 270 participants from 26 countries. The fourth world conference was held in June 1982 at Harvard Law School, USA. There were over 180 participants from 23 countries. The fifth world conference was held in July 1985 in Brussels, Belgium on the theme *The Family, The State and Individual Security*, under the patronage of Her Majesty Queen Fabiola of Belgium, the Director-General of UNESCO, the Secretary-General of the Council of Europe and the President of the Commission of the European Communities. The sixth world conference on *Issues of the Ageing in Modern Society* was held in 1988 in Tokyo, Japan, under the patronage of HIH Takahito Mikasa. There were over 450 participants. The seventh world conference was held in May 1991 in Croatia on the theme, *Parenthood: The Legal Significance of Motherhood and Fatherhood in a Changing Society*. There were 187 participants from 37 countries. The eighth world conference took place in Cardiff, Wales in June/July 1994 on the theme *Families Across Frontiers*. The ninth world conference of the Society was held in July 1997 in Durban, South Africa on the theme *Changing Family Forms: World Themes and African Issues*. The Society's tenth world conference was held in July 2000 in Queensland, Australia on the theme *Family Law: Processes, Practices and Pressures*. The eleventh world conference was held in August 2002 in Copenhagen and Oslo on the theme *Family Life and Human Rights*. The Society's twelfth world conference was held in Salt Lake City, Utah in July 2005 on the theme *Family Law: Balancing Interests and Pursuing Priorities*. The Society's thirteenth world conference is to be held in Vienna in 2008. The Society has also increasingly held regional conferences including those in Lyon, France (1995); Quebec City, Canada (1996); Seoul, South Korea (1996); Prague, Czech Republic (1998); Albuquerque, New Mexico, USA (June 1999); Oxford, UK (August 1999); and Kingston, Ontario (2001). In 2003, regional conferences took place in Oregon, USA; Tossa de Mar, Spain; and

Lyon, France and, in July 2004, in Beijing, China, on the theme 'Divorce and its Consequences'. In 2005, a regional conference took place in the Netherlands and dealt with the centennial anniversary of the establishment of juvenile courts.

B ITS NATURE AND OBJECTIVES

The following principles were adopted at the first Annual General Meeting of the Society held in the Kongresshalle of West Berlin on the afternoon of Saturday 12 April 1975.

(1) The Society's objectives are the study and discussion of problems of family law. To this end the Society sponsors and promotes:
   (a) International co-operation in research on family law subjects of world-wide interest.
   (b) Periodic international conferences on family law subjects of world-wide interest.
   (c) Collection and dissemination of information in the field of family law by the publication of a survey concerning developments in family law throughout the world, and by publication of relevant materials in family law, including papers presented at conferences of the Society.
   (d) Co-operation with other international, regional or national associations having the same or similar objectives.
   (e) Interdisciplinary contact and research.
   (f) The advancement of legal education in family law by all practical means including furtherance of exchanges of teachers, students, judges and practising lawyers.
   (g) Other objectives in furtherance of or connected with the above objectives.

C MEMBERSHIP AND DUES

In 2006 the Society had approximately 570 members.

(a) Membership:
   - Ordinary Membership, which is open to any member of the legal or a related profession. The Council may defer or decline any application for membership.
   - Institutional Membership, which is open to interested organisations at the discretion of, and on terms approved by, the Council.
   - Student Membership, which is open to interested students of law and related disciplines at the discretion of, and on terms approved by, the Council.
   - Honorary Membership, which may be offered to distinguished persons by decision of the Executive Council.

(b) Each member shall pay such annual dues as may be established from time to time by the Council. At present, dues for ordinary membership are €41 (or equivalent) for one year, €100 (or equivalent) for three years and €155 (or equivalent) for five years, plus €7 (or equivalent) if cheque is in another currency.

D DIRECTORY OF MEMBERS

A Directory of Members of the Society is available to all members.

E BOOKS

The proceedings of the first world conference were published as *The Child and the Law* (F Bates, ed, Oceana, 1976); the proceedings of the second as *Family Violence* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1978); the proceedings of the third as *Marriage and Cohabitation* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1980); the fourth, *The Resolution of Family Conflict* (J Eekelaar and S Katz, eds, Butterworths, Canada, 1984); the fifth, *Family, State and Individual Economic Security (Vols I & II)* (MT Meulders-Klein and J Eekelaar, eds, Story Scientia and Kluwer, 1988); the sixth, *An Ageing World: Dilemmas and Challenges for Law and Social Policy* (J Eekelaar and D Pearl, eds, Clarendon Press, 1989); the seventh *Parenthood in Modern Society* (J Eekelaar and P Sarcevic, eds, Martinus Nijhoff, 1993); the eighth *Families Across Frontiers* (N Lowe and G Douglas, eds, Martinus Nijhoff, 1996) and the ninth *The Changing Family: Family Forms and Family Law* (J Eekelaar and T Nhlapo, eds, Hart Publishing, 1998). The proceedings of the tenth world conference in Australia were published as *Family Law, Processes, Practices and Pressures* (J Dewar and S Parker, eds, Hart Publishing, 2003). The proceedings of the eleventh world conference in Denmark and Norway were published as *Family Life and Human Rights* (P Lødrup and E Modvar, eds, Gyldendal Akademisk, 2004). The proceedings of the twelfth world conference held in Salt Lake City, Utah are being published as *Family Law: Balancing Interests and Pursuing Priorities* (L Wardle and C Williams, eds, Wm S Hein & Co, in press, publication scheduled for August 2007). These proceedings are commercially marketed but are available to Society members at reduced prices.

F THE SOCIETY'S PUBLICATIONS

The Society regularly publishes a newsletter, *The Family Letter*, which appears twice a year and which is circulated to the members of the Society and reports on its activities and other matters of interest. *The International Survey of Family Law* provides information on current developments in family law throughout the world and is received free of charge by members of the Society. The editor is currently Bill Atkin, Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington, New Zealand. The Survey is circulated to members or may be obtained on application to the Editor.

PREFACE

This is the first edition since I took over the editorship of the Survey from Andrew Bainham. It is a daunting task following the tremendous work that Andrew did on the Survey and before him Michael Freeman. The transition has not been without its pressure points, one result of which is a shorter edition than before. Rounding up people to commit to writing and then collecting on those commitments is easier said than done, even in this electronic age. I am therefore very grateful for those who have written for the 2007 edition, some of them regular contributors and others who are new to the Survey.

The 2007 edition contains chapters from many parts of the world, although I am aware that there are large gaps. One area where I would appreciate some input is Central and South America, and I expect that this will be remedied in the next edition. Having been a regular contributor myself over the years, it has been interesting to see the different approaches that authors have adopted. While some still write an annual summary, others take a more thematic approach and deal with topics more holistically. This is inevitable for countries that appear in the Survey only occasionally. Following Andrew's practice, I have used a light editorial pen. Legal writing and citation styles vary enormously and I have not insisted on one uniform approach.

I thank all those who have written for the Survey and also those who have helped to find authors. Special thanks to Fareda Banda who has taken over from Bart Rwezaura as the Associate Editor (Africa). Dominique Goubau did the translation of the abstracts into French, and we were assisted in this by Nick Whittington, a recent law graduate from Victoria University of Wellington, who is about to embark on further study at Cambridge. I have greatly appreciated my secretarial help, first from Joan Johnson and then from Tracy Warbrick. They both ensured that contributions were edited and then not lost! Special thanks also to the publishers, Jordans, and in particular Greg Woodgate and Cheryl Prophett.

Bill Atkin
Victoria University of Wellington
May 2007

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[1] Ou la contrevaleur en US dollars.

CONTENTS

ANNUAL REVIEW OF INTERNATIONAL FAMILY LAW

*Dr Ursula Kilkelly**

Résumé

Cette revue du droit international fait état des développements au sein des Nations Unies et du Conseil de l'Europe en 2005. En ce qui concerne l'ONU, l'article détaille les nouveaux états qui ont approuvé les Protocoles facultatifs se rapportant à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés et la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants. Il analyse les deux Commentaires d'ordre général adoptés par la Comité des droits de l'enfant en 2005, relatifs aux enfants non accompagnés en dehors de leur pays d'origine et à la mise en œuvre des droits de l'enfant dès la petite enfance. L'article démontre que les Commentaires d'ordre général ont une force certaine et que leur terminologie est claire, faisant de ces textes des instruments qui seront fort utiles pour les intervenants dans ces différents domaines.

En ce qui concerne le Conseil de l'Europe, on peut déplorer le refus de plusieurs états de respecter la Convention sur les relations personnelles concernant les enfants, particulièrement à la lumière du nombre croissant de recours devant la Cour Européenne des Droits de l'Homme qui démontrent que l'effectivité des droits d'accès est un sérieux problème dans certains états. La jurisprudence analysée inclut deux arrêts portant sur ce problème spécifique (*Zawadka v La Pologne* et *Karadžić v La Croatie*). Des arrêts concernant le refus de corriger des informations erronées dans l'enregistrement d'un enfant mort-né (*Znamenskaya v La Russie*) et concernant les délais d'action en matière de recherche de paternité (*Shofman v La Russie*) montrent bien que la question du droit à l'identité demeure à l'ordre du jour à Strasbourg. Certains problèmes sont sans doute plus d'actualité, comme ceux soulevés dans des décisions concernant le droit de se marier et de fonder une famille (*Haller et Autres v L'Autriche*) et le droit de ne pas être soumis au travail forcé (*Siliadin v La France*). La présente revue se termine par une discussion sur le nécessaire équilibre entre le droit de l'accusé à un procès juste et équitable et le droit à la protection des enfants victimes ou témoins dans le cadre de procès pour des crimes d'ordre sexuel (*Bocos-Cuesta v Les Pays-Bas* et *Accardi et Autres v L'Italie*).

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I INTRODUCTION

The purpose of this chapter is to outline developments in the area of family law and children's rights for the year 2005. It focuses on two areas of international activity: the United Nations and the Council of Europe.

II UNITED NATIONS

(a) Optional Protocols to the Convention on the Rights of the Child

During 2005, there were seven ratifications to the Optional Protocol on the sale of children, child prostitution and child pornography. Armenia, Benin, Canada, India, Japan, Poland and the Netherlands all ratified the Optional Protocol without reservation. In addition, there were five accessions to the Protocol by Angola, Eritrea, Georgia, Turkmenistan, Saint Vincent and the Grenadines. Bhutan, Czech Republic, Fiji and Vanuatu all signed the instrument.

The Optional Protocol on the involvement of children in armed conflict received 11 ratifications: Armenia, Benin, Colombia, India, Israel, Latvia, Liechtenstein, Poland, Sudan, Togo and the Ukraine. In addition, four states signed the Protocol: Butan, Fiji, Somalia (which has signed but not ratified the Convention) and Vanuatu.

While it is important that states continue to ratify both of these Optional Protocols, it is impossible not to question the relevance or meaning of ratification given some of the states involved: Sudan's ratification of the Optional Protocol on the involvement of children in armed conflict is a case in point. According to the Secretary General, the practice of recruiting child soldiers is 'deeply rooted in southern Sudanese military culture'.[1] Moreover, Human Rights Watch note that Sudan is one of few countries where child soldiers are used by Government, paramilitary and opposition forces.[2] It is difficult to envisage therefore that Sudan has taken the necessary steps to ensure compliance with the Protocol and it is in this light that the relevance of its ratification of the instrument must be questioned. Two points fall to be made in this context: first, as reported in last year's Survey, it is important that the Security Council has taken on a role with respect to monitoring and enforcing standards in relation to children's involvement in armed conflict under Security Council Resolution 1612. This should ensure that greater political pressure is brought to bear on countries using children directly and indirectly in their armed conflicts. Secondly, it is also important that the

[1] AP, 'UN Chief: Sudan Children are in danger', 23 August 2006 available on the website of the Secretary General's Special Rapporteur on Children in Armed Conflict (www.un.org/special-rep/children-armed-conflict (10 November 2006)).

[2] See www.hrw.org (10 November 2006).

ratification of the Optional Protocol by states means that they become subject to the Committee on the Rights of the Child's reporting mechanism. Under the terms of both Protocols, states must submit a report on the measures taken to implement them to the Committee on the Rights of the Child two years following ratification. The Committee began considering state reports under the two Optional Protocols in 2006 and it is of obvious importance that the Committee continues its robust questioning of states parties during this process so as to prevent states gaining international support and credibility through ratification of instruments with which they quite obviously do not comply.

(b) Work of the Special Rapporteurs

There are a number of United Nations Special Rapporteurs with specific functions and mandates in the area of children's rights. They include the Special Rapporteur on the sale of children, child prostitution and child pornography, which reports to the Human Rights Commission (now the Council). The Secretary General also appoints a Special Representative on Children in Armed Conflict (currently Radika Coomarsaswamy) and, as reported in the previous Survey, Paulo Sergio Pinheiro was appointed in 2003 to lead a global study on violence against children. This Study is now complete – it was published in October 2006 – and will be discussed in full in next year's Survey.

The work of the Special Rapporteurs supplements the activities of the Committee on the Rights of the Child in the two areas covered by the Optional Protocols. Although it is not clear why they are not established under the same mechanism – one reports to the Human Rights Council and the other to the Secretary General – their work is broadly similar. In particular, they have an educational function; they undertake country visits and report on the situation faced by children there, and they also provide specialist advice and expertise to other UN agencies on areas within their remit. Those researching or working in the areas governed by the respective mandates of the Special Rapporteurs are encouraged to keep up to date with their activities via the High Commissioner's website at www.ohchr.org.

(c) Committee on the Rights of the Child

In 2005, the Committee on the Rights of the Child continued its work monitoring state reports under the Convention on the Rights of the Child (CRC). In December 2004, the General Assembly approved a temporary measure designed to clear the backlog of state reports awaiting consideration by the Committee. This decision sanctioned the Committee to operate in two chambers in 2006, a measure which has significantly reduced the waiting-list of state reports under both the CRC and the Optional Protocols.

In addition, the Committee issued two General Comments in 2005 on the Treatment of Unaccompanied and Separated Children outside of their

Country of Origin[3] and on Implementing the Rights of Children in Early Childhood.[4] Both General Comments make an important contribution to the understanding of the Convention's application in these specific areas and provide useful guidance for states with regard to their duty under Art 4 of the CRC to take all necessary measures to implement the Convention.

General Comment on Unaccompanied and Separated Children outside of their Country of Origin

The General Comment on Unaccompanied and Separated Children outside of their Country of Origin is a detailed and comprehensive analysis of the application of the Convention's principles and provisions to these vulnerable children. The General Comment is divided into several sections detailing first the applicable principles, response to general and specific protection needs, access to the asylum procedure, legal safeguards and rights in asylum, family reunification, return and other durable solutions, and training, data and statistics. According to the General Comment, the state's obligations in this area apply not only to those children that are unaccompanied or separated, but they also include measures to prevent separation extending to measures to identify and trace children who may be unaccompanied or separated from family members. Throughout the General Comment, the Committee adopts an expansive approach to the obligations which the Convention places on states with regard to unaccompanied or separated children. For example, in the context of the principle of non-discrimination under Art 2 of the CRC, the General Comment not only makes it clear that discriminatory treatment is itself contrary to the CRC but that states must also take steps to address the misconception and stigmatisation of such children in society.[5] Similarly, in the context of the best interests principle under Art 3, the General Comment explains that throughout all stages of the displacement cycle, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life. It goes on to provide that:[6]

> 'A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.'

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3 General Comment No 6 (2005) UN Doc CRC/GC/2005/6. The Council of Europe was also active in this area in 2005. The Parliamentary Assembly adopted Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum. This can be found at www.coe.int.

4 General Comment No 7 (2005) UN Doc CRFC/GC/2005/7 available at www.ohchr.org (30 October 2006).

5 Ibid, para 18.

6 Ibid, para 20.

Subsequent steps like the appointment of a guardian, and a legal representative where necessary, provide procedural protection for the best interests of the child.

The General Comment also draws on other international instruments. For example, it reiterates the principle of non-refoulement, which is not in the CRC, with reference to Art 33 of the Convention on the Status of Refugees 1951 while also making the link with Art 6 (right to life, survival and development), Art 37 (freedom from torture) and Art 38 (involvement in armed conflict).[7]

With respect to general and specific protection measures the General Comment deals with initial assessment and measures: these include prompt registration by means of an initial interview conducted in an age-appropriate and gender-sensitive manner in a language the child understands by professionally qualified persons, provision to the child of their own personal identity documentation and immediate tracing of family members. With respect to the appointment of a guardian or adviser and legal representative, the General Comment notes that the Convention requires the adoption of measures 'to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests'. Such guardians should have necessary qualifications and experience in childcare and have all necessary authority to participate effectively in decision-making concerning the child.[8] Children should be kept up to date on developments regarding their guardianship and review mechanisms must monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse. The General Comment makes it clear that unaccompanied and separated children are entitled to the benefit of all Convention provisions and in respect of accommodation, for example, are entitled to enjoy the protection of Art 20, which guarantees that children outside their family environment have a right to special protection and assistance.[9] More specifically, it provides that such children should, in general, not be placed in detention, should be kept together with siblings, be supervised by appropriately qualified staff, and should have access to education, to an adequate standard of living and to health and healthcare. Given the particular vulnerability of unaccompanied children, measures must also be taken to ensure their protection from sexual and commercial exploitation, and from involvement in armed conflict.[10]

The section of the General Comment on access to asylum procedures and legal safeguards elaborates on the protection contained in Art 22 of the Convention. In particular, it provides that refugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and fairly. In addition to using

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7 Ibid, paras 26–28.
8 Ibid, para 33.
9 Ibid, paras 39–40.
10 Ibid, paras 41–60.

procedures which are age-appropriate, the General Comment prescribes that the refugee definition in the 1951 Convention must be interpreted in 'an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children'.[11] Appropriate training should be provided to those assessing the claims of unaccompanied children to ensure compliance with the Convention and the General Comment. Efforts to find rights-based, durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. This must commence with the analysis of the possibility of family reunification and tracing is thus a priority in this process.[12] In the context of family reunification, Arts 9 and 12 of the Convention are important in ensuring that such a measure is consistent with the child's best interests and respect for his/her views. Where reunification with the child's family in his/her country of origin entails a risk to the child's rights then alternative solutions must be found including reunification in the host country, local integration based on a secure legal status, resettlement in a third country or, in exceptional cases only, international adoption. All options must be considered in light of what is in the best interests of the child and which solution best guarantees full vindication of the child's Convention rights.[13]

The final section of the General Comment makes recommendations regarding the collection of statistics and the training of staff. In particular, it recommends that all staff, including immigration officials, legal representatives, interpreters and others dealing with separated and unaccompanied children receive specialised training on children's rights, knowledge of the country of origin of separated and unaccompanied children, appropriate interview techniques, child development and psychology and cultural sensitivity and intercultural communication. Initial training programmes should be followed up with regularly with on-the-job training.[14] According to the General Comment, a detailed and integrated system of data collection on unaccompanied and separated children is a prerequisite for the development of effective policies for the implementation of the rights of such children.

The General Comment represents a detailed and comprehensive application of the Convention's principles and provisions to the situation and treatment of unaccompanied and separated children. Its holistic approach to the issue is welcome and in both its breadth and depth it offers important practical guidance to states on the extent of their obligations to these vulnerable children.

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[11] Ibid, para 74.
[12] Ibid, paras 79–80.
[13] Ibid, paras 81–94.
[14] Ibid, paras 95–97.

General Comment on the Implementation of Child Rights in Early Childhood

The second General Comment adopted in 2005 concerns the rights of children in early childhood and, in this document, the Committee confirms the application and importance of the Convention's principles and provisions to children in their early years. The origins of this General Comment lie in the failure of parties to the Convention to focus fully on the rights of children in early childhood during the reporting procedure and the need, according to the Committee on the Rights of the Child, to initiate a discussion on the broader implications of the Convention for young children. This debate took place during the general day of discussion on the topic in September 2004[15] and it is thus important that the General Comment was developed via dialogue between the Committee, states parties and other interested parties and experts. In this way, the General Comment reflects wide consensus on the topic and it also enjoys the legitimacy of having been generated via a consultation process at international level.

The Committee's working definition of 'early childhood' is all young children at birth and throughout infancy, during the pre-school years as well as during the transition to school.[16] The General Comment is written against the backdrop of research on early childhood and a clear understanding of early childhood development. It identifies a number of features of early childhood – the rapid period of growth, the strong emotional attachment to their parents and others, their relationships with other children, the foundation it provides for children's physical and mental health, identity and competencies – which explain why it is such a critical period for the realisation of children's rights.[17] Children in their early years are clearly recognised as rights-holders and as the General Comment makes clear, they are entitled to all the rights under the Convention – both to special protection and to the progressive exercise of their rights.

The General Comment begins by outlining the relevance of the Convention's general principles – Art 2 (non-discrimination), Art 3 (best interests), Art 6 (right to life, survival and development) and Art 12 (right to be heard) – for children in early childhood.[18] It explains the importance of these rights – interconnected with other Convention rights – in some detail but of particular relevance is the Committee's guidance on the application of Art 12. Often considered of little or no relevance to children too young to articulate their views like adults, the General Comment highlights how young children 'very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity'. The Comment makes clear that children 'make choices and communicate their feelings, ideas and wishes in

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15 See Kilkelly 'Annual Review of International Law' in A Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordans, 2005).

16 General Comment No 7 (2005) UN Doc CRFC/GC/2005/7, para 1.

17 Ibid, paras 3–8.

18 Ibid, paras 9–15.

numerous ways, long before they are able to communicate through the conventions of spoken or written language'.[19] Accordingly, states are recommended to take all appropriate measures to ensure that the concept of the child as rights-holder with the right to be consulted in all matters affecting him/her is implemented at the earliest stage and in a manner appropriate to the child's capacities, best interests and rights to protection from harmful experiences. This onus to listen to children, respect their views and adapt expectations to a young child's interests, levels of understanding and preferred ways of communicating is also placed on parents.[20] The crucial role that parents play in the exercise of a child's rights is also recognised in the next section of the General Comment which highlights the importance of the relationship between babies and young children and their parents or caregivers. Respect for parental roles and for the principle of evolving capacity – whereby parents first exercise their young children's rights on their behalf but then gradually relinquish this responsibility where the child acquires the maturity to undertake this role for themselves – is recognised as explicitly important, as is the need for parents to be supported and assisted to enable them to involve their young children in programmes aimed at their health, care and education in the early years.[21]

In recognition that in many countries and regions, early childhood has received low priority in the development of quality services, the General Comment urges states parties to develop rights-based, coordinated, multi-sectoral strategies based around a systematic and integrated approach to law and policy development in relation to all children in the early years. According to the General Comment, these programmes must focus on healthcare provision (Art 24), social security and family support (Arts 18, 26), and early childhood education (Arts 28, 29); the services, which must be accessible to all children including the most marginalised, must be appropriate to the circumstances, age and individuality of young children and must be implemented by staff trained to work with this age group.[22] These programmes must be community based and ensure sufficient attention is focused on the child's right to rest, leisure and play in accordance with Art 31. The role of private bodies as service providers must be supported and monitored and the potential for media to contribute positively to the realisation of children's rights in the early years is recognised under Art 17. The General Comment pays particular attention to the needs and rights of children in need of special protection in recognition of the fact that children in early childhood are particularly susceptible to the risks posed by poverty, family breakdown and violence. Accordingly, the Committee highlights the relevant Convention provisions relating to abuse and neglect (Art 19), children without families (Arts 20 and 21), refugee children (Art 22), children with disabilities (Art 23), and children exploited through work, substance abuse or sexual exploitation (Arts 32–34). On children in conflict with the law, the General Comment is unequivocal that 'under no

[19] Ibid, para 14.
[20] Ibid.
[21] Ibid, para 21.
[22] Ibid, paras 22–35.

circumstances should young children (defined as under 8 years old) be included in legal definitions of minimum age of criminal responsibility' and notes that young children who misbehave or violate laws require sympathetic help and understanding, with the goal of increasing their capacities for personal control, social empathy and conflict resolution.

In its final section the General Comment pulls together several recommendations under the heading of capacity-building for early childhood[23] and notes, in particular, the importance of ensuring sufficient resources are made available for this critical stage of a child's development, maintaining comprehensive and up-to-date quantitative and qualitative data on all aspects of early childhood to inform law and policy reform and ensuring that such policies are evidence-based, particularly given the wealth of research now available on early childhood development. Given the knowledge and expertise about early childhood changes over time, the Committee recommends that systematic child rights training be provided to children and their parents, as well as for all professionals working for and with children, in particular 'parliamentarians, judges, magistrates, lawyers, law enforcement officials, civil servants, personnel in institutions and places of detention for children, teachers, health personnel, social workers and local leaders'. It concludes with a recommendation for international co-operation and assistance and by urging states and non-governmental bodies to continue advocating for the establishment of independent institutions on children's rights and to foster continuous, high-level policy dialogues and research on the crucial importance of quality in early childhood, including dialogues at international, national, regional and local levels.

Both General Comments adopted in 2005 are very welcome as innovative and important documents which set out clearly how the Convention's principles and provisions apply in the two specific areas of unaccompanied children and early childhood. They are written in practical terms, which offer clear guidance to states parties and others involved in implementing the Convention, and most importantly, they are grounded in the established consensus in both areas in a way that ensures their relevance to and acceptance by those working in the respective fields of refugee law and early childhood.

III COUNCIL OF EUROPE

The second area of update is in relation to the activities of the Council of Europe. This section covers the latest ratifications of the Convention on Contact concerning Children and the case-law of the European Court of Human Rights.

[23] Ibid, paras 38–43.

(a) Convention on Contact concerning Children

As reported in the previous Survey, in 2005 the Convention on Contact concerning Children received the necessary three ratifications to enable it to enter into force. This occurred when Albania ratified the Convention on 27 May 2005.[24] Since that date, however, no further state has ratified the Convention, whose application is thus limited to the three states which are parties to it: Albania, the Czech Republic and San Marino. Securing contact between children and their parents following relationship breakdown is a pressing and difficult issue in many states. This is clear from the case-law of the European Court of Human Rights which, as explained below, continues to be confronted with issues regarding the enforcement and implementation of contact between separated parents and their children. In light of the fact that the resolution of such a dispute before the European Court can have limited effect – in most cases, regardless of outcome, the damage has already been done to the relationship between the parent and child concerned by the time the case gets to Strasbourg – it is extremely unfortunate that this Convention does not enjoy the political support of states. Every effort should be made to highlight the Convention's potential to address the underlying reasons for the practical difficulties experienced by parents and children maintaining contact. The Council of Europe Commissioner for Human Rights – whose current incumbent is Thomas Hammarberg, an inaugural member of the Committee on the Rights of the Child – is encouraged to take up the challenge to persuade states of the need to ratify and fully implement the Convention. The Committee on the Rights of the Child should also address a state's ratification of the Convention where Council of Europe members are being examined under the CRC's reporting process.

(b) Case-Law of the European Court of Human Rights

This year's discussion of the case-law of the European Convention on Human Rights concerns a variety of different legal disputes: disputes concerning parental rights of custody and access, those about paternity and identity issues, two cases concerning the right to marry and found a family and a rare case about the freedom from slavery.

Custody and access

In 2005, the European Court of Human Rights handed down several judgments and declared several more decisions admissible concerning the failure to implement or enforce decisions as to custody of or access to children. In *Zawadka v Poland,*[25] for example, the facts were that the applicant's former partner gave birth to their son in 1994 and in 1996, after their separation, the District Court issued an interim order that the child should live with the mother. Also that year, the parents reached a friendly settlement, which

[24] ETS 102.

[25] *Zawadka v Poland* (No 48542/99) Judgment 23 June 2005 [Section III].

stipulated, inter alia, that their son's place of residence would be with his mother, but that the applicant would be able to spend every second weekend with his son at home. When the mother failed to comply with the settlement, the applicant requested that a court guardian assist him in meetings with his son. He also requested the courts to fine the mother and instituted criminal proceedings against her. The courts stayed the proceedings on the ground that the friendly settlement agreement had not specified the dates of the applicant's access to his son and was therefore impossible to enforce. In 1997, after an altercation with the mother, the applicant abducted his son, although informing the authorities about the incident. The District Court ordered him to return the child to the mother, but the applicant and his son went into hiding. In 1998, the courts limited the applicant's parental rights, and later that year, completely deprived him of these rights for continuing to hide with the child. The police subsequently took his son away from him and returned him to the mother. The applicant requested the courts to prevent the issue of a passport to his son as the mother intended to abduct him abroad, and again requested assistance in the enforcement of his access rights. He was informed that none of the court guardians had agreed to assist him in the arrangements for contact with his son. In 2001, the Regional Court reinstated the first of the 1998 judgments which gave the applicant some access rights, albeit of a limited nature. However, it stayed the enforcement of the orders concerning contact between the applicant and his son because he was unable to indicate his son's place of residence. The proceedings were stayed when the case came before the European Court of Human Rights.

In respect of his complaint that his treatment violated his right to respect for his family life under Art 8, the Court noted that this provision includes a right for a parent to have measures taken with a view to his/her being reunited with the child. However, this right is not absolute. In the instant case, the Court noted that following the signing of the friendly settlement between the parents, and the applicant's petition to be assisted by a court guardian to obtain compliance with the agreement, the courts stayed the proceedings meaning that he did not obtain any assistance with regard to the enforcement of the settlement. It further noted that in 1998, the domestic courts seriously limited the applicant's parental rights due to his abduction of the child and disrespect to the courts. In its judgment, the European Court was not convinced that the applicant's lack of co-operation with the courts could justify such a far-reaching limitation of parental rights, especially as there were no grounds to believe that contact with his son was detrimental for the child. Similarly, the Court did not find that the deprivation of the applicant's parental rights was justified on the grounds pointed out by the domestic courts, ie that to tackle the mother's lack of co-operation and enforce his access rights the applicant should have availed himself of legal remedies. In particular, the Court noted that the applicant had sought since 1997 to do just that, but had been unsuccessful. In particular, it noted that in 1998, when he requested assistance in the enforcement of his access rights for the second time, he was informed that none of the court guardians had agreed to assist him.

According to the Court, an unmotivated refusal of assistance of this type was incompatible with the state's positive obligations under Art 8. In addition, the Court noted that the applicant had requested the domestic courts to take steps to prevent the mother from taking their son abroad. Despite this, a passport was apparently issued, as she later left Poland with the child. According to the Court, therefore, the authorities had failed to weigh carefully the conflicting interests of the mother's right to travel and the applicant's right of access to his child. In its overall assessment of the case, the Court noted that the applicant's parental skills had never been seriously challenged, and concluded that in the circumstances of the case, which had resulted in the applicant permanently losing contact with his child, the domestic authorities had failed in their positive obligation to provide the applicant with assistance which would have made it possible for him to effectively enforce his parental and access rights.

Karadžić v Croatia,[26] while also concerning a custody dispute, concerned lack of action on the part of the state in violation of the applicant's Art 8 rights. The applicant was a national of Bosnia and Herzegovina who lived in Germany with her son, born in 1995, and the boy's father, ŽP. ŽP moved to Croatia in 1999, while the applicant continued living with their son in Germany, but after several attempts, in 2001 ŽP took the boy back to Croatia. A German court confirmed that ŽP's decision to keep the child in Croatia had been 'wrongful' within the meaning of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and at the applicant's request, the German Chief Federal Prosecutor contacted the Croatian Ministry of Health and Social Welfare. Five months later, in October 2001, the local welfare centre in Croatia instituted proceedings for the child's return to Germany. In May 2003, a Croatian municipal court ordered that the child be returned to his mother but attempts to enforce the decision proved unsuccessful as the child could not be located. The court requested the police authorities to provide information on the whereabouts of the child and his father on three occasions and imposed sanctions on ŽP for failing to comply with the court order. In September 2004, when three police officers, a court bailiff and the applicant's lawyer went to ŽP's home, he refused to hand over the child and used force in fleeing the premises, taking his son with him. He was subsequently taken into custody but managed to escape after being transferred to a hospital. At a hearing in February 2005, the municipal court terminated the enforcement proceedings, having been informed by the applicant's lawyer that the child had been returned to his mother. The applicant, however, submitted that she had known nothing of that hearing and that her son had not been returned to her.

Considering the compatibility with her Art 8 rights of her treatment by the Croatian authorities, the Court found that they had taken insufficient action to facilitate the execution of the order issued by the domestic court in May 2003. Of concern was that there had been substantial periods of delay for which the Government had not produced any convincing explanation. In particular, the Court noted that the police had not shown the necessary diligence in locating

[26] *Karadžić v Croatia* (No 35030/04) Judgment 15 December 2005 [Section I].

ŽP and had allowed him to escape their custody. Furthermore, the only sanction used against ŽP had been the imposition of a fine and a detention order, neither of which appeared to have been enforced. The passage of time and the change of circumstances engendered irreparable consequences on the relationship between a child and parent living apart, and imposed an obligation on the authorities to act swiftly. In this case, however, the authorities had failed to make adequate and effective efforts to reunite the applicant with her son. The Court decided, unanimously, that there had been a violation of her rights under Art 8 and awarded her €10,000 in respect of non-pecuniary damage.

While these judgments do not represent any new law under Art 8 of the Convention, nonetheless they highlight the strict, positive duty on states to show respect for family life and in particular to ensure that domestic authorities act in a way that guarantees such respect also. In addition, the *Zawadka* case highlights the extent to which the best interests of the child is really the only legitimate aim for interfering with the rights of parents: as the Court has said before, custody or contact rights cannot be denied as punishment for wrong committed by a parent before the court or elsewhere.[27] As the *Karadžić* case makes clear, the Court's case-law shares the principles behind the Hague Convention, ie once a court has decided with which parent the child should live, the onus is on the domestic authorities to ensure that this is the reality. In some cases, enforcing contact or custody orders will simply be impossible as parents refuse persistently to co-operate and use ingenious devices to evade the authorities. Given the seriousness of these cases, the European Court of Human Rights should consider expediting them where possible but as part of the enforcement of its judgments, it should also consider encouraging if not obliging states to take pre-emptory action to prevent disputes escalating in this way. Requiring ratification and full implementation of the Council of Europe Convention concerning Contact would be a step in the right direction in this regard.

Paternity and identity

Disputes governing paternity and, more recently, the right of the child to identity have concerned the Court on many occasions in the past. Two Russian cases before the Court in 2005 addressed two new dimensions to this dispute. The case of *Znamenskaya v Russia*[28] concerned the establishment of paternity in respect of a child who was stillborn while *Shofman v Russia*[29] involved the compatibility with the Convention of time-barred paternity proceedings.

The facts of *Znamenskaya v Russia* were that in August 1997 in the 35th week of her pregnancy, the applicant lost her baby and he was stillborn. Mr Z, who had been the applicant's husband until their divorce, was entered as the stillbirth's father in the birth certificate and in the birth register. The applicant

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[27] See the case of *Sabou and Pircalab v Romania* discussed in 2006 survey.
[28] *Znamenskaya v Russia* (No 77785/01) Judgment 2 June 2005 [Section I].
[29] *Shofman v Russia* (No 74826/01) Judgment 24 November 2005 [Section I].

submitted, however, that the biological father of the stillbirth had been Mr G, with whom she had been living since 1994. They were unable to file a joint declaration of paternity because G had been placed in detention in June 1997, following which the applicant had been unable to see him, and he died in October 1997. In August 2000, the applicant requested the District Court to establish G's paternity in respect of the stillbirth and to amend the child's surname and patronymic name accordingly. She relied on Art 49 of the Family Code according to which, if a child is born to parents who are not married to each other and there is no joint declaration or declaration by the child's father, the paternity of the child shall be established in court proceedings on the application of either parent. The court shall then have regard to any evidence capable of establishing the child's paternity with certainty. In November 2000, Z also died. In March 2001, the District Court ordered the discontinuation of the proceedings, holding that Art 49 of the Family Code only applied to living children. The City Court upheld that decision, finding that the case could not be examined as a civil action because the stillborn child had not acquired any civil rights.

The applicant complained that the failure to obtain recognition of Mr G as the biological father of her stillborn child violated her rights under Art 8. The Court agreed. In particular, it noted that the existence of a relationship between the applicant and Mr G was not disputed; nor had anyone contested his paternity of the child. As the child was stillborn, the establishment of its paternity did not impose a continuing obligation of support on anyone involved and accordingly, said the Court, there were no interests conflicting with those of the applicant. In refusing the applicant's claim, the Court noted that the domestic courts did not refer to any legitimate or convincing reasons for maintaining the status quo. Moreover, the respondent Government accepted before the Court that the domestic courts had erred in dealing with the claim in terms of the stillbirth's civil rights, without due regard for the rights of the applicant. The Government also conceded that, under the applicable family law provisions, the claim should have been granted.

According to the Court's case-law, the situation where a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the state, with the obligation to secure effective respect for private and family life. Accordingly, by four votes to three, the Court concluded that her rights had been violated under Art 8 of the Convention.

Notwithstanding the Government's concession that an error had been made in the applicant's case, the three judges who dissented in this case disagreed with the premise that the state's failure to recognise the stillborn's paternity was a matter concerning the mother's private life particularly given that the main party affected – the birth father – was deceased. This is a valid argument and central to the question of the child's right to identity notwithstanding that the child was also deceased in this case. In order to respect the right of the child to

identity, recognised in Art 7 of the CRC, domestic regulations must exist and operate so as to uphold the correct biological situation at the child's birth. According to the applicant in this case, details of the child's birth were inaccurately entered on his registration documents. In this regard, therefore, the mother's only recourse to have her child's identity correctly recorded was to take the action she did.

More generally, the Court's judgment is an important restatement of principle in respect of the child's right to identity: while there may be some difficulty where biological and social reality do not coincide, such as where a child is born to a couple as a result of insemination by donor, there is little to dispute that legal presumption should not always prevail. At the same time, it would be closer in line to international standards, including Art 3 (best interests of the child) and Art 7 (right to know one's parents) of the Convention on the Rights of the Child, if the guiding principle in such cases were confined to what was consistent with respect for the rights of the child. It is submitted also that this would be closer in line with the Court's previous jurisprudence.[30]

In *Shofman v Russia*, the issue before the Court was slightly different. The applicant's wife gave birth to a son in 1995 and the applicant was registered as the child's father. Two years later, the marriage broke down and at the same time, the applicant's relatives advised him that he was not the boy's father. In December 1997, he brought an action contesting paternity and on the basis of the results of DNA tests, the District Court found it established that the applicant could not be the boy's father, but nevertheless ruled that his action was time-barred. The Court relied on the Marriage and Family Code of 30 July 1969, which set a one-year limitation period for a paternity action (to be calculated from the date when the putative father was informed that he had been registered as the father). The judgment was upheld on appeal. The applicant alleged a violation of Art 8 of the Convention.

According to the Court, the introduction of a time-limit for the institution of paternity proceedings could be justified by the desire to ensure legal certainty in family relations and to protect the interests of the child. So far, the Court had only been confronted with cases where the applicant had known with certainty, or had had grounds for assuming, that he was not the father from the first day of the child's life but – for reasons unconnected with the law – had taken no steps to contest paternity within the statutory time-limit.[31] The situation in the present case was different, however, because the applicant had not suspected that the child was not his and reared him as his own for some two years after birth. The applicant would have had a right under domestic law to contest paternity had he lodged the action within one year after the birth. However, the domestic law in force at the material time made no exceptions to that time-limit, and thus made no allowance for husbands in the applicant's

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[30] See *Mikulić v Croatia* (No 53176/99) ECHR 2002-I, ss 64–66. See Kilkelly 'Annual Survey of International Law' in A Bainham (ed) *International Survey of Family Law 2002 Edition* (Jordans, 2002).

[31] See *Rasmussen v Denmark* Judgment 21 November 1984, Series A no 87, 13.

situation who did not become aware of the biological reality until more than a year after the registration of the birth. The Government had not given any reasons why it should have been 'necessary in a democratic society' to establish such an inflexible time-limit. The fact that the applicant was prevented from disclaiming paternity because he did not discover that he might not be the father until more than a year after he had learnt of the birth had not been proportionate to the legitimate aims pursued. In particular, a fair balance was not struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence.

Accordingly, and despite the margin of appreciation derived from the fact that the legal systems of the Contracting States have produced different solutions to the problem which arises when the relevant circumstances only become known after the expiry of the time-limit, the Court concluded unanimously that there had been a failure to secure respect for the applicant's private life.

The right to marry and found a family

The Court has slowly begun to build up case-law on one of the rarely invoked provisions of the Convention, ie Art 12 which guarantees the right to marry and found a family. This provision, together with Art 8 and Art 14 (the non-discrimination provision), is at the heart of a case communicated to the Austrian Government in 2005. In *Haller and Others v Austria,*[32] the applicants are two infertile couples whose only option to conceive was through use of human assisted reproductive techniques involving donor gametes. As the use of donor gametes is prohibited by Austrian law they are prevented from acquiring this form of medical assistance. Their challenge to this legislation failed before the Austrian Constitutional Court which noted that the interference with the applicants' family life was proportionate to the aim of the legislature which was to avoid the forming of unusual personal relations such as having more than one biological mother (a genetic mother and the one carrying the child), and also to avoid the risk of exploitation of women. The decision of the Court on the admissibility of this complaint is awaited both on the Art 8 and the Art 12 point, notably does respect for family life and/or the right to marry and found a family require this form of human assisted reproduction to be made available to infertile couples?

A less controversial decision of the Court was also delivered in 2005 in the case of *B and L v UK*.[33] The applicants, who are father-in-law and daughter-in-law, complain that they are prevented by law from marrying. The first applicant is the father of the second applicant's former husband. When their respective marriages failed, the applicants moved in together with L's son, who is B's

[32] *Haller and Others v Austria* (No 57813/00) [Section I]. The case of *Evans v UK*, currently before the Grand Chamber of the European Court of Human Rights concerning the right to use frozen embryos without the consent of one of the parties, will be considered in next year's survey.

[33] *B and L v UK* (No 36536/02) Judgment 13 September 2005 [Section IV].

grandson but now refers to him as 'Dad'. The Marriage Act 1949 prohibits the marriage of a parent-in-law to a child-in-law unless the former spouse of each party is dead. The law was amended in 1986 and there is now no such prohibition regarding other relationships of affinity but not consanguinity, for example step-parent with stepchild. The prohibition may be lifted by a personal Act of Parliament but there are no established criteria for such a procedure, which is at Parliament's discretion and for which there is no legal aid available.

According to the Court, under Art 12, the limitations imposed on the right of a man and woman to marry and to found a family must not be so severe as to impair the very essence of that right. The bar on the marriage between parents-in-law and children-in-law meant that the applicants were unable to obtain legal and social recognition of their relationship. The fact that, hypothetically, the marriage could take place if both their former spouses died, did not remove that impairment. The same applied to the possibility of applying to Parliament as that was an exceptional and costly procedure, totally at the discretion of the legislative body and not subject to discernable rules or precedent. The bar on marriage, although pursuing a legitimate aim in protecting the integrity of the family and preventing harm to children who may be affected by the changing relationships of the adults around them, did not prevent such relationships occurring. Furthermore, since no incest, or other criminal law provisions prevented extra-marital relationships between parents-in-law and children-in-law, it could not be said that the ban on the applicants' marriage prevented the second applicant's son from being exposed to any alleged confusion or emotional insecurity. In a similar case to that of the applicants, Parliament had found that barring the marriage served no useful purpose of public policy. The Court thus considered that the inconsistency between the stated aims of the incapacity and the waiver applied in some cases undermined the rationality and logic of the law in question. In the circumstances of this case, the Court held, unanimously, that there had been a breach of Art 12.

Freedom from slavery and forced labour

Article 4 of the European Convention has not frequently been invoked before the European Court of Human Rights and it has rarely been invoked successfully. That changed with the case of *Siliadin v France*[34] where a modern version of slavery was held to violate the Convention. The applicant in this case was a Togolese national who, after being brought to France by a relative of her father before she had reached the age of 16, was made to work as an unpaid servant. As an impoverished illegal immigrant in France, whose passport had been confiscated, she was forced against her will and without rest to work for Mr and Mrs B, doing housework and looking after their young children. The applicant worked from 7 am until 10 pm every day and had to share the children's bedroom. The exploitation continued for several years, during which time Mr and Mrs B led the applicant to believe that her immigration status

[34] *Siliadin v France* (No 73316/01) Judgment 26 July 2005 [Section II].

would soon be regularised. Finally, after being alerted by a neighbour, the Committee against Modern Slavery reported the matter to the prosecuting authorities. Criminal proceedings were brought against the couple, who were acquitted of the criminal charges. Proceedings continued in respect of the civil aspect of the case and resulted in the couple's being convicted and ordered to pay compensation in respect of non-pecuniary damage to the applicant for having taken advantage of her vulnerability and dependent situation by making her work without pay.

The Court considered the case under Art 4 which, it held, imposed positive obligations on states including the adoption and effective implementation of criminal-law provisions making the practices set out in the provision – slavery, servitude, forced or compulsory labour – a punishable offence. In accordance with modern standards and trends in relation to the protection of human beings from such ill-treatment, the Court held that states were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Art 4.

In the instant case, the applicant had worked for years for Mr and Mrs B, without rest or payment and against her will. She had been a minor at the relevant time, unlawfully present in a foreign country and afraid of being arrested by the police. Indeed, the Court noted, Mr and Mrs B had maintained that fear and led her to believe that her status would be regularised. Accordingly, the Court held that the applicant had, at the least, been subjected to forced labour within the meaning of Art 4 of the Convention. It then went on to determine whether she had also been held in slavery or servitude within the meaning of Art 4.

With regard to slavery, although the applicant had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, ie that Mr and Mrs B had exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, the Court did not consider that the applicant had been held in slavery in the traditional sense of that concept. As to servitude, that was to be regarded as an obligation to provide one's services under coercion, and was to be linked to the concept of slavery. The forced labour imposed on the applicant lasted almost 15 hours a day, 7 days a week. Brought to France by a relative of her father, she had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B, where she shared the children's bedroom. The applicant was entirely at Mr and Mrs B's mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which never happened. Nor did the applicant, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant had no prospect of seeing any improvement in her situation and was completely dependent on Mr and Mrs B. In those

circumstances, the Court considered that the applicant, a minor at the relevant time, had been held in servitude within the meaning of Art 4.

Slavery and servitude were not as such classified as criminal offences in French criminal law. Mr and Mrs B had been prosecuted under articles of the Criminal Code which did not make specific reference to the rights secured by Art 4. Having been acquitted, they had not been convicted under criminal law. Thus, despite having been subjected to treatment contrary to Art 4 and having been held in servitude, the applicant had not seen the perpetrators of those acts convicted under criminal law. In the circumstances, the Court considered that the criminal-law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. Consequently, the Court reached the unanimous conclusion that France had not fulfilled its positive obligations to her under Art 4.

This case has important consequences in the light of the increasing scale of trafficking and related economic and sexual exploitation of girls and women in Europe and worldwide.[35] Importantly, in its analysis of this case, the Court's judgment appears to require not only that the specific terms of Art 4 are set out in the criminal law or code, but that they are enforced to ensure that those who suffer violations of Art 4 witness the conviction of the perpetrators of those acts. This is a high standard which goes to criminal process as much as to the content of the criminal law. Given the invisible nature of trafficking and exploitation of this kind, it is difficult to see this case setting a precedent. However, the unequivocal nature of the Court's judgment may well assist those seeking to rely on its reasoning at national level for either litigation or lobbying purposes.

Balancing rights of due process with the protection of child witnesses

There have been few countries unaffected by the sexual abuse of children and many challenges remain regarding how to balance fairly the rights of child victims and those of the adults accused of abusing them. In 2005, the European Court of Human Rights considered the case of *Bocos-Cuesta v the Netherlands* in which the applicant complained that his trial for indecency against four children violated his due process rights under Art 6(1) (the right to a fair trial) and particularly Art 6(3)(d) of the Convention. Article 6(3)(d) guarantees as a minimum the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The essence of the applicant's

[35] See Bales et al 'Hidden Slaves: forced labour in the United States' (2005) 23 *Berkeley J Int'l L* 47. See also Lindo 'The Trafficking of Persons into the European Union for Sexual Exploitation: Why it Persists and Suggestions to Compel Implementation and Enforcement of Legal Remedies in Non-Complying Member States' (2006) 29 *BC Int'l & Comp L Rev* 135 and Kilkelly 'Economic Exploitation of Children: A European Perspective' (2003) 22 *St Louis U Pub L Rev* 321.

complaint was that, at his trial, he was denied the opportunity to cross-examine the four witnesses to the alleged offences, namely the four child victims.

The Court began by noting that the admissibility of evidence is a matter for domestic courts and that its role is confined to one of ensuring that the trial as a whole is fair within the terms of Art 6. It then went on to note that the principles of a fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify. In this respect, it had regard to the special features of criminal proceedings concerning sexual offences, which are often conceived of as an ordeal by the victim and are particularly troublesome where children are concerned. Accordingly, the Court accepted that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.

On the facts of this case, the Court noted that while there had been other witnesses in the case – including the police to whom the children gave their testimony and other relatives – the fact that the children's testimonies were the only direct evidence of the facts held against the applicant meant that they must be regarded as having been of a decisive importance for the domestic courts' finding of the applicant's guilt. The children had given their testimony in writing to police officers and a transcript of this evidence was presented to the court, which permitted the applicant to contest its contents. The fact that the testimony was not video-recorded meant that neither the applicant nor the trial judge was in a position to observe the children's demeanour under questioning so as to form an impression as to their reliability. Thus, according to the Court, while the trial courts undertook a careful examination of the statements taken from the children and gave the applicant ample opportunity to contest them, 'this can scarcely be regarded as a proper substitute for a personal observation of a witness giving oral evidence'.

The applicant had consistently requested to hear the victims directly but these requests were denied. The reasons given by the domestic courts were that the applicant's interests in hearing them were outweighed by the interests of the four, still very young children in not being forced to relive a possibly very traumatic experience. However, according to the European Court, it found no indication in the case file that this reason was based on any concrete evidence such as, for instance, an expert opinion. Thus, while the Court appreciated that organising criminal proceedings in such a way as to protect the interests of very young witnesses, in particular in trial proceedings involving sexual offences, is a relevant consideration, to be taken into account for the purposes of Art 6, it found that the reason given by the trial courts for refusing the applicant's request to hear the four victims could not but be regarded as insufficiently substantiated and was thus, to a certain extent, speculative. In these circumstances, the Court found that the applicant could not be regarded as having had a proper and adequate opportunity to challenge the witness

statements which were of a decisive importance for his conviction and, consequently, he did not have a fair trial. This was a unanimous conclusion by the Court.

Striking an appropriate balance between the rights of the defendant and those of victims in sexual abuse cases is a constant concern in any adversarial system of criminal justice. Apart from the harm it may cause, placing too great a burden on the alleged victim, particularly when it is a child, as to testimony and cross-examination may deter future victims from coming forward to make a complaint in the first instance or may result in their refusal to participate in any criminal proceedings which result. However, it is equally vital that due process guarantees – like the right to examine and cross-examine witnesses – are not diluted in the trial of sexual offences or any other type of crime. They are the bulwark against injustice and reflect the widely recognised value that process is as important as the right outcome. That is not to say, as the Court made clear in *Bocos Cuesta*, that due process rights are absolute however. Limits can and are placed on them in various circumstances.

For example, in another case declared inadmissible in 2005 – *Accardi and Others v Italy*[36] – the Court found that it was sufficient that the applicants, also on trial for sexual offences against children, had been able to follow the questioning of the victims from a separate room through a two-way mirror. In this case, therefore, the applicants had been aware of the questions and replies and had observed the children's behaviour; their lawyers had had an opportunity to ask the children any question considered necessary for the defence's case, through the intermediary of the judge. However, they had not done so, which the Court understood as an implicit approval of the way in which the questioning had been carried out. The authorities had made an audio-visual recording of this investigative measure, which was available for examination by the trial courts. Those courts had thus had an opportunity to observe the prosecution witnesses' conduct during questioning, and the defendants had had an opportunity to submit their comments in this respect. In those circumstances, the Court held that the steps taken by the domestic authorities had sufficed to enable the applicants to challenge the witnesses' statements and credibility during the criminal proceedings. No violation of their due process rights had thus occurred and the case was found to be inadmissible.

The Court has thus made it clear that mechanisms that aim to protect child witnesses from harm during the criminal trial can be employed without interfering with the defendant's right to due process. As the Court explained in the *Bocos Cuesta* case:[37]

> 'It is accordingly not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by

[36] *Accardi and Others v Italy* (*dec*) (No 30598/02) ECHR 2005.

[37] Ibid, para 37 (see *Perna v Italy* [GC] (No 48898/99), s 29 with further references, ECHR 2003-V).

explaining why it is important for the witnesses concerned to be heard and their evidence must be necessary for the establishment of the truth.'

Moreover, respect for the rights of the child (see Arts 19 and 38 of the Convention on the Rights of the Child) makes it imperative that such mechanisms be developed and used effectively so as to minimise the harm children endure in such proceedings. While it is only, perhaps, with the advances of science and the use of DNA evidence that such trials might be permitted to go ahead without the testimony of victims at all, the video-recording of interviews with the assistance and support of independent advocates, including psychological support, should be established as a minimum safeguard. Ultimately, however, striking the appropriate balance between what is in the best interests of the child victim or witness and what will secure a fair trial for the accused will be a matter for the domestic authorities to decide on a case-by-case basis. The European Court, as always, will retain its supervisory role.

IV CONCLUSION

This year's survey touched on a variety of areas in which there has been positive development. The continuing ratification of the two Optional Protocols to the Convention on the Rights of the Child and the adoption of two strongly worded General Comments from the Committee on the Rights of the Child strengthen the hand of those seeking to use the Convention for legal and political purposes nationally and internationally to bring about change for children and their families. The approaches of the European Court of Human Rights in the various cases described above have more of an adult than a child focus but they show, nonetheless, that the Court continues to have a positive role to play in setting standards in many areas of state activity impinging on the family, and, however belatedly, holding states to account.

Australia

FINANCES AND FACILITATIONS – AUSTRALIAN FAMILY LAW IN 2005

*Frank Bates**

Résumé

En 2005, le droit de la famille australien s'est plus particulièrement intéressé à deux importants problèmes: d'une part, l'exercice du pouvoir discrétionnaire prévu dans la Partie VIII du Family Law Act 1975 et ses domaines d'application, comme en matière de droits à la retraite. Malheureusement, l'activité judiciaire en 2005 ne semble pas avoir simplifié la mise en œuvre du droit. En second lieu, des tentatives ont été faites pour faciliter l'accès à la justice.

Bien que ces deux questions semblent représenter l'essentiel de l'activité en droit familial, on ne peut passer sous silence les développements dans le domaine du droit de l'enfance, particulièrement en matière d'abus sexuels. De même, en ce qui concerne le droit patrimonial, une attention particulière a été portée à la question de l'exercice du pouvoir discrétionnaire et à celle du statut des tiers, plus précisément dans des affaires impliquant une faillite. Dans le contexte international on observe des développements en matière de forum non conveniens et d'usage d'injonctions limitant les droits de recours en justice.

Les développements en 2005 ont été assez intéressants et quelques-uns laissent présager de nouveaux changements encore en 2006.

I INTRODUCTORY

Australian family law has concentrated essentially on two major fronts: first, financial matters with particular reference to the operation of the discretion existing under s 79 of the Family Law Act 1975 and its interaction with other statutory provisions,[1] in particular with respect to those relating to superannuation which were introduced in 2001. The Full Court of the Family Court of Australia has, hitherto, been largely silent on this crucial issue, but, one fears, its eventual intervention may, at this stage at any rate, have served to obfuscate an already confused situation, rather than otherwise.[2]

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1 See (2005) FLC 93-226.

2 See (2005) FLC 93-220.

In addition to financial issues, developments have been more concerned with form, especially concerned with attempts to make family law more accessible to users of the system. At the same time, it is likely also to produce substantive reform based around the amendments to the legislation in 1995.[3] In addition, there have been developments on the international front which may not make Australia an easier jurisdiction, in family law matters, to deal with.[4] All in all, 2005 has been an interesting year in Australian family law and one which has produced material which is well worthy of international interest.

II PARENT AND CHILD

Despite the major orientations earlier described, there have, inevitably, been some other decisions which demonstrate features of interest. *Fitzpatrick and Fitzpatrick*[5] involved an appeal against an order that the father have no contact with his children. The marriage had subsisted for some ten years and there were three children of the marriage, aged 10, 9 and 7 years at the time of the appeal, who lived with their mother. The father had fortnightly contact with the children, which was supervised at a contact centre, as well as weekly telephone contact.

The father, admittedly, suffered from a sexual addiction and was diagnosed as suffering from two sexual disorders – fetishism and transvestic fetishism – though he denied paedophiliac tendencies and, especially, that he had abused any of the children or had accessed internet child pornography. On the other hand, the mother had reported disclosures by the two younger children that the father had subjected them to sexually inappropriate behaviour. The mother also reported that the eldest child had told her that she had seen pornography on the father's computer.

Both the eldest and youngest child had expressed wishes not to have contact with their father, while the other had expressed the wish to continue contact. A supervisor at the contact centre gave evidence that the contact had been successful and had apparently been enjoyed by the children. The mother, though, was fearful of the father having any contact with the children.

Further, a psychiatrist, who had been engaged by the children's representative,[6] gave evidence to the effect that a diagnosis of paedophilia would be difficult to substantiate and that the father had a low potential for abusing his children. He, rather obviously, concluded that the matter presented a complex case where the father's sexual problems would not necessarily indicate a risk to the

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3 For comment on an earlier draft, see Banks et al 'Review of Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005' (2005) 19 *Aust J Fam L* 79.

4 See (2005) FLC 93-232.

5 (2005) FLC 93-227.

6 Family Law Act 1975, ss 68L, 68M.

children, though there was a need for supervised contact away from the father's place of residence so as to protect the children from accidental exposure to pornography.

At first instance, it was found that there was ample evidence to support the view that the younger children believed that they had been sexually abused by their father. In reaching that conclusion, the judge had relied on the decision of the High Court of Australia in *M v M*[7] where the test of 'unacceptable risk' as a test for a finding of sexual abuse had been enunciated. It must be said that that is a test which has been subjected to not inconsiderable criticism[8] and has not been universally accepted in the Family Court of Australia.[9] In particular, she had adopted, in relation to supervised contact, the comment that 'there may be a risk of disturbance to a child who is compulsorily brought into contact with a parent who has sexually abused her or whom the child believes had sexually abused her'.

The trial judge had also accepted the mother's evidence to the effect that, in the period shortly before the parties' separation, she had left the youngest child in the care of the father while she was working outside the home and that, during that time, the child had become noticeably withdrawn and had anxiously asked questions as to whether she would be left with her father. The trial judge had relied on that evidence, together with the child's feelings of discomfort towards the father, which had been expressed in the preparation of the family report, in reaching the conclusion that it was more likely than not that the child believed that her father had sexually abused her.

Further, both a family therapist and an adolescent counsellor reported that the children's wishes, regardless of their ages, ought to be taken into account. On the other hand, the reports did not support the mother's proposition that the second child believed that the father had done the specific things alleged in her disclosure and, indeed, had expressed a positive wish to maintain contact with her father.

In making the order which she did, the trial judge also had regard to the wishes of the children and the capacity of the mother to provide for the needs of the children who had not wished contact were it to be ordered and the mother continued to entertain the belief that they had been abused. She further declined to order telephone contact on the grounds that it might cause the children upset and confusion. Similarly, she concluded that there was no reason to think that the provision of school and medical reports to the father would be in the children's best interests.

Conversely, the father submitted that a finding of unacceptable risk of psychological harm to the children could not be maintained owing to the

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7 (1988) 166 CLR 69.

8 See, for instance, Bates 'Child Abuse and the Fact-Finding Process: Problems with Recent Commonwealth Decisions' (1992) 41 *ICLQ* 449.

9 See, eg, *Re W* (*Sexual Abuse: Standard of Proof*) (2004) FLC 93-191.

evidence of the contact centre coordinator as well as the evidence regarding the children's satisfactory progress in all other aspects of their lives. Accordingly, he argued that the children's welfare would be damaged were they to be deprived of a relationship with their father. The Full Court[10] allowed the appeal in part and re-exercised the judicial discretion.

The majority, Bryant CJ and Kay J, first of all,[11] found that the trial judge's finding that there would be an unacceptable risk of emotional or psychological harm to each of the children if supervised contact were ordered was not supported by the evidence. The Court went on to adopt[12] the view which had earlier been expressed by the Full Court in the *Re W* (*Sex abuse: standard of proof*)[13] that 'the termination of a worthwhile relationship between a parent and child ought, in most cases, be the course of last resort'. Bryant CJ and Kay J then went on to say that it was difficult to see why 'the welfare of at least the two younger children is likely to be advanced by terminating entirely their relationship with their father. The Act assumes that the continuation of such a relationship is worthwhile if other factors do not act to countervail that position'.

In addition, Bryant CJ and Kay J noted[14] the dictum of Kirby J of the High Court of Australia in *AMS v AIF*,[15] that:

> 'Statutory instruction to treat the welfare or best interests of the child as the paramount consideration does not oblige a court, making the decision, to, ignore the legitimate interests and desires of the parents. If there is conflict between these considerations, priority must be accorded to the child's welfare . . .'

In the context of that dictum, Bryant CJ and Kay J stated[16] that there was no evidence that the mother's parenting capacity would be so adversely affected by the continuation of contact that the children's welfare would best be served by acceding to the mother's wishes. It followed that the mother should be ordered to keep the father informed of medical and health issues relating to the children and to authorise schools to provide copies of reports, photographs and awards obtained by the children.

As regards contact itself, in respect of the younger children, the orders made at first instance were set aside and the father was to have contact with them for three hours on the second and fourth Sunday of each month at the contact centre.[17] It was on that issue that May J dissented from the majority view:

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10 Bryant CJ, Kay J and May J.
11 (2005) FLC 93-227 at 79,750.
12 Ibid at 79,751.
13 (2004) FLC 93-192 at 79,217 per Kay J, Holden J and O'Ryan J. For comment on this case and other relevant authority, see Bates 'Child Sexual Abuse and Standard of Proof' (2005) 13 *Tort L Rev* 51.
14 (2005) FLC 93-227 at 79,751
15 (1999) 199 CLR 160 at 207. See also the comment of Hayne J, ibid at 230.
16 (2005) FLC 93-227 at 79,752.
17 Ibid at 79,754.

although she was of the view that it was not open to the trial judge to have made the initial order, she was of the view[18] that:

> '. . . in an endeavour to preserve their relationship with the father but also in minimising the risks, limited supervised contact at the present time accords with the children's interest.'

Hence, she recommended that contact take place monthly at the contact centre. As regard the oldest child, the majority took the view[19] that, given her age and her wishes as related by both her mother and the counsellor, the Court would not interfere with the trial judge's decision in respect of her.

The question of supervised contact also arose in the Full Court's decision in *F, AG and S, LL & Anor*,[20] which, factually, was altogether more complex. F, the father, and S, the mother, had one child, aged 9 years at the time of the hearing. The father, though, had seven other children from two previous relationships. The mother had one child, from a previous marriage, who presently lived overseas. The parents separated in early 2003 and the mother married her new partner some months later. The child lived with her father for some 18 months after the parties' separation until interim orders were made in favour of the mother and, in consequence, the child lived with her mother from that time and had no contact with her father.

The father had sought to appeal those orders and that hearing went on in the father's absence. It was there ordered that the child's residence should be entrusted to the mother and that the father was to have no contact with her. In making that determination, the judge, relying on two affidavits,[21] concluded that the child had suffered sexual and emotional abuse which had most likely occurred when she had been in the care of her father. A Full Court subsequently set that decision aside on the grounds of procedural unfairness.[22] The matter was remitted for further consideration at first instance.

The issue on remittal was, of itself, not without interest: the hearing was restricted to a day because the judge was only concerned with the child's interim residence pending the outcome of the final hearing. In the event, the judge told the parties that he would not be able to read all the material put before him by the parties. That material was very considerable because, first, a separate Child Representative had been appointed[23] to represent the child's interests and, further, evidence was adduced concerning a bureaucratic investigation into the child's welfare. The evidence at this stage included allegations that the child not only might have been sexually abused by the father, but might also have been abused while in the mother's household. It had

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18 Ibid at 79,755.
19 Ibid at 79,752.
20 (2005) FLC 93-211.
21 Which had been filed on the morning of the hearing and had not been served on the father.
22 See *F and S* (2005) FLC 93-208.
23 Family Law Act 1975, ss 68L, 68M.

also been suggested that the mother had been manipulating the child in order to make false allegations against the father.

The judge noted that all of the parties had strongly denied the allegations of sexual abuse which had been made against them, though, nonetheless, concluded that the risks to the child were greater in the father's household. It was also found that the child was well settled in her mother's care, that she was well settled in her new school and that she liked her new home. Hence, he determined not to disturb the interim orders.

At the same time, the judge was prepared to consider whether the father should have been permitted some supervised contact, though the father himself had argued that he would not consider any such orders. In consequence, it was held that the child's residence should remain with the mother and that the father should have no contact.[24]

Inevitably, the father appealed, specifying some 43 particular grounds. Essentially, though, it was claimed that the last judge had wrongly exercised his discretion in that he had given inappropriate weight to evidence which the mother, the Child Representative and the Department of Community Services (who had conducted the investigation) had given. He further argued that the judge had failed to give appropriate weight to evidence which was favourable to the father's case and had failed to take proper account of s 60B of the Family Law Act and particular issues in s 68F(2). The Full Court[25] dismissed his appeal.

First of all, the Full Court noted[26] that, though the Family Law Act did not draw any distinction between the principles to be applied regarding residence in interim and final proceedings, there were differences in procedure. 'Interlocutory proceedings' the Court stated, 'do not determine the long-term rights and obligations of the parties and their children . . . Such proceedings are an abridged process where the scope of the inquiry is necessarily significantly curtailed. As a consequence, the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process.' The Court then set out[27] the relevant criteria for the determination of interim proceedings as regards residence and contact.

Given the nature of such proceedings, which they had already outlined, the Court emphasised that, as a general rule, any interlocutory orders should promote that stability. It, thus, followed that, 'where the evidence clearly establishes that . . . the child is living in an environment in which he or she is well settled, the child's stability will usually be promoted by the making of an

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[24] Given all the circumstances, it was also recommended that the final hearing of the matter be expedited to allow all of the allegations made against the parties properly to be tested as soon as possible.

[25] Bryant CJ, Kay J and Boland J.

[26] (2005) FLC 93-211 at 79,542.

[27] Ibid at 79,543.

order which provides for the continuation of that arrangement until the hearing for final orders, unless there are strong or overriding indications relevant to the child's welfare to the contrary'.[28]

As regards a claim by the father that he had been denied procedural fairness, the Court were of the view[29] that the judge had clearly identified the material which was to be read at the application and the father had made no objection at the time. More particularly, the judge had had proper regard to the material relevant to the application and it was not necessary for him to have read the whole of the material which had been filed in the earlier proceedings. The judge had not departed from the Family Law Rules 2004 in any way which was unfair to the father. Indeed, he had allowed the father to continue his submissions beyond the allocated time and he had been afforded twice as much time as any other party to make submissions.

As regards the relative merits of the two households, it appeared that the father had slept in the same bed as the child, that he had questioned her about the allegations of sexual abuse and had tape-recorded her telephone conversations. In these circumstances, the Full Court considered[30] that the trial judge was entitled to find that there were greater risks in the father's household than in the mother's without totally accepting the allegations of sexual abuse which had been made against the father. Further, the judge had acknowledged[31] that problems did exist in relation to the mother's household, which included her new partner's criminal record, but had, nonetheless, found the child settled in her new environment. Hence, there was no substance in the father's claims that the judge had failed to consider those issues.

Finally, the Full Court noted,[32] in the submissions of the mother, the child representative and the Department of Community Services, concerns about aspects of the father's personality which suggested that contact with the child might not be appropriate. Hence, there were reasons which supported the judge's conclusion that the father not be granted supervised contact. The judge had, thus, taken into account all of the matters which were relevant to s 68F(2) of the Family Law Act – these included the child's relationship with each of the parties, the loss of her relationship with both her father and half siblings as well as the mother's ability to provide for the child's physical and educational needs pending a final hearing.

Thus, *F and S & Anor* is an interesting case which will be valuable as providing a clearly expressed illustration of what will generally be required in an interim hearing. It also illustrates, quite graphically, the problems which courts face in

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28 The Court then stated that such indications would include, but were not limited, to convincing proof that the child's welfare would be *really endangered* (author's emphasis) by his or her remaining in that environment.

29 (2005) FLC 93-211 at 79,546.

30 Ibid at 79,548.

31 Ibid at 79,549.

32 Ibid at 79,550.

dealing with complex cases involving issues of fact, law and procedure and which are not susceptible to rapid resolution.

However, those cases notwithstanding, the most immediately interesting case in the area of parent and child is the Full Court of the Family Court's decision in *W and W* (*Abuse allegations*: *Unacceptable risk*)[33] which involved an appeal by a father against an order for supervised contact. The parties had married in 1999 and had separated in 2003, there being one female child of the marriage, who was aged 4 at the time of the trial. In addition, the mother also had two daughters from a previous relationship, who were aged 12 and 10 at the time of the trial and who lived with the parties during the marriage. After the separation, the father continued to live in the matrimonial home and the mother and children went to live with the mother's parents.

The mother revealed to the older children that she (the mother) and her sister had been abused as children by the maternal grandfather. She, thus, sought professional assistance so that her daughters could learn 'protective behaviours'. The father agreed to that course.

During 2003, the youngest child made various statements to her maternal grandmother, her mother and to a social worker at a clinic which led them to believe that there was a possibility that the father had been sexually abusive towards her, or at least had acted in a sexually inappropriate manner. She was aged 3 at the time the statements were made. The allegations were consistently and vehemently denied.

At the trial at first instance, four experts gave evidence regarding the relationship between the child and each of her parents and in relation to the claims of sexual abuse. The social worker gave evidence of the child's behaviour during free play and as a witness to her statements.[34] Further, an experienced psychologist had written a family report and a child psychiatrist had provided an investigative report for the Child Representative and had concluded that there was a 90 per cent chance that the father had sexually abused the youngest child. Last, a forensic psychologist had been engaged by the father to provide personality testing of the father. He had conducted two tests and, from the first, he found that there was 'no evidence that [the husband] was sexually attracted to children, a pedophile, or child molester but . . . that he presented as an "uncertain risk" to his own or other children'. At the same time, that psychologist regarded the second test which he had conducted invalid.

At first instance, in a detailed judgment, the judge concluded, first, that a finding, on the preponderance of probabilities that the father had sexually abused the child could not be made. Second, that apart, there was an unacceptable risk of sexual abuse to the youngest child were an order for unsupervised access to be made. In so doing, the judge found that the mother

[33] (2005) FLC 93-235.

[34] The social worker had had 23 years' experience, 11 of which had been at the relevant clinic.

had not alienated the child from her father and she also discounted the evidence of the psychologist engaged by the father on the grounds that his evidence was inconclusive. The judge, thus, made orders for regular supervised contact to be increased over time and to be reviewed after 3 years, at which time a further report was to be obtained.

The father based his appeal, in essence, on the ground that, in finding the unacceptable risk, the trial judge had erred in law. Of special significance, the father claimed, first, that the social worker's evidence was outside her area of expertise and that she was biased towards the mother. Secondly, that the trial judge has implied a finding of abuse, which was both innately damaging to the father and not supported by the evidence. Thirdly, that the certainties of proof had not been attained and that the trial judge had not determined the matter of sexual abuse according to the standard set out by the High Court of Australia in *Briginshaw v Briginshaw*.[35] Fourthly, that the judge had failed properly to weigh the importance of the relationship between the child and her father and also had failed to take into account the fact that the father had lived in a house with two young stepdaughters without any suggestion of improper conduct. The Full Court[36] dismissed the appeal.

The major issue was, inevitably, whether there was an unacceptable risk of abuse. After a consideration of some of the case-law surrounding the issue, notably the decision of Fogarty J in *N and S and the Separate Representative*,[37] the Court reached the conclusion[38] that the law was well settled regarding findings of a positive nature regarding sexual abuse and that 'such finding should not be made unless a trial judge is satisfied to the highest standard on the balance of probabilities that such has occurred'. At the same time, the Court stated, that, as a matter of practice, a trial judge would be required to examine that issue as well as considering whether or not an unacceptable risk of abuse exists. The Court then referred[39] to the views of Fogarty J in *N and S*, when he had suggested[40] that a Court was required to inquire into such matters as:

> 'What is the nature of the events alleged to have taken place? Who has made the allegations? To whom have the allegations been made? What level of detail do they involve? Over what period of time are the events alleged to have occurred? What are the effects exhibited by the child? What is the basis of the allegations? Are the allegations reasonably based? Are the allegations reasonably believed by the person making them? What expert evidence has been provided? Are there satisfactory explanations of the allegations apart from sexual abuse? What are the likely future effects of the child?'

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35 (1938) 60 CLR 336.
36 Warnick J, May J and Boland J.
37 (1996) FLC 92-655.
38 (2005) FLC 93-235 at 79,910.
39 Ibid at 79,909.
40 (1996) FLC 93-655 at 82,714.

In *W*, the Court considered[41] that those questions provided a structure or framework which could assist a trial judge in assessing future risks to a child.

The Court went on[42] to comment that decisions in cases of this kind did have the potential for long-term consequences for the child and required careful consideration. Yet the Court did not regard it as appropriate to set guidelines as to when supervised contact might be appropriate or where it should take place. In general, however, the Court thought[43] that the trial judge had carefully weighed all of the expert evidence.

By way of conclusion on the *W* case, although it represents a useful explication of a correct judicial approach to evidentiary issues, it does not provide a conceptual analysis of the 'acceptable risk' test which is surely necessary if the controversy surrounding the *M* decision and its application is to be dissipated.

III FINANCE AND PROPERTY

(a) Discretions under the Act

A useful starting point to this discussion is the decision of the Full Court of the Family Court of Australia in *Gray and Gray*[44] which raised again the relevance of parties' relative contributions, in this instance to the purchase price of a property.

In *Gray*, there was an appeal against an order where it had been ordered that the property be divided in the proportions of 55.22 per cent to the wife and 44.78 per cent to the husband. The parties had married in 1972 and separated in 1999. There were six children of the marriage, all were over 18 at the time of the trial and were living with the wife in the former matrimonial home. The husband had a collection of vintage cars, the value of two of which was in dispute.

After separation, the parties sold the former home for a net amount of $72,000 and the proceeds of the sale were placed in a joint account. By order of the court, the husband later used the funds towards the purchase of another property in the joint names of himself and his then de facto partner, from whom, at the time of the hearing, he asserted he had separated. In relation to that property, there were three matters which were unchallengeable. First, that the purchase price was $250,000; secondly, that $150,000 of that price had been raised by the husband and his partner by way of mortgage; and thirdly, that the balance was paid by the husband which included the proceeds of sale of the former matrimonial home. At trial, both parties sought to claim the full value of the second property as an asset and the whole of the mortgage as a liability,

41 (2005) FLC 93-235 at 79,910.
42 Ibid at 79,911.
43 Ibid at 79,917.
44 (2005) FLC 93-228.

regardless of its being in the joint names of the husband and the partner. The trial judge had held that there was no resulting trust or similar claim which might justify a claim that the husband was entitled to the whole of the net equity of the property. The trial judge also found that the husband and the de facto spouse held the second property in equal shares and she notionally added back the interest of the other partner when she made an adjustment pursuant to s 75(2) of the Family Law Act[45] in favour of the wife.

On appeal, the husband argued that the trial judge had incorrectly determined the de facto partner's interest at 50 per cent when, in fact, it was only 30 per cent. Hence, there should have been no adjustment at all. In support of his submission, he relied on the important decision of the High Court of Australia in *Calverley v Green,*[46] to justify his view that his share of the property should be calculated according to the proportion of his contribution. Conversely, the wife argued that it was not open to the husband to contend that he only held a 70 per cent interest in the second property as that was wholly inconsistent with the case he had advanced at trial.

The husband based his appeal on three grounds: first, that the trial judge was in error in accepting the wife's valuation of the vintage cars; secondly, that the trial judge had failed to take into account, or give sufficient weight to, the wife's financial resource as represented by the support of the adult children; and thirdly, that the trial judge was in error in notionally including the whole of the second property in the pool of assets and in failing to hold that the de facto partner had a 30 per cent interest in it. The Full Court, by a majority, allowed the appeal and re-exercised the discretion.

The majority,[47] in dealing with the first ground,[48] took the view that the conclusions drawn by the trial judge were open to her on the evidence. More particularly, reference was made to a particular publication[49] to which she had not referred. The majority considered[50] that, since the relevant expert had not been cross-examined about the book at all, it was difficult to see how the trial judge could be said to have fallen into error. The majority stated that it was not incumbent on a trial judge to consider every piece of evidence advanced in a case, especially where such evidence is of marginal or no relevance and the course of, or the reasons for, the decision are otherwise clear. In relation to the question of valuation, whatever the item of property in question may be, valuers seem to speak different languages,[51] which may, in turn, be different from that spoken by the Court. Hence, serious communication breakdown

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45 Section 75(2) of the Act sets out the criteria for an award of spousal maintenance and is essentially needs-based. Section 79(4) is essentially concerned with contribution.

46 (1984) 155 CLR 242. For comment, see Bates 'Property Disputes and Unformalised Relationships: Looking for a Lighthouse' (1986) 60 *Aust L J* 31.

47 Kay J and Holden J.

48 (2005) FLC 93-228 at 79,765.

49 *CARS AND PARTS 2002 Ultimate Collector Price Guide*.

50 (2005) FLC 93-228 at 79,766.

51 In *Gray*, it appeared, ibid, that there was a dispute between the valuers appointed by the parties.

seems frequently to occur independent of any procedural framework.[52] As regards the husband's second ground, particularly as neither counsel had added to their written submissions, the majority stated that it was entirely without merit.

As regards the third ground, despite the fact none of the matters based on *Calverley v Green*[53] which were being argued before the Full Court had been argued at first instance, the trial judge was in error.[54] Without seeking to analyse *Calverley v Green* in significant detail as has been done elsewhere, some pointers are clear. Thus, first, Gibbs CJ stated[55] that:

> '. . . if two persons have contributed the purchase money in unequal shares, and the property is purchased in their joint names, there is, again in the absence of a relationship that gives rise to a presumption of advancement, a presumption that the property is held by the purchasers in trust for themselves as tenants in common in the proportions in which they contributed the purchase price.'[56]

After a detailed recitation of the various dicta in that case, Kay J and Holden J emphatically stated[57] that:

> '. . . on the powerful authority of *Calverley v Green*, her Honour ought to have found not that the appellant husband had a 50% interest in the property but rather that the property was presumed to be held in equity by the appellant husband and [his partner] in the proportions 7:3 respectively.'

The effect of making a correction to that error would be to increase the amount payable to the husband by the wife by $37,500.

However, there was a judgment in dissent by Coleman J who, in essence, took up the position that the findings of the trial judge were open to her considering: first, the position of the husband's second partner, who had not given evidence at trial and there was no explanation for her failure so not to do;[58] and second, at trial, the husband had given evidence that he was indebted to his new partner for money which she had contributed to the purchase of the second property. The evidence of his indebtedness to her was not accepted at trial, even though it was more consistent with his case, which was presented at trial, than that on appeal that she had an equitable interest in the property.

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52 See Bates '"We Prize Not to the Worth" – Some Thoughts on the Valuation of Property Under the Family Law Act' (2005) 7 *Newcastle L R* 35.

53 (1938) 60 CLR 336.

54 (2005) FLC 93-228 at 79,763.

55 (1984) 155 CLR 242 at 246.

56 Similarly, Mason J and Brennan J, ibid at 258, stated that: 'When two or more purchasers contribute to the purchase of property and the property is conveyed to them as joint tenants the equitable presumption is that they hold the legal estate in trust for themselves as tenants in common in shares proportionate to their contributions unless their contributions are equal.'

57 (2005) FLC 93-228 at 79,763.

58 Ibid at 79,767.

In addition, Coleman J emphasised[59] that a party was bound by his conduct at trial. In *Metwally (No 2) v University of Wollongong*,[60] the High Court of Australia had stated that:

> 'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had a opportunity to do so.'

In *Gray*, Coleman J was of the view[61] that to permit the husband, in the circumstances, successfully to rely on the third ground of appeal would be to visit an injustice on the wife.

Gray, thus, demonstrates that areas of property law, other than the Family Law Act itself, may be of central relevance to family law matters. That that may be applicable to other statutory issues is illustrated by the Full Court's decision in *Hunt and Zuryn*.[62] In that case, the parties had married in 1991 and separated in 2000 and there were two children of the marriage, aged 12 and 8 who lived with the wife.

At the outset of cohabitation, the husband's net assets exceeded those of the wife by $200,500, as well as an additional property. The trial judge had incorrectly assessed the husband's initial contribution as exceeding the wife's by $273,000, excluding that property, the nature of the ownership of which was in dispute. The husband and his sister were the registered owners, but the husband's father gave evidence that he had transferred the property to the husband and the husband's sister in trust to provide for the 'future needs' of the husband's parents. The trial judge had determined that there was insufficient evidence to find that the husband had any beneficial interest in that property. During the course of the relationship the parties' assets pool (excluding the disputed property) had increased from $303,500 to approximately $1.2m.

Following separation, the parties informally agreed that the wife accept a payment of $120,000. The parties attempted to have that agreement reflected in consent orders. However, that was rejected by a Magistrates' Court on the grounds that it was not just and equitable in its settlement terms.

At trial, the judge recognised the significant contributions to the welfare of the family and her non-financial contributions to the acquisition, conservation and improvement of various rental properties. The trial judge also found that, during the parties' 11-year 'committed relationship', they had pooled their resources in such a way as to meet the family's outgoings and expenses and to build up family assets 'for their mutual security and benefit'.

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59 Ibid at 79,768.
60 (1985) 60 ALR 68 at 71 per Gibbs CJ, Mason J, Wilson J, Brennan J, Deane J and Dawson J.
61 (2005) FLC 93-228 at 79,769.
62 (2005) FLC 93-226.

At the same time, though, the judge found that the husband's contribution at the beginning of the relationship substantially exceeded the wife's and had not been negatived or completely eroded by the wife's later contribution. In addition, the Full Court noted[63] that the trial judge had appeared to penalise the wife when he had referred to the conduct in accepting the payment pursuant to the informal agreement which had led to the husband acting to his detriment on the assumption that their property and financial affairs had been finalised.[64]

In the event, the trial judge determined that the parties' net assets should be divided 75 per cent to the husband and 25 per cent to the wife in respect of their individual contributions with an 8.5 per cent adjustment in favour of the wife by reason of s 75(2) factors. Included in the payment to the wife in respect of the property settlement was a payment of $40,000 in respect of lump sum child support, which was to be credited against any liability of the husband. An application by the wife for departure from the Child Support formula was dismissed – the Child Support Agency had assessed the husband's liability at nil because of his low declared income.

The wife appealed, seeking an additional $124,000 in respect of the property settlement so as to receive a total of 40 per cent of the asset pool. She also sought monthly child support of $400 per child to be capitalised as a lump sum of $87,200.

There were three bases of the wife's appeal. First, there was sufficient evidence for the trial judge to have found that the husband had a beneficial interest in the additional property. That included a letter from the husband's sister's solicitors where the sale of the property was proposed and the equal division of the proceeds between them. Secondly, that the amount awarded to the wife in respect of her contribution was clearly 'inadequate, inequitable and plainly wrong'. Thirdly, that the trial judge was in error in dismissing the wife's child support application and crediting the husband's liability in that regard with money paid from the property settlement. The Full Court allowed[65] the appeal.

As regards the additional property, the Full Court[66] took the view[67] that, while there must be serious doubts concerning the finding that there was insufficient evidence to find that the husband had a beneficial interest in it, the Court considered that not much turned on that issue. Since the wife had made no contribution to the asset, the increase in the pool of assets created by that property had been matched by the husband's contribution to those assets. It, thus, seemed to the Court that the more appropriate approach, on the evidence, 'would have been to quarantine the property from the pool of assets divisible

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63 Ibid at 79,731.

64 The trial judge had taken that into account under s 75(2)(o) of the Family Law Act.

65 Orders were made to consider written submissions to determine whether the property appeal be remitted for rehearing or have the Full Court exercise its own discretion.

66 Kay J, May J and Boland J.

67 (2005) FLC 93-226 at 79,728.

between the parties, given the lack of contribution by the wife and the circumstances said to attach the gift to the husband, namely an obligation to make provision for his parents should they require it'. At the same time, the husband's interest in that property was relevant in assessing any s 75(2) factors.

As regards the exercise of the discretion itself, the Full Court noted[68] that, although the judgment at first instance identified the contributions which each party claimed to have made, there were few findings on the actual contributions. That lack of findings made it hard for the Full Court to determine whether the assessment was within or without the generous discretion afforded by the Act. At the same time, they considered that the overall impression of the matters described by the trial judge 'would seem to indicate that an assessment giving the husband credit more than 50 per cent more of the total pool than the wife, coupled with his Honour's error in calculating the initial contributions, is beyond that generous ambit of discretion'.

In addition, also given the trial judge's findings in relation to the pooling of the parties' assets and the times when the wife had made important contributions as well as being the major breadwinner, it was an inevitable conclusion that the division of property as to 75 per cent of the property to the husband was unjust. Thus, the appropriate assessment ought not to have exceeded 67.5 per cent to the husband. In making that assessment, the Full Court had referred to an earlier Full Court decision in *Pierce v Pierce*[69] where it had been said that:

> '. . . it is . . . a question of what weight is to be attached, in all the circumstances, to the initial contributions by a party with all other relevant contributions of both the husband and the wife.'

The assessment ultimately reached by the Full Court in *Hunt and Zuryn* ought, they said,[70] 'adequately to recognise that much of the parties' wealth can be attributed to the capital growth in the assets introduced by the husband at the commencement of the marriage but at the same time bring into consideration the myriad of other contributions each made in the course of their relationship'.

As to the first point, regarding the issue of child support made by the Court,[71] they noted that, after the deduction of the $40,000 lump sum child support from the 8.5 per cent adjustment made by the trial judge in respect of the s 75(2) factors, the effective adjustment in favour of the wife was 5.1 per cent. That adjustment, the Court considered, was inadequate when the initial assessment was taken into account. However, when the revised assessment was

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68 Ibid at 79,730.
69 (1999) FLC 92-844 at 85,881 per Ellis J, Baker J and O'Ryan J.
70 (2005) FLC 93-226 at 79,730.
71 Ibid at 79,730.

considered, it was an adequate adjustment. Hence, the wife would receive 37.5 per cent of the asset pool by way of property settlement.

At the same time, the Court considered[72] that the trial judge had wrongly given consideration to the fact that the wife had accepted $120,000 from the informal property settlement. In the Court's *ipsissima verba*:

> 'The true nature of the transaction was that the wife received, at an early stage, monies to which she was ultimately entitled.'

Hence, she ought not to have been penalised for obtaining, in effect, an advance on her proper entitlement.

Furthermore, in dismissing the wife's application for departure from the child support formula, the Court were of the view[73] that the trial judge had really validated the nil assessment made by the child support agency. That set an unfortunate precedent for the agency to assess the continuing liability of the husband only on the basis of his taxable income, which was likely to continue to be a very small amount. It followed that the husband's liability to support the children was effectively capped at $40,000. Thus, a nil assessment was not an appropriate assessment for child support in circumstances where the husband possessed of significant assets.[74] Perhaps yet more fundamentally, the Full Court commented[75] that the trial judge had been purporting to exercise the child support power, though under the guise of a property order. In so doing, the judge had failed to take into account particular provisions of the Child Support (Amendment) Act 1989[76] when making an order for lump sum payments under s 124 of that Act.

Although not every case decided in 2005 in the areas of property and finance was so innately complex as those hitherto discussed, there is equally no doubt, as will become apparent, that many possess specific features of continuing interest and relevance. Thus, the issue of contributions, and the bases therefore, was considered by the Full Court of the Family Court of Australia in *Hill and Hill*,[77] where the parties had met in South Africa and had later married, there being three children of the marriage. Although there was a difference in the parties' opinion as to the actual separation, the trial judge found that, by August 2002, the marriage had inevitably broken down.

At the time the parties had begun to cohabit in Australia in 1985, the husband had an interest in property in Western Australia which, he claimed, was worth $65,000, in addition to other assets. The wife was employed and had modest

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72 Ibid at 79,731.
73 Ibid at 79,733.
74 The child support proceedings were remitted independently of the property proceedings.
75 (2005) FLC 93-226 at 79,736.
76 Child Support (Amendment) Act 1989, s 117(4), (5), (7) and (8).
77 (2005) FLC 93-209. For comment on this, and other related cases, see Bates 'Discretion, Contributions and Needs – Family Property in Australia' [2005] *Int Fam L* 218.

assets of her own. The husband had also set up a number of companies for the purpose of carrying on his stock broking business and the management of the family's investment portfolios. The wife began working in that business in 1995, until the husband terminated her employment after some 7 years. The trial judge found that she had been involved in organising the household and caring for the children, though, during her employment, she had been generally disruptive of the business.

On two occasions, the wife had withdrawn $100,000 from the funds of the business without informing the husband in any way. In consequence, orders were made which sought to deal with that situation by allowing the husband to deal with specified funds of the companies. Early the following year, additional orders were made which provided that, of the money which the wife had withdrawn, $50,000 was deemed to have been received by her as lump sum maintenance and the remainder as partial property settlement. Further, there had been a significant rise in the asset pool between the time the wife left the matrimonial home and the date, some 4 months later, used by the trial judge to establish the value of the assets to be divided.

The trial judge had concluded that the husband's contribution should be assessed at 75 per cent and the wife's at 25 per cent. In so deciding, he stated that he had had regard to the husband's substantial initial financial contributions, his contributions until the time of separation and his contributions after the separation when the asset pool had increased significantly. These were immediately contrasted with the difficulties caused by the wife's actions, her demands after separation and her own contributions. Nevertheless, the trial judge determined that there should be an adjustment of 5 per cent in the wife's favour, taking account of the matters contained in s 75(2) of the Act. However, he did not, in any way, deal with the wife's contributions as parent and homemaker.

Given all of that, it is not surprising that the wife appealed, arguing that the trial judge had emphasised that her conduct towards the end of the marriage had had a significant impact on this assessment of the parties' relevant contributions. In making that submission, she argued that there was no evidence to support any significant reduction being made to her contributions to such a large pool of assets by reason of her conduct. Perhaps still more fundamentally, she claimed that the trial judge's finding that the asset pool had effectively doubled after the separation was without foundation. Although the pool had grown in that time, it had not done so through the exercise of any special skills by the husband.[78] The Full Court[79] allowed the appeal and remitted the matter for retrial.

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[78] On that issue, see Bates 'Exceptional Contributions by a Spouse in Australian Family Property Law – A Road Mistaken?' [2003] *Int Fam L* 176.

[79] Kay J, Holden J and Boland J.

As regards the specific factual issues, the Court took the view[80] that, in the general context of a 17-year marriage and a financial pool of some $10,000,000, the wife's conduct in the business, shortly before her role had been completed in that area, ought to have been of scant consequence when assessing the matter of contributions. At the same time, though, the Court presented itself in rather paradoxical terms when it said[81] that:

> '. . . it may be that on a thorough analysis of the parties' contributions another judge may conclude that the husband's contributions so outweigh the wife's financial and non-financial contributions as to merit a significant imbalance as to outcome. However the wife's contributions as a homemaker or parent coupled with her financial contributions throughout the marriage ought not necessarily be seen as being of any the less worth than the financial contributions of the husband.'

At the same time, an especially vexed issue inevitably arose.[82] That was the matter of 'special contributions', so that, for instance, in *Figgins v Figgins*,[83] the Full Court of the Family Court of Australia had expressed concern about the operation of the notion and had urged its reconsideration. In *Hill*, the Court noted[84] that the issue which had there arisen was whether the increase in the parties' post-separation pool of assets ought to have been regarded by the trial judge as being a project of the husband's special stock brokering skills or as the result of market forces themselves which made them more in the nature of a 'windfall'. In that context, the Court had made it clear[85] that, '[i]n delineating the parameters of the doctrine, the courts have been careful to distinguish special contributions from inheritances or windfalls'. In *Hill*, the Full Court concluded on that issue[86] by saying that it was not open to the trial judge to make findings as to whether the growth in the parties' assets was the product of one factor or the other. Indeed, the Court found that, generally, it was difficult to ascertain clearly the emphases placed by the trial judge.

The next issue considered by the Full Court was the effect of misconduct when assessing contribution. In taking earlier case-law[87] into account, the Court emphasised, as they had done earlier, that the wife's actual conduct in *Hill*

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80 (2005) FLC 93-209 at 79,520.

81 Ibid at 79,525.

82 Ibid at 79,522. For comment on this, and other related cases, see Bates 'Discretion, Contributions and Needs – Family Property in Australia' [2005] *Int Fam L* 218.

83 (2002) FLC 93-122. There reliance had been placed on the House of Lords decision in *White v White* [2001] 1 AC 596.

84 (2005) FLC 93-209 at 79,523.

85 Ibid at 79,522.

86 Ibid at 79,524.

87 See *Kennon v Kennon* (1997) FLC 92-757. That case was primarily concerned with the issue of domestic violence. See, for comment, Bates 'Divorce Law Reform in Australia. The Emergence of Fault in the Family Law Act 1975' [2002] *Irish J Fam L* 9. Also *Kowaliw and Kowaliw* (1981) FLC 91-092.

should not have dominated that assessment of contributions in the way it seemed to have done. Hence, to the degree the trial judge had taken it into such account, he was in error.[88]

Hill is, thus, usefully illustrative of problems faced daily by Australian courts in the area: once again, the vexed issue of the effect of 'special contributions' was canvassed in addition to the basic one of the parties' relative contributions. The aim of the Full Court's deliberations was the correction of an initial finding which could be perceived as being unfair to both parties.[89]

It is equally clear that the question of contributions is linked to that of the parties' relative needs.[90] A useful illustration is represented by the Full Court's decision in *Cunningham and Cunningham*[91] where the parties had married in 1979 and separated in 2000. In 1986, they had bought a business in which they both had worked, the husband full-time, and the wife part-time. The wife, additionally, studied nursing, cared for the children and organised the household. After the separation, the wife sought an order for property adjustment and, in consequence an order for the sale of the business was made and, with judicial permission, the husband purchased it for $160,000.

The parties agreed that their contribution-based entitlements were equal and the pool of assets was judicially determined. Although the income of the husband was in a state of flux, at the time of trial, it was almost double that of the wife. The wife, though, did own properties which were negatively geared and, hence, did not generate any income. However, a dispute had arisen over the income from the business which the husband had received after the separation. The parties' accountant had credited the wife's loan account with the share of the profits from the time of separation to the date of the husband's purchase, which amounted to some $114,000. The trial judge ordered that the husband pay the wife the amount owing on her loan account and, further, awarded the wife a 7.5 per cent adjustment by reason of s 75(2) because of the disparity of the parties' income.

The husband appealed arguing that, as the wife had received her share of the property by way of capital adjustment, she ought not to receive any further adjustment. The wife, it was argued, could make investments so as to generate income.[92] From a conceptual standpoint, the Court in *Cunningham* noted[93] the comment of Fogarty J in the earlier decision of *Waters and Jurek*[94] where it had been said that:

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88 (2005) FLC 93-209 at 79,526.

89 For another case raising similar issues, in a slightly different context, see *Schirmer and Sharpe* (2005) FLC 93-213. For comment on this, and other related cases, see Bates 'Discretion, Contributions and Needs – Family Property in Australia' [2005] *Int Fam L* 218.

90 See *Spiteri and Spiteri* (2005) FLC 93-214.

91 (2005) FLC 93-212.

92 In so doing, the Court appeared to reject an argument on behalf of the wife that the husband's retention of the business had left him in a stronger position from which to generate income.

93 (2005) FLC 93-212 at 79,555.

94 (1995) FLC 92-635 at 82,376.

> 'The connection between the s 75(2) factors and a just and equitable settlement is more difficult since the criteria are expressed broadly and are fundamentally prospective in their operation . . . The rationale for [the adjustment] usually lies in the circumstance that the difference in income capacities is significant and/or has arisen either directly or indirectly as a consequence of the marriage and the roles which the parties played during the marriage.'[95]

In *Cunningham*, in allowing the appeal and re-exercising their discretion, the Full Court[96] commented[97] that, were Fogarty J's analysis simply to be applied to that case, the appeal would have been dismissed. But there was no general principle in the Act which gave support to the husband's contention that, as he had bought the wife out of the business, the trial judge was precluded from taking the relative income situation of the parties into account and, in the instant case, there was a very considerable difference in the parties' income position which was likely to continue.

At the same time, though, the husband was required to keep $160,000, which had been derived from his half share of the assets, invested in the business, while the wife had available to her an equivalent sum which she could invest as she thought fit. That was an issue which seemed to have been improperly overlooked by the judge at first instance.

Ultimately, the Court re-exercised its discretion so that the wife received an adjustment of $50,000.[98]

(b) Superannuation

There can be no doubt that the leading case in this area in 2005 is the decision of the Full Court of the Family Court of Australia constituted by a five-judge bench[99] in *Coghlan and Coghlan*.[100] It is important, as much as for anything else, in that it demonstrates that the apparently comprehensive reforms relating to superannuation introduced in 2001[101] are far from straightforward or uncontroversial in their apparent effect.

In *Coghlan*, the parties had married in 1991 and had separated in late 2002. At the time of the hearing both parties were aged 48 and there were no children of the marriage. The husband was unemployed but in receipt of a pension under the Public Sector Superannuation Scheme. In late 2001, he had received a lump sum of approximately $67,000. That amount no longer existed at the time of the trial at first instance and the trial judge refused to include it as a notional asset. The husband's sole source of income was a pension of $24 per fortnight,

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95 See also the comments of Baker J, ibid at 82,388.
96 Kay J, Warnick J and May J.
97 (2005) FLC 93-212 at 79,556.
98 In effect, reducing the sum by $32,079.
99 Bryant CJ, Finn J, Coleman J, Warnick J and O'Ryan J.
100 (2005) FLC 93-220.
101 For comment see Bates 'Of Courts and Cash – Australian Family Law in 2001' in A Bainham (ed) *International Survey of Family Law* (Jordans, 2003) 47 at 59 *ff.*

although he gave evidence to the effect that he expected to earn income through unskilled work and cabinet making. The wife's income was $760 per week.

The trial judge tabulated the parties' superannuation separately from their assets and liabilities. The husband's superannuation, which he was receiving as a pension, was valued at $231,096. The judge excluded it from the pool of assets for distribution[102] and, likewise, excluded the wife's superannuation of $65,482.[103] The judge, accordingly, assessed the parties' net property, excluding superannuation, at $590,208 and assessed the contributions at 60:40 per cent in favour of the wife. No adjustment was made for s 75(2) factors, despite the wife's superior income because, inter alia, of the husband's failure to make a full and frank disclosure as to his future income.

The wife appealed claiming, especially, that the trial judge had failed to take Part VIIIB of the Family Law Act into appropriate account through his disregard of the parties' superannuation interests when determining the net property for distribution under s 79 of the Act.

The Full Court allowed the appeal and remitted the case for retrial. However, it should be said at the outset that the apparent unanimity of that decision concealed very significant conceptual differences of approach towards the issue of superannuation and its relationship with s 79.

First, the majority of the Court[104] took the view[105] that there was no mandate in Part VIIIB of the Act to include the value of the superannuation interests of the parties in the pool of assets to be divided in proceedings under s 79. This involved a consideration of the earlier decision of the Full Court in *Hickey and Hickey and the Attorney General for the Commonwealth of Australia (Intervener)*.[106] In that case, the Court sought to encapsulate[107] the provisions of Part VIIIB, notably s 90MC, in the following terms:

> 'A superannuation interest is therefore to be treated as property for the purposes of proceedings between the parties to a marriage with respect to the property of the parties or either of them, being proceedings arising out of the marital relationship.'

The Court then went on to outline a 'preferred approach' to the determination of such proceedings, which involved four, interrelated, steps. First, the Court should make findings as to the identity and value of the property, liabilities and

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[102] Because, in his own words: 'it has such an air of artificiality about it that in my view it would be unjust to apply that valuation for the purpose of the calculation of the parties' net property.'

[103] On the grounds that it represented 'a valuation of the prospective entitlements, which will only arise many years into the future'.

[104] Bryant CJ, Coleman J and Finn J.

[105] (2005) FLC 93-220 at 79,640.

[106] (2003) FLC 93-143.

[107] Ibid at 78,384.

financial resources of the parties at the date of the hearing.[108] Secondly, the Court should identify and assess the contributions of the parties[109] and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and address the 'other factors',[110] which would include s 75(2), so far as they were relevant and determine the adjustment (if any) which should be made to the contribution based entitlements of the parties which had been established at the second stage. Fourth, the Court should consider the effect of those findings and resolve what order is just in all the circumstances of the case.

As regards the position of the superannuation interests, the majority were of the view[111] that the Court could include those interests in the first stage of the *Hickey* process for the determination of proceedings under s 79 of the Act where the parties agree that that should be done or where the Court decides that such an approach would be appropriate. More generally, the majority considered[112] that a preferable approach was to prepare a separate list of any superannuation interests.

The major purpose of s 90MC, the majority continued,[113] was to confer jurisdiction on the courts to make orders to divide, or otherwise to affect, the parties' superannuation interests. The only occasion on which they were to be treated as property was for the purpose of conferring jurisdiction.[114] That was further emphasised by the word 'also' which occurred in s 90MS meaning[115] that superannuation interests were another species of property different from that to be found in the Act at large. Insofar as that view stood in contradistinction to that which had been expressed in *Hickey*, the earlier decision was wrong.

Consideration, in the majority's view,[116] had to be given to the overall justice and equity of any proposed order, including the 'real nature' of the superannuation interests. That was, whether they represented, for instance, a present sum or future lump sum or future periodic sum.

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[108] Which, of itself may be a confusing and subjective process, see Bates '"We Prize Not to the Worth" – Some Thoughts on the Valuation of Property Under the Family Law Act' (2005) 7 *Newcastle L R* 35.

[109] See Family Law Act 1975, s 79(4)(a), (b) and (c).

[110] Ibid s 79(4)(d), (e), (f) and (s).

[111] (2005) FLC 93-220 at 79,642.

[112] Ibid at 79,643.

[113] Ibid at 79,641.

[114] That was for the purposes of the definition of 'matrimonial cause' in s 4 of the Family Law Act 1975.

[115] (2005) FLC 93-220 at 79,644. Section 90MS(1) provides that: 'In proceedings under s 79 with respect to the property of the spouses, the court may . . . *also* make orders in relation to superannuation.'

[116] (2005) FLC 93-220 at 79,646 .

Although they agreed in the ultimate adjudication, there were separate and dissenting judgments by Warnick J and O'Ryan J. First, Warnick J regarded[117] the view of the majority view that s 90MC had effectively no impact on the application of s 79 as leading to a conclusion:

> '. . . which is at least surprising if not inconsistent, namely, that the legislature has created a cause of action, based on a particular "premise", but in that course, it is not necessary to maintain that "premise".'

Given the convoluted nature of the majority's approach to the issue, it is not hard to agree with Warnick J's initial view. Similarly, the judge did not consider[118] that it was proper to depart from the formulation in *Hickey*. Fundamentally, Warnick J was generally critical[119] of the majority approach when he commented that:

> 'There seems in the view of the majority to be a concern that treatment of superannuation interests as property introduces an undesirable rigidity into s 79 proceedings. If this is the view of the majority, I disagree with it. It has always been the case that the court was required to acknowledge and reflect tensions between market value, value to the owner and lack of marketability of particular types of property and interests, such as minority shares in a private corporation and of particular pertinence when considering superannuation interests, property such as annuities. The terms of s 79 have proved adequate for that task . . .'

In addition, Warnick J expressed the view[120] that the instant case presented difficulties of interpretation and the majority approach could produce at least one result which was less desirable than the approach adopted in *Hickey*. It followed that he did not consider it proper to depart from the basic formula in the earlier case.

The approach adopted by O'Ryan J was not dissimilar to that of Warnick J. First, he did not consider it appropriate to depart from the *Hickey* view[121] and was especially concerned that the approach of the majority was likely to promote uncertainty and not provide a clear guide as to how superannuation interests were to be treated in determining applications for an order under s 79. Fundamentally, O'Ryan J expressed the view[122] that Part VIIIB of the Act enabled courts exercising jurisdiction under the Act, in appropriate circumstances, to make an order in relation to the superannuation interests of the parties to a marriage and, further, contained provisions which enabled the courts to make orders binding on the trustees of superannuation plans.[123]

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[117] Ibid at 79,648.
[118] Ibid at 79,652.
[119] Ibid at 79,651.
[120] Ibid at 79,652.
[121] Ibid at 79,660.
[122] Ibid at 79,656.
[123] In addition, ibid at 79,657, O'Ryan J intended to emphasise that the Court had power to make orders in relation to superannuation interests rather than seeking to treat them as another species of property.

In view of the preceding discussion, it is as well that *Coghlan* was not to be the end of the matter: in *Wilkinson and Wilkinson*[124] an identically constituted Full Court unanimously seemed to proceed on the basis that the general policy view which had been expressed by Warnick J and O'Ryan J in *Coghlan* was appropriate. Further, in another case,[125] the Full Court also emphasised that much would depend on the terms of the particular schemes which were being considered.

(c) Statutory intervention – family property and bankruptcy

The relationship between family law and bankruptcy in Australian law has never truly been a happy one: in essence, perhaps, because priorities have never properly been organised.[126] 2005 saw an attempt to resolve these difficulties through amendment to both the Family Law Act and the Bankruptcy Act 1966. First, s 35 of the Bankruptcy Act gives the Family Court jurisdiction 'in relation to any matter connected with, or arising out of, the bankruptcy', although this is only where a party to a marriage is bankrupt and where there are proceedings which have not been concluded for property settlement, variation of property settlement and spousal maintenance to which the Trustee in Bankruptcy is a party. The Family Law Act is amended by adding to the definition of 'matrimonial cause' for spousal maintenance where a trustee in bankruptcy is a party[127] and proceedings in relation to vested bankruptcy property where the trustee is a party.[128]

Even at this early stage, problems begin to emerge: s 39 of the Family Law Act gives the Family Court jurisdiction in matrimonial causes and such proceedings must be instituted in accordance with s 8(1) of the Act. At the same time, s 35A of the Bankruptcy Act permits the Family Court to exercise the powers of the Federal Court under the Bankruptcy Act if proceedings are transferred from the Federal Court to the Family Court, but, in the absence of a transfer, there would seem to be no other conferral of jurisdiction in bankruptcy on the Family Court. This represents something of a fundamental lacuna.

The major change to the legislation effected in 2005 is a new s 59A of the Bankruptcy Act which provides that the vesting regime to be found in ss 58 and 59 of that Act has effect subject to an order under Part VIII of the Family Law Act. The consequence of that is that, if the trustee is required to transfer property to a spouse under the Family Law Act, then that property will not be divisible among creditors. However, s 116(2)(q) of the Bankruptcy Act adds a further category of exempt property: namely, 'any property that under an order under Part VIII of the Family Law Act the trustee is required to transfer to the

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124 (2005) FLC 93-222.

125 *Casey and Braione-Howard and DFRDB Authority* (2005) FLC 93-219. See also *BAR and JMR* (2005) FLC 93-231.

126 See, eg, Lindenmayer and Doolan 'When Family Law and Bankruptcy Collide' (1994) 8 *Aust J Fam L* 111.

127 Family Law Act 1975, s 4(1)(caa).

128 Ibid s 4(1)(cb).

spouse of the bankrupt'. There may, hence, be a contradiction between s 59A which permits the Family Court to make orders in respect of property vested in the trustee and s 116(2)(q) which prevents it, in the first instance, from vesting.

These introductory comments can only hint at some of the issues which the 2005 reforms now raise. A full and detailed commentary is beyond the scope of this paper and has been set out by Kovacs.[129]

IV OTHER ISSUES

(a) Facilitating the process

A major initiative which has developed in 2005 is that of the Family Relationship Centres. These organisations are to be established in the major regions and population centres. The governmental aim is for there to be 65 such centres and, although they will be government funded and are to operate in accordance with government guidelines, they will be run on a daily basis by non-government organisations. At the outset, this has caused concern among welfare bodies, who are reported[130] as being concerned that they may be edged out in their application for a share of the $400m allocated by Government to the project by private, profit based organisations. This, it is suggested, is a legitimate concern as the new centres will be run on lines similar to the existing Job Network System, which is operated by a mixture of corporate and community or church-based organisations. It also appears that those in charge of the centres will be able to outsource some of the services which they are required to provide.

It appears, though, that the centres' primary role is to operate as an early intervention agency. At the same time it is reported that staff at the centres will be specifically instructed 'not to assume that clients with relationship difficulties or going through separation will inevitably separate'. Nevertheless, it is hoped that the centres will provide educational, support and counselling facilities for parents at this stage. However, if reports are to be believed, an ideological thrust may readily be apparent. Thus, '[i]f centres believe parents considering separation can resolve their difficulties and stay together, they should refer the parents to services that will help them to do so'.[131] Implicit in such a stance is compulsory counselling, which, it must be said, has not generally met with success in Australia at any time previously.[132]

At the same time, the centres ought to have a role in helping parents after separation through, for instance, providing them with information about child

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[129] Kovacs 'The New Face of Bankruptcy in 2005: The Bankrupt Spouse, the Trustee in Bankruptcy and the Family Court' (2005) 19 *Aust J Fam* L 60.

[130] See *Sydney Morning Herald*, 9 January 2005, p 1.

[131] Ibid.

[132] See Bates 'Counselling and Reconciliation Provisions – An Exercise in Futility' (1978) 8 *Family Law* 248.

support and to assist in parties negotiating workable agreements regarding parenting post-separation. They ought also to have a role in strengthening presently subsisting relationships.

The state of affairs at the time of writing[133] is that tenders have just closed in respect of the first 15 centres, so that it may not be long before their impact is felt, in some geographical areas at least. Nonetheless, some relevant groups have been cautious in their response: thus, Frank Quinlan, Executive Director of Catholic Family Welfare, has said that the growing role of the centres was 'not necessarily a bad thing provided we can be sure that people are not exposed to services that are less than professional'.

(b) Family law in an international context

As might be expected, 2005 has seen developments on the international front. First, the issue of *forum non conveniens* has again arisen in an Asian context. In *Cashel and Corr*,[134] the parties began cohabitation in Australia in the late 1980s and married in Hong Kong in 1991 where they lived until their separation in early 2002. Thereafter, the wife returned to live in Australia and the husband remained in Hong Kong. Both parties were Australian citizens and owned two properties in Australia jointly as well as a property in Hong Kong in the name of the husband.

In July 2004, the husband applied to the District Court of Hong Kong for dissolution of marriage and ancillary orders, including a property settlement. In September, the wife applied in Hong Kong for a stay of those proceedings and a temporary stay was granted, pending the hearing of the wife's application. In October, the wife filed an application for property settlement in the Family Court of Australia. The husband, not wholly unpredictably in proceedings of this kind, responded with an application which sought to restrain the wife's continuing her application.

In January 2005, the wife's application in Hong Kong for a stay was dismissed, although leave was granted for her to appeal on the condition that she took no further steps in relation to the substantive proceedings in Australia.

More centrally, the judge at first instance dismissed the husband's application for a stay in respect of the Australian proceedings. In so doing he applied the 'clearly inappropriate forum' test and placed considerable reliance on the decision of the High Court of Australia in *Henry v Henry*[135] especially as to whether the proceedings in the Australian courts were 'vexatious' or 'oppressive'. In reaching his decision, the trial judge noted that the wife had taken no part in the Hong Kong proceedings except to seek the stay and had not sought to embrace the jurisdiction of both courts.

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[133] January 2006.
[134] (2005) FLC 93-232.
[135] (1996) 185 CLR 571.

The husband appealed on four grounds. First, that the trial judge had failed to find that the continuation of proceedings in Hong Kong and Australia was prima facie vexatious and oppressive. Secondly, that the trial judge had failed to give sufficient reasons for concluding that the continuation of both proceedings was not productive of serious and unjustifiable trouble and harassment to him. Thirdly, that the trial judge had not given appropriate weight to the order of the proceedings as well as the connection of the parties to Hong Kong, the issues to be determined in Hong Kong and the ability of the parties to participate in the proceedings in each jurisdiction. Finally, that the finding at first instance that the Family Court of Australia was not 'a clearly inappropriate forum' was outside a reasonable exercise of judicial discretion. The Full Court[136] of the Family Court of Australia dismissed the appeal.

The Court were of the view that the first two grounds lacked substance; in essence, the Court were of the opinion[137] that all of the circumstances given to the issues had been properly taken into account by the trial judge who, in particular, had appreciated that the likely effect of refusing a stay was the continuation of both sets of proceedings.

As regards the third ground, the Court commented[138] that the various factors which the husband had identified were not, as the trial judge was clearly aware of the chronology of the events which had taken place in both jurisdictions, entitled to decisive or particular weight in favour of either party. As both parties had connections to both jurisdictions, 'the decision could have gone either way without necessarily involving error'.[139] The Court continued by saying that other than by concluding that to refuse to stay the Australian proceedings and, thus deprive the husband of the potential benefit of being the first to commence the proceedings, nothing would render permitting the proceedings to continue in Australia 'vexatious' or 'oppressive' in the senses used by the husband. Nor did that view render the trial judge's construction 'narrow' or 'rigid' in the sense used by Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay*.[140] Finally, the Court considered that it was within the ambit of a reasonable exercise of discretion to refuse the stay sought by the husband.

The Full Court's decision in *Dobson and Van Londen*[141] involved an issue related to that in *Cashel and Carr*, namely, the use of anti-suit injunctions in family law matters and their relationship with stays and the *forum non conveniens* doctrine. In *Dobson and Van Londen*, the parties had married in Australia in 1988 and, between 1990 and 1999, had four children. In 2002, the wife and children moved to live in the Netherlands, with the consent of the

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136 Bryant CJ, Coleman J and Boland J.
137 (2005) FLC 93-232 at 79,866.
138 Ibid at 79,867.
139 Ibid at 79,868.
140 (1998) 165 CLR 197 at 248.
141 (2005) FLC 93-225.

husband. The wife returned to Australia for a brief period in 2003, but returned to the Netherlands with the intention of living there permanently with the children.

In March 2004, the husband made application to the Family Court of Australia in which he sought final orders with respect to property matters and holiday contact with the children. The wife sought to have those proceedings permanently stayed or, in the alternative, sought other orders. The wife also instituted proceedings in the Netherlands seeking divorce, spousal and child maintenance and property settlement orders. The husband responded by filing an application in the Family Court of Australia for an order which sought to restrain the wife from prosecuting her applications in the Netherlands. At first instance, the application by the wife for a stay in respect of the parenting orders sought by the husband was dismissed. However, an injunction was granted restraining the wife from proceeding with the applications filed by her in the Netherlands Court insofar as those proceedings related to property proceedings between the parties.

The husband appealed to the Full Court against the trial judge's refusal to restrain the wife from proceeding in the Dutch courts in respect of spousal and child maintenance. The wife cross-appealed against the award of the anti-suit injunction granted in respect of property proceedings. The Full Court[142] allowed the husband's appeal and dismissed the wife's cross-appeal.

As regards particular issues, the Court, first, emphasised[143] that there was a requirement that a defendant against whom an anti-suit injunction was sought was required to be amenable to the jurisdiction of the court. In the instant case, the wife, because she had sought alternative orders in the proceedings begun by the husband, had effectively submitted to the jurisdiction of the Family Court of Australia.

As to the grant of anti-suit injunction[144] to the husband, the Court referred[145] to the High Court of Australia's decision in *Henry v Henry*,[146] where it had been said that:

> 'The marital relationship lies at the heart of all proceedings between husband and wife with respect to their marital status and . . . disputes with respect to property, maintenance and the custody of children will ordinarily be but aspects of an underlying controversy with respect to the marital relationship.'

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142 Finn J, May J and Boland J.

143 (2005) FLC 93-225 at 79,708.

144 The Court also noted, ibid at 79,710, that the power of the Family Court of Australia to grant anti-suit injunctions was derived either from s 34 of the Family Law Act 1975 or the inherent or implied power of the Court.

145 (2005) FLC 93-225 at 79,708.

146 (1996) 185 CLR 571 at 591 per Dawson J, Gaudron J, McHugh J and Gummow J.

Hence, the Court considered[147] that the trial judge was in error in deciding that the applications before him were to be decided on the assumption that they related to individual proceedings pertaining separately to each cause of action. The unity of matrimonial causes was to be the starting point for any consideration of an application for injunctive relief, as it was when considering a stay on *forum non conveniens* grounds.

Further, the Court was of the view[148] that the trial judge was in error in failing to have regard to whether the prosecution of the proceedings in relation to maintenance would have been vexatious or oppressive and the vexatious nature of the Dutch proceedings in relation to spousal and child maintenance. The Court continued by saying[149] that, in that context, it was necessary for the trial judge to have had regard to matters such as the language disadvantage which would be encountered by the husband, the difficulties of investigating the wife's financial affairs in the Netherlands and the capacity of the husband to have any order from that jurisdiction reviewed before it could be enforced in Australia. In the event, the Court granted the husband the anti-suit injunction which he sought. That meant[150] in the end, that the husband was entitled to have all financial matters dealt with in one jurisdiction, that being his home jurisdiction and the jurisdiction in which the parties had spent most of their married life.

Thus, *Dobson and Van Londen* represents a useful explication of the utility of anti-suit injunctions in family law matters. Situations which could lead to their use are unlikely, given the constitution of Australia's population, to disappear.

V CONCLUSIONS AND PROJECTIONS

It will be apparent that there has been considerable activity on a variety of fronts in Australian family law in 2005, some of which has been presaged in earlier commentaries, while other areas have not. However, any writing about activities in 2005 is bound to lead to further attempts at projection. One, for instance, can hope that the Family Relationship Centres, discussed earlier,[151] will prove as successful as their proponents will claim but, at the same time, one maintains a healthy degree of scepticism.

However, the major projection must be attached to the Family Law Amendment (Shared Parental Responsibility) Bill 2005 which was introduced into Parliament on 8 December 2005 and will be debated when Parliament resumes in February 2006. The Bill, which consists of 180 pages, contains some 392 amendments to the Family Law Act.[152] One suspects, or fears, that, in view

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147 (2005) FLC 93-225 at 79,709.
148 Ibid at 79,715.
149 Ibid at 79,716.
150 Ibid at 79,717.
151 See text above on 'Facilitating the Process'.
152 For comment on an earlier draft, see Banks et al 'Review of Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005' (2005) 19 *Aust J Fam L* 79.

of this seemingly inevitable development, the events of 2005 itself, superannuation notwithstanding, are simply in the nature of a preliminary skirmish compared with 2006 and, more likely beyond.

Canada

MARRIAGE AND MORALS

*Martha Bailey**

Résumé

En 2006, la Canada fut à nouveau confronté à la question du mariage entre personnes de même sexe. Une minorité de canadiens se sont fermement opposés à l'ouverture du mariage mais c'est en vain qu'ils ont tenté d'imposer leur définition traditionnelle de cette institution. Des rapports gouvernementaux sur le sujet de la polygamie ont provoqué un important débat public. L'inquiétude à propos de mauvais traitements dont seraient victimes des femmes et des enfants dans certains milieux religieux fondamentalistes, a suscité des appels en faveur d'une intervention gouvernementale. Les acteurs ne s'entendent cependant pas sur l'utilité et l'opportunité de sanctions pénales en la matière. Par ailleurs, la Cour suprême du Canada a rendu des arrêts concernant l'impact de la faute conjugale en matière alimentaire et concernant la rétroactivité des ordonnances alimentaires pour enfants.

In 2006, Canada revisited the question of same-sex marriage. A minority of Canadians strongly opposed the opening up of civil marriage to same-sex couples but was unsuccessful in reintroducing the traditional definition of marriage. Government reports on polygamy generated considerable public debate. Concerns about mistreatment of children and women among fundamentalist religious groups within Canada who practice polygamy have generated calls for government action, although there are divided views on whether criminal sanctions are an effective way of dealing with the problems. The Supreme Court of Canada handed down decisions on the relationship of fault to spousal support and on retroactive child support orders.

I INTRODUCTION

Continuing moral objections to the opening up of civil marriage to same-sex couples led Canada's newly elected Conservative government to briefly reopen the debate on that issue. Also the subjects of heated moral debate were polygamous marriages and plural unions, following release of government-commissioned reports on those issues. Of more concern to family law practitioners were the Supreme Court of Canada's decisions on the relationship of fault to spousal support and on 'retroactive' child support orders.

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II SAME-SEX MARRIAGE

Canada's Civil Marriage Act opened up civil marriage to same-sex couples across the country in 2005.[1] This statute was enacted under the Liberal Government. Most members of the Liberal party, the left-wing New Democratic party and the Bloc Québécois, a federal party but with members from Quebec only, voted in favour. Almost all members of the Conservative party voted against.

Parliament was dissolved at the end of November 2005. Stephen Harper, leader of the Conservatives, immediately said that if his party formed the next government they would hold a free vote in Parliament on whether to restore the traditional definition of marriage.[2] In the election held on 23 January 2006, the Conservatives won enough seats to form a minority government. Without the majority needed to ensure passage of a motion to reopen the debate, Prime Minister Harper's newly elected government moved cautiously, and only at the end of 2006 did it fulfil the pledge to reopen the question of same-sex marriage.

On 7 December 2006, the House, on a free vote and by a margin of 175 to 123, defeated the following motion:

> 'That this House call on the government to introduce legislation to restore the traditional definition of marriage without affecting civil unions and while respecting existing same-sex marriages.'[3]

Most members of the minority Conservative Government supported the motion, most Liberals and Bloc Québécois and all New Democratic party members were opposed. Prime Minister Harper immediately announced that the issue was settled and that his government would not reopen the matter even if it were to win a majority government in the next election.[4]

The Prime Minister's acknowledgement that this was a losing political battle was a blow to his socially conservative supporters, many of whom vowed to continue the fight. The statement of one Catholic bishop captured the heartfelt moral concern of those advocating for the traditional definition of marriage:

> 'What a terrible irony it is to witness our country sinking ever deeper into the morass of moral chaos and confusion as we ignore the sane order established by God for the good of creation. Rather than protecting this institution, so critical to the health and stability of society, our government denatures marriage and the family. The unique and irreplaceable contribution to the common good of society

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1 Civil Marriage Act, SC 2005, c 33. Federal statutes are available online at http://laws.justice.gc.ca/en. Note that prior to this enactment, civil marriage was available to same-sex couples in some provinces pursuant to court rulings that the traditional definition of marriage was unconstitutional.

2 Deveau 'Tories reopen same-sex marriage debate' *Globe & Mail*, 29 November 2005.

3 39th Parliament, 1st Session, *Edited Hansard*, No 093, 7 December 2006.

4 Galloway 'Same-sex marriage file closed for good, PM says' *Globe & Mail*, 8 December 2006.

> that men and women make when they enter into marriage, and especially when they beget and educate children, is no longer treasured or protected by those who make our laws.'[5]

Despite the resolve of the bishop and other social conservatives, the general consensus is that the same-sex marriage issue will not be reopened in the foreseeable future. The Enlightenment model of marriage, with terms set not by God or nature but by the parties themselves, in accordance with the evolving norms of civil society,[6] has long been embedded in Canadian law and remains so.

While Parliament was finally resolving the question of same-sex marriage, courts had been dealing with the issue of interpreting 'adultery' in light of the changed definition of marriage. Canada's Divorce Act gives one ground of divorce – marriage breakdown – but provides that marriage breakdown may be established by proving that the parties have lived separate and apart for one year or by proving adultery or cruelty.[7] 'Adultery' is not defined in the Divorce Act, but courts have generally interpreted it to mean voluntary sexual intercourse by a married person with someone of the opposite sex other than his or her spouse. Thus, by definition, homosexual acts were not considered 'adultery'. This traditional approach had to be re-examined in light of the opening up of civil marriage to same-sex couples.

The question was first addressed by the Supreme Court of British Columbia in the 2005 case of *SEP v DDP*.[8] A petition for divorce was brought by the wife on the basis of her husband's 'adultery' with another man. The wife's argument that 'adultery' could include sexual acts with a person of the same sex was supported by the Attorney General of Canada, an intervenor in the case. The judge reviewed the traditional common law interpretations of 'adultery', which were based on the traditional definition of marriage as a union of one man and one woman and the notion that the purpose of marriage was procreation, and noted that 'the historical justification for civil and, in fact, criminal penalties for adultery was the societal interest in ensuring the line of heredity was not adulterated'.[9] Taking into account the principle enunciated by the Supreme Court of Canada (Iacobucci J) that 'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country',[10] the court reasoned that the new definition and identified purposes of marriage required a rethinking of the traditional interpretation of adultery, commenting:

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5 Westen 'Bishop Wingle: Canada "Sinking Ever Deeper into the Morass of Moral Chaos" Criticizes Politicians for Failing to Protect the "Authentic" and "Sane" Definition of Marriage' *LifeSite*, 11 December 2006, online at www.lifesite.net/ldn/2006/dec/06121104.html.

6 Witte Jr *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006) at pp 306–308.

7 Divorce Act, SC 1985, c 3 (2nd Supp) C D-3.4, s 8.

8 *SEP v DDP* (2005) 259 DLR (4th) 358 (BCSC).

9 Ibid at para 43.

10 *R v Salituro* [1991] 3 SCR 654 at 670.

> '[M]arriage is now an institution to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. The evolution of societal values concerning same-sex marriage has not been without controversy or opposition. However, I consider parliament's enactment of the *Civil Marriage Act* to be a legislative statement of the current values of our society consistent with the Charter that I am obliged to use as a guide to my consideration of the current common law definition of adultery. Individuals of the same sex can now marry and divorce and the common law would be anomalous if those same-sex spouses were not bound by the same legal and social constraints against extra-marital sexual relationships that apply to heterosexual spouses.'[11]

Noting that 'intimate sexual activity outside of marriage may represent a violation of the marital bond and be devastating to the spouse and the marital bond regardless of the specific nature of the sexual act performed', the judge concluded that 'adultery' for the purposes of the Divorce Act may include same-sex acts.[12] As a result, the divorce was granted.

In 2006, the definition of 'adultery' again arose in the context of a petition for divorce brought by a husband on the basis of the wife's sexual contact with a same-sex partner.[13] The New Brunswick Court of Queen's Bench adopted the reasoning of the court in *SEP v DDP*, summarised above, but added some additional points that are worthy of attention. In particular, the court emphasised the responsibilities correlative with the rights of marriage:

> 'Equal treatment before the law endows rights. What is sometimes overlooked is that it also imposes responsibilities. Equal treatment means equal obligations, equal responsibilities, and the acceptance of equal consequences.
>
> The consequence of infidelity, at least in the context of the *Divorce Act*, should not be confined to heterosexual spouses. To do so grants license to homosexual spouses to be sexually unfaithful and to violate vows, untrammeled by the prospect of a fault-based dissolution of their marriage. That is not equal treatment.'[14]

As a result, the husband was granted a divorce on the basis of his wife's adultery with a same-sex partner. The issue of the correct interpretation of 'adultery' in the context of same-sex marriage seems to have been resolved.

III POLYGAMY AND PLURAL MARRIAGE

In contrast to Canada, most countries do not permit same-sex marriage, many consider same-sex relationships immoral, and many impose criminal sanctions

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11 *SEP v DDP* (2005) 259 DLR (4th) 358 (BCSC) at para 43.
12 Ibid at paras 48–49.
13 *Thebeau v Thebeau* (2006) 27 RFL (6th) 430 (NBQB).
14 Ibid at paras 11–12.

for sexual activity between parties of the same sex.[15] Many of these same countries continue to permit or tolerate polygamy, in accordance with religious or customary practice. In Canada it is not same-sex relationships but polygamous marriages that are considered immoral and criminalised. The disapprobation of polygamy in Western countries is longstanding and consistent with gender equality norms enshrined in human rights treaties and constitutions. The United Nations Committee on the Elimination of Discrimination Against Women has consistently inveighed against polygamy, and in 1992 issued a General Recommendation that included the following:

> 'Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5(a) of the Convention.'[16]

While Canada does not permit polygamy, it does recognise foreign polygamous marriages for some purposes, as is the case with most countries. Under Canadian law, a foreign marriage is valid if it is formally valid under the law of the place of celebration and essentially valid under the law of each party's prenuptial domicile.[17] It is possible to refuse recognition to a foreign marriage on the ground of public policy, but this discretion is rarely exercised. There is no blanket prohibition against the recognition of foreign polygamous marriages on public policy grounds. On the contrary, they are recognised for many purposes. '[P]olygamous marriages valid in the country where they were entered into and where the parties were domiciled would be recognized as valid by Canadian Courts.'[18]

Sometimes included in references to 'polygamous marriages' are 'plural unions' entered into by some renegade religious sects in North America, in particular the Fundamentalist Church of Jesus Christ of Latter Day Saints. The most

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[15] LGBT World Legal Wrap Up Survey (ILGA, 2006), available online at www.ilga.org/statehomophobia/World_legal_wrap_up_survey_November2006.pdf.

[16] UNCEDAW, 13th Session, General Recommendation 21: *Equality in marriage and family relations*(1992) UN Doc A/49/38 [UNCEDAW Recommendation] at 1. Article 5(a) of the Convention provides: 'States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'

[17] The common law provinces follow *Brook v Brook* (1861) 9 HL Cas 193. For Quebec, see *Civil Code of Quebec*, SQ 1991, c 64, Art 3083.

[18] *Ali v Canada (Minister of Citizenship and Immigration)* (1998) 154 FTR 285 at para 7. For an explanation of the apparent anomaly involved in extending recognition to foreign polygamous marriages, see Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) Neth Int'l L Rev 373 at pp 382-383.

well-known such sect in Canada is in Bountiful, British Columbia.[19] These plural unions are not legally recognised as marriages under Canadian law. There have been widespread concerns about allegations of abuse of women and children and other social problems in these communities.

In 2005, Status of Women Canada, a government agency that promotes gender equality, commissioned four research reports on the topic of polygamy.[20] The reports were printed and bound in one volume in late 2005 but not immediately released. As lead author of one of the reports,[21] I was then advised by Status of Women Canada that the reports had been requested by a reporter pursuant to Canada's Access to Information Act.[22] After the reporter obtained the report, he published an article in the national press.[23] The article was published just before the federal election in which Stephen Harper's Conservatives won enough seats to form a minority government. Perhaps because of the conditions in which the reports were released – an ongoing election campaign in which issues of same-sex marriage and moral values relating to the family were raised – the reports drew much attention. The original news item was subsequently picked up by the wire services, and the story was widely circulated across North America.

Some of the media stories suggested that the reports were urging that polygamy be 'legalised' in Canada.[24] During the debates on same-sex marriage, Stephen Harper had warned that, if same-sex legislation were passed, other claims for redefining marriage, for example by legalising polygamy, could be pressed.[25] In fact, none of the four reports recommended allowing polygamous marriages to take place in Canada. All of the reports emphasised the harms to women and children associated with polygamy. However, the reports did express some reservations about imposing criminal sanctions on parties to foreign polygamous marriages or plural unions. There was a division in the reports as to the constitutionality of the criminal provision and whether it should be repealed. The report that I co-authored recommended repeal of the criminal provision on polygamy but that other criminal laws and civil laws be used to combat the harms associated with polygamy. It was this recommendation to repeal the criminal provision that generated most of the media attention.

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19 The Canadian Broadcasting Corporation (CBC) has had a number of stories on this community. See 'Bust-up in Bountiful' (CBC, The Fifth Estate), online at www.cbc.ca/fifth/bustupinbountiful/.

20 Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005), available online at www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.html.

21 Bailey et al 'Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada' in *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005).

22 Access to Information Act, RS 1985, c A-1.

23 Dean Beeby 'Study Recommends Repealing Polygamy Ban in Canada' (12 January 2006).

24 See, eg, 'Legalize Polygamy, Study Urges' *Globe & Mail,* 12 January 2006.

25 Bibby 'Polygamy and the Same-sex Marriage Debate' Press Release, The Vanier Institute of the Family (25 January 2005), online at www.vifamily.ca/newsroom/press_jan_25_05.html.

The criminal prohibition against polygamy is set out in s 293 of the Criminal Code,[26] which provides:

> '293.(1) Every one who
>
> (a) practises or enters into or in any manner agrees or consents to practise or enter into
> (i) any form of polygamy, or
> (ii) any kind of conjugal union with more than one person at the same time,
> whether or not it is by law recognized as a binding form of marriage, or
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.'

By its terms, s 293 applies to both foreign polygamous marriages and to plural unions. The report that I co-authored primarily addressed issues relating to recognition of foreign polygamous marriages, but it did consider the application of s 293 to both foreign polygamous marriages and to plural unions and recommended repeal of s 293 in its entirety. The other reports gave more attention to plural unions of the sort existing in Bountiful, British Columbia. Two of the reports recommended retaining s 293 but suggested that prosecutions be conducted with sensitivity to the vulnerabilities and equality concerns involved.[27] Angela Campbell, who authored the fourth report, had this to say:

> 'The Parliament of Canada, in particular, the federal Department of Justice, must revisit the criminalization of bigamy and polygamy. These offences are rarely prosecuted and, as discussed, might not be consistent with current social perceptions of marriage. Moreover, the penal consequences that ensue from these offences might place women and children at considerable risk. As such, further study should be undertaken to determine the propriety of maintaining these offences in the Criminal Code.'[28]

Campbell's observation that the offences of polygamy and bigamy are rarely prosecuted is germane. There is general concern about the failure to deal with the exploitation and abuses that are often a feature of polygamous marriages and plural unions. The challenges of investigating and prosecuting the offence of polygamy and, more recently, apprehensions about challenges to the constitutionality of s 293 have prevented governments from proceeding. And

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[26] RS 1985, c C-34, s 257.

[27] Bala et al 'An International Review of Polygamy: Legal and Policy Implications for Canada' and The Alberta Civil Liberties Research Centre 'Separate and Unequal: The Women and Children of Polygamy' in *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research* (Ottawa: Status of Women Canada, 2005).

[28] Campbell 'How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis' in *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research*, ibid.

there is divided opinion as whether prosecutions for polygamy per se (as opposed to prosecutions for other offences that may have been committed) are the most effective way of dealing with the problems without further harming any women and children who have been victimised.

Later in 2006, another Government study on polygamy was released.[29] This broad-ranging report thoroughly outlined the harms associated with polygyny and emphasised that polygyny is a form of discrimination and a violation of international law. It recommended vigorous action to address the practice in Canada and measures to protect the women and children living in or transitioning from polygynous families. The report recommended these temporary measures to ensure that women and children 'are effectively protected from ongoing human rights violations and acts of discrimination, and are assisted in fully integrating into broader society':

> '– an inter-ministerial investigation into polygyny and polygyny-related abuses in Bountiful, B.C. and elsewhere in Canada until such abuses are eliminated (with an emphasis on the Attorney-General's duty to prosecute criminal offences occurring within such communities)
>
> – the development of gender-, religiously-, and culturally-sensitive guidelines for law enforcement officers and social workers investigating cases of polygynous families
>
> – a review and amendment of existing provincial family legislation relating to spousal support and matrimonial property to ensure that women leaving polygynous unions – whether de jure or de facto – can qualify for the automatic consideration of support where needed and equalization of net family property
>
> – training for law enforcement officials, social services authorities, health-care professionals, judges, lawyers, and teachers regarding the characteristics of polygynous families and polygyny-related abuses, until such time as training goals are achieved
>
> – free legal aid for women fleeing polygynous relationships/communities, until polygyny is eliminated
>
> – public education campaigns about polygyny and polygyny-related violations of human rights, until polygyny is eliminated
>
> – a time-limited working group within the Canadian Department of Justice to coordinate governmental policies on and assist with prosecutions of polygyny-related criminal offences
>
> – training for school counsellors about the impact of polygyny on young girls, as long as the practice continues to exist; within the Bountiful, B.C. community, this

[29] Cook and Kelly 'Polygyny and Canada's Obligations Under International Human Rights Law' (Ottawa: Department of Justice Canada, 2006), online at www.justice.gc.ca/en/dept/pub/poly/index.html#01.

should involve a counsellor who is not from the community in order that students learn some of the life skills that may be ignored in their regular curriculum

– provide and fund support services for individuals who wish to leave polygynous relationships/communities, until polygyny is eliminated, including, but not limited to:

(a) safe houses for up to 90 days that are staffed with counsellors with training regarding these types of family circumstances
(b) assistance with life skills such as managing one's financial and personal affairs
(c) counselling in sexual abuse/incest issues, grief resolution, and family separation issues.'

In a media report on this most recent study, a spokesperson for the Department of Justice Canada was quoted as saying that it 'reaffirms the position that polygamy will remain illegal in Canada' but that enforcement of the Criminal Code remains the responsibility of individual provinces.[30]

It seems unlikely that there will be any change to the Criminal Code provision on polygamy. Whether the provincial governments begin to prosecute cases remains to be seen. The widespread discussion of polygamy and plural unions over the course of 2006 may lead provincial governments to consider pursuing prosecutions or spur initiatives to assist and protect women and children in these relationships.

IV FAULT AND SPOUSAL SUPPORT

The 2006 Supreme Court of Canada decision on spousal support was not as morally charged as the public debates on same-sex marriage and polygamy. But because the decision addressed the question of marital fault and its relevance to spousal support, it obliquely dealt with the relationship between state regulation of marriage breakdown and morality. The relevance of fault to spousal support has not much concerned Canadian courts over the past 40 years. In 1968, Canada introduced no-fault divorce and replaced the traditional spousal support regime, under which an innocent (non-adulterous) wife was entitled to support for the duration of her life or until she remarried, with a needs-based system no longer linked to fault. Therefore fault has not been a relevant factor in determining spousal support, and it was something of a surprise for the matter to be raised in the 2006 appeal.

In *Leskun v Leskun*, the Supreme Court of Canada was asked to interpret the spousal support provisions of the Divorce Act.[31] The Divorce Act provides that a court determining spousal support shall consider the condition, means, needs and other circumstances of each spouse, and it explicitly provides that in

[30] Tibbetts 'Canada Criticized Over Polygamy' *National Post*, 23 October 2006.
[31] *Leskun v Leskun* [2006] 1 SCR 920.

determining spousal support, 'the court shall not take into consideration any misconduct of a spouse in relation to the marriage'.[32] This means that a recipient who has committed adultery or been cruel does not have her or his support reduced or cut off completely for that reason. And it means that a payor does not pay support or increased support because of the payor's marital misconduct. Instead the court is to consider the condition, means, needs and other circumstances of each spouse.

If a spouse's condition or need was caused by the other's misconduct, this does not render the condition or need irrelevant. A distinction must be drawn between the consequences of misconduct and the misconduct itself. There are various reasons why a spouse may be unable to work – age, lack of education, mental or physical disability, etc. That the inability to work was caused by the other spouse's misconduct does not mean that we can ignore the very relevant fact that a spouse is unable to work. Support is ordered not *because* of the misconduct but because of the fact that the spouse is not able to support himself or herself.

In the *Leskun* case, the wife had contributed to the support of the family and her husband's education during the 20-year marriage. After the wife suffered a back injury and lost her job, the husband deserted her in order to marry someone with whom he had been carrying on a long-term extra-marital relationship. The wife was deeply affected by the husband's betrayal and desertion. She was unable to become self-sufficient following the separation and required ongoing spousal support. The husband applied for an order to discontinue spousal support 4 years after the parties' divorce, but his application was dismissed. In the appeal to the Supreme Court of Canada, the husband argued that the order for ongoing support made in the court below essentially punished him for his marital misconduct and that this was impermissible under the Divorce Act. The husband's argument was rooted in the reasons for judgment given in this case in the court below by one of the judges of the British Columbia Court of Appeal. The judge said that the court could properly consider the fact that the wife's failure to achieve self-sufficiency resulted 'at least in part from the emotional devastation of misconduct by the other spouse', and that the claimant wife in this case was 'bitter to the point of obsession with [the husband's] misconduct and in consequence [she] has been unable to make a new life. Her life is this litigation.'[33]

The Supreme Court of Canada confirmed that fault plays no part in the determination of spousal support and that any suggestion to the contrary in the language of the court below was misguided. The wife was unable to obtain employment because of her age (57), limited range of job experience, health problems and family difficulties. The support order addressed the need of the wife and was not 'punishment' for the husband's misconduct. Furthermore, the Court rejected the husband's argument that the wife had breached a duty to

[32] Divorce Act, SC 1985, c 3 (2nd Supp) c D-3.4, s 15.2(5).
[33] 2004 BCCA 422 at paras 56 and 54.

become self-sufficient. The Divorce Act provides that one of the objectives of a spousal support order is to 'in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time'.[34] The provision does not require every spouse to become self-sufficient, and the words 'in so far as practicable' are an acknowledgement that in some cases self-sufficiency will not be possible. Justice Binnie, for the Court, stated:

> 'Failure to achieve self-sufficiency is not breach of "a duty" and is simply one factor amongst others to be taken into account.'[35]

V RETROACTIVE CHILD SUPPORT

The relationship between morality and legal obligation was taken up by the Supreme Court of Canada in a 2006 quartet of child support cases.[36] In considering the circumstances in which the support obligation should be imposed 'retroactively,' ie to run from a period prior to the request for support or application for a court order, the Court recognised that Canada's comprehensive statutory regime is undergirded and preceded by the moral responsibilities owed by a parent to a child. As Bastarache J, writing for the majority, stated:

> 'The parent-child relationship engages not only moral obligations, but legal ones as well. Canadians will be familiar with these legal obligations as they have come to be refined, quantified and amplified through contemporary legislative enactments.'[37]

Of the four cases appealed to the Court from the province of Alberta, two were decided under the federal Divorce Act provisions on child support. The other two involved unmarried couples and therefore the provincial Parentage and Maintenance Act,[38] which provides for child support in cases not involving a divorce, was the governing legislation. Both Statutes include child support guidelines, under which the quantum of support is determined in accordance with the payor's income. The implications of such guidelines, which overlay the pre-existing moral obligation of parents to support their children, were drawn by Bastarche J:

> '[P]arents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independently of any statute or court order. To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the

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34 Divorce Act, SC 1985, c 3 (2nd Supp) c D-3.4, s 15.2 (6)(d).
35 *Leskun v Leskun* [2006] 1 SCR 920 at para 27.
36 *DBS v SRG*; *LJW v TAR*; *Henry v Henry*; *Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 SCR 231.
37 Ibid at para 37.
38 RSA 2000, c P-1.

> federal scheme, a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.'[39]

Thus, despite the fact that there has been no request for child support or application for a court order, the failure of a payor to make payments commensurate with his or her income may be viewed as breach of an obligation.

Although the four cases raised a common issue, the circumstances of each was distinct. In all four the child support payments were below the amount set by the guidelines, and the moral culpability of the payors varied. The Court made clear that a contextual approach that takes into account the circumstances of each case is required when dealing with applications for retroactive child support. The extent of irresponsibility of the recipient or moral culpability of the payor are important factors to consider. As Bastarache J stated:

> 'Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect.'[40]

Each of the two cases governed by the provincial legislation involved an unmarried couple with three children. In *DBS v SRG*, the parties had an informal shared custody arrangement after separation. The father's income was substantially higher than the mother's, but neither paid child support to the other. Five years after separation, the mother applied for retroactive and ongoing child support under the provincial Statute. In the second case, *TAR v LJW*, the children lived with their mother following the parties' separation. The father paid $150 per month support in accordance with the parties' agreement, and this was later increased to $300 a month pursuant to a consent order. These sums were lower than those in statutory child support guidelines. The mother eventually applied for retroactive child support consistent with the guidelines.

Henry v Henry, the first of the two cases governed by the federal Divorce Act, involved a couple who had divorced in 1991, prior to enactment of child support guidelines. The mother had custody of the two children, and the father paid $700 per month in child support. The father, whose income increased dramatically after the divorce, eventually increased his support payments, but the increased amounts were substantially below the child support guidelines that were now in place. The father refused the mother's requests for additional financial assistance and was hostile rather than sympathetic when apprised of her straitened circumstances. In 2003, the mother applied for an order to increase child support payments to the guidelines amount retroactive to 1 July 1997, when the guidelines had come into effect. In the second case, *Hiemstra v Hiemstra*, the parties' two children lived with the father following the 1996

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[39] *DBS v SRG*; *LJW v TAR*; *Henry v Henry*; *Hiemstra v Hiemstra*, 2006 SCC 37, [2006] 2 SCR 231 at para 44.

[40] Ibid at para 5.

divorce, and the mother paid child support. When the son moved in with the mother in 2000, child support was discontinued. The mother asked the father to help with the daughter's college expenses in 2003. Despite his substantial income, the father refused. In 2004, the mother, who was then supporting both children, applied for retroactive child support.

In determining whether an order for retroactive child support was justified, the Court set out four factors to consider:

(1) unreasonable delay of the recipient in seeking support;

(2) conduct of payor;

(3) circumstances of the child; and

(4) any hardship that would result from a retroactive order.

Applying these factors, the Court ruled that retroactive support was not justified in either of the two cases governed by the provincial legislation. In *DBS v SRG*, the court's decision was based the delay of the mother in seeking support, the lack of blameworthy conduct on the part of the payor father and the fact that retroactive support would not benefit the children. In ruling against retroactive child support in the second case, *TAR v LJW*, the Court placed significant weight on the fact that the father had not deceived the mother about his financial circumstances nor behaved in a blameworthy fashion. In addition, the father's household income was below that of the mother.

Retroactive child support orders were made in the two Divorce Act cases. In *Henry v Henry*, the Court emphasised the blameworthy conduct of the father:

> 'Especially when a payor parent is acutely aware of the needs of his/her children living with the recipient parent, it is no excuse to shrug off one's obligations by saying the recipient parent never asked for disclosure. But Mr. Henry went even further: he insinuated that he did not have great financial means and that the mother's financial management was to blame; and on one occasion, he even asked her to give financial assistance . . . Mr. Henry was aware that his income had risen substantially since the original order was rendered, he was aware that his children were living at levels commensurate with his ex-wife's low income, and he still refused to raise his payments to levels appropriate to his income. This conduct falls well short of what is expected from a parent.'[41]

The Court also took into account the fact that the children had lived for a substantial period below the standard of living that was appropriate in light of their father's income and determined that they were entitled to be compensated for this deprivation. As well, the Court was satisfied a retroactive order would not impose any undue burden on the father.

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[41] Ibid at para 147.

Similarly, in *Hiemstra v Hiemstra* the Court emphasised the father's blameworthy conduct. The degree of culpability was less than in the other Divorce Act case, but the Court reasoned that the father should have provided support when he could well afford to do so and the mother was assuming the full responsibility. The Court was particularly critical of the father's refusal to contribute to his daughter's college expenses, saying that 'he did not take advantage of the opportunity to lend financial support when it so clearly arose'.[42]

VI CONCLUSION

Moral questions played a prominent role in family law this year. The opening up of civil marriage to same-sex couples seems to have been settled in Canada, but this further abandonment of the religious moorings of marriage have left deep unease among many faith communities. The problems related to plural unions in renegade religious sects have received much attention in 2006, and many hope that the Government will take effective action to assist and protect the women and children involved. Immigration from countries that continue to permit polygamy may increase attention to issues relating to valid foreign polygamous marriages, but at present these seem to be less of a concern than the plural marriages in communities such as Bountiful.

For practitioners, the resurrection of the notion that spousal support might be linked to marital fault created a brief flurry of debate. However, the Supreme Court of Canada put the matter to rest by confirming Canada's long-standing rule that spousal support is a needs-based determination unconnected with marital fault. The Court's quartet of retroactive child support decisions emphasised the moral obligation of parents to their children that underpins the legislative framework.

[42] Ibid at para 153.

England and Wales

WHO ARE MY FAMILY?

Mary Welstead[*]

Résumé

En 2005, plusieurs décisions intéressantes ont été rendues dans la juridiction d'Angleterre et du Pays de Galles sur la question de savoir comment une personne devient un membre de la famille d'une autre personne ou s'en voit refuser l'accès. L'entrée dans une relation familiale crée un statut social et légal et ce nouveau statut implique des droits et des obligations. Par conséquent, j'ai fait le choix de consacrer cette étude annuelle du droit de la famille à la question des règles en matière de reconnaissance de certains liens familiaux.

I WHO MAY MARRY WHOM?

(a) Parents-in-law and children-in-law

In *B and L v United Kingdom*,[1] a man in his late 50s began a relationship with his daughter-in-law after her marriage to his son had broken down but prior to their divorce. His son and daughter-in-law had a child, a boy, who now lived with the man and his mother. The boy called the man, who was, of course, his grandfather, 'dad'. He saw little of his biological father. After his son's divorce, the man wished to marry his former daughter-in-law and adopt his grandson and bring him up in their newly formed family. On making enquiries at their local register office, the couple were told by the superintendent registrar of deaths and marriages that, in accordance with the Marriage Act 1949, they could not do so.[2] The Act provides that a marriage between a man and his son's former wife and a marriage between a woman and her daughter's former husband will be void unless both parties are aged 21 or over and their former spouses are dead.[3] Rather unusually, it is possible to circumvent the rule; the couple may apply to have the marriage authorised by way of a personal Act of Parliament. This is an expensive process and takes time but rather strangely, it appears to involve minimal enquiry into the couple's circumstances or the

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1 [2006] 1 FLR 35; Gaffney-Rhys 'The Law Relating To Affinity After *B and L v UK*' [2005] Fam LJ 35 (955).

2 See the Marriage Act 1949, as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986, s 1, Part III of Sch 1.

3 Ibid, s 1(4) and (5) and Matrimonial Causes Act 1973, s 11.

potential effects on any children or other members of the family. It appears to be a somewhat Byzantine approach to the regulation of who may marry whom.

The couple in *B v L* complained to the European Court of Human Rights (ECtHR). They alleged that the UK's approach to the control of marriage was a breach of their rights under Art 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 12 provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. This rider clearly allows considerable freedom to Convention states to limit the right. However, the ECtHR maintained that any such limitation must not destroy the essence of Art 12, and found that the UK Government was in breach of Art 12 because it did precisely that.

In its judgment, the ECtHR explained that it should not merely substitute its view for that of the Convention state. There were sensitive moral issues, dependent on the prevailing culture, involved in regulating marriage, as well as the need to protect children and safeguard the integrity and stability of the family. These issues might be better decided by individual Convention states who understood the culture of the society concerned.

The UK claimed that its ban of marriages between a former father-in-law and his former daughter-in-law or a former mother-in-law and her former son-in-law, while their spouses were still alive, had as its aim the protection of the family. It explained that the law was an attempt to prevent the development of sexual rivalry between parents and children.[4] It also argued that the law served to protect children, and particularly minors, from the emotional distress involved in adapting to a change in the relationships between their parents and their grandparents. To permit these marriages would result in a change in the status of all members of the family. For instance, if a former daughter-in-law were permitted to marry her father-in-law while her former husband was still alive, the latter would become her stepson, and any children of the former marriage would become their grandfather's stepchildren and stepsiblings to their father.

The ECtHR accepted that the UK's aims behind the law were entirely legitimate. However, it maintained that the UK law did not satisfactorily serve these aims, it merely prevented former parents-in-law and former children-in-law from marrying; it did not prevent them from cohabiting. A sexual relationship between such persons is not a crime; it does not constitute incest.[5] The ECtHR also held that the law could not help children to avoid emotional confusion about relationships if their parent and grandparent were able to

[4] Readers may have seen Louis Malle's 1993 film, *Damage* (from the novel of the same name by Josephine Hart), which relates the tragic tale of an obsessive love affair between a father-in-law and his daughter-in-law.

[5] See the Sexual Offences Act 2003, s 65.

cohabit. The reality was that they would be living in the context of a new family involving a regrouping of their close relations and the creation of new de facto familial statuses.

The UK Government had argued that its ban on these marriages was not absolute because the deaths of a couple's former spouses waived the ban, and a personal Act of Parliament could also be obtained by the couple. These provisions ensured that the law did not offend the essence of Art 12; it did not prevent the marriage of former parents-in-law and children-in-law but merely circumscribed it in a reasonable way in conformance with legitimate aims. The ECtHR's response to this argument was that the avowed aims of the law were seriously compromised by the permitted circumventions of it. They were not fair means of achieving the law's aims. Private Acts of Parliament are expensive and unrealistic for the majority of the population. Parents-in-law and children-in-law were, in reality, prevented from marrying except in severely circumscribed circumstances. The UK law was, therefore, a clear breach of Art 12 of the ECHR.

As a consequence of this decision, the UK Government will be forced to reform the law[6] and reconsider the rules relating to marriage and the prohibited degrees of kindred. The rules have their origin in canon law which used to regulate marriage in the UK until the middle of the 19th century. Canon law itself had origins in biblical texts. Gaffney-Rhys in a fascinating article has explained that:[7]

> 'Leviticus 18:7-17 states that "a man shall not lie with his mother, his father's wife, his sister or sister in law, his daughter, granddaughter, daughter in law or his wife's daughter, his aunt or his uncle's wife". According to the Christian Church, a husband and wife were 'one flesh' (Genesis 2:24) and as a consequence, marrying one's in-laws was considered equivalent to marrying one's blood relatives. This view was confirmed by a vast amount of legislation produced by the church during the eleventh to thirteenth centuries. The legislation was extensive, as prohibited degrees could be created not only through blood and marriage, but also by entering into an extra-marital sexual relationship and by becoming a godparent. Although the prohibition against marriage between close relatives appeared to have a spiritual basis, according to J Goody,[8] the true purpose of the prohibition was to reduce the total number of marriages contracted in a year. This would increase the number of celibate and childless citizens and hence increase bequests to the church.'

It is of interest to note that the UK law imposes almost identical rules on those who wish to enter into a civil partnership as it does on those who wish to marry in spite of Government protestations that the relationship of civil partnership is totally different to that of marriage.[9]

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6 The implementation of the Human Rights Act 1998 requires that UK law conforms with the ECHR.

7 Gaffney-Rhys 'The Law Relating to Affinity After *B and L v UK* [2005] Fam LJ 35 (955).

8 The Development of the Family and Marriage in Europe (Cambridge University Press, 1983).

9 www.womenandequalityunit.gov.uk/lgbt/faq.htm (2005).

(b) Same-sex couples

Since December 2005, when the Civil Partnerships Act came into force, Same-sex couples may enter into a marital-type relationship but may not legally marry. The Act and its consequences were discussed in detail in the previous *International Survey of Family Law*.[10] Problems arise when a couple, who are legitimately married in a jurisdiction where such marriages are permitted, wish to have the marriage recognised in the UK.

In September 2005, an English lesbian couple who had entered into a legal same-sex marriage while resident in Canada returned to live in England. Their marriage could be registered as civil partnership but the couple wanted more than that; they wished to have the marriage recognised as a legal marriage in England. They commenced proceedings under s 55 of the Family Law Act 1986 and claimed that the UK's failure to recognise the validity of their marriage was a breach of their human rights under Art 12 of the ECHR. The case was transferred to the High Court to be heard in 2006.

II VULNERABLE ADULTS AND FORCED MARRIAGES

(a) Mental incapacity

In order to enter into a valid marriage, a person must have the mental capacity to understand the nature of the marriage contract and voluntarily consent to it. Members of their family may not consent to marriage on their behalf, or force them to marry and acquire membership of another family against their will. Mental incapacity or and/or lack of consent results in the marriage being voidable.[11] One of the major issues is who has the right to intervene on behalf of a vulnerable adult in order to protect them from arranged or forced marriages, or indeed, to support them in their desire to marry. Although there is a difference between forced marriages and arranged marriages, for vulnerable adults, whose consent is in some way impaired, the difference may be imperceptible and somewhat academic. At the time of writing, the Mental Capacity Act 2005 is not yet in force; when it comes into force, s 2(1) will give some protection to mentally impaired adults.

In *Sheffield City Council v E and anor*,[12] the court considered the situation of a 21-year-old woman, who had hydrocephalus and spina bifida. The local authority claimed that she functioned like a 13-year-old and was liable to be exploited. She had moved in with a 37-year-old man who had a history of sexually violent crimes and planned to marry him. The local authority wished to prevent the woman from marrying or associating with the man. It sought an

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[10] See Welstead 'Reshaping Marriage and the Family – The Gender Recognition Act 2004 and the Civil Partnership Act 2004' in A Bainham (ed) International Survey of Family Law 2006 (Jordans, 2006).

[11] Matrimonial Causes Act 1973, s 12(c) and (d).

[12] [2005] Fam 326; [2005] All ER (D) 192.

order, under the inherent jurisdiction, to decide what were the appropriate questions to be asked of experts to determine whether the woman had the necessary capacity to marry. The local authority maintained that capacity had to be approached by reference to the particular marriage in question and not to marriage in general.

Munby J explained that marriage, whether civil or religious, is a formal contractual relationship, which confers on each of the parties the new status of spouse. This new status involved living together in a common home; leading a common domestic life; loving one another as husband and wife, to the exclusion of all others, and undertaking reciprocal obligations to enjoy each other's society, comfort and assistance.

The question of capacity, according to Munby J, was a simple one,[13] and not to be compared with decisions relating to medical treatment. He explained that the question whether a person has capacity to marry is quite distinct from that of whether the person is wise to marry, either at all or to marry a particular person. Capacity involves the ability to understand the nature of the contract of marriage, not the implications of a particular marriage. He maintained that the court has no jurisdiction to determine whether it is in a person's best interests to marry a particular person. If an adult lacks capacity to marry, he cannot marry. The court cannot supply consent where the person concerned lacks capacity to give consent himself. Munby J stated, *per curiam*, that there are many people who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. If the test of capacity to marry were to be set too high, it would be unfair and would deprive mentally impaired people from a valuable relationship. The Official Solicitor was ordered to investigate the woman's capacity to instruct a lawyer and if she was not able to act as her litigation friend.

Munby J's view that the contract of marriage is a simple one does not sit easily with his statement that a person must understand all the consequences which flow from it. If correct, many mentally disabled persons will be denied the right to marry. The question arises under what circumstances might such persons be able to challenge a refusal to allow him or her to marry, under Arts 8 and 12 of the ECHR. Marriage or civil partnership remain the only legal means of establishing a stable relationship; a mentally disabled person living in a protected environment may be incapable of understanding the nature of the marriage contract (as indeed may many mentally able persons in advance of their marriage) but may be capable of sustaining, and benefiting from, an emotional and loving relationship. The major argument against marriage of mentally incapacitated persons is the risk to any children born of such a marriage. However, that risk exists whether or not the couple marries.

[13] See *Park v Park* [1954] P 112.

In *M v B, A and S (By The Official Solicitor)*,[14] a young woman of Pakistani origin, aged 23, had been assessed as educationally subnormal. The local authority had been concerned with all seven children because of their problematic family situation. It was particularly worried that the girl's parents might take her to Pakistan and arrange a marriage there for her. The local authority applied to the court for declarations that the woman lacked capacity to make a decision about marriage, and that it was in her best interests that she should not marry or leave the jurisdiction. Injunctions were also sought to forbid the parents from doing anything to facilitate her marriage, or removing her from the jurisdiction, without the court's leave. The parents and the Official Solicitor, who was acting on the woman's behalf, objected to a declaration that she lacked capacity to marry. The parents also maintained that they merely wished to take her on holiday to Pakistan where the extended family lived, and not to arrange, or force her into, a marriage while she was there.

The court followed the decision in *Re E* (above) and granted both the declarations and the injunctions. It held that under the inherent jurisdiction the court has the right, in circumstances where a vulnerable adult's best interests would be at risk, to restrain those responsible for attempting to arrange a marriage. The woman's father here was the dominant member of the family; he lacked insight into her mental state, and a strong cultural desire to see her married. The woman needed to be protected from him.

The court considered the human rights aspect of the decision and maintained that the injunctions and declarations actually protected the woman's rights to privacy under Art 8 of the ECHR rather than infringing her rights.

In *Re SA*,[15] the court significantly extended the role of the inherent jurisdiction to benefit vulnerable adults. It accepted that it could be used in a similar way to that of the wardship jurisdiction in its protection of children. The court explained that the inherent jurisdiction could be used to regulate anything which might affect the vulnerable adult's welfare and happiness, including companionship and domestic and social environment where the adult was incapable of acting himself.

The vulnerable adult in *Re SA* was an 18-year-old woman, whose family originated from Pakistan. She was deaf and dumb, and blind in one eye. She had learned British Sign Language and was unable to lip read and understand her family's languages of Punjabi and Urdu. She was somewhat mentally and educationally retarded, having the mental capacity of a very young teenager and the reading ability of a 7-year-old.

The local authority was concerned to continue the protection she had received during her minority when she reached adulthood. It applied for an order under the inherent jurisdiction to protect her from the potential consequences of an

[14] [2006] 1 FLR 117.
[15] [2006] 1 FLR 867.

arranged or forced marriage. After assessing her, a psychologist concluded, that she had the capacity to understand the general concept of marriage. She expressed a wish to marry a man chosen by her family, provided that she liked him and could live with him in England. According to the psychologist, the woman did not understand the consequences of the very real possibility that her parents might arrange her marriage to someone who could not come to live in England. In which case, she would have to live in a country where she would be unable to communicate with anyone, including the man she might marry. She would be forced to lead an isolated existence.

The court granted the local authority an indefinite order with a power of arrest attached for 6 months. The order was to prevent the woman's parents from indulging in a wide range of destructive behaviour towards her. They were forbidden to:

(1) threaten, intimidate or harass her;

(2) physically harm her;

(3) stop her from communicating in private with a solicitor through a British Sign Language interpreter;

(4) apply for passports or visas without her written agreement, after they had been, translated in British Sign Language, explained to her and notarised before her solicitor or solicitor's agent;

(5) arrange a marriage for her without her express written consent, and a signed notarised statement given to her solicitor by any potential bridegroom that he agrees to allow her to:
   (a) return home within 4 months of the marriage ceremony whether or not he is allowed to enter the UK;
   (b) reside in her home town after the wedding;
   (c) be visited by a worker from the British High Commission within 4 months of the wedding to be interviewed about her wishes relating to her return to England.

The decision is of interest because it demonstrates that the inherent jurisdiction may be used to protect the best interests not only of mentally incapacitated adults but also of adults who are vulnerable for other reasons. Adults may find themselves under constraint, coercion, or undue influence or for some other reason unable to give a valid consent to marriage. In the context of forced marriages, it seems that the inherent jurisdiction could be used to protect a person who is culturally unable to object to their parents' determination to act against their best interests. Adult offspring of first generation immigrants may live divided lives in two cultures. At school and within their peer group, they may have learned values which are very different from those prevailing at home. It may prove difficult for them to protest against their parents' wishes which conflict with their own; they may require help to be able to do so.

The decision in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)*,[16] illustrates the use of the inherent jurisdiction in an innovative way to protect a potentially vulnerable young adult woman. She was not mentally incapacitated in the accepted sense of the term but could be regarded as vulnerable because of her cultural background.

The Foreign and Commonwealth Office had learned that the woman, who lived in England and was of Bangladeshi origin, was somewhere in Bangladesh, probably against her will because her family, consisting of her parents and brothers, wanted to force her to marry there. The Foreign and Commonwealth Office requested that a solicitor take action on her behalf; the woman knew nothing of the court proceedings.

The High Court held that the inherent jurisdiction was capable of responding to new social needs and values. Orders could be made in an adult's best interest if that adult was deprived, in any way, of the capacity to make decisions. The jurisdiction could be exercised even in the absence of the vulnerable person, and without their knowledge.

The court made orders and issued directions to discover whether the woman was being forced to marry and/or remain in Bangladesh against her will.

Her family was ordered to allow her to be interviewed at the High Commission in Bangladesh to find out what she really wanted to do. The order included injunctions restraining the family from arranging any marriage or threatening or using violence against the woman. It would encourage others outside the family to co-operate with the High Commission. Other orders required the woman's relatives, who were living in England, to appear before the High Court. The orders had the desired effect. The relatives communicated with the woman and her family in Bangladesh. The woman was interviewed in Bangladesh by a British Consular officer. She came back to England and explained that she did not need the court's help and the proceedings came to an end.

(b) 'Forced Marriage: a Wrong not a Right'

The Foreign and Commonwealth Office and the Home Office have produced a joint consultation document entitled 'Forced Marriage: a Wrong not a Right' in response to the problem of forced marriages.[17] The aim of the consultation process is to consider, inter alia, whether there should be a specific offence of forcing a person to marry against his or her will. At present, such an offence does not exist, although it may be possible to prosecute those who try to force members of their family for other offences inherent in such conduct. Forced marriage often involves kidnapping, false imprisonment, assault, harassment,

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[16] [2005] 2 FCR 459.

[17] See also Guidance on Forced Marriage from the Law Society of England and Wales [2004] IFL 126; the joint Home Office – Foreign Office Forced Marriage Unit (see www.fco.gov.uk).

child cruelty, rape and other sexual offences, domestic violence, failing to ensure attendance at school, and in extreme cases, murder. The questions posed for consideration in the document are:

- whether a specific criminal offence would help to combat forced marriage;
- how any proposed offence might be formulated;
- how might compliance with the law be enforced given that the conduct often takes place outside of the UK;
- the penalties for such an offence.

The document suggests possible objections to the creation of a specific criminal offence such as:

- victims may fear giving information about their families and risking their prosecution; they may also fear that it might result in irreconcilable family differences and leave victims unable to move on to a new future;
- the risk that children may be taken abroad at an earlier age for forced marriages in order to avoid risks of prosecution in the UK;
- there are already sufficient criminal offences and protective measures that can be used;
- it might be very difficult to achieve a successful prosecution, and any new law would be regularly broken;
- black and minority ethnic communities might misinterpret the purpose of the law and see it as racially or ethnically motivated;
- families might fail to understand the offence because of the cultural acceptability in certain communities of forced marriages, and the belief that their children were consenting to marriage even when they were not;
- the implementation of a new offence would be expensive; funds might be better spent on supporting children at risk;
- there are alternative means of working within communities to change views and tackle the problem.

The document lists arguments in favour of the creation of a specific offence which include:

- new legislation could change public opinion and as a consequence, perception and practice;

- it could have a deterrent effect because it gives a strong message;
- it could help young people by giving them greater bargaining power with their families which might lead to negotiation;
- it could simplify and clarify matters for all involved in tackling the issue.

III RIGHTS TO A FAMILIAL RELATIONSHIP WITH CHILDREN

(a) Non-biological parental relationship

The Human Fertilisation and Embryology Act 1990 (HFEA 1990), s 28(3), confers the relationship of parent and child on a man who attends a licensed clinic with a woman for the purposes of receiving reproductive 'treatment services' together. In *Re R (IVF: Paternity of Child)*,[18] the House of Lords considered the interpretation of this section of the Act in rather unusual circumstances. The woman and her partner, who were unmarried, had sought treatment for infertility at a clinic which offered in vitro fertilisation (IVF) using donor sperm. The couple signed the relevant consent forms. The first round of treatment was unsuccessful and the couple's relationship ended. The woman returned to the clinic with a new partner but did not inform the clinic that he was not the person who had originally signed the consent form. She simply omitted the new partner's name from the consent forms prior to the second round of treatment. The woman became pregnant and gave birth to a daughter.

The woman's former partner made an application for contact and parental responsibility orders. It was common ground before the judge that the man was the child's legal father because he had signed the original consent forms and that the court had jurisdiction. The judge made an indirect contact order and adjourned the parental responsibility application.

The Court of Appeal refused the woman permission to appeal but the Court expressed concern about the issue of jurisdiction. That issue came before the High Court who made a declaration of paternity in favour of the former partner.[19] The woman appealed and the Court of Appeal allowed her appeal.[20]

On appeal by the former partner to the House of Lords, it was held that the relevant time for determining legal parenthood in the context of s 28(2) and (3) of HFEA 1990 was when the embryo or the sperm and eggs were transferred into the woman. The 'treatment services' being provided for a man and woman together had to be ongoing at the moment of implantation. This interpretation

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[18] [2005] 2 AC 621.
[19] *B and D v R (By Her Legal Guardian)* [2002] 2 FLR 843.
[20] *Re R (IVF: Paternity of Child)* [2003] Fam 129.

took into account the aims of the legislation which were to protect the welfare of the child and provide him or her with a parent who had participated, in some sense, in the process of the reproductive technology which had led to his or her birth.

Their Lordships maintained that the conferring of parenthood in this context should not be based on fiction. The process of technological reproduction could take place over a long period of time and it would be unfair to impose parenthood on a man (even if he wanted it) who was no longer involved in a relationship with the woman at the time of implantation of an embryo which did not involve the use of his gametes. Furthermore, the provision of treatment services to a man and woman together required a mental element by the couple and a recognition of that mental element by those working in the clinic providing the services. That mental element was clearly missing here.

The House of Lords expressed the view, *per curiam*, that licensed clinics involved in reproductive technology should be concerned to put in place more sound procedures. This would ensure that those receiving treatment together at the moment of implantation of the gametes or embryo were the same persons as those who had signed the consent forms.

This decision follows the general approach taken in a number of decisions both in England and the US that parenthood with all its rights and its onerous duties should only be imposed at the moment of conception, technological or otherwise. To do otherwise would logically leave both women and men open to having parenthood thrust upon them by virtue of an irreversible contract made in advance of conception.[21]

It is somewhat unusual to find that a man, as in *Re R*, desires to be a parent to a child to whom he is not biologically related and who came into existence some considerable time after his relationship with the child's mother had ended. Many men, it would seem, would rather escape from financial responsibility for the child, the involvement with the child's mother which would inevitably be necessary, and the inheritance issues which would arise not only for the man but also for his extended family.

(b) Uncertainty about biological relationship to a child

In *Lambeth London Borough Council v S, C, V and J (By His Guardian); Legal Services Commission Intervening*,[22] the court was concerned with the assessment of the apportionment of costs for the residential assessment of a putative grandmother as a carer for her putative grandchild. What is of interest for the purposes of this survey is the approach the court took to a putative relative.

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[21] See, eg, *Evans v United Kingdom European Court of Human Rights* (App no 6339/05), [2006] 1 FCR 585.

[22] [2005] 2 FLR 1171.

Care proceedings had been started relating to a child who had gone to live with his maternal grandmother. The child, a boy, had been injured by either his mother or her husband while living with them; it was not known which one of them had caused the harm. The husband was not the child's biological father. The local authority was granted a supervision order and contact conditions were imposed including a requirement that the child was not to be left alone in the care of his mother.

The mother's husband stabbed and killed the child's putative father during the final hearing of the care proceedings and was imprisoned for manslaughter. There were doubts about the child's paternity because, although a declaration had been made that the child's father was the man who had been murdered, there was no conclusive DNA evidence.

The local authority learned that the child was with the mother, in breach of the condition in the supervision order. It was granted a care order after the mother's application for a residence order was dismissed. Both the mother and the maternal grandmother agreed not to make further applications for contact with the child. The putative paternal grandmother expressed a wish that the child should live with her, and the court ordered an assessment of her.[23] There was a positive assessment to the effect that the putative grandmother might be a viable carer for the child. She, therefore, applied for a residential assessment for herself and the child. The mother objected on the grounds that there were doubts about the child's paternity.

The court ignored the mother's objections. The child was profoundly psychologically damaged and needed a stable environment in which he could be helped to cope. It was in his best interests that the residential assessment should take place. The court found that the putative paternal grandmother was a potential blood relative who had always played a part in the child's life. She was the only person who, with help, might be able to care for this child, and the only surviving possible relative who might be able to have a meaningful relationship with him. It would be very difficult to place such a disturbed child elsewhere. She and the child had already enjoyed a de facto family life together and had the right to family life under Art 8 of the ECHR 1950. It was the state's task to positively foster this right.

IV ADOPTION BY RELATIVES AND MEMBERSHIP OF A FAMILY

Under English law, it is an offence to place a child privately for adoption; all arrangements for the adoption of a child, except by relatives, must be made by

[23] See Children Act 1989, s 38(6).

an adoption agency or by an order of the High Court. The term (relatives) is limited to the child's grandparent, brother, sister, uncle and aunt, whether of the full blood or by marriage.[24]

In *Re P; K and K v P and P*,[25] a married couple did not want another child but the woman became pregnant. They offered the child for adoption to the child's great uncle and great aunt, who were unable to have their own biological child. The couple were assessed by the local authority, prior to the adoption, as suitable adoptive parents. An application for an order to allow the parents and adoptive parents to make arrangements for the adoption of the child and to place him for adoption was made under the Adoption Act 1976, s 11(1) (the Adoption and Children Act 2002 was not yet in force).[26]

The court accepted that the adoptive parents did not come within the definition of relatives; however, it was within its jurisdiction to make the order and thereby legalise the arrangements which had already been put in place and were contrary to the Act. The court had regard to all the circumstances of the case and in particular the need to safeguard and promote the welfare of the baby throughout his childhood.

In *Singh v Entry Clearance Officer, New Delhi*,[27] a married couple of Indian origin lived in England. The husband was a British citizen and the wife had a right of permanent residence. They had one biological child and claimed that, in accordance with their religious and cultural custom, they had decided to adopt a 3-month-old child who had been born to a member of their extended family, the husband's cousin's child. A religious ceremony took place in India to confirm the adoption and the adoptive parents registered the adoption as required by Indian law with the Indian court. Parental responsibility was thereby transferred to them. The UK did not recognise the adoption.

The adoptive parents, as sponsors for the child, applied for entry clearance to allow the baby to settle with them in the UK. The application was refused, as were the appeals against the refusal. The parents applied to be allowed to make an application to the ECtHR and their application was ruled admissible. Prior to the application being heard, the Human Rights Act 1998 came into force which allowed a further application alleging that the refusal to allow entry breached the child's human rights under Arts 8 and 14 of the ECHR.

The adjudicator allowed the appeal but the Immigration Appeal Tribunal allowed an appeal against that decision by the entry clearance officer. The Court of Appeal gave the child permission to appeal and the appeal was successful.

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[24] Adoption and Children Act 2002, s 144.
[25] [2005] 1 FLR 303.
[26] Adoption and Children Act 2002, s 92.
[27] [2004] 3 FCR 72.

The Court explained that whether a family life exists within the meaning of Art 8 of the ECHR is a question of fact and degree. It depends upon whether real and close personal ties exist in any individual case. The concept of family life can be extended and changed according to the views of society and is not limited to marital, blood or other legal relationships. Whether the relationship between a child and his adoptive parents constitutes family life depends on the nature of the relationship. If there was no family life or potential for it, a claim to a right under Art 8 to family life would fail. Adoptive relationships came within the ambit of family life. Although there was no legally recognised adoption in this case, it did not cause the appeal to fail. It all depended on how far the adoption departed from a legally recognised one. Where those involved in an inter-country adoption had paid minimal regard to the best interests of the child, it might result in a refusal to recognise the existence of family life. There were significant differences between child-trafficking arrangements, posing as adoption, and adoptions, as here, which genuinely sought to give a child a proper family life.

V COHABITANTS' RIGHTS TO CLAIM FAMILY MEMBERSHIP

Those who cohabit either in homosexual or heterosexual relationships are not, generally speaking, given the same legal recognition of the familial nature of their relationship as that given to spouses or civil partners. Since the enactment of the Civil Partnership Act 2005, it is arguable that cohabitants are in a worse position than prior to the Act. All cohabitants are now viewed as having the option to enter into a legally recognised relationship, that of civil partnership or marriage.

The Fatal Accidents Act 1976 illustrates the difficulties faced by cohabitants in attempting to bring themselves within the rigid definition of the familial relationships encompassed in the Act. Section 1 provides that certain familial members, who were dependent on the deceased, may make an application for compensation from a defendant, who has caused the wrongful death of the familial member. Civil partners and spouses are included in the statute. Any other category of person who was cohabiting with the deceased prior to death and wishes to make a claim must pass a more stringent test to demonstrate the existence of a familial relationship. Section 1(3)(b) of the Act accepts as proof of familial cohabitation that the claimant:

> '(i) was living with the deceased in the same household immediately before the date of the death; and
> (ii) had been living with the deceased in the same household for at least two years before that date; and
> (iii) was living during the whole of that period as the husband or wife or civil partner of the deceased.'

The decision in *Kotke v Saffarini*[28] provides a rather sad example of the difficulties facing cohabitants who wish to make claims. Ms Kotke, the claimant, was walking across a bridge in Bath with her long-term partner one evening in March 2000, when they were struck by an out of control car and were thrown over the parapet wall of the bridge into the river below. Ms Kotke's partner was killed and she was severely injured but managed to swim to a barge in the river and was rescued. The couple had an 11-month-old child who was not with them at the time of the accident. Ms Kotke maintained that she had lived with the deceased, as his wife, for 2 years prior to his death.

The couple's relationship had begun 5 years earlier in 1995. They each owned their own house. Ms Kotke was 10 years older than the deceased and wished to have a committed relationship with him but not marry. The couple spent as much time as possible together, including every weekend, mainly in her house but sometimes in the deceased's house. The deceased paid money into the claimant's bank account for living expenses. His work involved considerable travel and he stayed in his own house prior to travelling because it was closer to the station. The couple considered selling his house but decided to wait until the property market improved.

In 1998, the claimant became pregnant. When the baby was born in May 1999, the deceased registered it and gave his address as that of his own house. Six months before he died, the deceased let his own house and when not travelling lived entirely with the claimant.

The court at first instance rejected Ms Kotke's claim that she had lived in the same household with the deceased for 2 years prior to his death, but recognised that she was doing so at the time of the death. Ms Kotke appealed unsuccessfully. In upholding the judgment, the Court of Appeal considered the meaning of the word 'household' and stated that the term:

> '. . . embodies a concept somewhat elusive of definition, combining as it does both the physical connotation of a place ie a particular house or home and personal connotations of association ie the family or household resident within it. Both aspects are covered by the various dictionary definitions available.'

It accepted that the word household has an abstract meaning and refers to people held together by a particular tie even if temporarily housed apart. The court accepted the view of the lower court that Ms Kotke and the deceased were not living together in the same household until, at the earliest, the time at which the claimant became pregnant which was only 20 months prior to the death of her cohabitant, and 4 months short of the time required by the Act. According to the court, prior to that date, the couple may have wanted to live together, planned to live together but had not actually achieved it.

The decision illustrates a very restrictive view of what constitutes living together in the same household as husband and wife. The judicial model, in

[28] [2005] 2 FLR 517.

spite of statements to the effect that modern lifestyles were to be taken into account in interpreting the statute, fails to recognise the independent nature of many 21st century spousal relationships which may involve two partners with two careers and two homes, possibly in two countries. It is conceivable that a couple can live together in a familial relationship, as husband and wife, in the same household, albeit apart, for various reasons, in separate homes for part of the time and together in one of the homes for part of the time.

It has been suggested that living apart, yet in a familial relationship, may have positive benefits and even prevent the trauma of breakdown. Couples who have chosen to live separately often believe that their choice is partly responsible for the success of their relationship. They maintain that they have been able to maintain their friendships, their passion and their affection for each other to a greater extent than many couples who live together.[29]

VI MEMBERSHIP OF AN EXTENDED FAMILY AND RIGHTS TO PROPERTY OWNERSHIP

In the multicultural society facing the English courts, reference has often been made by the judiciary to the necessity to acknowledge and understand the nature of the many different cultural traditions and values which exist today in England. However, the courts have not always been able to reconcile an understanding of these cultural values and the requirement to administer English law. In *G v G (Matrimonial Property: Rights of Extended Family)*,[30] for example, the court regarded the Hindu customs and 'understandings' as factors to be taken into account when analysing the law but held that the principles of English law must nevertheless be applied.

The Hindu husband and wife had divorced following a 20-year-long arranged marriage. They had one child aged 10. The husband had remarried and had two substantial properties in London. However, in response to the wife's application for ancillary relief, he pleaded financial distress. The wife disputed her husband's financial state and asked for a clean break and an award of £3m to provide a home, furnishings and capital investment for her future. The husband offered a total award of £1.5m based on a strict calculation of the wife's needs. The court made an award of £2.25m. However, it is the court's view on the rights of the husband's extended family which are of interest in this decision rather than the actual amount of the ancillary relief.

Ten adult members of the husband's extended family maintained that they had acquired beneficial interests, and rights to live in one of the husband's properties and that it was not therefore available for redistribution in the

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[29] Hess and Cartell 'Dual Dwelling Duos: An Alternative for Long-Term Relationship' [2001] 10 *Journal of Couples Therapy* 25; the poet Rainer Maria Rilke wrote that one of the great gifts that two people can give to one another is to 'stand guard over one another's solitude'.

[30] [2006] 1 FLR 62.

June 28, 2007

proceedings for ancillary relief. They claimed that the interests had arisen from a common cultural understanding between themselves and the husband relating to living arrangements; that other younger family members would also become beneficiaries when they came of age and took up residence, and anyone who left the property would lose the right to an interest in it.

The court held that the beneficial interests in the property were to be determined by English law and not by the cultural understanding of the Hindu extended family vis à vis their family home. None of the extended family had made any financial contribution or acted to their detriment in reliance on their cultural understanding about their rights to live in the house. There was, therefore, no resulting trust, constructive trust, equity arising from proprietary estoppel, or an irrevocable licence. The family members' understanding was adjudged to merely give them a right to share the living space in a harmonious manner under a revocable licence.

VII CONCLUSION

The decisions discussed in this year's survey demonstrate the serious consequences for individuals when entry into family membership is imposed or denied. With some exceptions, they suggest that courts are aware of these consequences and have attempted to facilitate family membership unless it would adversely affect the individual on whom it is to be imposed.

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Germany

THE REFORM OF GERMAN MAINTENANCE LAW

Kathrin Kroll[*]

Résumé

Au cours des dernières années, le droit allemand de la famille a connu des changements fondamentaux en ce qui a trait aux valeurs sociales sous-jacentes au mariage et à la famille. La diminution du nombre de mariages, l'augmentation du nombre de divorces et l'émergence d'autres formes d'union ont forcé le droit à s'adapter aux nouvelles réalités. La conjugalité «pour la vie» ne semble désormais plus la voie privilégiée. Le nombre sans cesse croissant des couples non mariés et des naissances hors mariage attire l'attention sur l'émergence de nouveaux modèles familiaux. En réponse à ces changements fondamentaux, le gouvernement fédéral a récemment déposé un projet de loi portant réforme du droit alimentaire. Il est probable que la nouvelle loi entrera en vigueur au début du mois d'avril 2007. L'objectif de la réforme est d'adapter les normes juridiques aux nouvelles réalités de la conjugalité et de la famille. Bien que le projet s'inscrive donc dans le contexte social et économique bien particulier de l'Allemagne, il ne fournit que de rares statistiques en la matière. La question de savoir si la réforme réussira, néanmoins, à moderniser le droit, surtout en ce qui concerne les obligations d'entretien entre les conjoints divorcés, fait l'objet d'une analyse dans le présent texte. A cette fin, nous nous intéressons aux caractéristiques centrales de la réforme, soit la protection du bien-être de l'enfant, le renforcement du principe de l'autonomie financière après divorce et la question très importante de la simplification du droit alimentaire. Finalement, cet article s'intéresse tant aux aspects du projet qui semblent effectivement refléter adéquatement la nouvelle réalité, qu'aux volets plus controversés de la réforme.

I INTRODUCTION

Over the past few years German Family Law has been confronted with a fundamental change in social values regarding marriage and the family. The rise in the number of divorces and the appearance of other forms of union have made it necessary for the legislature to adapt the law to social reality. Since 1950, the number of marriages has decreased from 11 per thousand population to 4.8 in 2004.[1] Almost 38 per cent of the couples who said 'Yes' in 2004 were

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1 German Federal Bureau of Statistics, Frauen in Deutschland 2006, at 37.

entering into their second marriage, ie at least one partner had been previously married.[2] At the same time, almost half of married couples had no children.[3] The proportion of divorce increased from 15 per cent in 1970 to 43 per cent in 2003.[4] As this small sample of figures indicates, lifelong marital cohabitation no longer seems to be the preferred way of life. Instead, the growing numbers of non-marital cohabitations and of births outside marriage are a symptom of the presence of alternative family models. In 2004, there were 2.5 million 'single-parent families'[5] and approximately 2.4 million non-marital cohabitations[6] in Germany, ie since 1996 the number of cohabitating couples has increased by 34 per cent.[7] At the same time, women with children have become an important factor on the labour market in recent decades. In 2004, two-thirds of German mothers were gainfully employed even though childcare facilities are still lacking, in particular for children younger than 3 years.

In response to these fundamental changes in society, a Bill regarding the reform of maintenance law has recently been introduced by the Federal Government.[8] In addition, during a hearing on 16 October 2006 a panel of experts accepted the proposed law in principle. The law is likely to enter into force at the beginning of April 2007. The aim of the Bill is to make family law conform to new understandings of 'marriage' and 'family'. Even though the Bill thus refers to the social and economic conditions in Germany, it rarely cites statistical data. Whether the reform is, nevertheless, able to modernise the law, especially as far as maintenance obligations between divorced spouses are concerned, will be the analysed in what follows. To this end, the article will focus on the main features of the reform, ie protecting the welfare of the child (II), strengthening the principle of self-sufficiency after divorce (III) and, last but not least, simplifying the law regarding maintenance (IV).

II PROTECTING THE WELFARE OF THE CHILD

Under the proposed new law, the welfare of the child is the prime consideration. Since minor children are unable to support themselves, they are very much in need of special protection. Consequently, the claims of children are given a privileged status.

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2 Engstler/Menning, Die Familie im Spiegel der amtlichen Statistik – Lebensformen, Familienstrukturen, wirtschaftliche Situation der Familien und familiendemographische Entwicklung in Deutschland (2003).

3 German Federal Bureau of Statistics, Mikrozensus 2005.

4 German Federal Bureau of Statistics, Mikrozensus 2004.

5 85% of them were single mothers, see German Federal Bureau of Statistics, Frauen in Deutschland 2006, at 39.

6 German Federal Bureau of Statistics, Statistisches Jahrbuch 2006, at 47.

7 German Federal Bureau of Statistics, Mikrozensus 2005.

8 Bill to reform maintenance law: 'Entwurf eines Gesetzes zur Änderung des Unterhaltsrechts', 15 June 2006, BT-Drucks. 16/1830; the document is available in German at http://dip.bundestag.de/btd/16/018/1601830.pdf.

(a) Ranking of the maintenance creditors

If a debtor has insufficient means, the question as to how the claims of different maintenance creditors should be prioritised assumes a particular importance. Under current law, the issue of multiple maintenance claims is dealt with in ss 1609 and 1582 of the German Civil Code (BGB).[9] Since combining the two provisions has tended to be highly complicated, the draft proposes to introduce a central rule into s 1609. This is accompanied by a significant modification of the ranking system. Under present law, maintenance claims by the spouse, minor children, ie those under the age of 18, and unmarried children under the age of 21 – still living at home and in full-time education – are ranked equally (s 1609 para 2). In the case of divorce, the divorced spouse takes preference over the new spouse. Due to the fact that the spouse and children's claims are ranked equally, both must be reduced proportionately if the debtor lacks means. That is the reason why the amount awarded to children is often not sufficient to maintain them at a subsistence level.[10]

The Bill introduces changes to the priority system currently operating in Germany in order to achieve more equitable results in lack-of-means cases.[11] The claims of minor children should therefore be privileged, ie they should be ranked first. As these children are unable to maintain themselves, the expectation that they should share assets is no longer deemed to be reasonable. By contrast, adult creditors who are able to take up gainful employment are to be ranked lower. Nevertheless, the Bill supposes that creditors caring for children are more worthy of protection than others. It is therefore recommended that they should come next in order of priority.[12] This means that every spouse, former spouse, single parent or cohabitant caring for a child occupies the same position under the proposed new law. Note that the responsibility for children constitutes the main grounds for the equal ranking. The Bill proposes that spouses divorced following a long-term marriage are to be ranked alongside those who look after children. It does not provide any definition of what constitutes a 'long duration' of a marriage, but rather leaves the problem to the court's discretion.[13] In addition to the absolute duration of the marriage, another potential factor for consideration is the parties' age at the time of divorce, more specifically, whether they married young or at a more advanced age.[14] Care of children and the economic dependence of a spouse are further factors the court should take into account. Any other creditor who does not fall into one of the categories mentioned above is ranked third. Maintenance claims by adult children who are not privileged, and those made by any other descendant or relative of the debtor are ranked lower. The

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9 'Bürgerliches Gesetzbuch' (BGB). Every statutory provision that is not otherwise specified in the following is that of the BGB.

10 Bill to reform the law regarding maintenance (note 8), at 23.

11 Ibid, at 13.

12 Ibid.

13 Ibid, at 24.

14 Ibid.

proposed rules governing the priority of different claimants are also to be applied to registered partners.[15] Due to the intended maintenance reform, the revised version of the Registered Partnership Act (LPartG) of 2004[16] did not provide for any ranking system. The Bill proposes that the LPartG adopt the formal ranking as provided under s 1609.

In comparison with the legislation existing in other European countries, the proposed priority ranking of child support is convincing.[17] Aside from the privileging of maintenance creditors, most legal systems in Europe provide for a privilege of minor children in cases where the debtor lacks means.[18] Furthermore, it seems reasonable to give an equal ranking to parents – married or not – who care for children. As the equal treatment of children born in and outside wedlock is constitutionally provided for in art 6 para 5 GG,[19] it is consequently required to remove, in principle, any distinction between married and unmarried parents with regard to childcare maintenance.[20] However, it is doubtful whether the new ranking system will in fact be able to strengthen the welfare position of the child. What the Bill does not take into account is that child support is closely connected with the maintenance granted to the parent who cares for the child. As the child's claim must be met first and foremost, this will often leave insufficient means for the parent to provide for his or her own support.[21] As a result, the impact of the new law will, in the main, be on the statistical data: only it will be the parents rather than the children who are likely to be on welfare.[22] This being the case, it is questionable whether parents will retain the capacity to ensure their children's education and care.[23] Another criticism is that divorced spouses risk the loss of tax relief if several claims by privileged creditors must first be satisfied.[24] Given the potential conflict between maintenance claims, there is much to be said against a formal ranking

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15 Ibid, at 32.

16 For details of the revised version of the LPartG, see Dethloff/Kroll 'The Constitutional Court as Driver of Reforms in German Family Law' [2006] ISFL 217, at 219 *et seq*.

17 Hohloch 'Der unterhaltsrechtliche Rang minderjähriger und ihnen gleichstehender Kinder – Ein Beitrag zu § 1609 BGB in der Fassung des Entwurfs eines Unterhaltsrechtsänderungsgesetzes unter Berücksichtigung der Regelungen anderer europäischer Rechte', *Familie Partnerschaft und Recht* (FPR) (2005) 486, at 490.

18 Ibid. For an overall view of the ranking of maintenance claims in Europe, see also Lüderitz/Dethloff, Familienrecht (2007), s 6, at 169.

19 The German Constitution is called 'Grundgesetz' (GG).

20 See Willutzki 'Die neue Rangfolge des Unterhaltsrechts – ein Beitrag pro Reform' FPR (2005) 505, at 507.

21 Schwab 'Zur Reform des Unterhaltsrechts', *Zeitschrift für das gesamte Familienrecht* (FamRZ) (2005) 1417, at 1422.

22 Hohloch (note 17), at 490.

23 Ibid.

24 Borth 'Der Gesetzesentwurf der Bundesregierung zur Reform des Unterhaltsrechts', FamRZ (2006) 813, at 817; for a diverging opinion see Menne 'Regierungsentwurf zum Unterhaltsrechtsänderungsgesetz – Sachstand und Ausblick auf die geplanten Änderungen beim nachehelichen Unterhalt und beim Verwandtenunterhalt (2. Teil)', *Forum Familienrecht* (FF) (2006) 220, at 221.

system.[25] Having said that, there are good reasons to guarantee the creditors' subsistence level in the first place before dividing up the surplus.[26]

(b) Caring for an illegitimate child

At present, a parent caring for a child born out of wedlock is entitled to maintenance for a maximum period of 3 years (s 1615 l, para 2, sentence 3). It is mostly single mothers who care for an illegitimate child.[27] During the prescribed time-limit, there is no expectation that they will take up gainful employment.[28] As 3-year-olds are guaranteed a place in kindergarten in Germany, they are then no longer regarded as being in need of the parent's full attention. However, if termination of the 3-year time-limit seems to be unreasonable, the judge may prolong the maintenance period according to the hardship clause in s 1615 l para 2 sentence 3. In that case, it is up to the claimant to prove extraordinary circumstances that require an additional effort on the part of the parent, such as a child's illness or disability.[29]

Statutory provision for making maintenance orders in favour of a parent caring for a child born out of wedlock was introduced by the *Nichtehelichengesetz* in 1969.[30] Maintenance could be claimed for a maximum period of one year. In 1995, the prescribed time-limit was extended to 3 years.[31] This legislation provided for the equality of children born in and outside wedlock as required in art 6 para 5 GG. Two years later, the courts were granted the powers to make maintenance orders that exceed the 3-year time-limit in cases of extraordinary hardship.[32] However, differences between the maintenance regime for parents caring for an illegitimate child and for divorced spouses raising a child that has been born during the marriage have continued to exist. Unlike divorced spouses, who can be ordered maintenance at least until the child has reached the age of 8 years,[33] single parents are still obliged to seek employment after the 3-year period has expired. Over the past few years, the discrepancy in the law regarding childcare maintenance has been hotly disputed. Even though many have called for equal treatment of divorced spouses and single parents,[34] statutory and case-law still insist on structural distinctions. Recently,[35] the

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25 Borth, ibid.

26 Schwab (note 21), at 1423 *et seq*.

27 Lüderitz/Dethloff (note 18), s 11, at 84.

28 Göppinger/Wax *Unterhaltsrecht* (2003), at 1236.

29 Ibid, at 1239.

30 'Gesetz über die rechtliche Stellung der nichtehelichen Kinder', 19 August 1969, BGBl I, at 1243.

31 'Schwangeren- und Familienhilfeänderungsgesetz', 21 August 1995, BGBl I, at 1050.

32 ' Kindschaftsreformgesetz', 16 December 1997, BGBl I, at 2942.

33 Case-law has developed fixed age limits: until the child has reached the age of 8, a parent is not expected to be gainfully employed; between 11 and 15 years a part-time job, and from the age of 15 onwards a full-time job is required. For an overall perspective, see Palandt/Brudermüller *Bürgerliches Gesetzbuch* (2007), s 1570, at 8 *et seq*.

34 See e g Lüderitz/Dethloff (note 18), s 11, at 88, citing further opinions.

35 For an overview of the Federal Supreme Court's (BGH) jurisdiction with regard to s 1615 l during the past years, see Hahne 'Die Annäherung des Unterhaltsanspruchs einer nicht

Federal Supreme Court[36] ruled that the statutory limitation of a single mother's maintenance claim in s 1615 l para 2 sentence 3 does not place illegitimate children at a disadvantage relative to legitimate children.[37] The court examined the case of a mother claiming maintenance for her 4-year-old daughter who was born out of wedlock. It noted that the time-limit for the duration of maintenance in s 1615 l para 2 sentence 3 violates neither art 6 paras 1, 2 and 5 GG nor art 3 para 1 GG.[38] According to the court, the marriage itself – as constitutionally guaranteed in art 6 para 1 GG – is the main reason why maintenance obligations between divorced spouses do not end when the child has reached the age of 3. Unlike cohabiting partners, the assumption of mutual responsibility entered into through marriage continues to exist even after the marriage is dissolved. Post-nuptial solidarity (*nacheheliche Solidarität*) between former spouses therefore justifies the privileging of divorced spouses as far as the duration of maintenance is concerned.[39]

The Bill also refers to the differences in the situations of married and cohabiting partners.[40] Post-nuptial solidarity between former spouses is considered to be the main reason why maintenance may be ordered for a longer period of time. The Bill is not about to change the basic grounds for maintenance, neither in s 1570 nor in s 1615 l para 2. Rather, the aim of the Bill is to reflect recent trends in case-law,[41] practice[42] and legal literature[43] to harmonise the situation of divorced spouses and cohabitants as far as the caring for children is concerned.[44] It is therefore proposed that the hardship clause as provided in s 1615 l para 2 sentence 3 be modified. Under the new law, it should become easier for the court to establish an additional period of maintenance. The existence of extraordinary circumstances that fundamentally violate the principle of reasonableness will no longer be required. Thus, in each individual case the court should have regard to all circumstances of the case, considering whether it would be appropriate to prolong the 3-year time-limit.[45] When exercising its powers first consideration must be given to the welfare of the child. It is furthermore considered that the court should also take into

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verheirateten Mutter nach § 1615 l BGB an den Unterhaltsanspruch einer verheirateten Mutter nach § 1570 BGB', Festschrift für Dieter Schwab (2005), 783 *et seq*.

36 It is up to the Federal Constitutional Court (BVerfG) to finally decide if s 1615 l para 2 is constitutional. As two actions are currently pending with the court, its ruling is highly anticipated; for details, see Wever, FF (2006), 253 *et seq*, Anmerkung zu BGH, 5 July 2006, FF (2006), 245 *et seq*.

37 BGH, 5 July 2006, FamRZ (2006), 1362 *et seq*. For a comment on the decision, see Wever, FF (2006), at 253 *et seq.*

38 BGH, FamRZ (2006), 1362, at 1363 *et seq.*

39 BGH, FamRZ (2006), 1362, at 1364.

40 Bill to reform the law regarding maintenance (note 8), at 31.

41 See, eg, BGH, FamRZ (2005), 354 *et seq*., OLG Karlsruhe *Neue Juristische Wochenschrift* (NJW) (2004), 523 *et seq*, OLG Düsseldorf, FamRZ (2005), 234 *et seq* and 1772 *et seq*.

42 Empfehlungen des 16. Deutschen Familiengerichtstags an die Gesetzgebung, FamRZ (2005), 1962 *et seq*.

43 See, eg, Lüderitz/Dethloff (note 18), s 11, at 88, citing further documents.

44 Bill to reform the law regarding maintenance (note 8), at 31.

45 Ibid.

account the parents' needs and interests[46] – as might be the case, for instance, if the parents had agreed upon a longer period of caring for the child.[47]

However, one might ask the question whether the statutory 3-year period corresponds to reality and is therefore really an appropriate means. First, it must be taken into account that flexible childcare facilities are often lacking in Germany. The children's right to attend kindergarten at the age of 3 is therefore not synonymous with the guarantee of day-care services. And secondly, since a parent is obliged to work full-time after the 3-year period has expired, someone else must be found to look after the children. The parent has no alternative but to use non-maternal childcare.[48] Consequently, a better solution would have been more flexibility in deciding whether a parent can be expected to take up full-time employment.[49] Moreover, the reform of s 1615 l(2) stops short of harmonising the maintenance claims regarding the caring for a child. The legislature again fails to provide for a central rule that applies to both divorced spouses and single parents and that explicitly determines under which conditions a parent is expected to be gainfully employed.[50]

(c) Minimum amount of child support

The Bill makes provision for a statutory definition of the minimum amount of child support by applying the tax-free allowance for minor children to the revised s 1612 a. The intention behind this provision is that the law regarding maintenance, tax law and social law should be harmonised.[51] The modification of s 1612 a is therefore based on the consideration that the minimum demand that can be reckoned for each child is an absolute size that must be defined equally in different fields of law.[52] Furthermore, distinctions between the eastern and western parts of Germany with regard to the minimum standard of child support ought to be removed.[53] Under the proposed law, the debtor would be allowed predictability of the amount of child support he or she at least has to pay.[54] It is not up to the child to prove the amount he or she should receive.[55] When establishing the amount according to s 1612 a, the debtor's ability to pay must always be taken into account.

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46 Ibid.
47 Borth (note 24), at 820.
48 Schwab (note 21), at 1421.
49 Ibid.
50 According to Lüderitz/Dethloff (note 18), s 11, at 88, such a central rule is constitutionally required; regarding a total harmonisation with regard to post-divorce solidarity, see Menne (note 24), at 226 *et seq*; regarding a proposal for a central rule, see Kroll 'Zwischen Vertragsfreiheit und Inhaltskontrolle – zur Frage der Wirksamkeit vorehelicher Unterhaltsverzichte' (2003), at 18 *et seq*.
51 Bill to reform the law regarding maintenance (note 8), at 14.
52 Ibid.
53 Borth (note 24), at 819.
54 The Bill therefore realises the requirements the BVerfG has set out in its decision of 9 April 2003. For this decision, see BVerfG, NJW (2003), 2733 *et seq*.
55 Borth (note 24), at 819.

(d) Child benefits

Furthermore, the Bill allows for a revised form of s 1612 b concerning child benefits. Notwithstanding a reform of the law regarding child support in 1998,[56] several problems, for example with regard to adult children, remain unsolved.[57] The Federal Supreme Court has recently criticised that to date, s 1612 b only applies if both parents support a child.[58] Child benefits must then be divided equally. Given the case of an adult child living with the non-working spouse who receives the full amount of child benefits while the other spouse is obliged to pay child support, the court deems the equal division rule in s 1612 b para 1 unreasonable.[59] Taking this decision into account, the Bill proposes that child support be determined in relation to child benefits. It thus considers it fair to set off child benefits against the child's financial need of support.[60] A minor child, therefore, is entitled to demand that the parent receiving the benefits pay them out. If a parent meets his or her obligation to provide for child support exclusively by caring for the child, he or she is awarded half of the child benefits.[61] In all other cases, the full amount of child benefits is credited against the child's financial needs. Instead of dividing child benefits equally, they ought to be distributed proportionally, having regard to each spouse's financial capacity.[62]

III STRENGTHENING THE SELF-SUFFICIENCY PRINCIPLE

Under the proposed law, former spouses are expected to provide for their own support after divorce. The self-sufficiency principle is one of the main features of the reform.

(a) Statutory obligation of a spouse to provide for their own support

At present, there already exists a clearly spelled-out statutory self-sufficiency principle in s 1569. According to this provision, maintenance can be awarded only if the claimant is not able to support him or herself after divorce. Thus, the legislative intent has been to grant maintenance solely in exceptional cases. What the Bill proposes to do is to set down explicitly – and therefore strengthen – the self-sufficiency principle in s 1569.[63] For that purpose, a new sentence 1 is to be introduced, providing for an *obligation* of each spouse to attend to his or

[56] 'Kindesunterhaltsgesetz', 6 April 1998, BGBl I, at 666.
[57] For an overall view, see Scholz 'Änderungen der Rechtsprechung und Gesetzesinitiativen beim Kindergeld', FPR (2006), 329, at 332 *et seq*.
[58] BGH, FamRZ (2006), 99, 102 *et seq*.
[59] Ibid.
[60] Bill to reform the law regarding maintenance (note 8), at 29.
[61] Scholz (note 57), at 331.
[62] Ibid, at 332.
[63] Bill to reform the law regarding maintenance (note 8), at 29.

her own support after divorce.[64] However, as the principles of post-divorce solidarity and self-sufficiency interact, a modification of the latter is suggested in some cases. Particularly if there are marriage-related factors that make the claimant unable to provide for his or her own support after divorce, the other spouse is required to provide this support (s 1569, sentence 2).[65]

A comparative view shows that nearly all jurisdictions in Europe follow the self-sufficiency principle.[66] The former lifelong duty to support the non-guilty party gave way to the granting of time-limited maintenance claims to the needy spouse. Only in those jurisdictions where post-divorce maintenance is still based on fault are extensive and unlimited claims made possible.[67] However, we must not ignore the fact that economic and social conditions, concerning childcare facilities for instance, are different in Germany. By asking for more self-sufficiency after divorce, the Bill runs the risk of leaving the parents – rather than politicians – to cope with the lack of childcare services and a problematic employment situation.[68] It can further be doubted that it is possible to improve self-sufficiency after divorce through legislative means. Some have rightly pointed out that the economically weaker party following divorce will often still be the woman, which is why women are the main subjects of the reform.[69] Women, however, have no need of a stronger motivation to seek gainful employment after divorce.[70] Of greater importance is the improvement of the work/life balance in Germany.[71] The Bill does not answer the question as to how parents can be reintegrated into the labour market after having given up work to look after their children.[72]

(b) Caring for children

Placing higher demands on self-sufficiency after divorce has an effect on the divorced spouse's right to childcare maintenance (s 1570). As we have already seen, case-law has developed guidelines providing for time-limits on maintenance.[73] Basically, a divorced spouse can be granted maintenance as long as he or she cannot be expected to hold a job on account of their raising a child. As a general rule, the parent is expected to take up a part-time job when the child has reached the age of 11, and a full-time job when the child is 15 years old. In contrast to these fixed age limits, the Bill prefers a more flexible

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64 Ibid, at 16.
65 Ibid.
66 Lüderitz/Dethloff (note 18), s 6, at 163.
67 Ibid, for example in Belgium, Poland or Portugal.
68 Brudermüller, cited according to Wilmes, FF (2005), 126, at 127; Klein/Schlechta 'Will die Unterhaltsrechtsreform den Wert der Frau auf ihre Gebärtüchtigkeit reduzieren?', FPR (2005), 496, at 498 *et seq*.; for a diverging opinion, see Menne (note 24), (1. Teil), FF (2006), 175, at 180.
69 Klein/Schlechta, ibid, at 499.
70 Ibid.
71 Büte 'Begrenzung und Herabsetzung des nachehelichen Unterhalts', FPR (2005), 316, at 320.
72 Borth (note 24), at 814.
73 See at note 33.

solution to the problem.[74] The question as to when a parent is expected to be gainfully employed is to be left to the court's discretion. It is then up to the judge to take the circumstances of the individual case into consideration, especially regarding the childcare facilities available.[75] Revoking a maintenance claim according to s 1570 therefore requires the judge to make sure that day-care facilities are in fact available for the child (or children) in question.[76] It is, however, to be feared that the proposed version of s 1570 will require the taking, in court, of extensive evidence regarding childcare facilities.[77] Consequently, maintenance proceedings themselves might be seen to run contrary to the welfare of the child, as they would be the means by which new contentious issues are introduced.[78] The refraining from the fixed age limits that case-law has developed is furthermore deemed to ignore that the social and economic conditions are still lacking at present. It is therefore necessary, first of all, to improve the work/life balance in Germany.[79] The Bill leaves open the question as to how the spouses' marital agreement not to make use of public childcare services should be dealt with.[80] Should such an agreement soon also become a matter for the court's discretion?

(c) Seeking gainful employment after divorce

The issue concerning the extent to which the claimant could be expected to seek gainful employment after divorce is currently regulated in s 1574. According to this provision, the claimant is merely required to take up an 'adequate' occupation. As one aim of the Bill is to advocate greater self-sufficiency after divorce, it is, consequently, proposed that s 1574 be modified.[81] First, following s 1569 sentence 1 a divorced spouse should explicitly be obliged to seek gainful employment (s 1574 para 1).[82] And secondly, the standard of living maintained during marriage should no longer be a factor to be taken into account by the court in considering whether a job is 'adequate' or not (s 1574 para 2). Concerning this matter, the Bill points to the problem that in case law, if a spouse enjoyed a high standard of living during marriage, he or she is often not expected to return to the profession of their pre-marriage days.[83] Under the proposed law, it is up to the claimant to present evidence proving that he or she can absolutely not be expected to take up an occupation that would entail the loss of his or her marital standard of living.[84] This means that the creditor

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74 Several authors have also criticised the age limits, see, eg, Palandt/Brudermüller (note 33), s 1570, at 12; Anwaltkommentar/Schürmann (2005), s 1577, at 60; Puls 'Der Betreuungsunterhalt der Mutter eines nichtehelichen Kindes', FamRZ (1998), 865, 870 *et seq*.

75 Bill to reform the law regarding maintenance (note 8), at 17.

76 Ibid.

77 Diverging opinion Menne (note 24), at 181.

78 Borth (note 24), at 814.

79 Bericht des Arbeitskreis 6, 16. Deutscher Familiengerichtstag (2005), at 141; Brudermüller, cited according to Wilmes, FF (2005), 126, at 127.

80 Borth (note 24), at 814 *et seq*.

81 Bill to reform the law regarding maintenance (note 8), at 17.

82 Ibid.

83 Ibid.

84 Ibid.

spouse can no longer rely on the economic circumstances of their marriage, but neither need they fear a decline in social standing. Furthermore, it must be taken into account that s 1574 para 2 applies mainly to each individual claimant's abilities. It seems, therefore, reasonable to exclude the standard of living as one of the factors taken into account.[85] To sum up, the reform of s 1574 will eventually force the maintenance claimant to seek gainful employment after divorce, which includes the possible return to a former profession.[86]

(d) New time-limits

Under current law, maintenance can be claimed for an unlimited period, even for life. The issue of whether or not maintenance claims should have a time-limit placed upon them was first discussed after the first EheRG[87] entered into force in 1976. Since then, there have been proposals to give the court discretion to limit maintenance claims for equitable reasons.[88] In 1986, the legislature enacted a new law that included certain provisions designed to put a time-limit on maintenance claims (ss 1573 para 5 and 1578 para 1 sentences 2 and 3).[89] However, no more than a few decisions are known to have applied these provisions.[90] It was a decision by the Federal Supreme Court in 2001 that again prompted a discussion about setting a time-limit on the maintenance claims of divorced spouses.[91]

The Bill provides for a statutory basis to place a time-limit on all kinds of maintenance claims (s 1578 b).[92] It thus signifies the end of the lifelong duty to support a divorced spouse. According to s 1578 b, the court is given the power to decide whether and how it would be just and equitable to place a time-limit on any given maintenance claim. It is suggested that the court should take into account, in particular, those disadvantages directly stemming from the marriage (*ehebedingte Nachteile*).[93] The division of marital duties may therefore also have an impact on the right to maintenance after divorce. If, for example, a spouse had been the homemaker during marriage, ie had taken care of the house and of the couple's children, he or she should be compensated for the disadvantages resulting from the fact that he or she is unable to support him or

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85 Menne 'Die Unterhaltsrechtsreform: Der Unterhalt des geschiedenen Ehegatten', FPR (2005), 323, at 326.

86 Reinken 'Die Änderung der Zumutbarkeitsanforderungen an die Aufnahme einer Erwerbstätigkeit im Reformgesetz', FPR (2005), 502, at 504.

87 'Erstes Gesetz zur Reform des Ehe- und Familienrechts', 14 June 1976, BGBl I, at 1421.

88 Compare Willutzki, Brühler Schriften zum Familienrecht (1984), 15, at 16 *et seq*.

89 'Unterhaltsrechtsreformgesetz', 20 February 1986, BGBl I, at 301.

90 See, eg, OLG Hamm, *NJW-Rechtsprechungsreport Zivilrecht* (NJW-RR) (2003), at 1084; OLG München, *Familie und Recht* (FuR) (2003), at 326; for a critical comment on the case-law see Büte (note 71), at 316 *et seq*.

91 BGH, 13 June 2001, NJW (2001), 2254 *et seq*., ruling that the post-divorce employment of a spouse substitutes the value of the childcare and housekeeping performed during marriage. Concerning this matter see also a decision by the BVerfG, NJW (2002), 1185 *et seq*.

92 Bill to reform the law regarding maintenance (note 8), at 18.

93 Ibid.

herself after divorce. This means that under certain circumstances a lifelong duty to maintain is still justified. However, if the creditor spouse has suffered no prejudices as a result of the marriage, for example in the case of a short-term marriage, his or her maintenance claim should be limited, according to the Bill.[94] The Bill furthermore points out that even if no marriage-related reasons are at issue, the court should balance the conflicting principles of post-divorce solidarity and self-sufficiency. If, for example, maintenance was sought on the grounds of a spouse's age (s 1571), illness (s 1572) or unemployment (s 1573 para 1) – all grounds that do not depend on the marriage – it falls within the court's discretion to limit the claim by applying s 1578 b. According to this provision, the court is allowed to curtail periodical maintenance payments (para 1), put a time-limit on a claim (para 2) or choose a combination of both (para 3).[95]

(e) Relationship between ss 1578b and 1579

The proposed introduction of s 1578 b runs the risk of conflicting with s 1579, which provides for the limitation, termination or even denial of maintenance to the debtor spouse in the case of exceptional hardship. The Bill points out that – unlike the new thinking found in s 1578 b – s 1579 has been developed to provide legislation for every form of the creditor spouse's misconduct during marriage.[96] It is therefore only s 1579 that lists special and exclusive grounds of misconduct,[97] for example criminal offences (no 2), wilful causation of poverty to self (no 3) or grave financial misconduct (no 4). The exact quality of behaviour a spouse is accused of is the reason why s 1579 – in contrast to s 1578 b – requires a grossly unfair (*grob unbillig*) outcome.[98] Another factor the courts are directed to consider when applying s 1579 is the short duration of a marriage (no 1). However, the time during which spouses cohabited is also relevant in the decision as to whether a maintenance claim should have a time-limit placed upon it according to s 1578 b. In order to avoid confusion between the two rules, the Bill suggests the following: if a marriage has lasted no more than a few years, the court must first consider whether the marriage could be deemed 'short-term' according to s 1579 no 1.[99] As is the case under current law, the Bill does not provide for any statutory definition of how long a marriage must last to qualify as 'short-term'. Rather, the question is left to the courts to decide. Nevertheless, the Bill sets down some general principles; for instance, it only applies the de facto time of marital cohabitation.[100] Unlike

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94 Ibid. It is further suggested that the period of time elapsed between maintenance claims and divorce be taken into account, see Braeuer 'Gleichberechtigte Teilhabe beim nachehelichen Unterhalt', FamRZ (2006), 1489, at 1494 *et seq*.

95 Bill to reform the law regarding maintenance (note 8), at 18.

96 Ibid, at 20.

97 Under the proposed law, the fact that the claimant has entered into an informal long-term relationship should be included as a new ground (s 1579 No 2) for terminating, limiting or denying a maintenance claim.

98 Menne (note 24), at 182.

99 Ibid.

100 It was the BVerfG that required solely taking into account the de facto time of cohabitation; see BVerfG NJW 1989, 2807 *et seq*.

current law, the time spent caring for the children is no longer to be taken into account when determining the length of a marriage.[101] The court is, however, always directed to consider whether limiting, terminating or denying a maintenance claim would run contrary to the child's (or children's) welfare.[102] Only if the court were eventually to deny the application of s 1579 no 1, could s 1578 b be taken into account when examining the possibility of placing a time-limit on maintenance.[103] The case for the priority of s 1579 no 1 is not at all convincing. Why should maintenance in the case of a short-term marriage be limited to cases involving gross unfairness alone, whereas such a requirement is not provided in s 1578 b, ie with regard to longer marital cohabitation?[104]

(f) Entering into an informal long-term relationship

Under current law, s 1579 does not explicitly provide for limitation, termination or denial of a maintenance claim if the claimant enters into an informal long-term relationship. Subsequent cohabitation could nevertheless lead the court to terminate maintenance, by applying the general rule set out in s 1579 no 7.[105] However, over the years such cases have in practice become highly important. The introduction of a new hardship clause in s 1579 no 2 is therefore proposed.[106] Unlike other grounds, s 1579 no 2 should not provide for the creditor spouse's misconduct during marriage. Entering into an informal partnership is rather considered to be a change of circumstances.[107] The question as to how a long-term relationship can be defined is left to the courts' discretion. The following factors may be taken into account: the establishment of a joint household and of an economic unity, for example by acquiring a family home; the duration of the partnership; and the appearance in public as a couple.[108] To sum up, a '*verfestigte Lebensgemeinschaft*'[109] is required, ie the intensity of cohabitation must equal that of a marital relationship. Whether the claimant's partner in the informal relationship has means, whether the partners have a sexual relationship or whether they intend to marry, need not be taken into account. Some critics have argued, however, that the legislature has ultimately failed to provide for a clear definition, or at least a listing of factors that characterise an informal long-term relationship.[110] The legislature not only

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[101] For notions of s 1579 No 1 under current law see Lüderitz/Dethloff (note 18), s 6, at 85.
[102] Bill to reform the law regarding maintenance (note 8), at 20.
[103] Ibid, at 21.
[104] Hohloch 'Beschränkung des nachehelichen Unterhalts im Entwurf eines Unterhaltsrechtsänderungsgesetzes', FF (2006), 217, at 225.
[105] For details concerning the case-law so far, see Palandt/Brudermüller (note 33), s 1579, at 34 *et seq*.
[106] Bill to reform the law regarding maintenance (note 8), at 21.
[107] Ibid.
[108] Ibid.
[109] For the factors developed by case-law in its attempts to define 'verfestigte Lebensgemeinschaft' so far, see Schnitzler 'Die verfestigte Lebensgemeinschaft in der Rechtsprechung der Familiengerichte', FamRZ (2006), 239, at 240 *et seq*.
[110] Hohloch (note 104), at 221.

failed to set binding standards, it also omitted to conclude the discussion concerning what constitutes a '*verfestigte Lebensgemeinschaft*'.[111]

IV SIMPLIFICATION

Taking into account all the foregoing improvements, the new law is said to be simpler and more precise.[112] The Bill explicitly emphasises what constitutes the minimum amount of child support, the revised regulation concerning child benefits, the question of prioritising the claims of different maintenance creditors and the central rule regarding the placing of a time-limit on maintenance claims. Modifying child support is further expected to ease the burden on family courts and youth welfare departments.[113] Furthermore, the structure of maintenance law is clarified by the inclusion of the self-sufficiency principle in s 1569 sentence 1, and this clarification even extends to the introduction of a ground for limiting maintenance claims on account of a '*verfestigte Lebensgemeinschaft*'. Some, however, doubt that the new regulations proposed in the Bill will in fact lead to any simplification. What makes the law regarding maintenance so complicated and complex is the fact that it extends into other fields of law, such as tax law and social law.[114] Moreover, the failure to define legal terms such as 'long-term marriage' (s 1609), 'short-term marriage' (s 1579 no 1) and '*verfestigte Lebensgemeinschaft*' (s 1579 no 2) runs contrary to the aim of simplification. With important questions left to the courts, legal certainty is yet to be established.

V CONCLUSION

In view of the fundamental changes in society, in particular the rise in the number of divorces and non-marital cohabitation, there is no doubt that the law on maintenance is in need of reform. Several aims of the Bill, protecting the welfare of the child or simplifying the law, for example, seem an appropriate means to reflect reality, for the following reasons: first of all, the Bill makes an important effort to improve the financial situation of minor children by giving them a priority ranking. It is therefore highly likely that the number of minor children who are on welfare will decrease. Secondly, the lowering of the requirements for the application of the hardship clause in s 1615 l para 2 sentence 3 ultimately strengthens the maintenance claims of single parents. It will thus become much easier for the courts to take into account child *and* parent-related reasons in order to extend the statutory 3-year time-limit. On the other hand, refraining from the fixed age limits that have developed with regard to s 1570 will favour putting a time-limit on divorced spouses' maintenance

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[111] For a deferring opinion, see Schnitzler (note 109), at 242, in which the author considers that the new legislation will establish legal certainty.

[112] Bill to reform the law regarding maintenance (note 8), at 14.

[113] Ibid.

[114] Borth (note 24), at 818.

claims. Although the distinction created between divorced spouses and single parents in terms of childcare maintenance is therefore minimised, it continues to exist. A better solution would have been the introduction of a single central rule providing for the maintenance of those parents – whether married or not – who care for children.[115] For example, the following criteria could have been part of the new rule:[116] (a) its application to both divorced spouses and single parents caring for a child, whether born in or outside wedlock, (b) the specification of when a parent is expected to take up a full- or part-time job, rather than a fixed maximum period,[117] but with (c) reference to the availability of day-care facilities, (d) the taking into account of child or parent-related circumstances while determining (b), and (e) concerning the latter, the parent's proof of these circumstances.

However, several aspects remain open to criticism. Even though the Government has made strenuous attempts to modernise the law regarding maintenance, it has so far failed to present an omnibus reform. It has missed the opportunity for a fundamental rethink of the German maintenance system with regard to the formal ranking of creditors, the different maintenance claims in the case of a divorced spouse, for instance. For example, the Bill leaves out the question as to whether maintenance after divorce should still be granted on account of post-divorce solidarity or whether it should rather be considered as a compensation for marriage-related disadvantages.[118] It can be fundamentally doubted that the mere fact of the spouses' marriage justifies the obligation of the economically more powerful party to support the other if the material needs do not in fact derive from the relationship itself. This means that, consequently, maintenance granted on account of needs arising from a spouse's age, illness or long-term unemployment would no longer be the rule. It is therefore greatly to be regretted that the Bill is silent on these important issues. The proposed considerations with regard to a strong self-sufficiency principle after divorce would have suggested that the principle of post-nuptial solidarity should be refrained from. A further objection to the Bill arises: the intention to reflect social reality in family law should not ignore the present situation with regard to childcare facilities. The strengthening of the self-sufficiency principle following divorce requires the corresponding advancement of the conditions necessary for the realisation of the work/life balance in Germany – especially for women.

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[115] Lüderitz/Dethloff (note 18), s 11, at 88.

[116] For proposals concerning a central rule, see Kroll (note 50), at 20; Schilling '§ 1615 l BGB-E – ein Fortschritt?', FPR (2005), 513, at 514.

[117] According to Lüderitz/Dethloff (note 18), s 11, at 88, a central rule should indicate how old a child must be before a parent is obliged to seek employment.

[118] Concerning this critical aspect, see also Berghan/Wersig 'Wer zahlt den Preis für die Überwindung der "Hausfrauenehe"?', FPR (2005), 508, at 509.

India (Part 1)

HINDU LAW AND UNIFORM CIVIL CODE – THE INDIAN EXPERIENCE

*Anil Malhotra and Ranjit Malhotra**

Résumé

Comment fonctionne le système juridique dans la société indienne? Comment un Code Civil Uniforme peut-il s'insérer harmonieusement dans le contexte d'une société multiculturelle et multireligieuse qui reconnaît la liberté fondamentale de religion? De quelle façon les tribunaux de l'Inde harmonisent-ils le droit et la réligion dans une république démocratique, laïque, souveraine et socialiste? Quels sont les opinions exprimées par les tribunaux dans les arrêts qui touchent à ces questions? Les tribunaux religieux et les instances extra-judiciaires sont-ils acceptés par le système judiciaire indien? Un Code Civil Uniforme est-il une illusion? Est-ce que le droit de la famille en Inde nécessite une réforme? L'activisme judiciaire en Inde pourrait-il provoquer une réforme du droit de la famille? Comment se résolvent les questions relatives aux conflits de lois en droit extrapatrimonial de la famille? La coutume l'emporte-t-elle sur le droit écrit? La question du déplacement d'enfants comme conséquence de la rupture du mariage, doit-elle être encadrée législativement? Les Indiens non résidents invoquent-ils des jugements étrangers qui sont contraires au droit de l'Inde et que les tribunaux indiens refusent d'appliquer automatiquement? Ce ne sont là que quelques situations problématiques dont traite le présent article qui propose également une analyse de la jurisprudence dans d'autres secteurs du droit de la famille.

Avec la brève description ci-dessus pour toile de fond, cet article tente modestement de présenter quelques réponses possibles aux différentes questions posées et aux problèmes soulevés. Son objectif est d'examiner les possibilités de coexistence harmonieuse du droit et de la religion dans la démocratie indienne, à la lumière des différentes législations en matière familiale ainsi que des avis exprimés par la Cour Suprême indienne sur ces questions.

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I INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on 26 November 1949 resolved to constitute India as a Union of States and a Sovereign, Socialist, Secular, Democratic Republic. Today, a population of over one billion Indians lives in 28 States and seven Union Territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India, spread over an area of 3.28 million sq kms, the large Indian population, comprised of multicultural societies professing and practising different religions and speaking different local languages, coexist in harmony in one of the largest democracies in the world.

The Indian Parliament at the helm of affairs legislates on central subjects in the Union and Concurrent lists and State legislatures enact laws pertaining to State subjects as listed in the Constitution of India. Likewise, pertaining to the Judiciary, under Art 214 of the Indian Constitution there shall be a High Court for each State and under Art 124 there shall be a Supreme Court of India. Under Art 141 of the Constitution, the law declared by the Supreme Court shall be binding on all Courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures to its citizens 'Fundamental Rights' which can be enforced directly in the respective High Courts of the States or directly in the Supreme Court of India by issue of prerogative writs under Arts 226 and 32 respectively of the Constitution of India. Under the Constitutional scheme, among others, Freedom of Religion and the right to freely profess, practise and propagate religion are sacrosanct and are thus enforceable by a writ.

Simultaneously, Part IV of the Indian Constitution lays down 'Directive Principles of State Policy' which are not enforceable by any Court but are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles while making laws. Under Art 44 of the Constitution in this Part, the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. However, realistically speaking, to date a Uniform Civil Code remains an aspiration which India has yet to achieve and enact.

How does the system of law and society work in India? Against the background of an enforceable Fundamental Right of Religion in a multicultural and diverse society professing different religions, how does a Uniform Civil Code fit in? How do Indian Courts harmonise law and religion in a Democratic, Secular, Sovereign, Socialist Republic? What are the views expressed by Courts in judgments on such issues? Do religious Courts and extra judicial forums find acceptance in the Indian judicial system? Is a Uniform Civil Code an illusion? Does family law in India need reform? Does judicial activism in India trigger off an impetus for making changes in family

laws? How are the clashes on issues of personal family laws resolved? Does custom override statutory family laws? Does child removal as fallout of broken marriages need to be curbed by legislation? Do non-resident Indians bring in foreign judgments contrary to Indian family law which Indian Courts do not implement mechanically? These are only some conflict areas which will be dealt with in this chapter along with supporting case-law in some areas of family law to see how best the current system seeks to handle them.

Against the backdrop of the brief description above, this chapter is a modest attempt to put together possible answers to the above questions and issues raised to examine the harmonious coexistence of law and religion in the Indian democracy in the light of the different family law legislation enacted by the Indian Parliament and the views of the Indian Supreme Court expressed on the issues posed above.

II EXISTING FAMILY LAW LEGISLATION PREVALENT IN INDIA

India is a land of diversities with several religions. The oldest part of the Indian legal system is the personal laws governing the Hindus and the Muslims. The Hindu personal law has undergone changes by a continuous process of codification. The process of change in society has brought changes in law reflecting the changed social conditions and attempting to solve social problems by new methods in the light of experience of legislation in other countries of the world. The Muslim personal law has been comparatively left untouched by legislations.

The Indian legal system is basically a common law system. The Indian Parliament has enacted the following family laws which are applicable to the religious communities defined in the respective enactments themselves. A brief description of each of these separate enactments is given hereunder.

(a) The main marriage law legislation in India applicable to the majority population constituted of Hindus is known as the Hindu Marriage Act 1955, which is an Act to amend and codify the law relating to marriage among Hindus. Ceremonial marriage is essential under this Act and registration is optional. It applies to any person who is a Hindu, Buddhist, Jaina or Sikh by religion and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The Act also applies to Hindus resident outside the territory of India. Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment. Likewise, in other personal law matters, Hindus are governed by the Hindu Succession Act 1956, which is an Act to amend and codify the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act 1956 is an Act to amend and codify certain parts of the law relating to minority and guardianship

among Hindus and the Hindu Adoptions and Maintenance Act 1956 is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

It may be pertinent to point out that the Indian Succession Act 1925 is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt and choose to be governed by their respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act 1890 would apply to non-Hindus. Interestingly, s 125 of the Code of Criminal Procedure 1973 provides that irrespective of religion, any person belonging to any religion can approach a magistrate to be provided with maintenance. Therefore, apart from personal family law legislations, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

(b) The Indian Parliament also enacted the Special Marriage Act 1954 as an Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorces under this Act. This enactment of solemnising marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws. Registration is compulsory under this enactment. Divorce can also be obtained by non-Hindus under this Act. This legislation governs people of all religions and communities in India, irrespective of their personal faith. Likewise, under the Foreign Marriage Act 1969, a person has only to be a citizen of India to have a marriage solemnised under this Act outside the territorial limits of India.

(c) The Parsi Marriage and Divorce Act 1936, as amended in 1988, is an Act to amend the law relating to marriage and divorce among the Parsis in India.

(d) The Christian Marriage Act 1872 was enacted as an Act to consolidate and amend the law relating to the solemnisation of the marriages of Christians in India and the Divorce Act 1869, as amended in 2001, is an Act to amend the law relating to divorce and matrimonial causes relating to Christians in India.

(e) The Muslim Personal Law (Shariat) Application Act 1937, Dissolution of Muslim Marriages Act 1939, Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women (Protection of Rights on Divorce) Rules 1986, apply to Muslims living in India.

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislation mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective

enactments themselves. There is an organised system of designated civil and criminal judicial courts within every State in India which works under the overall jurisdiction of the respective High Court in the State. It is in the hierarchy of these courts that all family and matrimonial cases are lodged and decided by the aggrieved party. In addition, the Indian Parliament has enacted the Family Courts Act 1984 to provide for the establishment of Family Courts with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organised, well regulated and established hierarchy of judicial courts in India, there are still unrecognised parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorised and unwarranted bodies work without the authority of law and are not parts of the judicial system.

III CONFLICT AREAS IN INDIAN FAMILY LAW

To assess, evaluate, analyse and examine how different codified Indian family laws actually work in the Indian societal set up and how Courts interpret them and also to construe what are the lacunas involved in these individual family causes, it would be appropriate to deal with the individual subjects hereunder.

(a) Marriage laws

Societal conflicts, law and realities

All the codified marriage legislation in India stipulates conditions of a valid marriage. The bone of contention in these stipulations hovers around two harsh realities, ie age of marriage and registration of marriages. The principal family law legislation in India, ie the Hindu Marriage Act 1955, does not render a marriage void or voidable in the event that the boy has not reached the age of 21 years or the girl has not reached the age of 18 years. Child marriages are performed even though the Child Marriage Restraint Act 1929 provides punishment for solemnising child marriages of boys below 20 years of age and girls below 18 years of age. To add to the problem, India to date does not have a compulsory requirement by law for registration of marriages. This practice is in harmony with reality. Child marriages in practically all religious communities in India are accepted practices, which obviously cannot be registered due to non-fulfilment of the minimum age of marriage. Therefore, the violation of the condition of the minimum age of marriage does not entail nullity of the marriage since registration is optional and not compulsory.

However, the lack of will on the part of the Indian legislature to enact a compulsory law for registration of marriages has not gone unnoticed by the courts. The Supreme Court of India in *Seema v Ashwani Kumar*,[1] has directed all States in India to notify rules for compulsory registration of marriages

[1] *Seema v Ashwani Kumar*, Judgments Today 2006 (2) SC 378.

irrespective of religion, in a time bound period. This reform, which has been spearheaded by the National Commission for Women, has struck a progressive blow to check child marriages, prevent marriages without consent of the parties, check bigamy/polygamy, enable women's rights of maintenance, inheritance and residence, deter men from deserting women and check young girls being sold in the garb of marriage. The Supreme Court of India in another unreported decision dated 27 March 2006 has stayed the legal validity of the marriages of minor girls below 18 years of age, which had been earlier upheld by the two High Court orders being appealed against in the Supreme Court. At least seven States in India have high incidence of child brides and the law does not take care of the anomaly by banning child marriages.

The orders of the Indian Apex Court may open a Pandora's box. Besides Hindus, the problem will also be with the other minority religious communities. Even among Muslims mere non-registration of a marriage will not make it invalid. Codification of some personal laws among some religious communities in India is itself a very debatable issue. Besides, consequences of non-registration of marriages has created a large number of abandoned spouses in India deserted by non-resident Indians who habitually reside abroad. Times have changed, laws have not. Education, economic prosperity, agricultural improvements, cross border migration and Western influences have changed practices and lifestyles in urban India while rural set-ups are still struggling with adherence to customary practices in family law matters. Will society catch up with law or will the legislature enact a law on the request of the Courts to change societal practices? This remains to be seen. However, the fact remains that until the rural masses in India are educated and motivated to change for the better, any change in laws will not really help. Reality must dawn that the unhealthy social edifices of child marriage must be dismantled and the exploitation of married women must cease. Awareness must come from within the people and cannot be enforced by any law.

Inter caste marriages: a national interest

The Constitution of India guarantees the Fundamental Rights to equality, freedom and protection of life and personal liberty. Equality of laws and equal protection of laws are the touchstone and the spirit of these rights. Additionally, the Directive Principles of State Policy endeavour to get the State to strive to promote the welfare of the people in a social order in which justice, social, economic and political, shall inform all the institutions of national life. However, the fact remains that in India when young men and women marry outside their castes or community, it evokes strong sentiments and even honour killings, although there is no bar to inter caste marriages under any codified marriage law. In one such recent decision rendered by the Indian Supreme Court in *Lata Singh v State of UP*,[2] it was held that the caste system is a curse on the nation and needs to be destroyed for the better. Acts of violence and threats against such inter caste couples are wholly illegal and those who commit

[2] *Lata Singh v State of UP*, Judgments Today 2006 (6) SC 173.

them should be severely punished. The administration and police authorities all over the country were directed by the Supreme Court to ensure that no inter caste couple is harassed by anyone or subjected to any threat or acts of violence. Truly, the message of the Court is clear, India of the 21st century cannot be built on the basis of casteism. To amalgamate as a nation, inter caste and inter religious marriages among communities in India must be accepted by society. Barbaric practices of honour killings must be obliterated. But how far can Court decisions achieve this? The government must enforce the law of the land and uphold the citizen's fundamental rights. A heavy hand is required to check this menace. The realisation must dawn on citizens that in the path to development such archaic practices retard growth, reverse progress and kill the spirit of equality. Therefore, law and society must be in tandem to root out such prejudicial practices.

Unconstitutional extra judicial courts: a blow to codified laws

Community practices in certain States in India in certain religious denominations have led to the creation of Community or Religious Courts which do not have the legitimate backing of the system of law and have no sanctity in the official legal system. It is in the matter of inter caste or inter religious marriages or divorces that such self-styled extra-constitutional authorities take upon themselves the power of Courts of law to issue community mandates to people within the community. Such religious edicts result from summary hearings often in violation of Fundamental Rights guaranteed by the Constitution of India. In this regard, the Supreme Court of India on 27 March 2006 in *Vishwa Lochan Madan v Union of India and others*, issued notices to the Central Government, State Governments, All India Muslim Personal Law Board (AIMPLB) and Darul Uloom, an Islamic seminary, in the matter of the existence of parallel Islamic and Shariat Courts in the country, which are posing a challenge to the Indian judicial system. In this petition filed as a Public Interest Litigation petition in the Supreme Court of India, Advocate Vishwa Lochan Madan was seeking immediate dissolution of all Islamic and Shariat Courts in India. Earlier, on 16 August 2005, in *Vishwa Lochan Madan v Union of India and others*, the Supreme Court of India had also issued notices to the Indian States of Uttar Pradesh, Haryana, Assam, Madhya Pradesh, Rajasthan, West Bengal and Delhi, where, according to the petition, Islamic courts have been formed and were posing a challenge to the judicial system of the country.

The Petitioner in the above case sought an immediate dissolution of all Islamic and Shariat courts in India, alleging that the AIMPLB had established Darul Qaza (Muslim Courts) in India at Thane (Maharashtra), Akola Dholiya (Rajasthan), Indore (Madhya Pradesh), South and East Delhi, Asansol and Purulia (West Bengal), Lucknow and at Sitapur (Uttar Pradesh). Citing the fatwa (a religious decree) issued by the Deoband-based seminary in the State of Uttar Pradesh known as Darul Uloom in an earlier rape case and the supporting stand of AIMPLB, the above named petitioner pointed out that the criminal law was not allowed to have its natural course as the entire issue was

said to be hijacked by the Muslim clerics. The petitioner sought a ban on the establishment of such Islamic courts, along with a declaration that these fatwas have no legal sanctity and requested the Court to direct the Central and the State Governments to take effective steps to dissolve all Darul Qazas and Shariat Courts in India.

The petitioner further sought a direction from the Court to the AIMPLB and Darul Uloom, Deoband, other seminaries and Muslim organisations asking them to refrain from establishing a parallel Muslim Judicial System (Nizam-e-Qaza). A direction from the Court was also sought to restrain these organisations from interfering with the marital status of Indian Muslim citizens and passing any judgment, remarks or fatwas as well as deciding matrimonial disputes amongst Muslims. This petition no doubt raises a crucial issue as to whether there could be two parallel legal systems in operation, one legal and the other religious, particularly when the Constitution of India prohibits discrimination on grounds of caste or religion, and whether the right to freedom of religion could be extended to the establishment of a parallel judicial system. At the time of the submission of this paper, the matter had not been decided, still pending final adjudication in the Supreme Court of India, and no conclusive final decision stands reported on the issue by the Court.

On similar lines exist the caste panchayats (village councils) especially in the State of Haryana in India. These caste panchayats throw several lives into turmoil, often by declaring marriages invalid, and invariably their victims belong to the weakest sections of society. Traditionally, caste panchayats have played a powerful role at the village level in several other States of the country also. However, khap panchayats (caste-based village councils) are not elected bodies and their decisions are not enforceable by law as such extra-constitutional bodies have no sanctity or recognition in law. They, however, derive support from community recognition.

Khap panchayats are so powerful because of their ability to mobilise a large number of people that they appear to be democratic from the outside, but they are not. They exclude women, the young people as well as the groups who are lower down in the caste hierarchy in the village.

Recently, in response to a public interest litigation (PIL) filed by the Haryana unit of the People's Union for Civil Liberties (PUCL), the State's High Court directed the government to protect the life and liberty at all costs of a couple who had entered into an inter caste wedlock. The High Court also directed the authorities to ensure that nobody coerced the couple to change the status of their marriage. A similar situation had arisen when the Punjab and Haryana High Court heard a number of writ petitions challenging the fatwas issued by the self-styled caste-based khap panchayats in the State of Haryana ordering married couples to dissolve their marriages and live separately and ordering their expulsion from the villages on their refusal to do so. Another recent village panchayat dictated that a divorced Muslim woman could remarry her

husband only if she marries and divorces her brother-in-law first – this has also been reported in the *Indian Express* dated 6 August 2006. Other such decisions are also glaring and abound.

The positive decisions by the courts of law are no doubt a setback to the caste panchayats of Haryana which have a powerful influence in its socially and culturally backward villages. A positive step has been taken by the Court but there cannot be a constructive outcome until society as a whole decides to fight back to demolish this age-old obsolete system. The executive authorities have done little to check the extra-judicial activities of these unauthorised courts which are a blatant interference with the Fundamental Rights of citizens. The responsibility of the State cannot be abdicated. If this be so, judicial courts in India seem to be the best recourse in giving relief in individual matters involving blatant violation of Fundamental Rights of the citizens by community councils enforcing their edicts by force and extra-judicial means on alleged moral grounds. But then, should courts grant relief as an alternative to ailing legislation? Courts may not legislate but must vindicate human rights. Clearly, the duty of the State also to enforce the law of the land is the need of the day. The courts unhesitatingly should strike down any mandates of any such extra-judicial bodies which have no legal sanctity in a civilised society.

(b) Divorce: customs, practice and law

The two principal family law pieces of legislation in India, ie the Hindu Marriage Act 1955 and the Special Marriage Act 1954, contain three sets of separate grounds in a three-tier divorce structure. These are the fault grounds, breakdown grounds on non-compliance with judicial separation or restitution of conjugal rights and grounds of mutual consent. Irretrievable breakdown of marriage *simpliciter* is not a ground for divorce under any codified Indian family law. The Parsi Marriage and Divorce Act 1936 (as amended) and the Divorce Act 1869 (as amended) follow suit. The Dissolution of Muslim Marriages Act 1939 lays down the grounds for a decree for dissolution of marriage of Muslims.

Custom and the effect of codified law

Section 29 of the Hindu Marriage Act 1955 gives statutory recognition to customary divorces. This in effect means that parties relying on a custom need not go to Court and obtain a decree for divorce. However, the onus on the party who relies on a custom is indeed weighty and the custom should be ancient, certain, reasonable and not opposed to public policy. Even though Courts take judicial notice of customs, the validity of a deed of dissolution of marriage under a customary practice has to be established by leading cogent evidence by the person propounding such custom. In *Subramani v M Chandralekha*,[3] the Apex Court, following well-settled earlier principles of law, held that, since there was no custom prevalent in the community to which the

[3] *Subramani v M Chandrlekha*, Judgments Today 2005 (11) SC 562.

parties belonged for dissolution of marriage by mutual consent, the alleged deed of dissolution marriage could not be executed.

It is common for parties in India to set up customary divorce practices as a short cut to statutory procedures but with the vigilant judiciary such abuse of the process of law does not succeed. Regardless, multiple marriages are often solemnised in contravention of codified law by taking advantage of non-existent customs. To this extent neither law nor the Courts come to the rescue of such parties. However, s 16 of the Hindu Marriage Act clearly provides that, notwithstanding that such marriage is null and void, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate. Consequently, even though spouses may not gain, the statute protects and provides property and other inheritance rights to children of such unions. Conferring such rights upon children has been recently reiterated by the Supreme Court of India in *Bhogadi v Vuggina*.[4] The policy of law is therefore clear to provide beneficial effects to the offspring without condoning the contravention and violation of marriage laws. Customs will not die but their misuse must be prevented and curtailed.

Divorce by irretrievable breakdown of marriage: is it now a necessity?

Keeping in mind that the institution of marriage in Indian society is largely still a sacrament and not a contract, especially under the Hindu Marriage Act, any major overhaul may be counter-productive to the very concept of Hindu Marriage. The existing three-tier divorce structure in India, largely applicable to all communities, ie fault grounds, breakdown theory and the mutual consent principle, provide the codified and statutory grounds for divorce in Indian Courts. Two different High Court decisions, ie *Yudhister Singh v Sarita*,[5] *Kakali Dass v Dr Asish Kumar*,[6] and a Supreme Court of India decision in *Sham Sunder v Sushma*,[7] give a clear indication that the ground of irretrievable breakdown of marriage should be rarely used.

However, some recent decisions of the Supreme Court of India indicate that the Apex Court has recommended that 'irretrievable breakdown of marriage' should be added as a ground for divorce on the statute book. The Supreme Court in *Naveen Kohli v Neelu Kohli*,[8] has recommended to the Union of India to seriously consider bringing an amendment in the Hindu Marriage Act to incorporate irretrievable breakdown of marriage as a ground for divorce. It is not uncommon for the Apex Court to apply this principle in dissolving marriages as was recently done in *Durga Prasanna v Arundhati*,[9] following five earlier precedents of the Apex Court rendered in the last 5 years.

4 *Bhogadi v Vuggina*, Supreme Court Cases 2006 (5) 532.
5 *Yudhister Singh v Sarita*, Hindu Law Reporter 2004 (1) 228.
6 *Kalkali Dass v Dr Asish Kumar*, Hindu Law Reporter 2004 (1) 448.
7 *Sham Sunder v Sushma*, Judgments Today 2004 (8) SC 166.
8 *Naveen Kohli v Neelu Nohli*, Judgments Today 2006 (3) SC 491.
9 *Durga Prasanna v Arundhati*, Judgments Today 2005 (7) SC 596.

In view of the above noted position of law, in the opinion of the authors, a civilised parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the Court for such relief. This will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted time consuming legal battle on trumped-up grounds. Secondly, recourse to *ex-parte* divorce in foreign jurisdictions by non-resident Indians against hapless spouses on Indian soil may decline once a proper legal option of irretrievable breakdown is available to spouses on Indian soil. However, to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Retaining the ceremonial and sacramental concept of marriage, irretrievable breakdown hedged with safeguards can be introduced where both parties consent to it. To harmonise and blend modern family requirements in urban areas with traditional Indian concepts of family law, the above middle path can be best advocated.

Child removal – a fallout of broken marriages

The world is a far smaller place now than it was a decade ago. Inter-country and inter-continental travel is easier and more affordable than it has ever been. The corollary to this is an increase in relationships between individuals of different nationalities and from different cultural backgrounds. Caught in the crossfire of broken relationships with ensuing disputes over custody and relocation, the hazards of international abduction loom large over the chronic problems of maintaining access or contact internationally with the uphill struggle of securing cross-frontier child support. In a population of over a billion Indians, 25 million are non-resident Indians who by migrating to different jurisdictions have generated a new crop of spousal and family disputes.

Cross-border family relationships arising from such exchange have carved out a new niche in the jurisdiction of family law disputes. Such problems have no ready made solutions in the conventional legislation prevailing within the legal system in India. The net result: the innovative judicial system in India with its dynamic jurisprudence when invoked provides a tailor-made answer for every individual case. But then, this does not provide a consistent, uniform and universal remedy to be adhered to in an international perspective. What then is the answer in the highly sensitive area of family law disputes involving conflict of jurisdictions in inter-parental child custody cases when children are removed to India in violation of inter-parental rights or infringement of foreign court orders?

In a recent decision dated 3 March 2006 of the High Court of Bombay at Goa, between a 62-year-old American father and 39-year-old British mother resident in Ireland litigating over the custody of their 8-year-old daughter said to be

illegally detained in Goa by the father, the Court declining the issuance of a writ of habeas corpus held that the parties could pursue their remedies in normal civil proceedings in Goa. The Court dismissing the mother's plea for custody concluded that the question of permitting the child to be taken to Ireland without first adjudicating upon the rival contentions of the parents in normal civil proceedings in Goa is not possible and directed that the status quo be observed. The mother's appeal to the Supreme Court of India against the above High Court decision was dismissed on 21 August 2006, with a direction that, if a custody petition was filed in the appropriate forum, it would be decided within 3 months and until then the status quo would be observed regarding the custody and visitation rights as held by the High Court. This in effect means that the 8-year-old girl continues to live in Goa without her mother or any other female family member in the father's house.

The Hague Convention on Civil Aspects of International Child Abduction came into force on 1 December 1983 and has now 75 contracting nations to it. The Convention secures the prompt return of children wrongfully removed to or retained in any Contracting State and ensures the rights of custody and access under the laws of such Contracting States. India unfortunately to date is not a signatory to the Hague Convention and from practical experience it can be stated that the principles laid down in the Convention are not applicable in India. However, India is now actively considering accession to the said Convention due to the fact that its 25 million non-resident Indian population, spread out over 110 countries of the globe, seriously require such an initiative from an international perspective.

The above situation promotes and encourages child removal to India by an offending parent and deprives the child's custody rights from being determined by the laws of the country where the child was normally resident. It also diverts the best interest of the child as the litigation in India gets converted into a fight of superior rights of parents whereas the real issue of the welfare of the child becomes subservient and subordinate. Practical experience also shows that foreign courts now largely disallow children from overseas jurisdictions to be brought to India, apprehending that children will not be returned to the country of their residence.

In the totality of the emerging scenario, it is now practically seen that, in the absence of any Indian legislation on the subject, there is no uniform pattern of decisions to resolve issues of custody and contact which arise when parents are separated and live in different countries. The recent decision quoted above and another child custody dispute in the Supreme Court of India where a US Court declined the return of children to India despite the Supreme Court's directions show that the time has now come for some international perspective in this regard. In January 2005, the British Government appointed Lord Justice Thorpe as Head of International Family Law in the UK judicial system for promoting development of international instruments and conventions in the field of family law with greater international judicial collaboration. Pakistan has signed a judicial protocol between the President of the Family Division of

the High Court of London and the Chief Justice of the Supreme Court of Pakistan for co-operation between judicial authorities of the two countries on such issues.

In the larger interest of children at risk, the conflict of jurisdiction of Courts must take a back seat. It is, therefore, the need of the hour that the Indian legislature consider enacting some legislation to protect the rights of the abducted child to resolve the clash between the rule of domicile and the nationality rule. Maybe, until this is done, the Supreme Court of India could well lay down some uniform guidelines to be consistently followed in inter-parental child abduction from foreign jurisdictions. India cannot be promoted as a haven for parking removed children.

Enforcement of judgments and orders of foreign courts in India arising in family and matrimonial matters in overseas jurisdictions

With the ever-increasing multifold population of Indians migrating and settling in foreign jurisdictions, the link with their home country does not sever. Family ties, connections of property and movable assets, and the invariable link with some Indian end for any reason whatsoever often lead to cross-border litigation in human relationship matters. Situations abound when a non-resident Indian invokes the jurisdiction of the foreign Court where he is resident and convinces the overseas Court to pass favourable orders in such matters which are thereafter sought to be executed in the Indian jurisdiction through the Courts of law in India.

Indian law reports contain a number of judgments on matters relating to marriage, divorce, maintenance, succession, settlement of matrimonial property, child custody, parental abduction of children from foreign jurisdictions in matrimonial disputes and cases relating to adoption. These foreign court orders, once passed, are sought to be enforced or executed in India through the medium of the Courts. Since there exists no separate provision for recognition of foreign matrimonial judgments or other foreign decisions in related matters in the Hindu Marriage Act 1955, Special Marriage Act 1954, Hindu Succession Act 1956, Hindu Adoption and Maintenance Act 1956, Hindu Minority and Guardianship Act 1956 or in any other Indian legislation relating to family matters, the only recourse lies in s 13 of the Indian Code of Civil Procedure (CPC) which is the general provision of law relating to conclusiveness of judgments by foreign Courts.

In view of the aforestated position, the provisions of s 13 CPC are also fully applicable to matrimonial matters decided by foreign Courts. In such a situation, the precedents giving instances of such reported matters are therefore available only in the shape of judicial pronouncements of Indian Courts which have from time to time rendered a laudable service in interpreting foreign court orders in the best interests of human relationships rather than executing them *simpliciter* in letter and spirit. The Indian judiciary in such a pivotal role is extremely humane and considerate in family matters by implementing the

foreign court orders in a practical way rather than a mechanical execution of the order or judgment of the overseas Court. Perhaps this openness and fluidity are possible since the Indian Courts are not strictly bound by a foreign court order in family matters but when asked to implement or enforce the same, the Indian Courts apply principles of good conscience, natural justice, equity and fair play, thereby rendering substantial justice to parties in litigation. This can be best seen in decisions of some Indian Courts which have resulted from the Court being asked to implement or execute a court order or judgment arising from a foreign jurisdiction.

A very commonly arising issue pertains to recognition and indirect implementation of divorce decrees of foreign Courts produced in India by spouses residing in foreign jurisdictions. In this regard, different views have been expressed by different Indian Courts at different points of time. Consequently, the Supreme Court of India in 1991 laid down fresh comprehensive guidelines for the recognition of foreign matrimonial judgments by the Courts in India. It may be pertinent to point out that under Art 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The Apex Court in *Y Narasimha Rao v Y Venkata Lakshmi*,[10] made it clear that Indian Courts would not recognise a foreign judgment if it had been obtained by fraud, which need be not only in relation to the merits of the matter but also in relation to jurisdictional facts. By this ruling, the Supreme Court on the facts of the case declared a divorce decree passed by a US Court to be unenforceable in India. Interpreting s 13 CPC the Court laid down broad principles to be followed by Indian Courts with special emphasis on matrimonial judgments.

Likewise in *Neeraja Saraph v Jayant Saraph*,[11] on the facts of the case, the Apex Court came down heavily on the erring non-resident husband residing in a foreign jurisdiction who had abandoned his Indian wife without providing for any maintenance to her.

It will be noted that the proposed guidelines in both the above-mentioned Supreme Court rulings are meaningful and if implemented can mitigate the plight of wives dumped in India by foreign husbands. Although the Apex Court has clearly stated the need for suitable legislation on the subject, as yet no Indian law has been enacted to protect the rights of deserted and abandoned spouses in India. In essence, therefore, the judicial verdicts of courts of law are the only available law in India to come to the rescue of hapless Indian spouses who protest against the uncontested foreign divorce decrees invariably obtained in default by spouses from overseas jurisdictions. Thus, some codified law in India on the subject is undoubtedly now an absolute necessity.

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[10] *Y Narashimha Rao v Y Venkata Lakshmi*, Judgments Today 1991 (3) SC 33.

[11] *Neeraja Saraph v Jayant Saraph*, Judgments Today 1994 (6) SC 488.

A reading in totality of the matters in the overseas family law jurisdiction gives an indication that in such affairs, it is the judicial precedents which provide the best available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to prevent them from importing judgments from foreign Courts to India for implementation of their rights. The answer therefore lies in giving them a law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with composite legislation for non-resident Indians in family law matters. Until this is done, foreign Court judgments in domestic matters will keep cropping up and Courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear: the Indian Courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the consideration of Indian law and the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and until such time when the Indian legislature comes to the rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary which is rendering a yeoman service.

(c) Dowry and the law: a social menace

The evil of dowry, ie any property or valuable security given or agreed to be given by parties to the marriage or to their parents and given before or at any time after the marriage in connection with or in consideration of the marriage, is widely rampant in India. The Dowry Prohibition Act 1961 was enacted to prohibit the giving and taking of dowry, but this social menace in the institution of marriage is a deep-rooted community practice which continues despite stringent court verdicts. The practice by which dowry seekers attempt to justify it by quoting examples from Hindu scriptures has percolated to all religions in India though it has no customary or religious sanctity attached to it. Both the Dowry Prohibition Act and s 498-A of the Indian Penal Code (IPC) deal with dowry-related harassment of a married woman. Unfortunately, sometimes dowry leads to death by hanging or burning of a helpless girl tortured for the greed of money. Dowry deaths by burning or suicide have become a ponderous point. Section 304-B was introduced in IPC by the Dowry Prohibition Amendment Act 1986 and s 113-B of the Indian Evidence Act 1872 was also amended in 1986 to reinforce the statutory presumptions of dowry deaths. The decisions of the Supreme Court of India in *Vidhya Devi v State of Haryana*,[12] *Surinder Kaur v State of Haryana*,[13] and *Kunhiabdulla v*

[12] *Vidhya Devi v State of Haryana*, All India Reporter 2004 SC 1757.

State of Kerala,[14] show that dowry deaths by suicide result in conviction of only one person whereas dowry deaths by burning result in convictions of all concerned. This anomaly of law does not mitigate the crime. Therefore, if a married woman commits suicide on account of the dowry menace, the law and the law courts ought to be sensitised to the crime of the silent sufferer. In societal terms, the menace of dowry cannot be uprooted until the masses are educated in the ills of this malpractice and awareness comes from within. At the same time, the law must come down with a heavy hand on dowry seekers and provide deterrent punishment as an example for others who follow it. Harsher and more stringent penalties in law must be further advocated.

(d) Uniform Civil Code – an aspiration or an illusion?

Article 44 of the Constitution of India requires the State to secure for the citizens of India a Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Christians, Parsis and, to some extent, of Muslims. However, there exists no uniform family related law in a single statutory book for all Indians which is universally acceptable to all religious communities in India.

Indian case-law: directions to enact a code

The Supreme Court of India for the first time directed the Indian Parliament to frame a Uniform Civil Code in 1985 in the case of *Mohammad Ahmed Khan v Shah Bano Begum*.[15] In this case a penurious Muslim woman claimed maintenance from her husband under s 125 of the Code of Criminal Procedure after her husband pronounced triple Talaq (divorce by announcing the word 'Talaq' three times). The Apex Court held that the Muslim woman had a right to receive maintenance under s 125 of the Code and also held that Art 44 of the Constitution had remained a dead letter. To undo the above decision, the Muslim Women (Right to Protection on Divorce) Act 1986, which curtailed the right of a Muslim Woman to maintenance under s 125 of the Code, was enacted by the Indian Parliament.

Thereafter, in the case of *Sarla Mudgal v Union of India*,[16] the question which was raised was whether a Hindu husband married under Hindu Law can, by embracing the Islamic religion, solemnise a second marriage. The Supreme Court held that a Hindu marriage solemnised under Hindu Law can only be dissolved under the Hindu Marriage Act and conversion to Islam, as also marrying again, would not by itself dissolve the Hindu marriage. Further, it was held that a second marriage solemnised after converting to Islam would be

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13 *Surinder Kaur v State of Haryana*, All India Reporter 2004 SC 1747.
14 *Kunhiabdulla v State of Kerala*, All India Reporter 2004 SC 1731.
15 *Mohammad Ahmed Khan v Shah Bano Begum*, All India Reporter 1985 SC 945.
16 *Sarla Mudgal v Union of India,* All India Reporter 1995 SC 1531.

an offence of bigamy under s 494 of the Indian Penal Code. In this context, the views of Mr Justice Kuldip Singh as follows are pertinent:

> 'Where more then 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the "Uniform Civil Code" for all the citizens in the territory of India.'

Thus, the Supreme Court reiterated the need for Parliament to frame a Common Civil Code which will help the cause of national integration by removing contradictions based on ideologies. Thus, the Directive Principle of enacting a Uniform Civil Code has been urged by the Apex Court repeatedly in a number of decisions as a matter of urgency. Unfortunately, in a subsequent decision reported as *Lily Thomas v Union of India*,[17] the Apex Courts, dealing with the validity of a second marriage contracted by a Hindu husband after his conversion to Islam, clarified that the Court had not issued any directions for the codification of a common civil code and that the Judges constituting the different Benches had only expressed their views on the facts and the circumstances of those cases. Even the lack of will to do so by the Indian Government can be deciphered from the recent stand stated in the Indian press. It has been reported in the *Asian Age*, dated 5 August 2006, by the Press Trust of India (the Official Government News Agency) that the Indian Government does not intend to bring legislation to ensure a Uniform Civil Code because it does not want to initiate changes in the personal laws of minority communities. However, this ought not to deter the efforts of the Supreme Court of India in issuing mandatory directions to the Central Government to bring a Common Civil Code applicable to all communities irrespective of their religion and practices in a secular India. Hopefully, the Apex Court may review its findings in some other case and issue mandatory directions to the Central Government to bring a Common Civil Code applicable to all communities irrespective of their religion.

Secularism and the Uniform Civil Code

The preamble of the Indian Constitution resolves to constitute a 'secular' Democratic Republic. This means that there is no State religion and that the State shall not discriminate on the ground of religion. Articles 25 and 26 of the Constitution of India as enforceable fundamental rights guarantee freedom of religion and freedom to manage religious affairs. At the same time Art 44 which is not enforceable in a Court of Law states that the State shall endeavour to secure a Uniform Civil Code in India. How are they to be reconciled? What will be the ingredients of a Uniform Civil Code? Since the personal laws of each religion contain separate ingredients, the Uniform Civil Code will need to strike a balance between protection of fundamental rights and religious principles of different communities. Marriage, divorce, succession, inheritance and maintenance can be matters of a secular nature and the law can regulate

[17] *Lily Thomas v Union of India*, Supreme Court Cases 2000 (6) 224.

them. India needs a codified law which will cover all religions in relation to the personal laws of different communities.

Critics of the Uniform Civil Code think that the true principles of Muslim Law remain eclipsed by its extensive alleged misreading over the years. It is suggested by Tahir Mahmood,[18] an eminent scholar, that 'an Indian Code of Muslim Law based on an eclectic selection of principles from the various schools of Shariat is the ideal solution to all the contemporary problems of Muslim Law'. In another report dated 11 May 2006 in *The Hindu*, it has been reported that the Supreme Court of India dismissed a Public Interest Litigation Petition challenging the legality of the customs of polygamy, talaq and divorce practised by Muslims under personal laws. The plea for a direction to the Central Government to make Uniform Marriage Laws for all communities was rejected on the ground that it is for Parliament to change or amend the law. Thus, the debate is endless and the issue remains unresolved.

To sum up, it can be concluded that for citizens belonging to different religions and denominations, it is imperative that for promotion of national unity and solidarity a Unified Code is an absolute necessity on which there can be no compromise. Different streams of religion have to merge to a common destination and some unified principles must emerge in the true spirit of secularism. India needs a unified Code of Family Laws under an umbrella of all its constituent religions. Whether it is the endeavour of the State, the mandate of the Court or the will of the people is an issue which only time will decide for a true Indian Secular Democratic Republic.

(e) Judicial activism in family laws: a turning point

A series of decisions by the Supreme Court of India in the areas of family laws in the recent past has gone to show that the Apex Court is motivating a lot of positive and well meaning reforms which have become necessary over a period of time. Three recent decisions of the apex Court can be cited in support of this proposition:

(a) In *In Re: Enforcement and Implementation of Dowry Prohibition Act, 1961*[19] the Apex Court directed the Indian Central and State Governments to implement all the interim directions issued by the Supreme Court earlier and take effective measures to frame rules and enforce the provisions of the Dowry Prohibition Act 1961 by devising measures to create honest, efficient and committed machinery for the purposes of the implementation of this Act meant to eradicate the social evil of dowry.

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[18] In his article 'Muslim Personal Law: Clearing the Cobwebs' *The Hindu*, 30 July 2006.

[19] *In Re: Enforcement and Implementation of Dowry Prohibition Act, 1961*, Judgments Today 2005 (5) SC 71.

(b) In *Sushil Kumar Sharma v Union of India and others*,[20] the Apex Court upholding the constitutional validity of s 498A of the Indian Penal Code held that the object of s 498A is prevention of dowry menace and to check cruelty and harassment of women and therefore, the provision does not offend the Constitution of India.

(c) In *St Theresa's Tender Loving Care Home v State of Andhra Pradesh*,[21] it was held that the working of the homes run by State Governments for abandoned and destitute children offering them for adoption needs to be seriously improved and the Central and State Governments would do well to look at these problems with the humanitarian approach and concern they deserve.

However, the Supreme Court has also tested various aspects of personal laws on the touchstone of fundamental rights. In *Gita Hariharan v Reserve Bank of India*,[22] the Supreme Court read down s 6 of the Hindu Minority and Guardianship Act 1956 to mean that the mother is also a natural guardian, and irrespective of whether the father was unfit or not, the mother should also be given equal rights as a natural guardian. In *John Vallamattom v Union of India*,[23] s 118 of the Indian Succession Act was struck down as unconstitutional as it was held to be discriminatory against Christians in imposing unreasonable restrictions on the donation of their property for religious or charitable purposes by will. In *Danial Latifi v Union of India*,[24] a Constitutional Bench of the Supreme Court gave a categorical finding that, in view of their interpretation of the Muslim Women (Protection of Rights on Divorce) Act 1986, the provisions of the Act were not in violation of Arts 14 and 21 of the Constitution, the Fundamental Rights of which guarantee equality of law and right to life and personal liberty.

The views of the Indian Apex Court on the issue of registration of marriages, inter-caste marriages, child marriages, Dowry Prohibition Act, irretrievable breakdown of marriage, Uniform Civil Code and a secular approach have already been referred to earlier. A legislative setup which is slow to respond to societal changes and a proactive judiciary which is keen to motivate reforms in law is therefore clearly visible on the Indian horizon. Even in matters affecting the environment, pollution and the health of people, the role of the judiciary in India has been very constructive. The vibrant, dynamic and open jurisprudential system in India is amenable and flexible to the changing needs of people. We could therefore well have reform in family law through the views of the court even if there is opposition from religious communities in respect of personal laws. If a Uniform Civil Code does not come as a result of legislation, decisions of Courts will always suggest reforms to improve the plight of

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[20] *Sushil Kumar Sharma v Union of India and others*, Judgments Today 2005 (6) SC 266.
[21] *St Theresa's Tender Loving Care Home v State of Andhra Pradesh*, Judgments Today 2005 (9) SC 11.
[22] *Gita Hariharan v Reserve Bank of India*, Supreme Court 1999 (2) 228.
[23] *John Vallamattom v Union of India*, All India Reporter 2003 SC 2902.
[24] *Danial Latifi v Union of India*, Supreme Court Cases 2001 (7) 740.

children and women who are affected the most. The Indian judiciary indeed deserves to be hailed in this regard for its yeoman efforts for the welfare of Indians.

IV CONCLUSION

A net analysis of the various propositions and viewpoints discussed above drives home the ideal solution that for Indians there is needed one indigenous Indian law applicable to all its communities which coexist democratically. Analytically speaking, the answers to the social issues examined above are within the system. Codification of a Unified Civil Code may be the ultimate solution. Other measures will only tide over time. Judicial verdicts will keep the momentum going. Accommodating personal laws of all religions under such a Code is an uphill task. It may take time. The legislature will ultimately have to perform this onerous duty of compiling the Code. Religion will have to keep pace with the law. Unity in India exists in its diversity. Times have moved ahead, but personal laws have not kept pace. The Courts in India perform a Herculean task in carving out solutions on a case-by-case basis. The executive and the legislature in India however now need to contribute to provide the much needed solutions. In the e-age today, the path to progress must be chartered with harmony at home. India itself is a confluence and not a clash of civilisations. Indians are vibrant, amenable to change and have an astonishing ability to adapt to their environment. As the largest democracy in the world, India projects a role model in various aspects of family laws. Maybe with further changes and amendments in some aspects, a better role model to emulate may emerge in the Indian subcontinent.

India (Part 2)

WOMEN'S INHERITANCE ACCORDING TO THE 2005 AMENDED HINDU SUCCESSION ACT

*Florence Laroche-Gisserot**

Résumé

Le Hindu Succession Act de 1956 avait fait un pas important vers l'égalité garçons-filles mais n'avait pas été jusqu'au bout de celle-ci. L'amendement de 2005 y remédie totalement: la 'joint family' de l'école Mithaksara est remodélée et les filles sont désormais dès leur naissance partenaires comme les fils. La règle est d'application immédiate, même si la fille est déjà mariée. Cette mesure s'imposait mais va rendre les liquidations successorales encore plus complexes et probablement accélérer le déclin des "joint families". L'autre mesure essentielle élimine une controverse issue d'une rédaction maladroite de l'Hindu Succession Act et qui conduisait à douter que ce texte fut applicable à la terre agricole. L'ambiguité, largement exploitée dans le nord du pays au détriment des femmes, cesse donc. Il reste bien sur à appliquer les nouvelles règles; celles de 1956 ne le sont souvent pas encore ce qui génère des doutes.

I INTRODUCTION

The ancient traditional Hindu succession system was certainly not woman-friendly or daughter-friendly.[1] Sons, grandsons, great-grandsons were granted the whole heirloom and in case of no male heir even the widow prevailed over the daughter. Naturally the daughters owned some property, the so-called Stridhana, a tough and unclear question in ancient Hindu law,[2] but basically it consisted of presents given by parents or relatives on special occasions such as marriage; usually these consisted only of movables such as items of jewellery and clothes that would be passed on, after death, to

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1 Only the Mithaksara school will be analysed in this chapter as it prevails in most areas about the Hindu system: D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 285; SA Desai *Hindu law* (Butterworths, New Delhi, 2001) esp vol 1 and vol 2, 277; R Tripathir *Handbook on Hindu law* (Sagar Law House, Allahabad, 2003) ch 2; *Mayne's* revised by Justice Alladi Kuppuswani *Hindu law and usage* (Bharat Law House, New Delhi, 2001) 1048.

2 PC Jain 'Women's property rights under traditional Hindu law and the Hindu Succession Act 1956; some observations' (2003) 45 *Journal of the Indian Law Institute* 509.

daughters or daughters-in-law.[3] If a woman (a widow, for instance) had inherited land or other immovables, such property had to be reverted to the heirs of the deceased, not to her own heirs. This was corrected very little by testamentary provisions as drawing up a will was not part of the Indian custom.[4]

Things were made worse by the fact that in India the bulk of property is not held by individuals but by joint families (coparcenaries) as the ancestors' assets. Typically, in a joint family, the coparceners were all the males descended from a common ancestor. In no case could a woman be a coparcener, even though she worked as hard as everyone else for the community. It is well known that joint families are close clusters: even in the case of an outside job, pay cheques are handed over to the head of the family and money is given back according to one's needs. However, since 1930, especially if they have secured high level jobs, as a result of their qualifications, degrees and training, coparceners may now have separate assets; what is bought with this extra money remains personal. Every coparcener is entitled to ask for partition (they cannot sell their share). But usually partitions happen only when, due to too many coparceners, the whole thing is unmanageable; the joint property is split between brothers and they start new joint families with their own descendants. This is how, as scholars pointed out, in a joint family, devolution takes place through survivorship (birth and death) as one never knows how many partners will remain alive in the event of partition: if your brother has twin boys, your share decreases; if your uncle dies, your share increases.

In 1937 an important Act was passed which entitled widows of coparceners to inherit from their husbands but it was made clear that it was mainly for maintenance purposes, hence a life property with a limited right to interfere in the management of the common assets. Things changed with the Hindu Succession Act 1956 (HSA):[5] in relation to individual assets daughters were entitled to equal shares as sons and for joint assets a kind of compromise was set up that did not make female issue coparceners but provided some compensation for them as heirs. However, this specific persistent gender inequality turned out all the more controversial as most Central and Southern States enacted amendments to HSA making daughters full coparceners.

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[3] If not grabbed or pledged by in-laws; on dowry issues see W Menski (ed) *South Asians and the dowry problem* (Trentham Books, London, 1998) 237; Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3).

[4] D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 292.

[5] The HSA applies to Hindus, Sikhs, Jaïns and Buddhists (about 86 per cent of India's population); it has special provisions for Hindu matrilineal communities customarily ruled by other systems; the Christians are ruled either according to their residence (Goa: Portuguese Civil Code, Cochin, Travancore: Cochin Christian Succession Act) or by the 1925 India Succession Act (as are the Parsis); the Muslim communities are ruled by the Sharia. A few gender differences remain inside the HSA: for instance, the mother is first class heir of a son and not of a daughter; if a Hindu female dies with no children or husband, assets go to the husband's heirs except those inherited from parents which go back to her father.

Nevertheless, on the contrary, in Northern States a strong attempt was made to remove, through court orders, agricultural land from the HSA jurisdiction and get back to gender-biased state laws.

Eventually the central authorities made it quite clear that equality should prevail at least regarding joint families and invited every reluctant state to join the central-southern block and amend the HSA on a state level. As nothing happened, the Indian Government decided to move on and, based on a Law Commission report, a Bill was presented to Congress in December 2004. Obviously deficient in some focal points, it was thoroughly amended and the final Act goes much further than the initial step.[6]

Roughly speaking women get everything they were claiming. But it is obvious that some changes are clear-cut and easy to figure out whereas others are less simple to assess. To the first category belongs the suppression of s 23 of the HSA, known as the dwelling issue; this typical gender-biased provision provided that when a Hindu person (male or female) died leaving a house (that could be part of an agricultural tenancy) occupied by members of the family, the right of female heirs to collect their share of the house through selling it or otherwise would not arise until the male heirs agreed on it. Instead of money, female heirs could live in the house but this applied only to an unmarried daughter, a widow, a divorced woman or a wife deserted by her husband.[7] This provision underlined the fact that a married woman did not belong to her own family anymore and its suppression was sought for a long time.

Reshaping the Mithaksara coparcenary was tougher business: the joint property principle could be abolished as it had been done in Kerala or it could be maintained with daughters being partners from now on. Both solutions were disruptive for coparceners especially if applied to married daughters. Obviously, the radical approach prevailed; the 1956 compromise about coparcenary is dead and the main gender inequality in the Hindu inheritance system disappears at once. But the agricultural land problem that had fuelled controversy in northern India and known as the 'Land Acts' issue was still unsolved. So the ambiguous provision was very quietly removed from the HSA. Implementing these new solutions, especially the last one, will not be an easy task. Most Indian scholars think that the HSA is on the whole poorly effective in promoting gender equality and even the unclear possibility of making state laws occasionally prevail acted as a kind of safety valve. So, even if we can consider the reshaping of the ancient misogynist Mithaksara coparcenary as the most dramatic achievement, the agricultural land issue may well reveal itself the tougher.

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6 On the new Act: PK Das *New Law on Hindu Succession Act: Property rights of women and daughters under the Hindu Succession (Amendment) Act* (Saujanya Books, Delhi, 2005) 259.

7 This provision was very unfair for an unhappy wife compelled to ask for divorce or remain with her husband as she had nowhere to go. For a widow, the unfairness was just the same though opposite: she had to remain in the house whereas she might wish to live on her own.

II MAIN ACHIEVEMENT: RESHAPING THE MISOGYNIST MITHAKSARA COPARCENARY

The HSA contained some provisions eager to deal with some past unfairness and to find workable solutions when getting to the core of Hindu traditions. The 1956 compromise (a) has been overridden by the 2005 amendment (b).

(a) The 1956 compromise

In the first place, widows who in 1937 had gained a life interest in their husbands' assets for maintenance purposes from now on were to be considered as full owners of those assets including the joint assets, which meant the right to partition and sell the land. This gave way to a lot of litigation when the widow started selling the common land; indeed this was often challenged by the husband's male relatives and coparceners. Widows usually got strong support from the courts.[8]

The most delicate problem was to decide on coparcenaries: would the daughters become full partners? This was suggested and seriously considered but eventually not settled in this way. According to the HSA, females belonging to first class heirs (daughters, widow, mother) are not partners but they will get a compensation as an heir: whenever a coparcener died, a fictitious partition was achieved; shares were assessed and divided but only to carve out the share of the deceased. It was not a real partition. The share, as carved out, was distributed in equal parts to first class heirs and the joint family was supposed to receive their share afterwards especially if a lump sum of money had been given to the daughters in lieu of the share. However, scholars thought[9] that this was likely to end up, most of the time, in disruption to the community.

But, though not obviously, this arrangement remained strongly gender-biased. Indeed, when the so-called notional partition occurred to carve out the father's share and have it transferred to children, it has not been emphasised enough that the sons would get richer as surviving partners as well as heirs. We know that in the joint family devolution does not occur through succession but through survivorship. This is the reason why a coparcener has no idea of his prospective share until partition because it depends on births and deaths. Hence, when the father died his sons automatically had an increased share in the coparcenary; but not the daughters.[10] However, the son collected his share as heir as well. So sons received two grants as coparcener and heir whereas daughters received one grant only as heirs. And that is the reason why the compromise had to be reviewed.

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8 See, for example, a Supreme Court ruling in 1996 AIR 146.

9 See D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001), 279.

10 Kusum 'Towards gender-just property laws' (2005) 47 *Journal of the Indian Law Institute* 95.

(b) The 2005 solution

The new s 6 of the HSA bridges the gap left by the 1956 compromise. It provides that daughters have by birth full coparcener's rights and liabilities on the same level as sons; and it is twice repeated (s 6-a and 6-b) in the new provision. It means that, since 9 September 2005, every joint family has to include as additional partner's daughters and daughters' daughters automatically.

Moreover, the new Act does what the former state level laws had not done, ie that daughters already married at the time of the enforceability of the new regulations are granted these new rights as well as unmarried daughters. This is a real breakthrough and will not go unnoticed. Indeed every Hindu knows that giving a dowry to daughters was one of the Mithaksara coparcenary obligations. Hence the idea that the daughter may have been given a compensation for her non-partner status by means of a dowry and consequently that the new Act should not apply to previously married daughters. This suggested restriction was actually inconsistent: the dowry should not be a compensation for having fewer or no rights at all in one's family interests. Doing so would be to admit officially that the Indian daughter, estranged from her own kinship, has to bring money to fit into a new home and family. Though dowry practices are of very little comfort, because most of the time in-laws will try to grab it or take control of it, this goes legally against the Dowry Prohibition Act 1961.[11] Actually dowries should not fit into the coparcenary birthrights but be considered as a pre-mortem share possibly collected by the daughter and later on be deducted from the daughter's total share of the deceased parent's heirloom. Indeed, what was at stake in this controversy could be more than just inheritance issues and have a close link with dowry issues: many Indian scholars feel that the main explanation of the well-known dowry abuses is the deprivation of a daughter's rights in her family assets devolution; the dowry buys the bride a kind of share as a potential widow in her husband's family heirloom; consequently the best way to curb these abuses would be to enhance equal rights among children in families so that the married daughter should not need a widow's allotment.[12] So it would have been a real mistake to make dowry issues interfere – even in a transitory way – with the new Act.

Would the total abolition of Mithaksara joint property (as in Kerala) have been a better solution? Some Indian scholars considered this difficult to work out as it would have had to be safeguarded by restrictions on testamentary freedom because fathers would have drawn up wills to disinherit daughters.[13] However,

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[11] See W Menski (ed) *South Asians and the dowry problem* (Trentham Books, London, 1998), 97; Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3).

[12] Madhu Kishwar (founder of Manushi review) *Off the beaten track: Rethinking gender justice for Indian women* (Oxford University Press, Delhi, 1999) esp ch 2.

[13] B Agarwal 'Landmark step to gender equality', *The Hindu*, 25 September 2005, 1 (the author was closely associated with the parliamentary process).

we are left with the fact that inheritance settlements of deceased Hindu coparceners will not be made easier by the new amendment; two sets of operations have still to be conducted with the same persons but separately: the management of the coparcenary after the father's death has to be reorganised with the remaining partners and the share of the deceased has to be transferred (and that involves partners as well). As in the 1956 Act, this devolution does not operate any longer through survivorship to actual partners but to intestate or testamentary heirs. As before the notional partition has to take place and, if devolution operates intestate, first class heirs (children, widow, mother) will collect equal shares. The new s 6 insists on the fact that daughters and sons must collect equally which was already the 1956 solution (this operation should lead to the deduction of a possible dowry). One can consider that, in an increased way because of new added partners, the disruptive effect of such assessments and allotments will give way to partition and that de facto the old Mithaksara coparcenary arrangements will decline and in the long run disappear.

As on the contrary, agriculture will remain for a while the occupation of most Indians, it is important to assess the effect of the new Act regarding the quiet suppression of the land property provision in the HSA.

III AGRICULTURAL LAND BACK INTO THE HSA

Section 4(2), which is suppressed by the 2005 Amendment Act, was an unclear provision which had given way to a lot of litigation and had even underlined the contrast between the (moderately) gender-equality oriented Southern India and the more misogynist Northern India. Constitutional issues were involved as well. The debate was very unfortunate (a) but the clarification could be very difficult to implement (b).

(a) An unfortunate debate

After independence most states enacted Land Acts to abolish and dismantle the old Zamindari system (a sort of feudal system). That is why some tenants paying rent became full owners; ceilings were fixed to prevent the comeback of Zamindars, and other provisions prevented fragmentation of holdings to consolidate this new class of owners. In most Northern States these Land Acts contain provisions for devolution of land through inheritance as well and they are strongly gender-biased. So what happens in the case of a conflict between these provisions and the HSA? For some scholars it is against the Indian Constitution that the HSA should rule agricultural land which is under state jurisdiction. But as intestate devolution is under federal jurisdiction the assumption is far from correct. Some court orders in the north favoured the

anti-HSA solution and it was often said that this Act does not apply to agricultural land.[14] But it was never ruled that way by the Supreme Court.

What fuelled controversy was the fact that the above related s 4(2) of the HSA was supposed to deal with these possible conflicts in a very unclear way. It provided that the HSA will not prevail over provisions of local Acts if they fix ceilings, prevent fragmentation of holdings or provide for the 'devolution of tenancy rights'. Obviously it meant that the HSA prevailed over other provisions that might be in those land Acts. But an additional controversy arose about the correct meaning of 'devolution of tenancy rights'. For some scholars and judges 'tenancy' means any kind of title allowing people on the land to cultivate it either by full ownership or by renting. For others it was obvious that tenants were only people paying rent. These two constructions led to opposite solutions. If tenancy included ownership, the provisions of local acts regarding the devolution of land through inheritance obviously prevailed over the HSA; they were 'saved' by the above provision and equality was simply ruled out; if not it was just the other way round. The HSA was written in English and the inconvenience of this has been underlined. Regarding this specific issue the difficulty was very serious. Some Indian judges looked up the meaning in English dictionaries and found out that tenancy means both renting and full property! So far it seemed that most courts had chosen the restrictive construction that allowed the HSA to apply to most land cases.[15] But nothing was final and things remained confused. This is why the new Act is probably not welcome everywhere.

(b) Implementing the solution

The first cause of concern is that the suppression of the controversial provision went almost unnoticed; it was introduced after the Bill's presentation through amendments and was voted on on the quiet;[16] experience teaches that such unnoted and uncommented changes on sensitive issues give way to court battles (and maybe more so in common law countries).

Moreover the new rule will have to coexist with the fact that agricultural land legal statutes and distribution remain outside constitutional challenges and are ruled on locally. In some states, regulations are openly discriminatory as in Uttar Pradesh (one-sixth of the Indian population). Land ceiling legislation is a good example: adult daughters are not taken into account for the definition of the family; both spouses' holdings are added whereas there is no community of property in India. Practices may be just as unfair: if surplus forfeiture occurs, it will usually be done in consultation with the husband and will lead to taking away the wife's land; redistribution will be carried out in order to favour

[14] SA Desai *Hindu law* (Butterworths, New Delhi, 2001) vol 2, s 4; see Allahabad High Court rulings 1970 AIR 238; 1973 AIR 407; 1975 AIR 125.

[15] See Bombay High Court 1994 AIR 247; see also Punjab High Court 1964 AIR 272 and although unclear (based on application of personal law provided by the specific land Act) SC 1978 AIR 793.

[16] See B Agarwal 'Landmark step to gender equality', *The Hindu*, 25 September 2005.

male-headed households despite official recommendations.[17] In a lot of cases tenancy registration practices only lead to registering the woman's land under her husband's or son's name and this does not encourage women to claim their rights. Whereas in the South comprehensive data show that owning land or a house seriously decreases the risk of domestic violence against women, some regional split and resistance are very likely to occur.[18]

IV CONCLUSION

It is obvious that the 2005 Act is a landmark in gender equality. Will it only benefit a few women, with many others being submitted to the pressure of custom? What we know about the actual implementation of the 1956 Act may lead to pessimism. It has been reported that even a lawyer or a judge will advise his wife not to claim her share in her father's heirloom because he expects his own sisters will do the same.[19] If in educated circles the law is not implemented, what can we expect for illiterate women or for those who live secluded lives in rural areas? The existence of early marriage and virilocal residence powerfully acts against women. As they leave their birthplace and family, what use will they have of land or property so far away from effective control? But obviously in modern India males of every strata migrate for jobs and do not give up claims on family assets. Why should women give up their claims? The answer is definitely beyond the mere changing of the law.

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17 B Agarwal *A field of one's own* (Cambridge University Press, Delhi, 1994).

18 Ibid; it is important to consider that this regional split started a long time ago: dowry cases are more frequent in Northern India and the sex ratio is more strongly biased against girls than in Southern India (Laroche-Gisserot 'De la compensation matrimoniale à la dot dans le mariage indien moderne' (2006) *Les Annales* (à paraître n 3)).

19 See D Annoussamy *Le droit indien en marche* (Société de législation comparée, Paris, 2001) 291.

Italy

SHAPING THE FEATURES OF EUROPEAN FAMILY LAW: PROBLEMS AND PERSPECTIVES

*Elena Urso**

Résumé

La première conférence de la Commission pour le droit de la famille européen – créée le Ier septembre 2001 – a été consacrée aux perspectives de l'harmonisation et de l'unification du droit de la famille en Europe (Utrecht, le 11-14 décembre 2002). La publication de ses travaux a suscité beaucoup d'intérêt parmi les experts de la matière les années suivantes. On peut être d'accord ou non sur ses buts et sur les méthodes suivies, mais il faut souligner que ses activités ont été considérées avec une attention croissante dans le débat entre les comparatistes. Dans un même temps, des innovations introduites par les institutions de l'Union Européenne (UE) ont marqué un pas important vers le développement d'un droit commun pour les Etats membres dans ce cadre. Des règles unitaires sont applicables aujourd'hui pour déterminer la compétence juridictionnelle, la reconnaissance et l'exécution des décisions judiciaires dans les procédures matrimoniales (Reg no 1347/2000, Bruxelles II) et également, dans les cas de rupture du couple, marié ou non, concernant la responsabilité parentale (Reg no 2201/2003, Bruxelles II-bis).

Des prévisions communes ont été rédigées afin d'établir des garanties pour la réunion des membres des familles qui vivent dans les Pays externes à l'UE (Dir 2003/86) et une réglementation nouvelle a été créée pour la circulation des citoyens Européennes et des membres de leur familles dans les territoires des Etats de l'Union (Dir 2004/38). Un projet a également été présenté pour l'émanation d'un Règlement applicable aux aspects de droit international privé du divorce (appelé Rome III). La proclamation de la Charte des droits fondamentaux de l'UE à Nice en décembre 2000 et son insertion dans la II partie du Traité qui aspire à créer une Constitution pour l'Europe, signé à Rome, le 29 octobre 2004, ont renforcé les liens entre les Etats de l'UE. Il faut mentionner aussi des décisions innovatrices de la Cour de Justice de la Communauté Européenne. Dans une perspective différente, des principes communs pour un droit de famille européen se trouvent aussi dans la jurisprudence de la Cour Européenne des droit de l'homme. Néanmoins, il existe des différences importantes dans certains développements récents des expériences juridiques considérées (par exemple, dans la définition du mariage). Ce rapport analyse l'incidence de ces innovations dans le contexte national grâce à une description des modifications législatives, des réactions de la jurisprudence et de la doctrine italiennes.

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I INTRODUCTION

The beginning of the new millennium saw an astonishing increase in interest towards the so-called phenomenon of the 'Europeanisation' of several areas of the law.[1] Initially, the main aspect of this phenomenon was linked with the leading role played by legal scholars. They stressed the distinction between European Union (EU) law, European Community (EC) law, strictly speaking, and European law in a broader sense, that is to say, as comprehensive not only of other formal sources of law applicable inside the European context, but also of those principles and rules stemming from national experiences that gave rise spontaneously to similar core features in this area and that, at the same time, called for a renewed and conscious effort in favour of its harmonisation.[2]

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[1] It is important to mention the absence of family law in several, albeit different, initiatives unified by a common interest towards harmonisation of European private law, in an initial phase. Indeed two Resolutions of the European Parliament (very important documents, but without binding force) were enacted in 1989 and in 1994 to promote the idea of drafting a common European Private Law Code (See Doc A2-157/89 and Doc A3-0329/94). However, not only the work done by the so-called 'Lando Commission', but also that of other academic groups was focused on contract law. See H Beale and O Lando *Principles of European Contract Law, 1997, Parts I and II* (Kluwer, The Hague, 2000). See also the results of the activity of the Academy of European Private Law *Code européen des contrats: avant-projet/ European Contract Code. Preliminary Draft* (Giuffré, Milan, 2001), and the collected papers of the first meeting of the 'Society for European Contract Law', S Grundmann and J Stuyck (eds) *Academic Green Paper on European Contract Law* (The Hague, 2002). In the area of contract law the most recent trend embodied in the European Commission's Action Plan favours a 'soft law' approach (i e a common frame of reference, as defined in the Communication from the Commission to the European Parliament and the Council – COM [2003] 68 Def in para 4.1.1) instead of a binding code. It is not possible to consider here these issues accurately. It is sufficient to mention that different approaches were adopted by other legal scholars. See, eg, J Smits *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed Legal System* (Intersentia, Antwerp, 2002); C Von Bar *The Core Areas of Tort Law, its Approximation in Europe and its Accommodation in the Legal System* (Clarendon Press, Oxford, 1998). For another vision, see M Bussani and U Mattei *The Common Core of European Private Law. Essays on the Project*(Kluwer, The Hague, 2003). Thus, tort law and the law of property also became subjects of comparative enquiries. See, eg, A Gambaro *Perspectives on the Codification of the Law of property: An Overview*, in *European Review of Private Law* (1998) 497 ff. A European Group on Tort Law was created too, in association with the European Centre of Tort and Insurance Law in Vienna (see the website hosted by the University of Girona at www.egtl.org/members.htm) and a Study group on a European civil code by Christian Von Bar, at the University of Osnabrück (see the website at www.sgecc.net/).

[2] The idea of 'codification', independently of the aims of its promoters, did not embrace family law, a core area of contemporary private law in which fundamental rights are often at stake. It seems superficial to propose here a synthesis of the possible, express or implied justifications for this exclusion. It is clear that the basic reasons that traditionally were considered as obstacles to comparison in this area determined this outcome too. The absence of EU legislative competence was a formal, important aspect to be considered, but it was not the only one, evidently. All in all, in cases having cross-border implications the European Community has now legislative powers (Art 65 of the TEU) with regard to judicial co-operation in civil matters, albeit only as far as this is necessary for the proper functioning of the internal market. Comparative analysis – devoted to family law – was focused for a long time on the nation state dimension so that important interconnections with international and transnational legal issues were necessarily undervalued. However, as we will see, this trend has started to change in recent years. Evidently, comparative lawyers who are against the very idea of a European codification manifested their criticism on a wide scale. Thus, their opposition is linked to more general

The existence of certain deeply rooted differences among legal systems, as well as the sudden rise of completely new ones, was not seen as an obstacle to the adoption of unitary rules for European citizens,[3] at least in some specific areas of family law, nor to the promotion of more extended 'uniformisation' plans. In this perspective, contributions of EU law to the developments that occurred in state contexts were seen as part of a more general legal trend not limited by national boundaries, nor necessarily coinciding with the expanding EU borders. A great deal of attention was also devoted to the practical consequences of the reciprocal interconnections between the two levels. This awareness grew as concrete measures were taken to cope with specific problems working both from a common European standpoint and from that of the more firmly established but very useful and still lively approaches followed domestically.[4] However, a sharp divergence emerged.

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reasons: eg, albeit from different perspectives, P Legrand *Fragment on Law-as-Culture* (Kluwer, The Hague, 1999) and, by the same author, *Against a European Civil Code* (1997) 27 *Modern Law Review* 44; R Zimmermann C*ivil code and Civil Law: the 'Europeanization' of Private Law within the European Community and the Re-emergence of a European Legal Science* (1994–95) *Columbia Journal of European Law* 68. By the same author see also *Savigny's Legacy: Legal History, Comparative Law and the Emergence of a European Legal Science* (1996) *Law Quarterly Review* 576; *Roman Law and Harmonization of Private Law in Europe*, in A Hartkamp, M Hesselink, E Hondius, C Joustra, E Du Perron, M Veldmann (eds) *Towards a European Civil Code* (Kluwer, Nijmegen, 2004) 21 ff. A sceptical vision was expressed also from a common law point of view: see B S Markesinis *Why a Code is not the Best Way to Advance the Cause of European Legal Unity* (1997) *European Review of Private Law* 519.

On the EU competence in the area of judicial co-operation, see S Bariatti *La cooperazione giudiziaria in materia civile dal Terzo Pilastro dell'Unione europea al Titolo IV del Trattato CE*, in *Diritto dell'Unione Europea* (2001) 261 ff and by the same author *Le competenze comunitarie in materia di diritto internazionale privato e processuale*, in *Casi e materiali di diritto internazionale privato comunitario* (Giuffré, Milan, 2003) pp 1 ff. See also C Kholer *Lo spazio giudiziario europeo in materia civile e il diritto internazionale privato comunitario*, in P Picone (ed) *Diritto internazionale privato e diritto comunitario* (Cedam, Padua, 2004) 65 ff; O Remien *European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice* (2001) *Common Market Law Review* 53. More recently, see S Bariatti (ed) *La famiglia nel diritto internazionale privato communitario* (Giuffré, Milan, 2007).

[3] European citizenship was introduced by the Maastricht Treaty (TEU), signed in 1992: 'Citizenship of the Union shall complement and not replace national citizenship' (Art 17 of the Treaty of Rome, ex Art 8, as amended). In compliance with Community law, each member state establishes the conditions for the acquisition and the loss of nationality. This was specified by the ECJ, in the case *Micheletti v Delegación del Gobierno en Cantabria* (C-396/90) [1992] ECR I-4239. In brief, citizens of the EU have the right to work, to vote, to move and reside in the EU (Art 19), as well as the right to receive diplomatic protection by other Member states when they are in a non-EU member state, in case of absence of diplomatic or consular authorities of their own state (Art 20 TEU). To have an idea of the complex issues to be considered, see R Bellamy and A Warleigh (eds) *Citizenship and Governance in the European Union* (Continuum, London-New York, 2001); M La Torre (ed) *European Citizenship: An Institutional Challenge* (Kluwer, The Hague, 1998). For a critical essay, see C Salazar 'Tutto scorre': riflessioni su cittadinanza, identità e diritti alla luce della Carta dei diritti fondamentali dell'Unione Europea alla luce dell'insegnamento di Eraclito' (2001) *Politica del Diritto* 373.

[4] See F Ruscello *La famiglia tra diritto interno e normativa comunitaria*, in *Familia* (2001) p 697 ff, *Rilevanza dei diritti della persona e 'ordinamento comunitario'* (Esi, Naples, 1993). J Roberts *Constitutional and International Protection of Human Rights: Competing or Complementary Systems?* (1994) 15 *Human Rights Law Journal* 1; C Kolher *Interrogations sue les sources du droit international privé européen après le traité d'Amsterdam*, in *Revue Critique de Droit International Privé* (1999) 3. In Italian, see E Urso 'Il diritto di famiglia nella prospettiva

On one side, the proponents of a conception based on clear statements of fundamental rights considered a common constitutional binding Charter as the logical premise, a necessary 'precondition' for such a plan.[5] On the other side, this requirement was not deemed to be so compelling. On the contrary, the emphasis was put on the common constitutional traditions created in Europe, especially since the signature of the Rome Treaties (1957). According to the latter view, not only was the 'façade' of this 'European building' already very clearly delineated,[6] its foundations came to be seen as resting on solid ground

"europea"' in F Brunetta d'Usseaux (ed) *Il diritto di famiglia nell'Unione European* (Cedam, Padua, 2005) 515 ff. More recently, see P Stanzione, G Sciancalepore (eds) *Minori e diritti fondamentali* (Giuffré, Milan, 2006).

5 An important role was conferred on some evident signs of a 'constitutional' process. According to Art 6 (ex Art F) of the Maastricht Treaty (ie the Treaty establishing the EU), which was signed in 1992 and entered into force on 1 November 1993: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member states.' Article 6.2 TEU reaffirms that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member states, as general principles of Community law'. Before the entry into force, in 1999, of the Treaty of Amsterdam (1997), Art F.2 of the TEU emphasised the respect due to the human rights and fundamental freedoms as guaranteed by the ECHR and as they resulted from the common constitutional traditions of EU member states. However, the effectiveness of this provision was undermined by former Art L (now Art 46), because it excluded Art F from the jurisdictional competence of the ECJ. Therefore, fundamental rights could play a limited role even if the ECJ's fundamental task consists of ensuring respect for EC law in the interpretation and the application of the EC Treaty. In that way, its function was rather limited. The Treaty of Amsterdam (Art 13 – ex Art 6a) provides that: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' Thus, the scope of the protection afforded to individuals in the EU was expanded. It became comprehensive not only of cases of non-discrimination based on nationality (Art 12 TEU, ex Art 6 EC) but also of other kinds of discrimination. However, Art 13 EC allowed the Council to adopt measures to combat discrimination, but it did not impose a prohibition on the previously mentioned forms of discrimination. At the same time, however, the Treaty of Amsterdam modified Art 46. Consequently, Art 6, 2 of the TEU, became applicable to the ECJ, which now has jurisdiction in all cases in which a member state committed a violation of fundamental rights. After the proclamation, on the occasion of the signature of the Treaty of Nice (2000), of the European Charter of Fundamental Rights, a further step was taken in the same direction: the recognition of a strong commitment by the EU in the protection of human rights. See, on these issues, in Italian, U Villani, *I diritti fondamentali tra Carta di Nizza Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea*, in *Diritto dell'Unione europea* (2004) pp 73 ff. In particular, on the implications for family and child law, see M C Andrini, 'La famiglia nella Costituzione europea', in A Celotto (ed) *Processo costituente europeo e diritti fondamentali* (Giappichelli, Turin, 2004) pp 131 ff; G Ferrando *Le relazioni familiari nella Carta dei diritti dell'Unione europea,* in *Politica del diritto* (2003) p 347 ff; G Passagnoli, 'I diritti del bambino nella Carta europea'in G Vettori (ed) *Carta europea e doveri nel nuovo sistema delle fonti*, (Cedam, Padua, 2002) pp 327 ff. More generally, see F Ferrari (ed) *I diritti fondamentali dopo la Carta di Nizza* (Giuffré, Milan, 2001).

6 The 'Nice Charter' was inserted into the second part of the Treaty establishing a Constitution for Europe, which was signed in Rome on 29 October 2004, but that is not yet in force. Some of its provisions deserve to be mentioned. While Art II-80 of the Treaty contains the general principle of 'equality before the law', that is stated in respect of 'everyone', Art II-81 reaffirms

as well. The building may be said to be a firm structure, with walls built out of bricks added year by year and now waiting for its roof to be put on.[7]

II THE IMPACT OF THE 'EUROPEAN' CASE-LAW

Despite these contrasts, some points are now undisputed. Undoubtedly, the vision centred on a mere national dimension of the legal protection of fundamental rights, which was initially predominant, has now been superseded by a more advanced conception.[8] In dismantling the original structure a decisive contribution was made by the 'European judiciary', that is to say, by the European Court of Justice (ECJ – the 'Luxembourg Court') and the European Court of Human Rights (ECtHR – the 'Strasbourg Court').[9]

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the principle of 'non discrimination' and its related specifications ('1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'). The Third Title, which is devoted to equality, imposes respect for cultural, religious and linguistic diversity (Art II-82). Equality between men and women (Art II-83) is ensured in all areas, including 'employment, work and pay', but also in family relationships. At the same time, the 'principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex'. Also children's rights are expressly mentioned. Article II-84 provides that 'children shall have the right to such protection and care as is necessary for their well-being', that they 'may express their views freely' and that these 'views shall be taken into consideration on matters which concern them in accordance with their age and maturity'. In particular, every child has the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests. Moreover, in all actions relating to children 'whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. Finally, the rights of the elderly are taken into account (Art II-85) – 'to lead a life of dignity and independence and to participate in social and cultural life'. Disabled persons (who have rights 'to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community' (Art II-86)) are recognised and respected by the Union. All these aspects deserve great attention in dealing with family law reforms. On these points see below in the text.

7 See, in English, among Italian authors, E Caracciolo di Torella, A Masselot *Under Construction: EU Family Law* (2004) *European Law Review* 32, 45. See also E Caracciolo di Torella, E Reed 'The Changing Shape of the "European Family" and Fundamental Rights' (2002) *European Law Review* 80 ff.

8 See M Killerby *The Council of Europe's Contribution to Family Law (Past, Present and Future)* in N Lowe and G Douglas (eds) *Families Across Frontiers* (Martinus Nijhoff Publishers, The Hague, 1996) p 13. More recently, in Italian, see on the role of the ECtHR, G Ferrando 'Il contributo della Corte Europea dei diritti dell'Uomo all'evoluzione del diritto di famiglia', in M C Andrini (ed) *Un nuovo diritto di famiglia europeo* (Cedam, Padua, 2007) p 135 ff and L De Grazia 'Il diritto al rispetto della vita familiare nella giurisprudenza degli organi di Strasburgo: alcune considerazioni', in *Rivista di Diritto Pubblico Comparato ed Europeo* (2002) pp 1069 ff. On child protection in Community law, see P Di Pasquale 'L'interesse del minore nella prospettiva del diritto comunitario' in *Diritto Pubblico Comparato ed Europeo* (2001) pp 1237 ff.

9 It is not possibile to quote here all the decisions taken, respectively, by the ECJ and the ECtHR that are related, in different ways, to family law issues. See for a very clear, general analysis G Alpa 'Alcune osservazioni sul diritto comunitario e sul diritto europeo della famiglia' in *Familia* (2003) pp 439 ff. See for a description of some of the problems to be dealt with, E Urso 'Il diritto di famiglia nella prospettiva "europea"' in F Brunetta D'Usseaux (ed) *Il diritto di*

The ECtHR developed its own 'jurisprudence' thanks to a long series of judicial decisions delivered in heterogeneous cases. These cases were about the balance to be struck between the national rules concerning adults' procreative choices and those aimed at protecting the foetus;[10] the rights of adopters, as well as those of would-be adoptive parents, in connection with the adopted child's rights, including the respect for, and knowledge of, his or her origins; the substantive protection and the procedural rights of children in care and those of foster parents; the condition of children born out of wedlock and their inheritance rights; family name; and, last but not least, new forms of family life, in cases of de facto unions, of transsexual couples and of homosexual parents.

The ECtHR condemnations of member states of the Council of Europe for not respecting the rights embodied in the 1950 Rome Convention coexisted with decisions that 'saved' national solutions – in all these fields. Evidently, the specificity of each controversy can often explain such differences, but it is worth mentioning that, as a rule, the Strasbourg Court tends to be extremely respectful of state discretion, even more so when it is called to interpret the inherently vague provisions of the European Convention on Human Rights (ECHR), drafted in a period of time in which most of the difficult 'challenges' proposed by contemporary family law could not have been envisaged.[11] Moreover, at a state level, reactions were different, also in anticipation of condemnation, both at a legislative and at a judicial level.[12] Thus, there are several reasons why, despite the direct impact of precedents that declared the contrast between national legislation and the ECHR, the final outcome of any

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famiglia nell'Unione Europea. Formazione, vita e crisi della coppia (Cedam, Padua, 2005) pp 515 ff. For some detailed surveys made more recently by Italian legal scholars, see C Ricci 'La "famiglia" nella giurisprudenza comunitaria' in S Bariatti (ed) *La famiglia nel diritto internazionale privato comunitario* (Giuffré, Milan, 2007) pp 91 ff; G Bisogni 'Il diritto comunitario e la costruzione di un diritto di famiglia europeo' and S Patti 'Note sulla formazione del diritto europeo', pp 159 ff, contributions both published in M C Andrini (ed) *Un nuovo diritto di famiglia europeo* (Cedam, Padua, 2007) pp 17 ff. For a synthesis of the law about kinships/relationships, seen within a 'European picture', see A Diurni 'La filiazione nel quadro europeo' in G Ferrando *Il nuovo diritto di famiglia*, vol 3, *Filiazione e adozione* (Zanichelli, Bologna, 2007) pp 41 ff. For a wide analysis of the interrelationships between international conventions and domestic law, see J Löng *Il diritto italiano della famiglia alla prova delle fonti internazionali* (Giuffré, Milan, 2006) and, by the same author on the ECtHR case-law, see 'La Convenzione Europea dei diritti dell'uomo e il diritto italiano della famiglia' in P Zatti (ed) *Trattato di diritto di famiglia. Aggiornamenti (gennaio 2003–giugno 2006)* (Giuffré, Milan, 2006) pp 1 ff. See, also, F Caggia *Famiglia e diritti fondamentali nel sistema dell'Unione Europea* (Arakne, Rome, 2005) pp 51 ff, pp 193 ff.

[10] See, eg, the much debated case *Vo v France* (App no 53924/00, ECtHR 8 July 2004) available at www.echr.coe.int.

[11] It was only in 2000 that the ECtHR began also to consider other conventions to interpret the ECHR. It underlined that it is important to read it 'in the light' of more modern international documents (e g the 1980 Hague Convention on civil aspects of international child abduction). See in the first decision in this sense: *Ignaccolo Zenide v Romania* (App no 31679/96, 25 January 2000) and, more recently, in a rather similar case, *Bianchi v Switzerland* (App no 7548/04, 22 June 2006). See the Court official website www.echr.coe.int.

[12] In Italian, see V Zagrebelsky 'Famiglia e vita familiare nella convenzione europea sui diritti umani' in M C Andrini *Un nuovo diritto di famiglia europeo* (Padua, 2007) pp 115 ff.

procedure cannot be considered decisive, per se, in determining identical solutions, in domestic systems. It is necessary also to look at its indirect effects both in the state involved in the litigation – which has the duty to modify its internal rules accordingly – and in all the other member states of the Council of Europe.

As far as the role of the ECJ in the area of family relationships is concerned, its work consisted of a substantial, albeit interstitial, expansion of the applicability of some social benefits and measures originally granted to migrant workers so as to extend them to their family members.[13] Thus, a 'communitarian web' began to be 'knitted' thanks to a case-by-case method, well known to common law countries, but rather unprecedented in civil law systems, at least in the modern, codification era.

III THE INTERSECTIONS BETWEEN THE EUROPEAN AND THE NATION STATE LEVELS

The decision of the EU not to adhere to the Council of Europe was justified – in the mid 1990s – with the absence at 'that moment' of the necessary conditions to accede to that international organisation, but it was followed soon afterwards by a growing openness to the reciprocal co-operation in the protection of fundamental rights.[14] This was perhaps not yet evident soon after the signature of the Maastricht Treaty (1992), but there is now clear evidence that some of the answers given to the same questions by the two Courts in

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[13] For a rather brief account of these judicial developments, see E Urso 'Il diritto di famiglia nella prospettiva "europea"' in F Brunetta D'Usseaux (ed) *Il diritto di famiglia nell'Unione Europea. Formazione, vita e crisi della coppia* (Cedam, Padua, 2005) pp 528 ff. Subsequently, for further bibliographical references, see C Ricci'La "famiglia" nella giurisprudenza comunitaria' in S Bariatti (ed) *La famiglia nel diritto internazionale privato comunitario* (Giuffré, Milan, 2007) pp 91 ff. It is important to emphasise that, since 1991, member states are liable for the loss they caused as a consequence of the infringement of rights directly conferred by community law on EU citizens. Civil liability arises also if the prejudice was caused by activities (or omissions) of the legislature and the judiciary, and not only in cases of responsibility of the executive branch (i e of all public authorities, at a state or a local level). The ECJ stated this principle very clearly in the case of *Francovich and Bonifaci v Republic of Italy* (Cases C-6 and 9/90) [1991] ECR I-5375. In that case, the Italian Government had not implemented a Directive – Directive 80/987 (which imposed on member states the duty to establish a minimum compensation scheme for workers in the case of their employers' insolvency). The ECJ added some specifications in subsequent cases (i e *Brasserie du Pêcheur v Federal Republic of Germany* and *R v Secretary of State for Transport ex parte Factortame Ltd* (Cases C-46 and C-48/93) [1996] ECR I-1029). The breach had to be 'sufficiently serious' and with a direct causal link to the loss suffered. In one of the most recent decisions on this issue (*Traghetti del Mediterraneo Spa v Italy* (Case C-173/03), decided on 28 July 2006) a debated point was clarified: the seriousness of the breach exists whenever there is an infringement of EC law.

[14] The European Community did not accede to the ECHR because, according to an opinion of the ECJ (which had been requested by the European Council) its case-law had already made it clear that respect for human rights was a condition for Community action. Moreover, at that moment, the Community had no competence to make accession to the ECHR. See *Opinion* no 2/94 on *Accession of the Community to the ECHR* (1996) ECR I-1759.

deciding cases that have important implications for national family law reflect a reciprocal influence, even where it is obvious that different methods have been followed to cope with those issues. This intersection between two Courts that still work 'in parallel' is not an isolated phenomenon, nor has it happened by chance. Several instances confirm the common European direction deliberately given to some recent initiatives on both sides of the European legal framework. New Conventions have been signed within the Council of Europe, with the aim of updating rules concerning the most common problems of 'European' families today. Of course, the central role of the principles embodied in the ECHR as necessary points of reference for the ECtHR makes them inevitable points of departure.

As far as the role of the ECJ is concerned, there is another kind of internal limitation that depends on the scope of its competence, which is defined by the EU Treaty so as to ensure a necessary correspondence with the areas of communitarian competence. The very mechanism of the preliminary judgment signals this interdependency. There is, however, something new in recent European legal experience that justifies the impression that, notwithstanding the fact that some differences will – and should – continue to be present as expressions of the autonomy of nation states, a new approach will be adopted in the future. This seems likely to happen not only in situations in which international obligations prompt the application of human rights law, especially if 'shaped' by ECtHR case-law or as a reaction to Recommendations adopted by the Parliamentary Assembly of the Council of Europe or to Resolutions enacted by EU Parliament in specific areas,[15] but also, more generally, when the EU agenda indicates the priority of certain socio-economic targets in order to favour political integration.[16]

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[15] See the EU Parliament Resolutions on the protection of family and children (A4-0004/1999, OJ C128/79) and on the reconciliation between family and work life (A5-0092/2004, OJ C102/83). Other Resolutions date back to previous years. For a complete list, see C McGlynn *Family law in the EU* (Camdridge University Press, Cambridge, 2006) pp xxviii ff. For a brief analysis see E Urso 'Il diritto di famiglia nella prospettiva "europea"' in F Brunetta D'Usseaux *Il diritto di famiglia nell'Unione Europea. Formazione, vita e crisi della coppia* (Cedam, Padua, 2004) pp 515, 522.

[16] A vast analysis of the 'European' case-law is not possible. It is interesting to note the 'links' between some famous decisions. On the one hand, the ECtHR decision in the case *Goodwin v United Kingdom* (App no 28957/95, 11 July 2002), in *Reports and Decisions of the European Court of Human Rights* (2002) p 18, was mentioned by the ECJ in deciding the case *KB v United Kingdom* (C-117/01) 7 January 2004. On the other hand, a case decided by the ECJ (*P e S v Cornwall County Council* (C-13/94)), was quoted by the ECtHR in the above-mentioned decision (*Goodwin v United Kingdom*). All these cases concerned the treatment of transsexual couples. An analogous approach, favourable to equal treatment with heterosexual couples, was followed. However, the condition of homosexual couples has not received equal protection compared to different-sex couples in 'European' case-law. However, the recent statutory modifications in this area are likely to have an impact on future judicial developments in both the ECJ and the ECtHR. See on these issues M Bell 'Shifting Conceptions of Sexual Discrimination of the Court of Justice: from *P v S* to *Grant v SWT*' in (1999) 5 *European Law Review* 63 ff and, by the same author, *Antidiscrimination Law and the European Union* (Oxford University Press, Oxford, 2002) and 'Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union' in R Wintemute, M Andenas (eds) *Legal Recognition of Same Sex Partnership* (Hart Publishing, Oxford, 2001) pp 653 ff; 'We are Family? Same-sex

IV A SKETCH OF THE CURRENT ITALIAN POLITICAL TENSIONS

In introducing a national survey, these considerations may appear extremely vague. They may, nonetheless, help to understand better the nature and the extent of the tensions now rife in Italy. Some instances of these tensions can be drawn from recent events. For example, representatives of different political parties, according to their personal ideas about the notion of 'family', or, rather, to their religious and social visions, took part in a mass demonstration (organised by several associations and named 'Family day'), held in Rome on 12 May 2007, independently of their opposition to, or participation in, the government coalition. The common denominator among the participants was the same emphasis put on the unitary foundation of the family, as a natural society founded on marriage according to the words of an article of the Constitution, and the refusal to be 'homogenised' to foreign models, adopted by other European countries in which this important aspect is no longer central to the family law system. The day this event took place, and it was vastly publicised and attracted a million participants in the capital, another demonstration was held in Rome. The latter was planned to support opposing projects to regulate the conditions of families formed by unmarried (heterosexual and same-sex) couples.[17] From the latter perspective, a frequent basis of criticism is linked with the accusation against the Italian legislature of not following the 'European trend'.

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partners and the EU Migration Law' (2002) *Maastricht Journal of International and Comparative Law* 335 ff. As far as the decisions concerning unmarried couples are concerned, it is worth mentioning *X e Y v United Kingdom* (1983) in *Decisions and Reports of the European Commission on Human Rights* 32 (1983) 220; *Johnston v Ireland* (18 December 1986) and *Sauce do Gómez c Spagna* (App no 37784/97, 26 January 1999), all available at www. echr.coe.int. On these issues, among Italian authors, see E Calò *Le convivenze registrate in Europa-Verso un secondo regime patrimoniale della famiglia* (Giuffré, Milan, 2000). More recently, see S Asprea *La famiglia di fatto. In Italia e in Europa*, (Giuffré, Milan, 2003); L Balestra *La famiglia di fatto* (Cedam, Padua, 2004); C S Pastore *Famiglia di fatto. Analisi e disciplina di un modello familiare* (Utet, Turin, 2007); D Riccio *La famiglia di fatto* (Cedam, Padua, 2007). On the role of religious factors, see A Fucillo *Unioni di fatto e fattore religioso* (Giappichelli, Turin, 2007). For a comparison between Italian legislative proposals for reforms and the French PACS, see G Autorino Stanzione and P. Stanzione 'Unioni di fatto e patti civili di solidarietà. Prospettive de iure condendo' in G Autorino Stanzione and P Stanzione (eds) *Le unioni di fatto, il cognome familiare, l'affido condiviso, il patto di famiglia, gli atti di disposizione familiare*, vol 5 of the Treaty *I grandi temi del diritto di famiglia* (Giappichelli, Turin, 2007). For a private international law view, see A Devers *Le concubinage en droit international privé* (Montchrestien, 2004).

[17] Apart from a lively debate, some judicial decisions can also be mentioned. See, eg, *Tribunale di Latina*, *Decreto* of 10 June 2005, annotated by P Schlesinger and by M Bonini Baraldi in *Famiglia e Diritto* (2005) pp 413 ff and 418 ff; by P Cavana in *Diritto di famiglia e delle Persone* (2005) pp 1268 ff; by G Musolino in *Rivista del Notariato* (2006) pp 740 ff; by M Orlandi in *Giurisprudenza di merito* (2005) pp 2292 ff and by G Dosi in *Diritto e Giustizia*, no 30 (2005) pp 36 ff. See also M Bonini Baraldi 'Il Pacs in Europa ed in Italia: luci ed ombre' *Quotidiano Giuridico* n 2 May 2006 (available also at www.studiolegaleriva.it/public/pacs-1.asp) and by R De Felice *Diritto di famiglia e ordine pubblico internazionale* at www.personaedanno.it/site/sez_browse1.php?campo1=25&campo2=232&browse_id=4840.
It is interesting to quote the last sentences of this decisions: 'In the current state of

development of Italian society, same-sex marriage is contrary to history, tradition and culture of the Italian community, according to an evaluation accepted by the legislature and followed by legal norms, at a constitutional and at an ordinary level . . . The judge has the duty to be a faithful interpreter of these norms, independently of his personal opinions . . .' Thus, 'no evolutionary interpretation, albeit if in consonance with common ideas' was considered admissible. To reinforce this reasoning, the Tribunal added that 'also in member states of the EC' the decision to open marriage to homosexuals is 'an exception' so that 'it is not possible to affirm that a legislative novelty can be easily accepted'. Rather, the uniqueness of such legislation determines that it is not 'in line with shared principles of international law'. Finally, however, the Court admitted that there is a diversity, which is becoming more and more frequent, in the case of solidarity agreements or of similar solutions, no matter if the partner is of the same or of the different sex. Anyhow, it stressed that 'it is not the judiciary, but the legislature', that has the discretion to modify the current situation. Some further decisions depicted a partially different picture. See *Decreto* of *Tribunale per i Minorenni di Brescia*, 26 September 2006, in *Guida al Diritto – Il Sole 24 Ore*, *Famiglia e Diritto*, n 2 February 2007 (on-line review available at www.guidaaldirrito.ilsole24ore.com). The Tribunal refused to recognise a foreign adoption decision because it considered contrary to 'fundamental ethical and social principles', at least as they are perceived in Italy currently, the fact that the adoptive couple was a same-sex one. The adoptive parents were two men who had got married in Massachusets in 2004 and who subsequently were allowed to fully adopt a child. The decision emphasised the absence of the requirements provided for full adoption by Italian legislation (i e that the adopters are members of a married couple). Given that marriage is possible only for heterosexual couples in Italy, the Tribunal observed that a homosexual couple could not have been considered suitable for adoption. In brief, there was no mention of public policy but only a simple specification of the presence of different social and ethical visions. The same Tribunal decided a case, soon afterwards, on 19 October 2006 (*Decreto* no 26/4) that affirmed the possibility of recognising a foreign decision concerning a full adoption in favour of a single person. This is not a new outcome. See for a survey of case-law, E Urso, *Adozione*, vol 7 in the Treaty *La famiglia*, P Cendon (ed), in the series *Il diritto privato nella giurisprudenza* 201 (Utet, Turin, 2001) pp 288 ff. It seems important to consider, however, its final remarks: '[T]he concept of public policy has a relative nature and it is also apt to be transformed, in space and time, as a consequence of the modifications of habits and of social ethic . . . The phenomenon of de facto family has been continuously extended in our society . . . and recent scholars' debates were devoted to the possibility of allowing full adoption in our legal system also in favour of unmarried persons and even of singles.' Also the Court of Appeal took an analogous decision. It acknowledged that the Italian state has the duty to abide by common principles and rules operating within the international community. It admitted that there are international subjects and courts called to protect the rights of individuals who are members of each national community, as well as a 'supranational' context which is comprehensive of the domestic systems. However, it added that the judicial control in the field at stake is delimited by the prerogatives of national actors and that the Italian legislature is aware of the fact that the EU Parliament gave specific indications (with its Resolutions concerning homosexual couples – taken on 8 February 1994, on 16 March 2000, 14 July 2001 and 4 September 2003). However, these Resolutions have no binding effect in interpreting the domestic legislation. The absence of binding force was expressly mentioned also as far as the 'Nice Charter' is concerned, after a quotation of Art 9, which establishes the right to marry and create a family, but leaves to the legislation of member states the definition of the 'exercise' of this right. A decisive importance, on the other hand, was given to the relevant 1950 ECHR provision (Art 12). The fact that several EU member states enacted innovatory Acts dealing with same-sex unions, albeit differently, was considered the result of a long process in which each national community made its own choices in balancing individual rights. The debate on these issues is still ongoing in Italy and Parliament has not yet decided – concluded the Court. Consequently, the appeal was dismissed and the first instance judge's decision was affirmed (see Court of Appeal of Rome, 13 July 2006, in *Guida al Diritto*, *il Sole 24 Ore*, no 35 (2006) pp 55 ff and in the online review www.guidaaadiritto.ilsole24ore.com/).

Another case – unpublished – was decided by the civil Tribunal of Florence, on 7 July 2005

On both 'sides', however, a detailed legal and comparative analysis is often lacking and a mere list of Acts is mentioned, albeit for different purposes, without due reference to the socio-political reasons underlying certain choices or their modifications. For instance, the expression PACS – borrowed from the acronym of the French definition used to describe unions not based on marriage (*Pacte civil de solidarité*) – is often used, also by the media, to describe several, different models of civil union or registered partnerships, proposed in a series of partially different Bills.[18] In order to underline the specificity of the model proposed by the government, the unions to be regulated were called 'Di-co' (*Diritti dei conviventi* – rights of cohabitants), a word that became

(decree no 266/2005). The public was informed only in late 2006, when a local newspaper (*Il Giornale della Toscana*) published the text of the decision. The first instance judge allowed the reunion of a couple formed by two men, an Italian citizen and a non EU-citizen, coming from New Zealand. She denied any conflict with public policy. She noted that they formed a de facto family, according to the law of New Zealand, but that also in Italy de facto couples, heterosexual and homosexual, have social importance and have obtained also specific legal attention, as happened with Act no 154/2001 (on family violence). Moreover, she observed that their rights have not only a constitutional foundation (Art 2, Constitution), but also recognition in the EC Directive (2004/38/CE) about the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. Indeed, for the purposes of this Directive, the definition of 'family member' should include the registered partner too, but only 'if the legislation of the host Member state treats registered partnership as equivalent to marriage'. Thus the fact that the judge invoked an EC Directive in a period in which it was not yet implemented (2005) is not per se decisive, given the immediate duty of public authorities to follow the principles embodied in a Directive, even before its implementation. Also, if another EC Directive is applicable to the reunion of third-country nationals (2003/86/CE), the main obstacle to the recognition of the right at stake consists in the absence, in current Italian legislation, not only of equivalence between marriage and registered partnerships, but also of any express regulation of the latter. At the same time, it is necessary to think about the consequences of a refusal, which would have been a violation of the principle of non-discrimination envisaged by the EUCFR. It true that the Treaty of Rome (2004) is not yet in force, but the Charter acquired a legal *status* and its principles should be followed in all member states. The latter aspect was only partially considered in a more recent decision – not yet published – taken by the Court of Appeal of Florence on 12 May 2006 and registered on 6 December 2006, which allowed the appeal of the Ministry of the Interior and consequently reformed the first instance judgment so to deny the existence of the right to family reunion. The latter decision emphasised the difference between a de facto and a legal relationship and the need to respect nation states competence in this field. It stressed that the member of a de facto same-sex union cannot be considered a 'family member' (according to Art 28 of Act no 218/1998). The recognition of the decision taken by New Zealand authorities was thus considered contrary to 'Italian public policy'.

[18] Before the presentation of several Bills under the current legislature (XV), other plans for legislative regulation of de facto unions were drafted. For a brief view, see E Urso 'De facto Families and the Law: Dealing with Rules and Freedom of Choice' in A Bainham (ed) *The International Survey of Family Law 2001 Edition*, (Jordans, 2001) pp 187 ff. For a comparative perspective on these issues, see E Ceccherini 'The Principle Against Discrimination on Grounds of Sexual Orientation: A Brief Survey of the Debate from the Perspective of Different Constitutional Systems' in E Ceccherini (ed) *Sexual Orientation in Canadian Law* (Giuffré, Milan, 2004) pp 28 ff; for a 'European' perspective, see E Rossi 'L'Europa e i gay' in *Quaderni Costituzionali* (2000) pp 404 ff; M R Marella 'Il diritto di famiglia fra status e contratto: il caso delle convivenze non fondate sul matrimonio' in F Grillini, M R Marella (eds) *Stare insieme. I regimi giuridici della convivenza fra status e contratto* (Esi, Naples, 2001) pp 51 ff; E Del Prato 'Patti di convivenza' in *Familia* (2002) pp 959 ff; E Moscati, A Zoppini (eds) *I contratti di convivenza* (Torino, 2000); A Zoppini 'Tentativo di inventario per il nuovo diritto di famiglia' in *Rivista Critica del Diritto Privato* (2001) pp 335 ff.

popular in a few weeks, even among opponents of this plan. Some of them proposed a clear slogan to express their dissent: 'Dico di no ai Dico' ('I say 'no' to Dicos').

In brief, while waiting for the competent parliamentary Commission to examine all the Bills presented so far – those drafted by other groups that belong to the current majority and another one proposed by a member of Parliament who is part of the opposition[19] – it seems very unlikely that a vast consensus can be reached in the near future. A recent, three-day national meeting on the family (*Conferenza nazionale sulla famiglia*) held in Florence (on 24–26 May 2007) and organised by the Italian Government, with the participation of the President of the Republic, gave the public the idea that the issues at stake are really deserving of great attention and that a general debate is necessary, open to all voices, so that contrasts are not seen as obstacles, but as unavoidable elements of the dialogue, with a view to arriving at widely approved solutions.[20]

The knowledge of foreign experiences should be of paramount importance, of course. However, not only do 'black letter rules' need to be known, but also the actual outcomes of the application of those legislative provisions, taking into account the socio-economic contexts in which they have operated. Comparing social experiences and focusing on political ideas might increase the awareness of the complexity of the problems to be dealt with. Indeed, a mere analysis of legal aspects can give a rather limited vision. It is not possible here to propose an overview of this wider context nor of the obstacles often encountered, especially in the past, to considering family law outside the area of 'comparable legal issues'.[21] However, it seems worthwhile to mention at the outset that, due

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[19] These are the references of the Bills presented in the current legislature: Bill approved by the Council of Ministries on 8 February 2007 (*Diritti e doveri delle persone stabilmente conviventi*); Bills presented at the Senate: by Senators Russo Spena (S 1227 – *Disciplina delle unioni civili*) Maria Luisa Boccia (S 1208 – *Normativa sulle unioni civili e sulle unioni di mutuo soccorso*), Natale Ripamonti (S 472 – *Disposizioni in materia di unioni civili*), Vittoria Franco (S 18 – *Norme sul riconoscimento giuridico delle unioni civili*), Luigi Malabarba (S 62 – *Norme in materia di unione registrata, di unione civile, di convivenza di fatto, di adozione e di uguaglianza giuridica tra i coniugi*), Giampaolo Silvestri (S 481 – *Disciplina del patto civile di solidarietà*). Other Bills were presented at the House of Representatives by On Titti De Simone (C-1563 – *Disciplina delle unioni civili*). The opposition's Bill was presented by Senator Alfredo Biondi (S 589 – *Disciplina del contratto d'unione solidale*). Their discussion is forthcoming. For a clear synthesis, made by the President of the 'Justice Commission' of the Senate, Senator Cesare Salvi, see www.senato.it/notizie/8766/131996/131997/131998/notiziearchivio.htm.

[20] On the occasion of the national meeting on the family, ISTAT and the Ministry of the Policies for the Family published a statistical report. It was drafted by a working team made up of representatives of ISTAT and of the Department of the Policies for the Family. It was created also with a view to having more structured collaboration in order to collect information useful to detect needs of Italian families before drafting the national plan for the family. See C Canali, R Crialesi, G Dalla Zuanna, L L Sabbadini and T Vecchiato (eds) *La famiglia in Italia. Dossier statistico* available at www.istat.it/istat/eventi/2007/famiglia/dossier.pdf.

[21] There was general scepticism about comparison in the area of family law for a long time. See W Müller-Freienfels 'The Unification of Family Law' in (1968–1969) 16 *American Journal of Comparative Law* 175 ff and 'The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England' (2003) 28 *Journal of*

to a high level of abstraction, both in the theories based, respectively, on the idea of 'legal transplants' and on the prospects of the creation (or, rather, of the discovery) of a set of 'better law' solutions, there are serious limits on funding common grounds for a unitary European family law.[22] On the contrary, socio-legal comparison gives evidence both of some trends towards convergence and of sharp differences that have arisen recently,[23] especially if one does not limit one's description to an exclusively 'private law' vision,[24] as if all family law issues could be equated to those pertaining to the area of contract law.[25]

Family History 31 ff; M A Glendon 'Irish Family Law in Comparative Perspective; Can There Be Comparative Family Law?' (1987) 9 *Dublin University Law Journal* 1.

22 In contemporary comparative literature, more nuanced positions were expressed. See A Agell 'Is there One System of Family Law in the Nordic Countries?' (2001) 3 *European Journal of Law Reform* 313 ff; D Bradley 'A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics' (2005) *Oxford University Comparative Law Forum* 4 at http://ouclf.iuscomp.org. By the latter author see also 'Convergence in Family Law: Mirrors, Transplants and Political Economy'(2001) *Oxford University Law Forum* 2 and in *Maastricht Journal of European and Comparative Law* pp 127 ff and 'A Family Law for Europe? Sovereignty, Political Economy and Legitimation' in K Boele-Woelki (ed) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia, Antwerp, 2003) pp 65 ff.

23 See A Rieg 'L'harmonisation européenne du droit de la famille: mythe ou réalité?' in *Mélanges en l'honneur d'Alfred E von Overbeck à l'occasion de son 65ème anniversaire* (Fribourg, 1990) pp 473 ff; A Verbeke and Y H Leleu 'Harmonization of the Law of Succession in Europe, in A Hartkamp, M Hesselink, E Hondius, C Joustra, E Du Perron, M Veldmann (eds) *Towards a European Civil Code* (Nijmegen, 2nd edn, 1998) pp 173 ff and, in the latter book, D Martiny 'Is Unification of Family Law Feasible or Even Desirable?' pp 151 ff. See also, for a critical analysis, M T Meulders-Klein 'Towards a European Civil Code on Family Law? Ends and Means' in K Boele-Woelki *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Antwerp, 2003) p 105 and, in the same book, C McGlynn 'Challenging the European Harmonisation of Family Law: perspectives on "the family"' pp 219 ff; D Martiny 'The Harmonization of Family Law in the European Community. Pro and Contra' in *Towards a European* Ius Commune *in Legal Education and Research*, (Antwerp, 2001) pp 191 ff. More recently, see C McGlynn *Families and the European Union: law, politics and pluralism* (Cambridge, 2006).

24 The establishment of the Commission on European Family Law – CEFL – (on 1 September 2001), the subsequent, first meeting, devoted to the 'Perspectives for Harmonization and Unification of Family Law in Europe' (held in Utrecht, 11–14 December 2002) as well as the publications of its proceedings and its further activity gave rise to a renewed debate about this important legal field in the academic context. See on this initiative, recently, in Italian, K Boele-Woelki 'Il metodo di lavoro della Commissione sul diritto di famiglia europeo' in M C Andrini *Un nuovo diritto di famiglia europeo* (Padua, 2007) pp 225 ff, and, for the English version of the same contribution (*The Working Method of the Commission on European Family Law*), ibid 197 ff and in K Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia, Antwerp, 2005) p 14 ff. See also K Boele-Woelki (ed) *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia, Antwerp, 2003); M Antokolskaia 'The Harmonization of Family Law: Old and New Dilemmas' in (2003) *European Review of Private Law* 28; K Boele-Woelki 'Comparative Research-Based Drafting of Principles of European Family Law' in (2003) I *ERA-Forum* 142 and 'The Road Towards a European Family Law'(1997) 1 *Electronic Journal of Comparative Law* 1; K Boele-Woelki, *The Principles of European Family Law: Its Aims and Prospects* (2005/1) *Utrecht Law Review* at www.utrechtlawreview.org. More recently, in light of certain legislative innovations (for example, the different notions of marriage), some distinctions were also made in this regard. See M Antokolskaia 'Convergence of Divorce Law in Europe' (2006) *Child and Family Law Quarterly* 302. An up-to-date version of the work of the Commission on European Family Law is available at www.law.uu.nl/priv/cefl. The third conference of the CEFL will take place

V THE INCIDENCE OF SOCIAL CHANGES ON THE LEGAL SCENARIO

Before focusing on the national experience, it is important to underline that there are new difficulties to be considered at present. Some of them are due to the increasingly frequent formation of couples in which the spouses' or partners' nationality is different and to the related problems caused by a more intense transnational mobility and by a higher percentage of separations and divorces. This is linked to the broader geographical area of contemporary Europe. Its frontiers have been so much extended, especially with the recent further 'enlargement' of the EU, which is now made up of 77 states, not to mention the previous expansion of the area delimited by the 47 members states of the Council of Europe.

The fact that, at both levels, special attention has been given to family matters in general, and not only when inter-state conflicts arise, does not mean that the traditional perspectives of public and private international law have faded away, nor that exclusively domestic situations should not deserve a similar

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on 7–9 June 2007 in Norway, at the University of Oslo, and it will be devoted to several issues: the harmonisation of family law in Europe, particularly in Northern countries and the US; children's rights and responsibilities owed to them; recent developments in cross-border family matters; and the position of cohabitants upon the termination of their relationship either by means of death or dissolution. The second conference, which took place in 2004, was devoted to divorce and maintenance between former spouses. For a list of publications related to European family law, see www2.law.uu.nl/priv/cefl/PublicationsHeading.html.

25 An interesting vision was proposed by M R Marella 'La contrattualizzazione delle relazioni di coppia' in *Rivista Critica del Diritto Privato* (2003) pp 57 ff (partly reproducing 'Gli accordi fra i coniugi fra suggestioni comparatistiche e diritto interno' in G Ferrando (ed) *Separazione e divorzio*a in the Treaty *Giurisprudenza sistematica di diritto civile e commerciale*' (Utet, Turin, 2004)). More recently the same author published an essay in English on these issues, albeit in considering the European harmonisation trends. See M R Marella 'The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law' (2006) 12 *European Law Journal* 78. According to M R Marella, 'the connection of family law to freedom of contract is extremely helpful in visualising [the] . . . perspective' based on the following core idea: the 'political weight of *any* legal rule – family law rules and *pure* patrimonial law – as revealed through its distributional effects and its social impact' (at 94). The legal definition of family is considered an 'issue of welfare regulation and private law'. In conclusion, in her vision, '[o]nce again, harmonisation of private law has embodied the occasion for backward, mystifying ideas of legal development to strike back. This has been stated many times in relation to contract and tort law. More than ever it seems to be also true for *many aspects* in family law [emphasis added]' (at 105). Indeed, 'many aspects' are not all the possible aspects. Thus, despite the objective expansion of private autonomy in family law, there are some areas that cannot be included in this perspective: not only child law, but also every ambit in which weakest subjects' protection is at stake (for example, maintenance of the ex-spouse who is in need, recognition of the contribution given by a partner to family wealth, etc). For the proposal to transcend the 'market/family dichotomy', see F E Olsen 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497. For a very accurate analysis of the role played by private law today, in the so-called 'globalised' world, see D Caruso 'Private Law and State-Making in the Age of Globalization' in *Boston University School of Law*, Working Paper Series, Public Law & Legal Theory, Working Paper No 06-09, available at www.bu.edu/law/faculty/papers.

effort, so that common European standards can be followed uniformly.[26] Thus, an inner contradiction appears when one realises that the Europeanisation of certain conflict of law rules might have intensified the risk of promoting procedural 'devices' (e g rush to court and forum shopping) aimed at obtaining a favourable result only, with guarantees linked to general principles (like the 'best interest of the child') being ignored. There have been attempts to trace guidelines ensuring compliance with such principles, but there are good reasons to doubt the effective capacity of 'abstract' plans of harmonisation to be accepted at a 'concrete' stage. First of all, differences are still present in certain areas of family law (and relationships). Moreover, even where European rules have to be applied, there is a lack of uniformity in their application, and in the way the principles envisaged by the most recent Conventions of the Council of Europe are transposed into state systems.

Looking again to the future, in the absence of a general legislative competence of the EU institutions in this field – as far as substantive aspects of family law are concerned,[27] the most debated matter is not that of claiming an absolute (and unlikely) unanimity among legal solutions, but that of finding a method that can usefully take all these sources of law into account in order to avoid inconsistencies among them. The mechanisms that have given rise to those outcomes achieved up to now, in modifying the EU Treaty, have operated in a rather traditional way, in that they have presupposed inter-state agreements, a technique that is unavoidable until multi-state co-operation is achieved without altering the single state's sovereignty. Though these results have been sought for long time, given their positive effects in heightening standards of protection, their limitations soon became apparent as social and legal changes affected the European context as a whole.[28] As has already been pointed out, this intense interplay does not diminish interest in the nation state dimension. The Italian scene deserves a brief description at this point.

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[26] See on these aspects and on their interrelations H Stalford 'Concepts of Family under the EU Law. Lessons from the ECHR' (2002) *International Journal of Law, Policy and the Family* 41; M Killerby 'Family Law in Europe: Standards Set by the Member states of the Council of Europe' in *Liber Amicorum Meulders-Klein* (Bruylant, Brussels, 1998) pp 351 ff.

[27] Evidently, in compliance with Art 61(c) of the TEU, the EU can now intervene, given its competence, albeit only in cases concerning conflict jurisdiction, conflict of laws, recognition and enforcement of decisions, and the elimination of obstacles to the good functioning of civil proceedings. Its intervention should be made with a view to promoting the compatibility of the rules of civil procedure, on condition that this is required for the proper functioning of the internal market.

[28] For a very critical vision, which challenges the idea of codification of European private law including family law, see C McGlynn *Families and the European Union* (Cambridge University Press, Cambridge, 2006) pp 181 ff.

VI SOCIAL CHANGES AND LEGAL REACTIONS: THE ITALIAN EXPERIENCE WITHIN THE EUROPEAN CONTEXT

Family life in Italy, as in other countries belonging to the so-called 'industrialised world', most of which share the 'Western legal tradition', has undergone a series of modifications that have become more and more evident, especially since the mid 1970s.[29] Several factors have caused this historic transformation. First comes the powerful impact of 'urbanisation', which was mainly due to the industrialisation that had begun in the two previous decades. At that time, 'waves' of immigrant workers arrived in the large towns of the North of Italy and of northern continental Europe.[30] This led to a gradual decline of the model represented by rural, extended families accustomed to living together and including different generations in the same household. This also led to the widespread abandonment of their much smaller home towns.

The average 'dimension' of families was reduced as well, in that the number of its members fell.[31] As a rule, now only the 'nuclear family', made up of the parents and their common children, lived in the family house. Moreover, birth rates declined steadily, and have now fallen to the lowest level of any country in the world. This peculiar trait of contemporary Italian society obviously cannot be explained only by the elimination in the 1970s of the criminal sanctions contained in the original text of the Penal Code (1930) for any advertising of contraceptive methods. Despite the manifest impact of this reform in allowing a broader awareness of the techniques of birth control, this factor alone cannot justify the Italian demographic collapse. There must be other circumstances behind this phenomenon, which may be related to the disappearance of ancient traditions – in which large family units played a central role – and to the parallel appearance of a trend that reveals an ongoing contraction in the number of new marriages in the younger segment of the population.[32]

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[29] C Saraceno, M Naldini *Mutamenti della famiglia e politiche sociali in Italia* (Il Mulino, Bologna, 1998).

[30] See, for a study of the social policies to react to economic difficulties, C Saraceno, N Negri *Le politiche contro la povertà in Italia* (Il Mulino, Bologna, 1996).

[31] C Saraceno, M Naldini *Sociologia della famiglia* (Bologna, 2001) pp 123 ff, 173 ff.

[32] The above-mentioned data were taken – inter alia – from a recent enquiry, which was made by EURES (the European Job Mobility Portal) and published in 2006. See the website at http://europa.eu.int/eures/home.jsp?lang=en. A great emphasis was given by Italian newspapers to these data. See, eg, *La Repubblica*, 8 November 2006 ('Matrimoni in crisi profonda ci si sposa di meno e si divorzia di più' – available at www.repubblica.it/2006/11/sezioni/cronaca/divorzi-boom/divorzi-boom/divorzi-boom.html) and *Il Corriere della Sera*, 8 November 2006 ('Matrimoni, se ne rompe uno ogni cinque minuti' – available at www.corriere.it/Primo_Piano/Cronache/2006/11_Novembre/08/matrimonio.shtml).
Analogous data were reported by ISTAT (the National Institute of Statistics) in 2007. See in the official website the analysis of family structures at www.istat.it/societa/struttfam, where it is possible to consult online volumes about 'Marriages and Separations in Italy' (year 2003, published on 19 January 2007); 'Having a Child in Italy' (year 2002, published on 20 December 2006); and 'Becoming Fathers in Italy' (published on 27 November 2006). Press releases are also delivered about these issues: 'Marriage in Italy' (2004-2005, delivered on 12 February 2007); 'Becoming Mothers in Italy' (2005, delivered on 17 January 2007); 'Relationships

These aspects are recurrent throughout the country, notwithstanding some evident differences, due partly to socio-cultural circumstances (ie differences in customs and in socio-economic contexts) and partly to the fact that there are sharp contrasts between lifestyles in industrialised, urban areas and those in the country. In all areas, as a rule, free healthcare, not only in cases of real emergencies but also in all the other situations in which medical care and operations are necessary, does not correspond to a high level of efficiency in social services, especially for children (in the 0–3 years segment) and old people.

There have lately been unmistakable signs of legislative interest in this problem. A long-awaited reform was approved in 2000 (TU no 328/2000). Indeed, the previous, general legislation that governed this area had been enacted in 1891. The new Act created the so-called 'social services integrated system', in which families are to participate, together with public agencies at the state and local level and private, non-profit organisations and associations, so creating a kind of 'safety net' protecting the weakest members of society. Subsequently, a Constitutional Act (Act no 3/2001) was approved. With its entry into force, the Fifth Title of the 2nd part of the Constitution was modified, with a view to enlarging the legislative power of the Regions. More particularly, exclusive competence was given to local public authorities – at a Regional level – in the sector of social service sector, though the 'essential levels' of services ensuring the exercise of civil and social rights has to be established at a state level.[33] Even though this 'decentralisation' process is not yet completed,[34] its effects are starting to make themselves felt. On the one hand, it has had positive effects. More detailed plans and more extensive and efficient monitoring are now done locally in order to cope with problems once on the state agenda. On the other hand, unfortunately, some social needs are still unsatisfied due in part to a lack of financial resources.

Striking differences can obviously be noted among Italian Regions, but in most areas – and not only in the South and in the large islands – problems are rather

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between Relatives and Solidarity Nets' (2003, delivered on 10 October 2006); 'The Life of the Couple' (2003, delivered on 21 August 2006); 'Family Structures and Opinions on Family and Children' (2003, delivered on 21 June 2006); and 'Adoption Requests' (2003, delivered on 18 January 2006). See also the reactions in the above-mentioned newspapers soon after the publication of the results of this further demographic study.See *La Repubblica*, 12 February 2007, *Istat. Aumentano le coppie di fatto e i figli nati fuori dal matrimonio* at www.repubblica.it/2007/02/sezioni/politica/coppie-di-fatto3/matrimoni-istat/matrimoni-istat.html. On economic conditions of Italian families, see some recent news in *Il Corriere della Sera*, 24 May 2007: *ISTAT. L'Istat*: in *Italia è povera una famiglia su sei*, available at www.corriere.it/Primo_Piano/Economia/2007/05_Maggio/23/emergenza_poverta.shtml. See also the above quoted ISTAT report, *La famiglia in Italia. Dossier statistico*, at www.istat.it/istat/eventi/2007/famiglia/dossier.pdf.

More particularly, births out of wedlock increased by 70 per cent over a 10-year period, also because the decision to get married is postponed.

The number of adults who still live with their parents (ie young people over 25 years and under 34 years) and who are not married or have children is also increasing. It went from 35.5 per cent to 43.3 per cent.

[33] See Art 117, 1, (m) of the Constitution.

[34] See A Barbera, C Fusaro *Corso di diritto pubblico* (4th edn, Il Mulino, Bologna, 2006) ch 12.

similar: young couples face great difficulties in finding suitable housing, because buying a house or renting a flat is very expensive, particularly in the large cities, where, however, it may at least be easier than elsewhere to find a job. Public kindergartens are not readily available everywhere, nor can they always meet the demand. The alternatives – private organisations or baby-sitting – are more expensive and not all families can afford these costs. Under these circumstances, it is not difficult to understand why young people often do not create new families soon after completing their professional training. Some couples start cohabitation, but, while the number of de facto unions is increasing, that of marriages is becoming lower and lower. Also births out of wedlock are becoming more frequent than in past decades.[35]

Another typical characteristic of the Italian family is the presence of sons and daughters in the family home for many years after reaching adulthood. It may be that these social phenomena are due in part to the desire to achieve success in one's career or to fulfil plans of socio-economic advancement before being involved in the long-term responsibilities of a life-long commitment. Indeed life expectancy is much higher than it was in the mid-20th century. This can lead both to the postponement of marriage and to longer working lives. Despite the persistence of strong family relationships, a very high percentage of old people live alone after the death of their spouses, and this situation can give rise to serious difficulties especially if they have chronic diseases and are in need of daily assistance and support. Moreover, as in other European countries, women's lives have changed though more slowly than they have in northern Europe. The scale and importance of their involvement in social and cultural activities is growing. Their massive entrance into the labour 'market', including highly qualified professions – with the exception of the politics, where their number is still not so high – has finally given them an independence that had not been adequately ensured as long as the simple, formal equality with men recognised by the Republican Constitution of 1948 did not bring a substantive affirmation of their role.[36]

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[35] More generally, for a wide survey about the condition of children in Italy today, see the 3rd Report to the UN Committee for the Rights of Child, which was published in May 2007: *I diritti dell'infanzia e dell'adolescenza in Italia*, 05/2007, *3° Rapporto prodotto dal Gruppo di Lavoro per la CRC, coordinato da Save the Children Italia*, available on the website of Save the Children at www.savethechildren.it/2003/download/pubblicazioni/Monitoraggio/StC_3_Rapporto_2007_light.pdf.
Italy ratified the 1989 UN Convention on the Rights of the Child in 1991. See Act no 176, enacted on 27 May 1991). At the EU level, it is important to remember that the EC Commission published a Communication on children's rights, in July 2006. See Communication from the Commission, *Towards an EU Strategy on the Rights of the Child*, Bruxelles, COM(2006) 367 final (SEC [2006] 888; SEC [2006] 889). See the website of the EU at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0367:FIN:EN:PDF. See also the recent Report, written by E Ahmed *Findings of a Consultation with Children & Young People, in Non-EU Member States*, April 2007 available at www.europarl.europa.eu/hearings/20070417/libe/plan_international_en.pdf.

[36] For comparative data about women's status in the EU member states see the Report from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committe of the Regions on equality between women and men, 2005, COM(2005) 44 final (on the website of the EU at www.europa.eu.int).

The introduction of divorce (Act no 896/1970) and the progressive disappearance of any social stigma against 'non traditional' unions – ie those not based on marriage – certainly fostered a new vision of family life, which, however, was shaped also by the socio-economic and cultural changes noted above. Consequently, in a sociological sense, the current conception of the family includes not only the modern 'nuclear family' but also broader, post-modern manifestations of family relationships created by single (divorced or unmarried) parents with their offspring or by new couples formed after the breakdown of their matrimonial or de facto unions, with children born before and/or after the separation or divorce.[37]

To understand the current Italian legal situation one must consider this general scenario.[38] However, the results of large-scale sociological studies – which necessarily seek to give a picture of past and present trends[39] – must be coupled with a vision of the future. Indeed, all these societal changes have spurred a stronger commitment on the part of European institutions to the protection of fundamental rights,[40] and this necessitates an effort to adapt legal solutions to social needs and expectations.

VII THE LONG ROAD TO A (BINDING) EUROPEAN CHARTER

In the last years of the 20th century, when the Treaty of Amsterdam, signed in 1997, came into force (1999), expectations of reaching an agreement favouring a common constitutional framework approved by all the EU member states were very high in Italy and in most EU countries. The European Parliament intervened in the sphere of family law, adopting Resolutions promoting the recognition of new family models and, thus, a uniform treatment of these relationships. These were merely persuasive in character, but their importance cannot be underestimated given their formulation by a democratically elected Assembly. Moreover, the same year of the proclamation of the 'Nice Charter' (hereinafter: EUCFR), the European Council enacted a Regulation (no 1347/2000, called *Brussels II*), with a view to finding common solutions directly applicable in all member states in a very delicate area of family law. It set up a common set of rules concerning the criteria for establishing jurisdictional competence and for regulating the recognition and enforcement of decisions

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[37] For an up-to-date picture, see G Autorino Stanzione (ed) 'Il diritto di famiglia nella dottrina e nella giurisprudenza' in *Trattato teorico-pratico* (Giappichelli, Turin, 2007); vol 2 *La separazione e il divorzio*, 2005, vol 3 *I rapporti patrimoniali, l'impresa famiiliare*, 2005; G Autorino Stanzione, Pasquale Stanzione (eds) *Le unioni di fatto, il cognome familiare, l'affido condiviso, il patto di famiglia, gli atti di disposizione familiare*, vol 5 of the Treaty *I grandi temi del diritto di famiglia* (Giappichelli, Turin, 2007).

[38] For a comparative survey of social policies in Europe, see M Naldini *Le politiche sociali in Europea. Trasformazioni dei bisogni e risposte di policy* (Rome, 2006) pp 65 ff.

[39] For a comparative survey of social policies in Europe, see M Naldini *Le politiche sociali in Europa. Trasformazioni dei bisogni e risposte di policy* (Carocci, Rome, 2006) pp 65 ff.

[40] On the idea of family in Italy, see, recently, A Cavallera Hervé, *Storia dell'idea di famiglia in Italia. Dall'avvento della Reblubblica ai giorni nostri* (La scuola, Brescia, 2006).

concerning the annulment of marriages, separation, divorce and parental responsibility.[41] Initially, problems of parental responsibility were taken into consideration only in proceedings in which married parents' claims were at stake, but since the redraft of this Regulation (no 2201/2003, called *Brussels II-bis*, that came into effect in April of 2005) decisions concerning parental responsibility will be subject to this discipline in cases of breakdown of both married and unmarried couples. Another example of the specific attention on the part of the EU to family law issues is the approval, respectively in 2003 and 2004, of two Directives concerned with reuniting the families of third-country nationals[42] and of EU citizens.[43] An ad hoc Regulation (the so-called Rome III)

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41 M Jäntera-Jereborg 'Marriage Dissolution in an Integrated Europe: The 1998 EU Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters (Brussels II Convention)' in *Yearbook of Private International Law* (1999) vol I, pp 7 ff. For a critical vision, see H Stalford 'Brussels II and Beyond; A Better Deal for Children in the European Union?' in K Boele-Woelki *Perspectives for the Unification and Harmonization of Family Law in Europe* (Intersentia, Antwerp, 2003) pp 472 , 479-480; J Israel 'Conflicts of Law and EC after Amsterdam. A Change for the Worse?' (2000) *Maastricht Journal of European and Comparative Law* 81. On these issues, see also B Ancel and H Muir-Watt 'La désunion européenne' (2001) *Revue Critique de Droit International Privé* 403. More generally, see J Basedow 'The Communitarisation of the Conflict of the Laws under the Treaty of Amsterdam' (2001) *Common Market Law Review* 687. In Italian, see A Bonomi 'Il regolamento comunitario sulla competenza e il riconoscimento in materia matrimoniale e di potestà dei genitori' in *Rivista di diritto internazionale* (2001) pp 298 ff; A Davì 'Il diritto internazionale privato della famiglia italiano e le fonti di origine internazionale comunitaria' in *Rivista di Diritto Internazionale* (2002) pp 861 ff; F Mosconi 'Un confronto tra la disciplina del riconoscimento e dell'esecuzione delle decisioni straniere nei recenti regolamenti comunitari' in *Rivista di diritto internazionale privato e processuale* (2001) pp 549 ff; B Nascimbene 'Riconoscimento di sentenza straniera e "ordine pubblico europeo"' in *Rivista di diritto internazionale privato e processuale* (2002) pp 659 ff. More recently on this subject, see L D'Avack 'Il Regolamento CE 2201/2003 entrato in vigore il 1 marzo 2005' in M C Andrini *Un nuovo diritto di famiglia europeo* (Cedam, Padua, 2007) pp 123 ff; L Fadiga 'Il regolamento 'Brussel II bis' e i provvedimenti relativi ai figli minori (n. 2201/2003 del 27 novembre 2003, che abroga e sostituisce il n.1347/2000)' in G Passagnoli, I Mariani *Diritti e tutele nella crisi familiare* (Cedam, Padua, 2007) pp95 ff; O Porchia 'La filiazione nel diritto internazionale privato' in G Ferrando, *Il nuovo diritto di famiglia*, vol 3, *Filiazione e adozione* (Zanichelli, Bologna, 2007) pp 549 ff, at 576.

42 Italy implemented the Directive about family reunion (2003/86/EC) on 8 January 2007. See the *Decreto legislativo* no 5/2007, published in *Gazzetta Ufficiale* no 25, 1 January 2007. It is important to remember that the ECJ, on 27 June 2006, took a decision that dismissed an action of the EU Parliament. By its application, the European Parliament sought the annulment of the final subparagraph of Arts 4(1), (6) and 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. Article 4(1) of the Directive provides that the member states are to authorise the entry and residence, pursuant to the Directive, of, in particular, minor children, including adopted children, of the sponsor and his or her spouse, and those of the sponsor or of the sponsor's spouse where that parent has custody of the children and they are dependent on him or her. In accordance with the penultimate subparagraph of Art 4(1), minor children 'must be below the age of majority set by the law of the Member State concerned and must not be married'. Furthermore, the final subparagraph of Art 4(1) provides that: 'By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member state may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.' Article 4(6) of the Directive reads as follows: 'By way of derogation, Member states may request that the applications concerning family reunification of minor children have to be

has been proposed to develop unified 'conflict of law' rules to establish judicial competence and indicate the applicable law in transnational cases of divorce.[44]

submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member states which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.' Finally, Art 8 of the Directive provides that: 'Member states may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her. By way of derogation, where the legislation of a Member state relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member state may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.' In brief, the EU Parliament challenged the compatibility between these articles and the principles embodied in the ECHR (at Art 8 – respect for private and family life – and at Art 14 – the right to non-discrimination) as well as in other international conventions. Furthermore, the Parliament contended that the contested provisions did not respect fundamental rights 'as they result from the constitutional traditions common to the Member states of the European Union, as general principles of Community law' and that the Union has 'a duty to respect them pursuant to Article 6(2) EU, to which Article 46(d) EU refers with regard to action of the institutions'. After quoting the most important cases on these matters (*Carpenter* (Case C-60-00) para 42, and *Akrich* (Case C-109/01) para. 59), the EU Parliament emphasised that this principle is reaffirmed in Art 7 of the EUCFR, and expressly cited Art 24 of the Charter (about children's rights). Finally, the Parliament cited a number of provisions of international Conventions signed under the aegis of the United Nations, the Recommendation No R (94) 14 of the Committee of Ministers of the Council of Europe to member states of 22 November 1994 on coherent and integrated family policies, and the Recommendation No R (99) 23 of the Committee of Ministers to member states of 15 December 1999 on family reunion for refugees and other persons in need of international protection. The Parliament also invoked the constitutions of several member states of the European Union. However, the ECJ rejected the view that the contested provisions are contrary to the right to respect for family life set out in Art 8 of the ECHR as interpreted by the European Court of Human Rights. The Court said that Art 4(6) of the Directive 'does give the Member states the option of applying the conditions for family reunification which are prescribed by the Directive only to applications submitted before children have reached 15 years of age'. However, according to the ECJ, this 'provision cannot be interpreted as prohibiting the Member states from taking account of an application relating to a child over 15 years of age or as authorising them not to do so'. To 'save' the provision at stake, the Court added that Art 4(6) 'of the Directive must, moreover, be read in the light of the principles set out in Article 5(5) thereof, which requires the Member states to have due regard to the best interests of minor children, and in Article 17, which requires them to take account of a number of factors, one of which is the person's family relationships'. As far as Art 8 is concerned, the ECJ underlined that it 'authorises the Member states to derogate from the rules governing family reunification laid down by the Directive'. The Court was of the opinion that the latter provision does not have 'the effect of precluding any family reunification' but merely 'preserves a limited margin of appreciation for the Member states by permitting them to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host state for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration'. Consequently, for the ECJ, the fact that 'a Member state takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights'.

[43] Italy implemented the Directive on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU (2004/38/EC) on 6 February 2007. See the *Decreto Legislativo* no 30/2007, published in *Gazzetta Ufficiale* n 72, 27 March 2007.

[44] Another Regulation seems to be forthcoming. See the proposal for a Council regulation on

Substantive aspects of family law are evidently considered preconditions to the operation of these rules (eg the respect of the child's best interest or of the right to the due process of the law). In all these cases, however, the free circulation of European citizens seems to be the most pressing need taken into consideration.[45] Moreover, as far as third-country nationals are concerned, it is possible to observe a certain resistance, which can only partially be explained by the need to control immigration trends.

At the same time, some national legislators have begun to enact extremely innovative reforms which would have seemed very unlikely just a few years before. It is not possible to present a detailed analysis here, but it is worth mentioning that, though the most revolutionary changes are not yet widespread, they have had a kind of 'catalyst effect', in that they have accelerated certain ongoing processes and transformed what had long been considered abstract goals into actual targets, so that they acquired the force of symbolic 'clashes' with very ancient traditions. Thus, while it is true that marriage has been opened to same-sex couples in only three European countries – in the Netherlands (2001), in Belgium (2003) and Spain (2005) – the overall context has been modified in the wake of this change.[46] Whatever one's point of view may be, there is no more room for a debate that considers this kind of development impossible. These reforms may be viewed in opposite ways: as progress or as an unacceptable metamorphosis of consolidated – even if often unexpressed – legal concepts and principles, but they cannot be met with silence.

Certainly, the Charter of Fundamental Rights of the EU (EUCFR), promulgated in Nice on 17 December 2000, did not impose specific innovations on national legislators as far as marriage is concerned, but it did not preclude any (Art 9 EUFCR). The fact that it left 'the door open' to national solutions not only paved the way for these unexpected developments, although they were made in only a few legal systems, but dramatically widened the scope of the options in other legal systems, wherever the redrafting of family law regulations was at stake. Further developments showed a widespread and parallel evolution in other areas of modern family law and produced an analogous effect. Generally speaking, the leading trend in the EU seems to be characterised currently by a progressive openness in favour of less rigorous rules in several contexts. Access to medically assisted reproduction has generally been regulated by new legislation in such a way as to broaden the options of would-be parents, and a similar situation can be seen also in the range of cases in which full adoption of children is now possible. Indeed, in some countries

jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, presented by the Commission on 15 December 2005, COM(2005) 649 final, 2005/0259 (CNS). SEC (2005) 1629.

[45] On the complex challenge to coordinate the freedom of circulation and social policies in the EU, see S Giubboni 'Libera circolazione delle persone e solidarietà europea' in *Lavoro e Diritto* (2006) pp 611 ff.

[46] For an up-to-date synthesis of these aspects, see M Sesta 'Le convivenze fra persone dello stesso sesso: diritti europei e diritto interno a confronto' in M C Andrini *Un nuovo diritto di famiglia europeo* (Cedam, Padua, 2007) pp 185 ff.

this is no longer denied to unmarried couples and singles, regardless of their sexual orientation. These innovations, are not however, present in all European legal systems, but they are carefully considered whenever state legislators seek to regulate these fields. In other words, it is not a matter of establishing a hierarchy placing more progressive rules above all others. It is simply a means of balancing the various outcomes of each choice in light of its socio-legal premises in order to have a broader and more accurate vision.

In looking at the Italian scene, a foreign observer's first impression might be that of a legal system in which all these reforms have been constantly debated, with their pros and cons, but only to arrive at the opposite results. Indeed, apart from political ideas, there is very strong resistance in a large segment across various party lines to such radical innovations. They are seen as threats to the proclaimed, common vision of the family or, rather, to the already quoted conception expressed by Art 29 of the Constitution, which contains the recognition of the family as 'a natural society' founded 'on marriage', and which is often seen as an obstacle to any innovation that sanctions a different foundation, not related to a formal legal bond, voluntarily created, as in the case of de facto relationships.

At the same time, the opposite position is taken by other groups that promote the 'transplanting' of the aforementioned legislative innovations, seen as symbols of modernity deeply connected with family lives as they are lived today, and for this reason preferable, per se, to consolidated regulations. The dialogue between these 'extremes' is not easy. However, instead of seeking to reach an agreement that can represent an acceptable compromise for both sides, unilateral approaches have been followed in most recent years.

Consequently, the situation is now at a standstill. As we shall see, although there have been clear signs of a serious legislative commitment as far as certain aspects of family law are concerned, and although there are good reasons to foresee several pieces of legislation before long, the present is fraught with uncertainty. Even newly enacted regulations (eg those concerning children's rights in all cases in which their parents' union breaks down, be they married or unmarried, or those applicable in civil proceedings for separation and divorce) have not succeeded in creating a better coordinated or more efficient system.[47]

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[47] For a clear description of the deep renewal of children's rights in current legislation and for a criticism against some of its contradictions, see G Ferrando 'Relazioni familiari' in P Zatti (ed) *Famiglia e matrimonio*, vol I *Trattato di diritto di famiglia (*Giuffré, Milan, 2002) pp 123 ff. By the same author, see 'La successione tra parenti naturali: un problema aperto' in *Familia* (2002) pp 313 ff. On the ascertainment of relationships of kinship, see F Danovi 'Le azioni in materia di filiazione e i principi generali del processo' in *Diritto di Famiglia e delle Persone* (2004) pp 153 ff. Among the most recent decisions of the Constitutional Court that declared the unconstitutionality of some limitative provisions of the civil code as contrary to the right to the ascertainment of maternity and paternity (in cases of children born in incestuous relationships), see *Corte Costituzionale*, 28 November 2002, no 494, in *Familia* (2003) pp 841 ff, and, for a comment, S Landini 'Incostituzionalità dei limiti alle indagini sulla maternità e paternità ex art. 278 c.c. e posizione giuridica del figlio incestuoso' pp 857 ff.

Before dealing briefly with these innovations and with the proposals to reform other areas,[48] it seems important to underline another point. Unfortunately, it has often happened that, especially during electoral campaigns (both local and national), intense pressure is felt in the political arena to demonstrate the prominence given to policies in favour of 'families' – albeit with the different meanings that this word may have today. However, when legislative decisions have to be made, they tend very often to be postponed in order to avoid open contrasts within each coalition. If decisions are made, they are often so confused and incomplete that the 'last word' has to be said by judges. All in all, this is not a great problem, because Italian courts have proved to be very scrupulous in 'filling in the gaps' of the legislature's provisions.

Even in a civil law country, law shaped by judges can play a decisive role, and even if it is a substantial and not a formal source of law. The real risk lies elsewhere. That Acts of Parliament may follow separate and uncoordinated paths in dealing with the same problems and delegate to judicial interpreters the definitive resolution of complex problems can perpetuate a dangerous habit. The tendency to delay decisions involving 'hard choices' – that are avoided for fear of losing voter support – can become dominant.

Needless to say, this is a general problem not necessarily linked with family law issues. However, this difficulty seems almost insurmountable in this context today. Notwithstanding attempts to arrive at solutions that can be widely approved with a view to improving the status quo, the incongruous situation created by being elusive can lower the chances of reaching concrete objectives. Whenever a consensus might be obtained, the possibility of modifying this trend depends on a change in the reformers' mental framework. As long as they continue to accuse each other of being, respectively, too short-sighted or too revolutionary, no step forward can be taken in all the areas that deserve to be regulated in a more coherent way. The main purpose of this chapter is to focus on these difficulties, while trying to offer an overview of the law applicable to Italian families today. For this reason, my starting point was a brief description of their transformation, in the last three decades. Another general premise, however, highlights the two sides of the same image. Indeed, the current problems cannot be understood without taking into consideration the future prospects, which are closely linked to the project of reinforcing the common heritage shared by EU countries.

VIII FAMILY LAW IN EUROPE AND ITS TWO FACES: SOME GENERAL TRENDS

The political steps taken to strengthen the constitutional foundations of the EU intensified interest in the creation of a family law for Europe, but also the controversy noted above. A fierce debate arose over the possible results of the Treaty providing for a Constitution for the EU signed in Rome on 29 October

[48] See later at section X.

2004. This Treaty – which is not yet in force – contains, in its second part, the entire text of the EUCFR, which thus acquired the 'legal imprimatur' it has lacked. It is evident too that, had the Treaty been ratified by all the EU member states, its implications in the sphere of family law might have been very far-reaching. However, as is well known, this came to a sudden halt in the wake of its rejection by the majority of the French and the Dutch electorates in 2005, which seriously hampered the prospects of giving a stronger basis to the construction of a common European framework through the insertion of a list of fundamental rights into a common Charter. The analysis of the underlying reasons for this rejection is a task for experts in socio-political problems. From a merely legal point of view, however, it is possible to observe that, although several EU member states completed the ratification procedure after the signature of the Treaty,[49] the negative results of the referenda held in France and in the Netherlands had a powerful impact, delaying the opening of new negotiations. This led to a sort of suspension of long-debated programmes. Indeed, a great deal of uncertainty still surrounds efforts to create a unique European constitutional text that would not only summarise those guarantees and rules already applicable at present, thanks to their renewed location, but would also adapt their contents to the needs expressed by society (and families) at the beginning of the 21st century.

As a result, a very prudent approach has prevailed in recent times. Even observers who had shown a positive attitude towards the prospect of arriving at a higher level of harmonisation, not to mention those who had openly favoured the creation of a common family law for Europe, at least in certain areas, became more doubtful about the future prospects of a more powerful commitment by EU institutional subjects in the strategic context of social policy, which is deeply connected with various areas of state legislation in family matters. Indeed, the strongest scepticism emerged in looking at the most likely outcomes of the plans for widening the scope of EU involvement in this area. Under these circumstances a national vision can still be considered a necessary 'point of comparison' with a view to verifying the strengths and weaknesses of the different methods adopted by state and supranational players in dealing with such controversial issues. In brief, European family law seems to have two faces, one internal and one external. These are not mutually exclusive, being interrelated and in constant contact one with the other.

A first glance seems to justify the impression that the attention devoted to these issues has been rather limited up to now, except in the studies of international

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[49] Ratification takes different forms in member states. While in some countries a referendum is admitted (and may have a binding or a consultative character), in others, like Italy (or Germany), it is prohibited by the Constitution (see, eg, Art 75, 2 of the Italian Constitution). In case of ratification, the Treaty would have come into force on 1 November 2006, but unanimity was (and still is) necessary for this purpose. At the beginning of 2007, 15 EU member states ratified it: Austria, Belgium, Bulgaria, Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovenia and Spain. In Spain and in Luxembourg referenda were held with a favourable result. In Finland, Germany and Slovakia the parliamentary procedures necessary for ratification have already been completed.

lawyers, experts in communitarian and private international law.[50] It is easy to understand, however, why they were more ready than private lawyers to manifest an immediate interest in this field. They had gradually grown accustomed to dealing with the initiatives taken by the EU in 'non-economic' areas, and to studying the activity of the Council of Europe, together with the vast corpus of 'European' case-law created, respectively, by the Luxembourg and the Strasbourg courts. In Italian legal literature, however, a progressive modification has started to become evident in recent years, when these developments were no longer viewed as belonging to sharply distinct spheres but as part and parcel of a broader vision of the sources of law.

IX THE EUROPEAN INFLUENCE ON DOMESTIC LAW: A BRIEF OVERVIEW

Let us now analyse the impact of those innovations upon the domestic scenario, thanks to European influence in the area in question, while considering some specific problems due to the adoption of a 'European perspective' in the current Italian legal landscape. The breadth of this area forces us to limit the scope of this analysis. Accordingly, legislative solutions will be selected from among the most recent ones – listed chronologically, even if a logical criterion will be adopted in surveying both legislation already in force and plans for reforming it. Some general trends – common to other legal systems – will soon be clear from the Italian experience.

First of all, we consider the development of the so-called phenomenon of 'contractualisation' of family law. Apart from the area in which children's rights are at stake,[51] this trend can be observed in several contexts today: from the economic 'regimes' instituted prior to marriage or chosen in the course of married life to agreements reached to resolve controversy in a time of crisis. The role assigned to autonomy seems to be a basic trait of some of the most recent Bills about de facto unions as well, whether heterosexual or homosexual. This approach can be viewed as the consequence of the conscious refusal to give these couples full legal recognition through public law. Indeed, the fact that in Italy there is still no direct and analytical regulation of this sphere is due not to a lack of interest on the part of society or the political parties but may be ascribed, rather, to a prevailing opinion across much of the political spectrum against the model of civil partnerships accepted by most Northern European

[50] See M Condinanzi 'Il 'livello comunitario' di tutela dei diritti fondamentali dell'individuo' in Bilancia, De Marco (eds) *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione* (Giuffré, Milan, 2004) pp 35 ff.

[51] A recent collection of contributions of Alfredo Carlo Moro gives a clear picture of child law in Italy. See L Fadiga (ed) *Una nuova cultura dell'infanzia e dell'adolescenza. Scritti di Alfredo Carlo Moro* (Franco Angeli, Milan, 2006). For a synthesis, of the children's right be heard in judicial proceedings, see F Ruscello 'Garanzie fondamentali della persona e ascolto del minore' in *Familia* (2002) pp 933 ff.

countries and viewed as threats to the stability of marriage as the foundation of the family. The proposal to open marriage to same-sex couples, too, has not received much support.

It is true that the current Government, a centre-left coalition, showed a certain openness towards a 'mixed' solution, which was finally embodied in a common Bill signed by the two competent Ministries of Policies for Family and of Equal Opportunities and approved by the Council of Ministers. It proposes the possibility of acknowledging a de facto relationship (ie the existence of a couple, heterosexual or homosexual, whose members wish to obtain a recognition of their union, as the consequence of an independent agreement between them), without offering a clear legal formalisation of this factual situation. A strong tension still persists among some representatives of the same administration, even concerning the legislative course to be followed (ie whether the decision should be taken by Parliament as a whole or by the Council of Ministers). It is, therefore, difficult to foresee the outcome of the current proposals.

A second trend that can be noted highlights, from the outset, the role of comparison made at a European level and the ensuing emergence of a stronger role conferred on the position of each family member. The once prevailing conception of the family as a unit with its own, superior interests has been abandoned and it is now almost unanimously accepted as a group of persons whose personal identity has to be respected, without unjustified exceptions. Of course, some limitations are possible in cases of minors who have not yet reached a sufficient level of self-determination, but both in the relationships between husband and wife and in those between parents and children the guiding principle is respect for their equal dignity. Thus, in recent years, thanks to a number of judicial decisions, there has been a development similar to that which brought about the collapse of the so-called 'immunity doctrine' in common law countries. Civil liability began to be imposed not only in cases of the most serious intra-family torts,[52] as had happened in the past, but was to be affirmed in every situation in which the injured party can give evidence of being the victim of harmful behaviour that illegally caused damage (*danno ingiusto*).[53] The violation of the general principle of *neminem laedere* (established by Art 2043 of the civil code) thus acquired a wider meaning, being extended to anyone whose tortious conduct caused unjustified harm, whether or not there was a family tie between the victim and the wrongdoer. Of course, some difficulties can arise when damages are awarded in cases of breach of duties pertaining to matrimonial obligations.[54] However, the spouses' freedom is not undermined by any threat to be 'forced' to act in a certain way in order to avoid

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[52] See for a comparative picture S Patti 'Intra-Family Torts' in M A Glendon (ed) *International Encyclopaedia of Comparative Law*, vol IV, *Persons and Family* (Mohr Siebeck, Tübingen, 1998), ch 9.

[53] E Pasquinelli, P Cendon (eds) *Le persone deboli, i minori, i danni in famiglia* (Giuffré, Milan, 2004).

[54] See G Facci 'Violazione dei doveri nascenti dal matrimonio e risarcimento del danno' in *Responsabilità Civile e Previdenza* (2005) pp 624 ff.

civil condemnation. Indeed, according to a basic principle of tort law, fault (or intent) must be present and, as a rule, cannot be presumed, but must be proved.[55] Consequently, the spouse who is responsible for a violation of one of these duties (ie of cohabitation, mutual support, faithfulness[56]) as a consequence of a decision to break the union cannot be considered civilly liable if there is no evidence that he or she acted (at least) negligently.[57] On the other hand, decisive importance has been attributed to the absence of the honesty required prior to marriage in informing one's prospective spouse about one's physical condition.[58] Compensation was, accordingly, awarded to a wife who was not informed by her would-be husband about his incapacity to have sexual intercourse.[59]

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[55] Opposite opinions were expressed on the judicial recognition of new figures of recoverable losses widely prejudicing the rights of the person. See for a favourable reaction P Cendon, P Ziviz *Il risarcimento del danno esistenziale* (Giuffré, Milan, 2003) pp 243 ff. For a critical analysis, G Ponzanelli 'Il riconoscimento del danno esistenziale e la sua estraneità ad un moderno sistema di r.c.' in G Ponzanelli (ed) *Critica del danno esistenziale* (Cedam, Padua, 2003) pp 33 ff and, of the latter author, 'Il "nuovo" art. 2059' in G Ponzanelli (ed) *Il 'nuovo' danno non patrimoniale* (Cedam, Padua, 2004) pp 53 ff. For a general description of these problems, see A Fasano *Il danno non patrimoniale* (Utet, Turin, 2004) pp 87 ff.

[56] The danger consists in proposing a kind of automatic equation between betrayal and wrongful behaviour. See a case in which damages were awarded to a wife whose husband breached the duty of faithfulness and revealed to her the details of his (homosexual) relationship, F Bilotta, P Cendon 'Infedeltà coniugale e danno esistenziale' in *Responsabilità civile e Previdenza* (2007) pp 7 ff.

[57] In some cases, there is an invisible dividing line between compensatory, satisfactory and punitive purposes of the civil pecuniary award. This is also a very debated matter. For a wide analysis and for a description of the current Italian discussion, in light of some statutory innovations and judicial trends, see C Favilli 'I danni da illecito familiare' in E Navarretta (ed) *I danni non patrimoniali* (Giuffré, Milan, 2004) pp 369 ff. Before these recent developments, see S Patti, *Famiglia e responsabilità civile* (Giuffré, Milan, 1984) and P Morozzo della Rocca 'Violazione dei doveri coniugali: immunità o responsabilità?' in *Rivista Critica del Diritto Privato* (1998), pp 605 ff; G Ferrando 'Rapporti familiari e responsabilità civile' in P Cendon (ed) *Persona e danno*, vol 3 (Giuffré, Milan, 2004) p 2777.

[58] However, a specific rule deals with cases of nullity of marriage (Art 129-*bis* of the civil code). The spouse who acted in good faith has the right to receive a 'congruous indemnification' from the other spouse, as well as from a third person who acted with the latter and to whom the nullity is also imputable, in case of declaration of nullity of the marriage. See F Giardina *Per un'indagine sulla responsabilità civile nella famiglia. L'art. 129-bis del codice civile* (ETS, Pisa, 1999).

[59] A leading case is a decision of the *Corte di Cassazione* (no 9801, 10 May 2005, published and annotated in several reviews: in *Familia* (2005) annotated by C Caricato *Impotenza taciuta prima delle nozze: risarcimento o indennità?*, pp 875 ff; in *Famiglia e Diritto* (2005) pp 365 ff, with comments of M Sesta *Diritti inviolabili della persona e rapporti familiari: la privatizzazione 'arriva' in Cassazione*, and of G Facci *L'illecito endofamiliare al vaglio della Cassazione*, as well as in *Responsabilità civile e previdenza* (2005) pp 3 ff. The Supreme Court awarded damages to the ex-wife who had not been informed by her would-be husband, before the marriage, of his *impotentia coeundi*. She obtained both pecuniary and non-pecuniary losses (*danno patrimoniale* and *non patrimoniale*). The reasoning of the Court was based on the following assumption: the omission at stake caused prejudice that has to be compensated because it consists of the violation of the fundamental right to live a full life in the family and in society, as a woman, and, eventually, as a wife and as a mother. According to the Court, the husband's silence about his condition, which was intentional, constituted a violation of the 'human person, seen as a whole, in her freedom and dignity', in making an autonomous decision whether or not to marry, and in her expectation of completely fulfilling all the plans related to family life. The

Another example of this trend towards the recognition of a higher degree of autonomy in the family, despite the original predominance of the husband/father's role, can be drawn from the proposals to reform the family name.[60] Despite differences among the proposals presented for this purpose, in the final one, which was recently approved by the Government, the rigid patronymic rule (still in force) is to disappear in favour of a more open solution: the surnames of both parents might be given to the child, in a different order. Alternatively, he or she will have the name of one of them exclusively.[61] Another area that manifests a trend that resembles the ones

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foundation of all these values is in the Constitutional Charter (Arts 2, 3, 29 and 30). Thus, another step was taken towards the expansion of the area of civil liability, after an important modification of the judicial trend that took place in 2003, when both the Court of Cassation and Constitutional Court widened the scope of compensatable non-pecuniary losses, now including all cases in which a constitutionally protected value has been violated: see *Corte di Cassazione*, nos 7281 and 7283, 12 May 2003 and nos 8827and 8828, 31 May 2003 and in *Foro Italiano* (2003) I, pp 2273 ff, annotated by E Navarretta, *Danni non patrimoniali: il dogma infranto e il nuovo diritto vivente*, pp 2277 ff) and *Corte Costituzionale*, no 233, 13 July 2003 (in *Foro Italiano* (2003), I, pp 2201 ff annotated by E Navarretta, *La Corte costituzionale e il danno alla persona* in fieri). For a comment on the most recent case-law and the necessary references, see G Ramaccioni 'I c.d. Danni intrafamiliari: osservazioni critiche sul recente dibattito giurisprudenziale' in *Rivista Critica del Diritto Privato* (2006) pp 175 ff, 181, n 23; E Carbone 'La giuridificazione delle relazioni domestiche e i suoi riflessi aquiliani' in *Familia* (2006) pp 83 ff.

[60] See the *Disegno di legge delega* no 19/2007, approved on 17 January 2007 by the competent Parliamentary Commission (*Commissione Giustizia del Senato*). Other Bills were presented too in both chambers. See: C 1772 (On Brugger *et al*); C 1551 (On Carfagna *et al*); C 1546 (On Fundarò); C 1537 (On Santelli *et al*): C 1474 (On Intrieri *et al*); C 1395 (On Amici *et al*); C 1247 (On Berillo *et al*); C 1185 (On Mascia *et al*); C 1136 (On Poretti *et al*); S 580 (Sen Caprilli), available at www.senato.it/.
The Government Bill is aimed at modifying the civil code (Arts 143-*bis* and Art 262). More precisely, it has the purpose of changing the rules that provide, respectively, that a married woman acquires her husband's family name and that children born out of wedlock receive their father's name, in case of contemporaneous acknowledgment by both parents and (in substitution or in addition to the mother's name) in cases of subsequent recognition of paternity, on condition, if they are minors, that the judge decides in that way (a decision that, according to case-law, has to be made taking into account their interests). However, the Bill maintains the current rule that determines, for children of unmarried couples, that they acquire the name of the parent who was the first in the acknowledgment of the relationship of kinship (Art 143-*bis* of the civil code). The Bill provides that each spouse will maintain his or her family name after the marriage. Moreover, it allows children of married couples to receive, in the alternative, the name of one of their parents or both their names, in a sequence decided by the parents or – in absence of agreement – in alphabetical order. Moreover, the surname of the first child will be given to the other children of the same couple. If a person has a double family name, only one of them will be transmitted. The above-mentioned rules will also apply in cases of contemporaneous recognition by both parents of their 'natural children'. However, in cases of subsequent recognition or ascertainment of the relationship of kinship by one of the parents, the family name will be added to that already given to the child at the moment of birth.

[61] Both the Supreme Court and the Constitutional Court intervened in this area recently. See *Corte di Cassazione*, *Sezione I civile*, decision no 12641 given on 26 May 2006, that emphasised the role of the basic guidelines of the principle of equality between men and women and of the interests of child in the decision whether or not to give the child the father's name, if the acknowledgment of paternity was made many years after the child's birth. The Court observed that the rule that automatically imposes the father's family name is under discussion according to current trends. The family name in the contemporary Italian legal system does not play only

followed in other European legal experiences is that of regulation of the condition of children born out of wedlock. In the last draft of a common Bill (*Disegno di legge delega*) approved by the Council of Ministers on 17 March 2007, a long awaited reform takes shape. If approved in the end, all traces of the ancient discrimination against the (still defined) 'natural offspring' will be eliminated. The words 'natural child/children' (initially described as 'illegitimate') will be substituted by a simple reference to the birth 'in' or 'out of' wedlock (*figli nati nel matrimonio/fuori del matrimonio*). Moreover, complete equality will be reached in inheritance law. Already existing differences (ie the so-called *diritto di commutazione*, the right of 'legitimate heirs' to give 'natural'

a 'public function' (ie to protect the family thanks to the possibility for its members being identified as belonging to a specific family group), but it also has a fundamental 'private function'. It is aimed at identifying the person and his or her personal identity. Then, the Court mentioned the international obligations to respect the fundamental rights at stake (ie the New York Convention – signed on 18 December 1979 – about the elimination on any form of discrimination against women, ratified by Italy, with the Act no 132 enacted on 14 March 1985; the Recommendations of the Council of Europe – no 1271 of 1995 and no 1362 of 1998, and the Resolution no 37 of 1978, concerning full equality between the mother and the father in the attribution of the family name, as well as some decisions of the ECtHR, which clearly indicated the need not to discriminate in the choice of the family name between men and women – *Unal Teseli v Turquie* – case decided on 16 February 2005 – *Stjerna v Filande* – case decided on 24 October 1994 – and *Burghartz v Suisse* – case decided on 24 January 1994). It is also important to mention the case decided by the ECJ: *Garcia Avello* C- 148/02. A further confirmation of the importance of 'European' and international law can be found in a decision of the Constitutional Court. See *Corte costituzionale*, decision no 61 of 16 February 2006. The Court delivered an 'inadmissibility' decision. Therefore, it did not examine the merits of the core question at stake: whether there is or is not a conflict between the Constitution (Arts 2, 3 and 29 (ie the recognition of inviolable human rights and the principle of equality, also between husband and wife)) and a series of provisions of the civil code that determine, albeit impliedly, the automatic imposition of the father's name to 'legitimate' offspring. The central point of the reasoning of the Court of Cassation in the *ordinanza* that had asked the Constitutional Court to decide whether the question was based on a twofold observation. First, according to the current legislation, the 'legitimate' child immediately receives the father's name at the moment of birth. Secondly, there is no possibility of derogating from this rule for married parents, even if they reached an agreement in this respect. Indeed, according to the current legislation, the 'legitimate' child immediately receives the father's name at the moment of birth. There is no possibility of derogating from this rule for married parents, even if they reached an agreement in this respect. This was the central point of the reasoning of the Court of Cassation in the *ordinanza* that had asked the Constitutional Court to decide the question. Indeed there is an absolute impossibility for married mothers to transmit their family name to their children. Thus, they cannot 'acquire signs of identification in respect of both their parents, so as to testify to a continuity in their family history', taking into account the maternal roots as well. However, the Constitutional judges did not examine the doubts of the Court of Cassation about the unconstitutionality of the system because they said that this would have interfered with legislative prerogatives. Indeed – as the Court underlined – there are so many different options in this field that only the legislature, in its discretion, can decide how to reform the system. However, an obiter dictum in this decision is very important. The Court mentioned its previous case-law, but only to make it clear that the contested 'rule [is] deeply rooted in social custom. It is a device to protect the unity of the family founded on marriage' (eg decision no 586/1988). Then, it observed that these decisions were taken many years ago and that 'after 18 years, . . . it is unavoidable to emphasise that the present system . . . is a remnant of a patriarchal conception of family, which is rooted in the roman family law system, and [that it is a heritage of the notion of] marital authority that faded away and is not anymore compatible with the current principles and with the constitutional value of equality between men and women'.

brothers and sisters a sum of money instead of a part of the inheritance) will be abolished. All these issues – only briefly listed here[62] – reveal a desire to favour the role of free will and autonomy in family matters, and the need to pay due attention to its weakest members' rights. This can also be considered a sign of the strength of the 'European' influences.

X EUROPEAN INFLUENCE: COMPARING 'FAMILIAR' AND 'UNFAMILIAR' SOLUTIONS IN FAMILY LAW DEVELOPMENTS

As has already been noted, some of the legislative innovations and judicial decisions that have given rise to the most intense debate in Italy recently can be defined as expressions of a clear trend that attempts to reach certain 'European' standards. To have an idea of this phenomenon several examples can be mentioned at this point. Over a 5-year time span (2001–06) we witnessed the general reform of adoption law, both of foreign and domestic adoption. From a substantial point of view it is important to remember the fact that a period of at least 3 years of cohabitation before marriage was also taken into account in order to ascertain the would-be adopters' suitability.[63] From a

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[62] Article 537, 3, of the civil code still provides that 'legitimate children may satisfy with money or with rights on immovable goods the portion of inheritance that is due to natural children, on condition that they are not contrary [to this]. In case of their opposition, the judge shall decide, taking into account personal and economic circumstances'. The basic principles to be followed by delegated legislation (*decreti legislativi)* were listed analytically: (a) unification of the status; (b) substitution of the terms '*figli legittimi*' and '*figli naturali*' with the expressions '*figli nati nel matrimonio*' and ' *fuori del matrimonio*'; (c) reform of the rules about the '*possesso di stato*', about the ascertainment of the relationship of kinship, so to take into account also children born out of wedlock; (d) redefinition of the rules about the presumption of paternity and about the action to contest paternity (art 235, 1 of the civil code); (e) modification of the current provisions about recognition of paternity and maternity by unmarried parents and of its effects; (f) reform of the rules concerning the civil suit to contest recognition; (g) unification of the rules concerning parental rights and duties towards their children independently of the fact that they were born in or out of wedlock; (h) specification of parents' rights, powers and duties and attribution of a core role to the assumption of '*responsibilities towards children*'; (i) confirmation of the provisions about the children's right to be heard if they have adequate capacity; (l) adaptation of succession law and rules about grants to the principle of equal treatment of all children; (m) adaptation and restatement of the criteria indicated by the reform of the Italian system of private international law (Act no 218/1995) – arts 33, 34, 35 e 39 – in order to comply with the above-mentioned principles and those affirmed by case-law at a civil and constitutional level. Finally some technical provisions were proposed to adapt the present norms about status to the new system. A regulation will be enacted (in application of art 17, 1, Act no 400, 23 August 1988) to modify the '*Regolamento dello stato civile*' adopted by the Decree of the President of the Republic no 396, on 3 November 2000.

[63] However, as has been already pointed out, only married couples are allowed to fully adopt a child. The 2001 reform (Act no 149, enacted on 28 March 2001 – AdA) introduced some innovations as far as the difference of age – between adopters and adoptee – is concerned (Art 6, 3 AdA). It created a more flexible system, in comparison to the previous one, in which there were rather rigid limitations both for domestic and intercountry adoptions (partially eliminated by the intervention of the Constitutional Court during the last decade of the 20th century). For a brief description of the system prior to the most recent reform, soon after the approval (and before the entry into force) of the Act no 476, enacted on 31 December 1998,

formal point of view, stronger guarantees were introduced for all the persons involved from the first phase of the procedure. The legislature also planned the gradual elimination of the institutionalised foster care system in favour of foster families or small communities based on the family model (*comunità di tipo familiare*). Unfortunately, the entry into force of some of these innovative provisions has been postponed. Furthermore, the subsequent ratification, in 2003, of the 1996 Convention of the Council of Europe concerning the exercise of children's rights in civil proceedings was followed by the indications of a limited series of the procedures to which it is applicable, so that its scope of application is rather narrow.[64] However, a clear message was sent: to fully respect children's rights procedural guarantees are of core importance.

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which authorised the ratification of the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (1993 HCIAd), see E Urso 'Intercountry Adoption Reform in Italy: from 'Adoptive Nationalism' to Global Harmonization?' in A Bainham (ed) *The International Survey of Family Law 2000 Edition* (Jordans, 2001) pp 207 ff. It is important to remember that after the ratification (in January 2000) of the 1993 HCIAd, Italy made several steps forward in the direction of a more efficient system in this area, which ensures better protection of fundamental rights for all the subjects involved. For a general view, see P Pazé and R Pregliasco (eds) *Adozioni internazionali sul territorio e nei servizi. Aspetti giuridici e percorsi formativi,* first volume of the Series '*Studi e ricerche'*, coordinated by the Central Authority for Italy, *Commissione per le adozioni internazionali* (Istituto degli Innocenti, Florence, 2003). For up-to-date information on publications see www.minori.it/pubblicazioni/index.htm and, on events, www.minori.it/eventi%20e%20corsi/intro_eventi.htm. A new regulation has been drafted recently to allow the Central Authority to be coordinated with other actors (i e accredited bodies – *enti autorizzati* – and associations representative of adoptive parents and children). See www.commissioneadozioni.it/Contents/SchedaNotizia.aspx?numero=492.
For complete references on the 1993 HCIAd, see the official website of the Hague Conference at www.hcch.net/index_en.php?act=conventions.publications&dtid=1&cid=69.

64 According to Art 1, 4 of the Convention, every member state must, at the moment of signature or 'when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, specify *at least* three *categories of family cases* before a judicial authority to which this Convention is to apply' (emphasis added). The purpose of this provision consists in facilitating the ratification procedure and in widening the number of ratifying states. However, the Italian Government did not indicate any categories, but only some articles of the civil code, which are related to different situations and not homogeneous cases. This point passed with silence, but it is important to understand the impact of the Convention in the domestic context. Indeed, some months after the approval of the Act no 77, enacted on 20 March 2003, a decision of the Ministry of Foreign Affairs was published in the Official Journal (see *Gazzetta Ufficiale* no 210, 10 September 2003). It contained a list of the situations (or, rather, of the provisions of the civil code) that were selected (i e Art 145, about judicial intervention in cases of conflicts between spouses over decisions concerning family life; Art 244, last paragraph, about the civil suit aimed at contesting the ascertainment of the relationship of kinship, brought by a *Curatore* on behalf of the child over 16; Art 247, last paragraph regulating the latter proceedings in case of death of the person presumed to be the child's father or in case of the mother's or the child's death; Art 262, 2, about the judicial authorisation of the child over 16 to contest the recognition of the relationship of kinship; Art 322, about the possibility of annulment of acts made by living parents on behalf of the minor child without the necessary authorisations; Art 323, about other acts forbidden to parents); and Art 274, about the admissibility of the action to ascertain paternity judicially (in the latter area however, the Constitutional Court intervened in 2006 – decision no 266 taken on 21 June to 6 July 2006 – and declared contrary to the Constitution a related provision – Art 235, 1, no 3 – in a part which required that it was necessary to give evidence of the adultery committed by the mother

Other innovations may be mentioned as well: the partial redraft, in 2001, of rules concerning parental leave, after the implementation in 2000 of a EC Directive enacted by the European Council in 1996;[65] the insertion in the civil code of the so-called 'protective orders' (*ordini di protezione*) to ensure that victims of family violence are adequately protected from the risk of being exposed to the repetition of such behaviour;[66] the introduction of ad hoc measures to increase the level of respect for children's rights, thanks also to the formal recognition of the specific role of a legal aid system in some civil proceedings.[67] Further modifications might be made with the ratification of the 2003 Council of Europe Convention on contact concerning children, but also if other proposals are approved by the Italian Parliament.

Other sectors were subjected to a thorough revision as well, but some of these changes seem to be intentionally limited to very specific targets. For instance, the much awaited enactment in 2004 of the Act that deals with medically assisted procreation gave the impression of sending a strong symbolic message to the public rather than setting up a comprehensive and coherent legal framework, given the often contradictory and incomplete character of the answers given to the basic issues that call for a solution.[68] More precisely, the

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in order to allow the DNA and the blood tests during the preliminary judgment aimed at verifying the admissibility of the action to contest the child's paternity. See *Guida al Diritto Il Sole 24 Ore*, no 30, 29 July 2006 and at www.guidaaldiritto.ilsole24ore.com/doc.asp?tipologia=num_pub&Numero=30&Data=2006-07-29&iddoc=7467445&idfonte=53&sez In that way, the ambit of the application of the Convention has been delimited unexpectedly. It is true that Art 1, 5 provides that: 'Any Party may, by further declaration, specify additional categories of family cases to which this Convention is to apply or provide information concerning the application of Article 5, paragraph 2 of Article 9, paragraph 2 of Article 10 and Article 11.' However, it seems unlikely that this will happen. A possible way to ensure wider application of the Convention consists in giving direct force to its self-executing provisions (for example., those about the right of the child to be heard in civil proceedings, to receive explanations of the effect of judicial decisions, to have his or her opinion taken into account). See on these aspects G Magno *Il minore come soggetto processuale. Commento alla Convenzione Europea sull'esercizio dei diritti del fanciullo* (Giuffré, Milan, 2001); C Fioravanti 'I diritti del bambino tra protezione e garanzie: l'entrata in vigore, per la Repubblica italiana, della Convenzione di Strasburgo' in *Le Nuove Leggi Civili Commentate* (2003) pp 561 ff.

65 See the *Decreto legislativo* no 151, enacted on 26 March 2001, which is comprehensive not only of the provisions of the Act no 53, enacted on 8 March 2000 implementing also the EC Directive 1996/34/EC – *Disposizioni per il sostegno della maternità e della paternità, per il diritto alla cura e alla formazione e per il coordinamento dei tempi delle città* (that implemented, *inter alia*, the EC Directive about parental leaves) – but also of previous provisions that were amended and/or substituted. On these aspects see R Del Punta, D Gottardi (eds) *I nuovi congedi* (Il Sole 24 Ore, Milan, 2001); M Cagarelli *I congedi parentali* (Utet, Turin, 2002); L Calafà *Congedi e rapporto di lavoro* (Cedam, Padua, 2004). For a social policy perspective, see M Naldini *Le politiche sociali in Europa* (Carocci, Rome, 2006) pp121 ff.

66 See Act no 154 enacted on 4 April 2001, and partially amended by Act no 304, approved on 12 November 2003. On the reform, see S Silvani 'Gli ordini di protezione contro gli abusi familiari (art. 2-8 legge 4 aprile 2001, n. 154 – Misure contro la violenza nelle relazioni familiari)' in P Zatti (ed) *Trattato di diritto di famiglia*, vol 7, *Aggiornamenti (gennaio 2003-giugno 2006)* (Milano, 2006) pp 154 ff.

67 See Art 10, 2 and 5 of the 2001 AdA.

68 In this context, in contrast to the sector of biological and adoptive kinship relationships, the role of consensus is of paramount importance. See on this point M D'Auria 'Informazione e consensi nella procreazione assistita' in *Familia* (2005) pp 1005 ff. More generally, on the new

choice to list extremely restrictive rules and, at the same time, to foresee in some detail the consequences of their violation may seem highly contradictory at first sight. Thus, despite the legal prohibition of in vitro fertilisation made with sperm and/or ovules given by a third person, specific rules were drafted to regulate this situation too, which is not so infrequent, given the opportunity for (married or unmarried) couples to obtain such 'donations' abroad.

Similarly unsatisfactory, it would seem, is the final result of the Act – also approved in 2004 – creating an ad hoc figure (*amministratore di sostegno*)[69] to protect mentally or physically incapacitated persons, as an alternative to the ancient – and still existing – figures (*tutore* and *curatore*), now relegated to the most serious situations (*interdizione* and *inabilitazione*). The legislation did not modify the general picture, which had been created by the civil code of 1942, but merely added new rules to the old ones, and this choice precluded the emergence of a comprehensive new system. The 2005 reform of some procedural aspects of separation and divorce, too, did not give rise to radical changes,[70] but only to piecemeal innovations that are not always well coordinated with the provisions subsequently enacted, at the beginning of 2006, to completely redefine the exercise of parental rights and duties in all case of the breakdown of their unions (both married and unmarried couples). The

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Act no 40, enacted on 10 February 2004, see, among the most recent works, also for wider bibliographical references, I Corti 'La procreazione medicalmente assistita' in G Ferrando *Il nuovo diritto di famiglia*, vol 3, *Filiazione e adozione* (Zanichelli, Bologna, 2007) p 491 ff. R Villani 'Procreazione assistita' in P Zatti (ed) *Trattato di diritto di famiglia. Aggiornamenti (gennaio 2003-giugno 2006)* (Giuffré, Milan, 2006) pp 249 ff. On the first judicial decisions in this area, see V Baldini *Libertà procreativa e fecondazione artificiale. Riflessioni a margine delle prime applicazioni giurisprudenziali* (Esi, Naples, 2006). For a critical view, see A Celotto, N Zanon *La procreazione medicalmente assistita. Al margine di una legge controversa* (Franco Angeli, Milan, 2004); F D Busnelli 'Procrezione artificiale e filiazione adottiva' in *Familia* (2003) pp 1 ff. For a comparative perspective, see C Casonato, T E Frosini *La fecondazione assistita nel diritto comparato, Dossier – II*, of the review *Diritto Pubblico Comparato ed Europeo* (Turin, 2006). See also E Camassa C Casonato, *La procreazione medicalmente assistita: ombre e luci* (Università di Trento, Trento, 2005); M Fortino *Procreazione medicalmente assistita* (Giappichelli, Turin, 2005); C Flamini, M Mori, *La legge sulla procreazione medicalmente assistita* (Net, Milan, 2005). It is important to remember that on 13–14 June 2006 five referenda were held, to abrogate some provisions of this Act, but the minimum number of voters required by Italian law to ensure its validity was not reached. Thus, the Act received an implied confirmation by the electorate.

[69] Act no 6, enacted on 9 January 2004, n 6 (Introduzione nel libro primo, titolo XII, del codice civile del capo I, relativo all'istituzione dell'amministrazione di sostegno e modifica degli articoli 388, 414, 417, 418, 424, 426, 427 e 429 del codice civile in materia di interdizione e di inabilitazione, nonché relative norme di attuazione, di coordinamento e finali). A proposal to reform the Act no 6/2004 has been published recently. See P Cendon *Rafforzamento dell'amministrazione di sostegno e abrogazione dell'interdizione e dell'inabilitazione* – Bozza Cendon 2007 (22 May 2007) available at www.personaedanno.it/site/sez_browse1.php?campo1=28&campo2=264.

[70] The statutory innovations at stake were inserted in a heterogeneous series of new provisions contained in a Decree confirmed by an Act (Act no 80, enacted on 14 May 2005, *Conversione in legge, con modificazioni, del decreto-legge 14 marzo 2005, n 35, recante disposizioni urgenti nell'ambito del Piano di azione per lo sviluppo economico, sociale e territoriale. Deleghe al Governo per la modifica del codice di procedura civile in materia di processo di cassazione e di arbitrato nonché per la riforma organica della disciplina delle procedure concorsuali*).

presentation of several Bills in 2007, all designed to modify this recent Act, illustrates the need to complete the legislative picture in the latter area as well.[71] Sharp criticism has also been made against some of the innovative rules contained in an Act approved in 2006, which introduced important exceptions to some ancient limitations imposed by succession law (ie the so-called *patti successori*), as far as entrepreneurial activities are concerned (*patti di famiglia*).[72] Indeed, this reform too has been considered incomplete and partially contradictory, given that its scope of application is rather limited. Moreover, it seems likely that these once forbidden agreements made with a view to regulating one's assets before the death might be easily 'attacked' thanks to common instruments of succession law.

XI FAMILY LAW AS A MIRROR OF SOCIETY AND ITS REFLECTED VISION

Any generic list of innovations may be useless without an explanation of the reasons underlying the orientation and contents of these reforms. At the same time, a brief description of the previous situation may be helpful in giving a more detailed vision of the impact of these new Acts and to better highlight their role in the ongoing process of finding common procedural standards in Europe to protect fundamental rights involved in family relationships.

Generally speaking, family law mirrors socio-cultural developments but in some cases it can stimulate them. Contemporary Italian experience clearly exposes this twofold relationship. Notwithstanding the presence of very broad and far-sighted provisions that are contained in the civil code – as amended three decades ago – or in more recent pieces of special legislation, some of its aspects are no longer consonant with core social needs and expectations, which justifies the invitation to reconsider the persistence of their initial foundations. The task of indicating valid solutions to this incongruity has been at the forefront of the more recent discussion of reforms. However, these new proposals were not advanced to totally revolutionise the status quo. On the contrary, their common and implied premise is represented by the acceptance of the basic lines of the complex 'architecture' set up in the past, when a progressive modernisation was effected by the legislature.

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[71] See the Bill presented at the Senate by Senator Pietro Fuda (S 1399 – *Nuove disposizioni in material di affidamento condiviso*) and those presented at the House of Representatives by On Katia Bellillo (C 2438 – *Nuove Disposizioni in materia di affidamento condiviso dei figli*), On Enrico La Loggia (C 2423 – *Modifiche al codice civile in materia di affidamento condiviso dei figli*), On Riccardo Pedrizzi (C 2360 – *Nuove disposizioni in materia di affidamento condiviso dei figli*) On Carlo Costantini (C 2231 – *Nuove disposizioni in materia di affidamento condiviso dei figli*), On Luisa Capitanio (C 2538 – *Disposizioni in materia di tutela dei minori nell' ambito della famiglia e nei procedimenti di separazione personale dei coniugi*) on the Parliament website at www.parlamento.it.

[72] Act no 55, enacted on 14 February 2006 (*Modifiche al codice civile in materia di patto di famiglia*). For a brief comment see S Landini 'Il cosiddetto patto di famiglia: patti successori o liberalità?' in *Familia* (2006) pp 839 ff. On this subject, see G Oberto *Il patto di famiglia* (Cedam, Padua, 2006); B Inzitari *Il patto di famiglia* (Giappichelli, Turin, 2006).

During this first 'era' of statutory innovations, several changes were made in the original framework set up by the civil code that entered into force in 1942. As in other legal systems of that time, legislative choices gradually conferred more autonomy and freedom to all family members. The impulse expressed by these 'historic' and enlightened reforms enacted in the early 1970s produced a sudden transformation of formal notions as well. Some expressions disappeared definitively from the legal dictionary: the idea of an almost exclusive power attributed to the father by an ancient patriarchal mentality (*patria potestà*) was replaced by the concept of shared parental powers (*potestà dei genitori*),[73] closely intertwining the responsibilities of both parents or, rather, their rights/duties towards their children (*diritti/doveri dei genitori*). The husband's and wife's positions received an almost identical formal treatment, though some differences remained, especially as far as the actual exercise of this power is concerned. More specifically, whenever a family conflict arises and cannot be resolved by an agreement, both in cases of permanent difficulties (eg after divorce) or of temporary ones (eg disagreement between the parents about educational programmes), the 'last word' – said by the judge – could still determine a preferential position for one of them. In such cases a dichotomy can emerge very clearly. Indeed, in the procedures for separation and divorce, the percentage of situations in which both parents were authorised to exercise parental powers together (*esercizio congiunto della potestà*) was very low in the past, because, as a rule, the parent to whose care the child was entrusted (*affidamento esclusivo*) was inevitably the same one (ie the mother). This experience gave rise to a long debate that preceded the final approval of the January 2006 Act, noted above, which introduced new rules favouring joint parental responsibility (or, rather, joint custody – *affidamento condiviso*).[74] As

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[73] The Italian word *potestà* can be translated differently. Indeed the word 'power' corresponds to the term *potere*. Thus, it seems possible to use also the word authority but the latter can give the idea of a more intense subordination of children to their parents.

[74] The expression 'parental responsibility' is not used in the new statute that now regulates parental custody rights and the exercise of parental authority (Act no 54, enacted on 26 February 2006 – *Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli*) in all cases of breakdown of a union (of married or unmarried couples). Thus, despite the introduction of several innovations, traditional terms were adopted, with the exception of the adjective '*condiviso*' (joint custody). Previously, the legislature had used the expression '*affidamento congiunto*' (shared custody). The modification was probably due to the fact that, according to consolidated case-law, it was necessary to obtain the parents' agreement in order to grant shared custody. For a clear picture of the provisions regulating parental responsibilities and authority in Italy, see S Patti, L Rossi Carleo and E Bellisario, *National report for Italy*, to the Commission on European Family Law (available at www.law.uu.nl/priv/cefl/).

After a long parliamentary debate, the Act no 54/2006 was suddenly approved. Soon after its entry into force, the reactions were extremely strong. The solutions embodied in the legislative text were criticised from several perspectives. Also, promoters of the reform expressed their doubts about its coherence. See, eg, M Maglietta, *L'affidamento condiviso dei figli* (Franco Angeli, Milan, 2006) p 8. Experts in family law underlined a lot of discrepancies and lacunae as well. See, eg, S Patti 'Rilievi introduttivi' in S Patti, L Rossi Carleo *L'affidamento condiviso* (Giuffré, Milan, 2006) pp 1 ff. There is a clear statement of the right of the child to maintain contact with both parents after their separation or divorce (Art 1, 1), on condition that this solution respects the 'moral and economic' interests of the child (Art 1, 1), but most of the new provisions are rather unclear and/or incomplete. Thus, for instance, it is not clear if the former

regulation of the exercise of parental authority, in cases of unmarried parents (Art 317-*bis*, 2 of the civil code), is still in force or not. According to this rule, whenever the child lives with one of his or her parents only, the latter has the exclusive exercise of parental authority. The new Act, while providing identical substantive provisions for all children (born in or out of wedlock) – Art 4, 2 – does not specify if this provision has been abrogated. Moreover, the Act does not clarify if the jurisdictional competence should be the same (i e of the civil court – *Tribunale civile*). Indeed, for proceedings concerning parental authority of unmarried parents the competence was 'shared', until the recent statutory modification, between two courts. For economic aspects the competence was of the judge of the *Tribunale civile* – in compliance with Art 261 of the civil code), while for personal aspects (about parental custody and the exercise of parental authority) the competence was of a court called Minors' Tribunal (*Tribunale per i minorenni* – a panel of professional and lay judges). A dispute soon arose on this point. Indeed, the new statute did not specify if a provision of the civil code, which deals with this aspect, is still applicable (Art 38 of the *disposizioni di attuazione*). See for opposite positions, F Tommaseo *L'ambito di applicazione della legge sull'affidamento condiviso* and L Salvaneschi *Alcuni nodi processuali da districare: reclamo dei provvedimenti provvisori, competenza in materia di figli naturali e soluzione delle controversie in caso di inadempienza*, contributions published in *MinoriGiustizia,* n 3/2006, at pp 104 ff and pp 116 ff. For the situation prior to the reform and for the necessary references to case-law, see G Ferrando, *Manuale di diritto di famiglia* (Bari, 2005) pp 118 ff, at 123, n 17–21and at pp 330–331.

Thus, completely different solutions were followed by Italian ordinary judges and Minors' Tribunals in the period February 2006 to April 2007, until the United Chambers of the Supreme Court (*Sezioni Unite della Corte di cassazione*) made a decision. The Court decided that only the Minors' Tribunals have competence in relation to both aspects, but in its decision (*ordinanza* no 8362, taken on 3 April 2007, not yet published, and available at www.altalex.com/index.php?idstr=26&idnot=36528, annotated by C Ravera) it also emphasised that it is the legislature's task to modify the current situation, especially as far as the coordination with the civil code is concerned. However, a certain degree of uncertainty still exists, at least as to the applicability of Art 317-bis, 2 of the civil code. A further clarification seems, therefore, necessary. There is also a great deal of confusion in respect of the current notion of custody rights and its relationship to the exercise of parental authority. The choice not to use the expression 'parental responsibility' created this uncertainty. Analogously, the welcome provision of the right of the child to 'maintain important relationships (*rapporti signficativi*) with his/her ascendants and with the relatives of both his/her parents' is so vaguely drafted that it was necessary to wait for some judicial decisions before having any indications of its concrete scope of application. See for different opinions about grandparents' procedural rights (on one side) L Lenti 'La legge sull'affidamento condiviso: nell'interesse dei figli o dei padri separati?', J Löng 'L'affidamento condiviso in giurisprudenza: il ruolo dei nonni, l'ascolto del minore e i rapporti con l'affidamento esclusivo', and (on the other) G Amoroso 'Sul diritto di visita degli ascendenti', contributions published in *MinoriGiustizia*, n 3/2006, respectively, at pp 246 ff, at 249, 272 ff and 262 ff. One of the first decisions on this point – favourable to the grandparents' intervention in the civil proceeding, albeit *ad adiuvandum* – was taken by the Florence Tribunal, on 22 April 2006. For a comment, which approves this interpretation, see F Tommaseo 'L'interesse dei minori e la nuova legge sull'affidamento condiviso' in *Famiglia e Diritto* (2006) pp 291 ff.

Also the provision of the 'exception' to the rule (i e of exclusive custody) gave rise to different judicial and academic interpretations, as well as the rules about the determination of the maintenance contribution and those about the right of occupation in the family house. The new statute reaffirms that this right is conferred primarily while taking into account 'the children's interest' (Art 1.2 – Art. 155 of the civil code), but it introduces some automatic consequences that are related to the ex-spouse's personal choices. Indeed, the right of occupation ceases not only when its beneficiary no longer lives in the family house, definitely or not, but also in the case of a new marriage or of cohabitation *more uxorio*. No power is left to the judge to evaluate if this consequence can cause damage to children's rights. For this reason, the constitutionality of this provision was challenged. While waiting for a decision of the Constitutional Court, further limits of the current legislation can be listed. Mediation was

only briefly mentioned and no precise indications were given to judges (Art 1, 2 – Art 155-*sexies* of the civil code). If they think it appropriate, after hearing the parties and obtaining their consent, they can postpone the adoption of the above-mentioned decisions (‘*provvedimenti di cui all’art. 155*’), in order to allow the spouses to ‘attempt a mediation’, thanks to the intervention of ‘experts’, with a view to reaching an agreement, aimed at protecting the moral and economic interest of the children. However, no specific rule has been provided to regulate the exact procedural steps to be taken, in the sense that a wide discretion is left to the judiciary, including the selection of family mediation experts, in the absence of a professional list. Indeed, greater attention should have been paid to this aspect, in light of the provision embodied in Art 13 of the Council of Europe Convention on the exercise of children’s rights, signed at Strasbourg on 25 January 1996. (‘In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties’). As already observed, the Italian Parliament authorised its ratification and execution in 2003 (Act no 77 enacted on 20 March 2003) but the Ministry of Foreign Affairs limited its scope of application. The other countries that ratified the 1996 Convention are: Cyprus, the Czech Republic, Germany, Greece, Latvia, Poland, Slovenia, the Republic of Macedonia and Turkey. It is worth mentioning that the Standing Committee on the European Convention on the Exercise of Children’s Rights (T-ED), in its first meeting, held on 8–9 June 2006, at Strasbourg, delivered a Report to the Committee of Ministers about the 1996 Convention. See T-ED/2006/docs/Meeting report revised, Strasbourg, 8 November 2006 T-ED (2006) RAP 3 E rev.

Last but not least, the system of deterrent, compensatory and punitive measures envisaged to sanction violations of the parental duties is rather contradictory (see Art 2, 2, that introduces Art 709-*ter* into the code of civil procedure). Indeed, the first reaction is an ‘admonition’. If the judge ascertains ‘serious breaches’, those duties or behaviour that in any case cause prejudice to ‘the minor’ or that create obstacles to the correct way of fulfilling custody obligations, he or she can modify the decisions already taken and may, also contemporaneously (*anche congiuntamente*): (1) warn the parent responsible of the violation; (2) award damages in favour of the minor; (3) or in favour of the other parent; and (4) order the parent liable for the breach to pay an ‘administrative pecuniary sanction’ (for a minimum amount of 75 euros-and a maximum of 5,000 euros). This decision can be contested in ‘ordinary ways’. It is evident that a civil appeal is allowed, but it is not so clear if the danger of double jeopardy (or rather, the respect of the principle of *ne bis in idem*) has been taken into account, in the sense that appropriate procedural guarantees should be provided in order to avoid double punishment. Indeed, even if these measures cannot be compared to punitive damages, it is clear that they will be related, in most cases, to non-pecuniary losses caused by a tortious conduct, given the simultaneous possibility of obtaining compensation (for both economic and non-economic losses) for violations of maintenance obligations, when a crime is committed – Art 185 of the criminal code. This is also an aspect that deserves further thought by the legislature. On the latter point, see A D’Angelo ‘Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art. 709-ter c.p.c.’ in *Familia* (1998) pp 1031 ff, also for a selected bibliography, p 1031, at n 1.

On the Act no 54/2006 see the collected contributions published in the reviews *Minori Giustizia*, n 3/2006, *La bigenitorialità che continua oltre la separazione*, pp 7 ff and *Familia* (2006) issues 4, 5 and 6. For further analysis, see I Masini ‘Dagli orientamenti giurisprudenziali in tema di affidamento congiunto alla nuova disciplina dell’affidamento condiviso’, and G Passagnoli ‘L’affidamento dei minori tra Carducci e Tomasi di Lampedusa’, contributions published in G Passagnoli, I Mariani (eds) *Diritti e tutele nella crisi familiare* (Cedam, Padua, 2007) respectively, at pp 137 ff and 121 ff. See, also for a survey of judicial decisions, G De Marzo, C Cortesi, A Liuzzi, *La tutela del coniuge e della prole nella crisi familiare. Profili di diritto sostanziale e processuale* (Giuffré, Milan, 2nd edn, 2007). Before the reform, see V Zambrano ‘Interesse del minore e affidamento congiunto. Esperienze europee a confronto’ in *Diritto di famiglia e delle persone* (2000) pp 1385 ff and C Marcucci ‘L’affidamento dei figli in Europa: disciplina vigente e prospettive di riforma’ in *Famiglia e Diritto* (2001) pp 225 ff.

has already been noted, some provisions contained in this reform are so vague and unclear that the main aim to favour agreements between the parents, also through mediation,[75] can easily be defeated. Indeed, a substantial, albeit not formal, superior position can be conferred on the parent who is 'more powerful' both economically and/or psychologically. It is worth emphasising, however, that there are still some provisions of the civil code that admit a formal superiority of the father. Despite the limited scope of applicability of these rules and notwithstanding their rare application, they represent a remnant of the past, which is almost unanimously no longer considered acceptable. These and other aspects will now be examined, to give an idea of the impact of the European 'standards'.

XII A GLANCE AT THE PAST AND AN ANALYSIS OF THE PRESENT SITUATION

Some of the Acts approved or the Bills presented in recent years, which have been very briefly described so far, seek to eliminate the 'traces' of the previous non-egalitarian system, but not all the solutions or proposals envisaged for this purpose were drafted very carefully. To understand the scope of this discrepancy, it will be useful to look back at the moment when this still unfinished 'picture' began to be 'painted'. It was soon after the enactment of the first Act that regulated divorce in 1970 that a real subversion of the traditional 'codified' model took place. This was mainly due to the subsequent approval of the general reform enacted in 1975, which produced the aforementioned modifications that anticipated some lines of development, but which, were not yet completely clear in the society of that time. Indeed, it was necessary to wait for some decades before arriving at a full acknowledgment of that new vision finally adopted in more recent years, after the ratification of important international Conventions.

It will be useful to focus on these developments to show the presence of an evolutionary approach similar to the one adopted in other European countries during this first phase of legislative reforms. More importantly, in this period it began to become clear just how deep the shift was from the theories based on the 'public' dimension of family law that had prevailed until the mid-20th century to a more modern vision inspired by a fairly generalised 'privatisation'

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[75] On family mediation from a legal perspective, seen in 'the light' of the Act no 54/2006, see L Fernández del Moral Domínguez 'La mediazione familiare' in S Patti, L Rossi Carleo, *L'affidamento condiviso* (Giuffré, Milan, 2006) pp 229 ff. Before the enactment of the reform, see A D'Angelo 'Un contributo per un approccio giuridico allo studio della mediazione familiare' in *Familia* (2004) p 533; G Giaimo 'La mediazione familiare nei procedimenti di separazione e di divorzio. Profili comparatistici' in *Diritto di Famiglia e delle Persone* (2001) p 1606. For a recent survey and the necessary references, see I Pupolizio *La mediazione familiare in Italia* (Giappichelli, Turin, 2007). Prior to the reform see G Capilli, P La Selva 'Mediazione familiare e progetti di riforma' in *Famiglia e Diritto* (2006) pp 87 ff and, in a comparative vision, see V Zambrano 'Un modello alternativo di giustizia: la mediazione familiare in Europa' in *Familia* (2005) pp 487 ff.

trend.[76] With the noteworthy exception of the sector of child law, in which the involvement of public law measures was – and still is – very intense,[77] in all the other fields the main common trait of contemporary Italian law can be identified in its choice to give priority to the free will of the individual components of the family and, consequently, to widen the scope of agreements between them. At the same time, there was a pressing need to ensure a public law protection aimed at balancing unequal positions within the family.[78]

The secularisation of family relationships led to the introduction of ad hoc rules to deal with cases of breakdown of conjugal unions as well as an objective evaluation of their irretrievable character.[79] The need for impartial evaluation – in this context – was seen as a clear sign of a more egalitarian approach also in connection with the introduction of a legal 'regime' of shared property between

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[76] On the concept of autonomy in family law, see recently R Amagliani *Autonomia privata e diritto di famiglia* (Giappichelli, Turin, 2005).

[77] For instance, in order to declare a child free for full adoption, the biological parents' consensus is not relevant or required. A judicial declaration, based on an objective evaluation of complete and definite abandonment, is necessary (*abbandono morale e materiale*). However, the child's opinion is taken into account. If under 12, the child shall be heard by the judge, but taking into consideration his or her capacity of discernment. If over 12, the child shall be heard personally. In the case of minors over 14 their personal consent to adoption is necessary (Art 7, 2 and 3 of the AdA). In cases of simple adoption, on the other hand, the consent of both biological parents and the adoptive parents is required, as well as the would-be adoptive child, if over 14. If under 14, the child's legal representative has to be heard. Moreover, the same rule is applicable in cases of full adoption provided for cases of minors over 12 (Art 45 of the AdA). For one of the most recent analyses of these aspects and for a detailed description of the current legislation and case law, see L Fadigae, 'L'adozione dei minori e l'affidamento familiare' in G Ferrando *Il nuovo diritto di famiglia*, vol 3 (Zanichelli, Bologna, 2007) pp 587 ff. In general, on the public relevance of child law, see M R Ferrarese 'Giuridificazione e diritto minorile' in *Politica del Diritto* (1990) pp 59 ff.

[78] See V Pocar, P Ronfani *Il giudice e i diritti dei minori* (Laterza, Bari, 2001).

[79] The provisions applicable to 'religious marriages' recognised by Italian legislation cannot be analysed here in detail. It is important to remember, however, the incidence of the European case-law also in this area. In the case *Pellegrini v Italy* (App no 30882/96), the ECtHR decided that Italian courts had not duly verified whether Art 6 of the ECHR had been secured in the proceedings concerned, before granting the authority to enforce a decree issued by the courts of the Vatican, which had declared the nullity of a religious marriage. The ECtHR considered this review necessary when the decision in respect of which authority to enforce was sought emanated from the courts of a country that did not apply the Convention (like the Holy See), especially where 'a matter of capital importance to the parties was at stake in the application for the authority'. The reasons given by national Courts for dismissing the applicant's complaints about the ecclesiastical proceedings did not give 'any importance to the fact that the applicant had been denied an opportunity to see the evidence relied on by her former husband and by the – alleged – witnesses'. The right to adversarial process can be ensured – concluded the ECtHR – if 'each party to the proceedings had in principle to be given to examine and contest any evidence or observation submitted to the court with a view to influencing its decision'. Moreover, the applicant should have been afforded 'an opportunity to seek assistance from a lawyer', and the ecclesiastical courts should have presumed that the applicant was unfamiliar with the case-law regarding legal assistance in canon-law proceedings. Given that she was summoned to appear before the ecclesiastical court without knowing the purpose of the proceedings and without being informed that she could have a lawyer's assistance before she came to court, Italian courts had 'failed to ensure that the applicant had had a fair hearing in the ecclesiastical proceedings before issuing the authority to enforce the judgment of the Tribunal of the Roman Rota'. For this reason, there was a violation of Art 6,

husband and wife (*comunione legale dei beni*) to be applied when the couple had not expressly made a different decision about their assets. At first the recognition of the value of domestic work as a contribution to the creation of family wealth due to woman's activity as a housewife was considered a welcome solution to promote a system truly respectful of the principle of equality, interpreted substantially. However, experience soon revealed that most young couples preferred to opt for the separation of those assets acquired after the marriage (*separazione dei beni*), especially when the wife too worked outside the household. The participation of women in many professions emphasised their autonomy in this context as well. The general legislative solution, adopted to ensure a fair and balanced redistribution of family wealth, was superseded, in most cases, by the free will of both 'parties', as soon as women acquired more freedom, from both a social and an economic standpoint. In other words, as recent sociological studies have confirmed, the 'statutory net' created in the 1970s to protect women began to be seen as the result of a stereotypical and old-fashioned conception of family roles, that is to say, of the idea of a clear-cut and unavoidable distinction between activities pertaining, respectively, to husbands and wives or, more precisely, to male and female family members.[80]

Indeed, the 'key-word' of the most recent modifications has been the progressive and spontaneous 'emancipation' from the strict requirements initially established in order to protect the 'weak' member of the family (ie the wife, seen as representative of the 'weaker sex'), in a rather paternalistic way. At the same time, any moralistic constraint disappeared in the discipline of the two phases of the divorce procedure (ie *separazione* and *divorzio*), not only at a legislative level (Act no 74/1987), but also in judicial interpretation. The original idea of 'fault' gradually played a rather limited role. According to a well established case-law orientation, its ascertainment was relegated at the moment in which the civil judge determined to which half of the couple the responsibility for the 'failure' was to be imputed (*addebito*). This solution was accepted by the legislature as well, thanks to the 1987 reform. Thus, the judicial decision in a divorce procedure that might establish a spouse's 'liability' is no longer linked to a moral judgment, but it is necessary today only to determine the foundation of the legal obligation to ensure the support of the ex-spouse who is in need. In other words, whenever one of them has been found responsible for the breakdown of the marriage, he or she loses the right to receive monetary support (*diritto al mantenimento*) even if he or she faces economic difficulties. The 'responsible' ex-spouse has the right to ask for alimony only (ie the sum strictly necessary for mere subsistence), but on condition that a situation of serious need is at stake, in that he or she lacks any means of support.

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1 ECHR. See S Dominello 'I matrimoni "davanti ai ministri di culto"', in P Zatti (ed) *Trattato di diritto di famiglia*, vol II, *Aggiornamenti (gennaio 2003 – giugno 2006)* (Giuffré, Milan, 2006) pp 85 ff, at p 128 at n 41.

80 See V Pocar, P Ronfani *La famiglia e il diritto* (Laterza, Bari, 4th edn, 2003).

Despite the intention to defend the neutral nature of this rule, in some cases it proved to be a mechanism to reinstate, albeit indirectly, the old-fashioned conception of fault-based measures and thus obliterate the declared impartiality of the system. This point too appears in some reformers' agendas, as well as in the proposal to modify the entire discipline of judicial separation and divorce, to shorten and simplify it, especially in the absence of children.[81] Apart from this area, there are also other areas of family law that were deemed to be ripe for a complete revision. As has already been stressed, the very concept of 'couple' is at stake, according to the innovative visions that prompted the adoption of the rules and principles followed in some EU states whereby de facto families received legislative recognition. Central aspects of child law and succession law, too, are being reshaped as the very concept of family 'life' changes. Rules governing these areas were tested, especially after these statutory innovations, to verify their suitability to cope with the complex dilemmas arising from the increasing level of predictability ensured by medical techniques, from 'birth to death'.

For instance, ad hoc solutions had to be tailored to new situations in the area of medically assisted reproduction. The approval of some explanatory 'guidelines',[82] drafted by the Ministry of Health soon after the entry into force of the new legislation, was clear evidence of the fact that further steps should be taken. In particular, there are sectors in which the diagnosis of diseases can influence the exercise of individual freedom regulated by family law (ie in pre-natal injury cases and in cases concerning the parents' range of 'choices' after knowing the status of health of the foetus, or – to look at the opposite side of the coin – in the so-called living will[83]). This is one of the areas in which the legislature cannot delegate to the judiciary the entire task of defining the scope of legal protection.

In light of the statistical data collected, sociologists have given us a photographic image of past and present trends of 'Italian families' that is

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[81] See these recent Bills presented, respectively, at the Senate and at the House of representatives, by Senators Giuseppe Saro (S 1432 – *Modifiche alla disciplina in tema di separazione personale tra i coniugi, scioglimento e cessazione degli effetti civili del matrimonio e successione ereditaria del coniuge*) and Roberto Manzione (S 275 – *Modificazioni della disciplina in tema di assegnazione della casa familiare nei procedimenti di separazione e divorzio*), by On Maurizio Turco (C 2247 – *Modifica all' articolo 3 della legge 1 dicembre 1970, n. 898, in materia di rapporto tra separazione dei coniugi e domanda di scioglimento del matrimonio and C. 2248 – Modifiche al codice civile in materia di assegnazione della casa familiare nei procedimenti di separazione e di scioglimento del matrimonio*) and Franco Grillini (C 656 – *Modifiche alla legge 1 dicembre 1970, n. 898, recanti semplificazione delle procedure e riduzione dei tempi per l' ottenimento del divorzio*).

[82] See the *Linee guida in materia di procreazione medicalmente assistita*, Decree enacted on 21 July 2004 by the Ministry of the Health.

[83] See the Bills presented at the Senate by Senator Gianpaolo Silvestri (S 1615 – *Disposizioni in materia di consenso informato e di testamento biologico al fine di evitare l' accanimento terapeutico*) and at the House of Representatives by On Tommaso Pellegrino (C 1884 – *Disposizioni in materia di consenso informato e di testamento biologico al fine di evitare l' accanimento terapeutico*) and On Franco Grillini (C 1702 – *Disciplina dell' eutanasia e del testamento biologico*).

decisive for lawyers and lawmakers alike. However, these images reflect the vision of an archipelago in which 'non-Italian' – European and 'non-European' – families are also present today. It seems necessary now to indicate the paths to follow to connect these 'islands', or, rather, all these separated parts of family law that cannot remain isolated one from the other.

XIII CONCLUSIONS

After this general description we may offer some concluding remarks. Family law in Italy has changed in recent years, but it is still susceptible to modification in order to comply with international and 'European' obligations, especially when 'non-traditional' situations are at stake. Indeed, several new areas have emerged as core elements of contemporary family law. Of course, all aspects of the regulation of matrimonial and post-matrimonial relationships are still of vital interest. After all, numerous judicial decisions can be cited to show how very important these issues are even now, albeit not almost to the exclusion of others as they were a few decades ago. They continue to be decisive 'chapters' of the current reformers' agendas and not only in textbooks devoted to problems of family law.

However, while glancing at the most detailed and recent legal treaties, reading miscellaneous volumes, or simply perusing the indexes of the law reviews published in this field, one easily discovers entirely new areas as well as profound modifications of existing areas, a phenomenon that is also to be explained in light of the 'European' influences noted above.

Comparison reveals the sharp differences among the solutions adopted by state legislators in identical social situations in a rather heterogeneous set of cases. Let us consider children's rights.[84] In other European countries a variety of regulations govern access to birth records.[85] Moreover, a certain openness characterises new rules about adoption, even if open adoptions are not unanimously accepted and there is no uniformity in the contents of procedural guarantees (e g the right to be 'heard' in all the proceedings in which children are involved). Other controversial areas also revealed a growing differentiation within the European context, particularly when state legislation has had to deal with multicultural challenges. Family models that are deeply connected with so-called 'non-European' socio-cultural roots have reinstated to the political and legal agendas of the EU and of state institutions issues that had been

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[84] On 'European' child law, see A Opromolla *Children's Rights under Articles 3 and 8 of the European Convention. Recent Case Law* (2001) *European Law Review* H/R 42; U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, Dartmouth, 1998); S Grataloup, *L'enfant et sa famille dans les normes européennes* (LGDJ, Paris, 1998).

[85] Article 28 of the 2001 AdA now recognised the right of adopted persons to know their origins, on condition that they are 18 years' old, albeit with some (unexplained) differences for those who are under 25. The new provision, is however, criticisable for several reasons. See L Romagnoli 'Effetti dell'adozione e identità biologica ell'adottato' in G Passagnoli, I Mariani (eds) *Diritti e tutele nella crisi familiare* (Padua, Cedam, 2007) pp 181 ff.

debated in Europe long before – for instance, the problem of women's subordination to men's will, the limitation of their freedom especially in educational, religious and matrimonial choices, not to mention their freedom to decide whether or not to wear traditional clothes (eg the foulard, chador and burqa). These are just a few examples of the pressing need to find answers to some fundamental questions: where to draw the line between respect for diversity and the duty to protect weaker members of society? How to justify a differential treatment of minors according to their 'personal status' (or, rather, to their family origins), given the recognition of children's rights (to receive the necessary support if they are in need and to self-determination as soon as they acquire the necessary capacity to make autonomous decisions)? Is it possible to impose on female children a separate (and/or lower level of) education only because their 'social role' is still seen as inextricably linked with their future responsibilities within the family as married women? Can polygamy and unilateral repudiation (ie by the husband) be accepted in the EU – albeit from the perspective of legal recognition and/or enforcement only – without creating a sharp conflict with both the principle of spouses' equality and the right to respect for one's human dignity?

One clearly cannot justify or legitimise a 'social habit' that is often transformed into a law on religious grounds. Nor is it decisive to say – as in the case of female genital mutilation – that religion is not responsible for such practices, which had already been deeply rooted in ancient tribal (pre-Islamic) customs and are thus expressions of tradition. Even if restrictions of women's (and of autonomous children's) freedom can be understood from a historical point of view, no form of submission on their part – no matter what justification 'nature' may offer – can be considered compatible with traditions shared by European countries. Similarly, discrimination based on sexual orientation or on racial, religious or ethnic grounds cannot be accepted without breaching the duty to respect the fundamental rights of all human beings, men and women, adults or minors.[86]

[86] The protection of children's rights was also taken into consideration in the adoption of new criminal statutes. An Act was passed in 1996 to reform the Penal Code. New rules were introduced against sexual violence (See Act no 66, enacted on 15 February 1996). Another Act was approved in 1998 (Act no 269, enacted on 3 August 1998) on the exploitation of prostitution, of pornography, and of sexual tourism when victims are minors, regarded as new forms of reduction in slavery. More recently, the legislature approved an Act (Act no 7, enacted on 9 January 2006) containing provisions about the prevention and the prohibition of female genital mutilation. It is not possible here to comment on these Acts. In most cases the purpose of protecting children led to the enhancement of the severity of the criminal sanctions. In some cases such consequences are unavoidable, but it is also necessary to consider wider strategies to prevent the commission of these crimes and social measures to help minors who are 'victims and offenders' at the same time. For a clear picture of these recent modifications of the Penal Code, see A Cadoppi (ed) *Reati contro la libertà sessuale e lo sviluppo psico-fisico dei minori* (Utet, Turin, 2006). On the new trends in criminal law and procedure in cases of minors who committed crimes, see for a critical view S Larizza *Il diritto penale dei minori: evoluzione e rischi di involuzione* (Cedam, Padua, 2005). For a survey on international child abduction, see V Paraggio, F Ciccarella *La sottrazione internazionale di minori: casistica e giurisprudenza* (Laurus-Robuffo, Rome, 2005). For a vast social enquiry about minors (under the age of 14) not subjected to ordinary criminal procedures, see the Report drafted by the National Centre

A non-European observer might have the impression that, in certain cases, a relativistic abstention has prevailed as a sort of preventive measure against the accusation of promoting Euro-centrism, in Italy, as well as in other EU countries. An awareness of the risks inherent in a pseudo-neutral approach can be avoided if, in place of a misguided indifference to socio-familial models, a more nuanced position is adopted by legislators, one respecting diversity without compromising principles of equality. These basic principles should take differences into account in order to guarantee an identical level of protection to all members of an open society, in which a multiplicity of forms of family life cannot be viewed as a menace to the basic rights of distinct family members. Therefore, instead of wondering only about the (social, historical, religious) reasons why a phenomenon exists – which are certainly worthy of discussion – it seems much more important to consider the fact of its existence and its acceptability in the current societal context in light of the constitutional vision shared in contemporary Europe.

One must therefore cope with the difficulties arising from the coexistence of two trends. The first favours the target of 'integration' – which does not necessarily coincide with assimilation or with any proposals of self-proclaimed better models – while the second promotes the simple acceptance of habits and customs belonging to traditions defined as external to 'European culture'. Apart from the ambiguous character of any vague reference to socio-geographical origins, which can be misleading, even more so after the 'enlargement' of the EU, the main obstacle to avoid is the opposition between 'two Europes' and between a 'European' and a 'non-European' context. The basic values solemnly proclaimed in the preamble of the EUCFR (and its express prohibition of several grounds of discrimination, or, rather, of any violation of the principle of equality between women and men, of children's dignity, etc) are universal and should be respected regardless of nationality or citizenship. The fact that an ad hoc Agency was recently instituted by the European Council for the protection of fundamental rights and the fact that the creation of a 'gender equality' agency seems to be forthcoming[87] are hints of the seriousness of several unresolved problems, especially in relation to the challenges posed by immigration.[88] Thus, the starting point can become conclusive: there is still much work to do in order to give more coherence to the current Italian family law system, particularly in light of the need to reach core

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of documentation and analysis on children and adolescents (*Centro Nazionale di documentazione e analisi per l'infanzia e l'adolescenza)*, *Under 14: Indagine nazionale sui minori non imputabili* (Istituto degli Inocenti, Florence, 2003).

87 See the Regulation enacted by the Council of the EU (CE, no 168/2007) on 15 February 2007 that instituted the *European Agency for Fundamental Rights*. It is a kind of 'development' of the previous European Observatory on racism and xenophobia, created by the Council Regulation (EC) 1035/97. Another Regulation is forthcoming. It should introduce a *European Institute for Gender Equality*. Its first draft was published on 8 March 2005 (see COM[2005] 81 final – 2005/0017 [COD] – SEC [2005] 32). The increased involvement of the EU institutions is welcomed of course, but it also signals the need to enhance the current level of protection of fundamental rights.

88 On these issues H Stalford *A Community for Children?: Children, Citizenship and Migration in the European Union* (Ashgate, Aldershot, 2004).

'European' targets, and this is a task in which international co-operation can be decisive,[89] at a 'European' and at a 'non-European' level.[90]

[89] See K Lenaerts 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) *International and Comparative Law Quarterly* 873. On the role of the EUCFR and on its limits, see C McGlynn 'Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?' (2001) 26 *European Law Review* 35 and, by the same author, 'The Europeanisation of Family Law' (2001) *Child and Family Law Quarterly* 35 and 'A Family Law for the European Union?' in J Shaw *Social Law and Policy in an Evolving Europe* (Hart Publishing, Oxford, 2000) pp 223 ff.

[90] The judicial and legislative European 'framework' needs to be considered from a twofold perspective: taking into account the transnational and international dimension vis-à-vis *the* domestic one.

Japan

MERITS AND LIMITS OF CRIMINALISATION OF FAMILY LAW

*Emiko Kubono**

Résumé

Nous abordons la question de la pénalisation du droit familial à partir de deux thèmes; ainsi, nous ferons état des débats concernant tant certains aspects subjectifs que certains aspects objectifs de la nouvelle législation japonaise en matière de violence conjugale. En deuxième lieu, nous aborderons la polémique qui a eu lieu au sein de la Cour Suprème à l'occasion d'un arrêt portant sur le recours au droit répressif en matière d'enlèvement d'enfants.

I CRIMINALISATION OF FAMILY LAW

One of the most significant features about Japanese family law in recent years seems to be criminalisation of the law. But the process has not been straightforward. Although nobody would argue that some state intervention is not required when a person is threatened physically, mentally or financially in a family context and the intervention could be by way of criminal justice, the extent to which such intervention is used to solve family related disputes should be constantly questioned. It may be better to leave the disputes to be resolved by family members themselves or by way of a legal process other than criminal. Attention should also be paid to human rights that might be infringed by the strong effects of criminal justice. I will discuss two more recent examples where enforceability of family law by using criminal sanctions was questioned.

II LAW ON DOMESTIC VIOLENCE

In 2004, there was an amendment of the law on domestic violence originally enacted in 2001. This offers a good example showing both the importance of measures under the criminal justice system where some weak people should be protected, and the difficulty of drawing the right limits on the intervention.

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A new act

A new act on Domestic Violence was enacted in 2001.[1] It was triggered not only by the international movement such as the Beijing Declaration and Platform for Action in 1995 and the following resolution adopted at the special session of the general assembly of the UN in 2000, but also by an awareness that about 22 per cent of women seem to have experienced violence by a man with whom they have intimate contact.[2]

Strictly speaking, the act deals with violence only between spouses.[3] Under the act, spousal 'violence' was originally defined as 'illegal attacks toward the body threatening the other's life or physical conditions'.

The measures to be taken under the act are two-fold. One is various services to be taken on a voluntary basis, from a consultation to temporary protection provided by institutions or professionals specialising in the area. The other, and the stronger one, is an order by the court to remove the violent spouse from the other, which is called the protection order. The court may make an order either prohibiting the spouse from contacting the other for 6 months or ordering him or her to vacate the family home for a certain period.[4] Breach of the court order shall result in criminal sanctions such as imprisonment with labour of up to one year or a fine of not more than one million yen.[5]

The significance and the limits of the Act

The significance of the enactment of the legislation was that it turned domestic violence from a private issue inside a family to a public issue to be worked on by the society. In fact, the number of cases reported to institutions specialising in the area rose dramatically after the enactment.[6] The other important aspect of the act, which concerns its legal effect, is that it was the first time that any criminal effect was imposed following a breach of the order to prevent domestic violence.

However, this very fact that a strong criminal effect was introduced, caused a debate on the appropriate extent of the act's coverage. One conclusion was that cover of both violence from men to women and vice versa was implied in the act because creating a criminal offence targeting action only by men would

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1 Law for the Prevention of Spousal Violence and the Protection of Victims (Law No 31 of 2001). An English version of the amended law is accessible on the Internet at www.gender.go.jp/dv/sv.pdf (as accessed on 12 February 2007).

2 According to the Survey on violence between men and women carried out by the Gender Equality Bureau, Cabinet Office in 2000.

3 The term 'spouse' includes persons who are in a de facto state of marriage, even if it has not been legally registered.

4 It was originally 2 weeks and, as will be mentioned later, 2 months under the amended law after 2004.

5 That is about $8,200 or about €6,300 according to the rate on 9 February 2007.

6 The number of consultations accepted countrywide at the centre for consultation and support of spousal violence was 35,943 during the fiscal year of 2002 (2002.4–2003.3).

cause a constitutional problem on the basis of equality. Also, violence regulated by the act was only that between spouses, although some people had insisted on violence between couples such as boyfriend and girlfriend being included. As a whole, the extent of coverage under the act was determined very deliberately, with an eye on the appropriate limits of state intervention, with accompanying criminal effects, into people's intimate relationships.

Amendment of the Act in 2004

The act was amended in 2004 so as to prevent domestic violence and to protect victims more effectively. First of all, the protection orders were changed in three aspects. As for applicants, a former spouse was now qualified in applying for the orders. Regarding the effects of the contact prohibiting order, it was made possible for the court to prohibit approaching not only the victim but also any child whom the victim accompanied. The term during which the vacation order takes effect was extended from 2 weeks to 2 months.

Besides, the definition of spousal violence was enlarged in that it includes words and deeds causing comparable psychological or physical harm, in addition to violence to the body causing such harm. The enlarged definition concerns only voluntary measures taken at specialised centres and court orders are not available in the case of spousal violence by words and deeds.

Finally, though this is not through an amendment of the act itself, there was a partial change of the registration system. The registration office shall limit disclosure of information about the victim recorded on the register, following an application by her or him. It is expected that this will prevent the violent spouse from knowing the new address of the victim.

The law on domestic violence is a good example showing both the importance of strong enforceability with criminal consequences where some weak people should be protected, and the difficulty of drawing the right limits on intervening in people's intimate relationships.

III CHILD ABDUCTION

Another area where criminalisation of family law is questioned is child abduction. There have been two Supreme Court cases condemning the use of criminal offences against a parent or grandparents when they had removed a child from other family members.[7] In one of the cases, a clear contrast of opinion among the judges on the suitability of using criminal offences in resolving disputes among families was seen.

[7] The Supreme Court, 6 December 2005 (Keisyu 59.10.1901.) and the Supreme Court, 12 October 2006 (Hanreijiho 1950.173). The judgment discussed in this chapter is the former.

The father of a child abducted his child who was living with the mother and her mother (the child's grandmother). When the grandmother was coming to meet the child at a nursery where the child stayed during the day, the father approached them, suddenly held up the child in his arms and took him into the car. He started the car while the grandmother was trying to open the door or was hitting the windows of the car. The father and the mother had been separated, but had not yet legally divorced, which meant the father and the mother still had parental rights and duties jointly at that time. However, they were disputing the divorce and the case had already been dealt with at a family court. The court would have decided which of them would have parental rights and duties after the divorce. The court was also able to make a temporary decision to permit either of the spouses to exercise parental rights and duties even before the end of the divorce procedure. But there had not yet been any decision by the court on how parental rights and duties should have been allocated or exercised.

The majority declared the father guilty of abduction of a minor, reasoning that 'even considering that the father had parental rights and duties, what he did can not be justified'.

The dissenting opinion in summary read as follows.

> 'Any disputes about custody of a child should be resolved only in a procedure at a family court which is led by the principle that the welfare of the child is paramount. Intervention by other institutions, especially one by the criminal justice system should be avoided to the utmost. The material and personal constitutions and facilities of the family court are prepared for resolving this kind of dispute.'

The opinion from the side of the majority reacted to this as follows:

> 'I agree with the dissenting opinion in that the role of the family court should be respected in resolving disputes in a family. But this leads me to the opposite conclusion. If the abduction of a child by a spouse during the time when the parents are in dispute over divorce or custody of their child escaped criminal responsibility, the parties would try to resolve the dispute by committing abduction rather than by bringing cases to the family court (in summary).'

The problem underlying the debate at the Supreme Court is that there is not an adequate system to control cases, if necessary, using measures with sufficient enforceability at the family court, although the court is well equipped for dealing with cases which can be resolved by agreements between parties or without enforceable measures.

IV CONCLUSION

A criminal justice system has been called for to supplement the lack of enforceability of the current civil justice system and the accompanying family court system. But its merits and limits are still to be seen.

Malaysia

FAMILY LAWS IN MALAYSIA: PAST, PRESENT AND THE FUTURE

*Noor Aziah Mohd Awal**

Résumé

La Malaisie est une société multiculturelle et donc multi-religieuse. Bien que l'Islam soit la religion de la Fédération (la Constitution fédérale, art 3), la liberté de religion est garantie par la Constitution malaisienne (la Constitution fédérale, art 11). Si la conversion d'une religion à une autre est permise, elle n'en est pas pour autant sans conséquences. La Malaisie est unique en ce que certaines questions relatives à la religion relèvent de la compétence des états alors que d'autres relèvent de la juridiction fédérale. Les tribunaux 'Syariah' et les tribunaux de droit commun civil sont tous deux présents dans ce champs puisque les matières relatives aux Musulmans et au droit islamique seront entendues par les tribunaux 'Syariah' alors que celles relatives aux autres religions sont de la compétence des tribunaux de droit commun. Cet état des choses est renforcé depuis l'amendement constitutionnel de 1988 puisque selon l'article 121(1A), les matières qui relèvent des tribunaux 'Syariah' ne peuvent être entendues par la cour civile.

Le droit de la famille en Malaisie est unique parce qu'il est divisé en deux parties: les lois familiales islamiques et le droit familial civil. Les lois familiales islamiques relèvent de la compétence des états et tombent sous la juridiction des tribunaux 'Syariah'. Mais tout comme les non-Musulmans, les Musulmans sont soumis à la

Law Reform (Marriage and Divorce) Act 1976 (LRA) dont l'application est de la compétence exclusive du tribunal civil. Cependant, il y a conflit de juridiction lorsqu'un des époux dans un mariage non-Musulman se convertit à l'Islam, que l'autre conjoint ne se convertit pas et qu'il faut trancher la question de la garde, de l'entretien ou du partage des biens. Le conjoint non converti pourra demander le divorce dans le cadre de l'article 51 de la LRA, alors que le conjoint converti ne peut faire une demande de divorce sur base de sa conversion puisque l'article 3 de la loi interdit la demande de divorce par les Musulmans. Pareillement, lorsque dans un mariage musulman un des époux se convertit à une autre religion, le droit islamique prévoit que ces personnes sont automatiquement divorcées. Cependant, dans pareil cas, les mesures accessoires au divorce devront être décidées. Or les tribunaux 'Syariah' n'ont pas compétence pour entendre une demande présentée par un non-Musulman. Reste donc la question de savoir quel tribunal est compétent en la matière. Le présent texte s'intéresse au droit de famille pour les

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non-Musulmans en Malaisie et traite de quelques arrêts récents qui touchent à la question de la conversion à l'Islam ainsi qu'à la controverse que suscite cette question.

En ce qui concerne le droit familial islamique, les lois récemment adoptées ont créé toute une polémique, notamment en ce qui à trait à la polygamie, au divorce par 'fasakh' et au partage des biens. Le présent article fait état de toutes ces questions ainsi que d'autres développements récents dans la jurisprudence des tribunaux 'Syariah' en Malaisie.

I INTRODUCTION

The introduction of the Islamic Family Law Bill of Federal Territory 2005 on 22 December 2005 has certainly caused a stir in the peaceful multi-racial society of Malaysia. The Bill, according to various Muslim women non-governmental organisations was 'discriminatory' and 'unjust' to Muslim women. The focus of the controversy was the law on polygamy, division of matrimonial property upon husband's application to practise polygamy, also a husband's rights to apply for '*fasakh*' divorce and the introduction of the power of the court to set aside and prevent dispositions of property to defeat claims to maintenance.[1]

Even before the controversy could be settled, the Syariah Court and Islamic law were again under attack when the Syariah High Court of Kuala Lumpur decided that Moorthy Abdullah, a Hindu-born Indian man who had converted to Islam on his death, was still a Muslim and should be buried in accordance with Muslim rites. Moorthy's wife, S Kaliammal, had applied to the Civil High Court for an order to direct the Kuala Lumpur Hospital to release her husband's body to her for burial and also an injunction to stop the Kuala Lumpur Religious Council from claiming her husband's body. The application was made on the 21 December 2005 but the Syariah High Court, sitting to hear the application on 22 December, decided that Moorthy died a Muslim and therefore should be buried in accordance with Muslim rites. The Civil High Court finally, in its decision on 29 December, held that since Moorthy was a Muslim when he died, the Civil High Court had no jurisdiction to entertain S Kaliammal's application. The Civil High Court's decision, 5 days after Moorthy's body was buried in accordance with Muslim rites, had caused yet another dilemma in the Malaysian legal system.[2] In accordance with the Malaysian Federal Constitution, matters relating to Islamic laws come under the state legislatures including Islamic family laws.[3] This was further enhanced by Art 121(1A), which states that any matter, which falls under the jurisdiction of the Syariah Courts, the Civil High Court and all other courts below it shall have no jurisdiction. In relation to Moorthy's case, it is true the Syariah High

1 *New Strait Times*, 25 December 2005.
2 *New Strait Times*, 29 December 2005.
3 Federal Constitution, List 2, Sch 9.

Court had jurisdiction to determine whether or not he was still a Muslim.[4] However, at the time of his death, he was still married to S Kaliammal, a non-Muslim. They were married in accordance with the Law Reform (Marriage and Divorce) Act 1976 (Act 164), which is not applicable to Muslims.[5] Furthermore according to s 51 of Act 164, should one party to such marriage convert to Islam, only the other party who did not so convert may apply for divorce under this Act. With no such application being made, S Kaliammal was still Moorthy's wife at his death.[6]

Moorthy's case was just the tip of the iceberg to show the dynamics of Malaysian family laws. This chapter highlights the development of family laws in Malaysia from the past to the future.

II FAMILY LAWS IN MALAYSIA

Since matters relating to persons professing the religion of Islam and Islamic laws are within the jurisdiction of the state legislatures, there exist two sets of family laws, namely the Law Reform (Marriage and Divorce) Act 1976 (Act 164) which applies to all non-Muslims in Malaysia and Islamic family laws which apply to all Muslims in Malaysia. Act 164 not only applies to non-Muslims but specifically states that it does not apply to Muslims or persons who are married under the Islamic law.[7] Marriage contracted under Act 164 is monogamous and must be registered under the Act. The Act is modelled on the English Matrimonial Causes Act 1973 with certain modifications to suit local customs and religion.[8] All matters relating to marriage, divorce, custody, adoption, legitimacy and maintenance shall be heard in the High Court of Malaya, a civil court which is based on the common law system. Appeal from the High Court decision may be taken to the Court of Appeal and the Federal Court.

As for Muslims, since there are 13 states and three Federal Territories, there exist 14 Islamic Family Law Enactments, one for each state and the three Federal territories share one enactment. Each state has to establish its own Syariah Court where all its judges, prosecutors, registrars and officers of the courts are employed by the State Government. At present the hierarchy of the Syariah Court in each state is as follows:

Syariah Appeal Board
(three to five judges)
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4 *Soon Singh v Perkim, Kedar & Anor* [1994] I MLJ 690.

5 Act 164, s 3.

6 *Eeswari Viswalingam v Govt of Malaysia* [1990] 1 MLJ 86.

7 Act 164, s 3.

8 For example, the lists of prohibited degrees relationship under s 11 made a special exemption where a Hindu man may marry his niece under Act 164 as allowed by the Hindu custom in Malaysia.

Syariah High Court
(one judge sitting
alone)

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Syariah Subordinate
Court (one judge)

In 1988, the Federal Constitution was amended where provision (1A) was inserted into Art 121. Article 121(1A) provides that in any matter where the Syariah Court has jurisdiction, the High Court and all the courts below it shall have no jurisdiction. This amendment has enhanced the position of Islamic law and Syariah courts in Malaysia. Apart from the amendment made to the Federal Constitution, since 1983 all states in Malaysia had moved to pass an Islamic Family Law Enactment of their own. Later the Administration of Islamic law Enactment, the Islamic Evidence Enactment, the Islamic Civil Procedure Enactment, the Islamic Criminal Procedure Enactments and the Islamic Criminal Law Enactment were passed and enforced in all of the states in Malaysia. The main aim of the drafters was to have a uniform law throughout Malaysia. Thus a model statute was used and adopted by all the states. Since these statutes need to be passed by each state legislative body, they went through a number of changes and finally when they were passed and enforced, they differed slightly from state to state. For example, some states allowed a very restrictive practice of polygamy but some are more relaxed on its application. Furthermore, a Syariah Court in one state has no jurisdiction to hear cases or to make an order against a citizen of another state.

III THE HISTORICAL DEVELOPMENT OF ISLAMIC LAWS AND THE SYARIAH COURTS IN MALAYSIA

In order to understand the position of Islamic family laws in Malaysia, it is important to understand the historical development of Islamic laws and the Syariah Courts in Malaysia. Before the coming of the Western Colonial powers, the law enforced in the Malay states was Islamic law which was modified to a certain extent by the Malay adat or customs.[9] However, during the British administration, English law was introduced to replace Islamic laws and the Malay customs. The British introduced laws such as the Penal Code, the Contact Act, the Evidence Act, the Criminal Procedure Code and the Civil Procedure Code, which was enacted in India. The Land Code was based on the Torrens System brought from Australia. Most significantly, judges who were appointed were either trained or brought directly from England. It was through this method that English common law and the principles of equity were introduced and applied in the Malay states. Finally, the Civil Law Enactments of 1937 and 1951 were introduced to confirm the application of English

[9] A Ibrahim and A Joned *The Malaysian Legal System* (1987) chs 1–3. The Law of Malacca was extended to Pahang, Johore and Kedah. In Trengganu Islamic law was applied by Sultan Zainalabidin III.

common law and rules of equity in the absence of any written law. This later became the Civil Law Act 1956 which was extended to Sarawak in 1949 and Sabah in 1951. In the area of mercantile law, the law applicable in the absence of any written law is English law in the Peninsula Malaysia as at 7 April 1956 whereas in Penang, Malacca, Sabah and Sarawak the law applicable is the law of England at the corresponding period. Even though it is accepted that Islamic law was the law of the land,[10] the application of Islamic law in Malaysia up until its independence in 1957 was very limited and restrictive.

When Malaysia became independent on 31 August 1957 and later became Malaysia in 1963, the position of Islamic laws went through a number of changes. However, the phrase 'Islamic law' is not defined by the Federal Constitution, although common law, custom and usage are defined.[11] The major change that was made was to place Islamic law, Syariah Courts and all matters relating to the religion of Islam, including Islamic family law under the jurisdiction and control of the State Government.[12] From a detailed analysis of the 9th Schedule, List 11(1) it can be seen that Islamic law can be applied only in a very limited area. The Syariah Courts' jurisdictions cover only persons professing the religion of Islam, in particular, family matters and in relation to criminal matters, it has only such jurisdiction as was conferred by the Federal Laws. Until 1984, the Syariah Court (Criminal Jurisdiction) Act 1965[13] provided that such jurisdiction can only be exercised in respect of any offence punishable with imprisonment for a term not exceeding 6 months or any fine exceeding RM1,000 or both. The Act was amended in 1984 and the jurisdiction of the Syariah Court has been extended to (in criminal matters) up to 3 years' imprisonment or a fine up to RM5,000 or a whipping up to six strokes or a combination of all three. However, in a conflict between the Syariah Courts and the Civil Courts, the decision of the Civil Court shall prevail. This can be seen in a number of cases[14] which caused uneasiness amongst the Muslim

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10 *Ramah v Laton* (1927) 6 FMSLR 128.

11 Federal Constitution, Art 160 – Definition of law.

12 Ibid, List 11(1), Sch 9 – Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts, wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustee and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities, and charitable institutions operating wholly within the state; Malay custom; zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List: the constitution, organisation and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as concerned by federal law; control of propagating doctrines and beliefs among professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

13 Act 23 of 1965, now revised and known as Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355).

14 *Myriam v Mohammad Ariff* (1971) 1 MLJ 265; *Tengku Mariam v Commissioner of Religious Affairs Trengganu & Ors* (1969) 1 MLJ 10, *Ainan v Syed Abu Bakar* [1939] MLJ 209; *Nafsiah v AbdulMajid* [1969] 2 MLJ 174 and 175.

community. Hence, in 1988, the Federal Constitution was amended and clause 1A was inserted into Art 121 where it provides that the Civil High Court and courts subordinate to it shall have no jurisdiction in any matter which comes within the jurisdiction of the Syariah Courts.[15]

With the amendment there is now a clear demarcation between Syariah Courts and Civil Courts' jurisdiction.[16] However, there a number of grey areas which have caused conflict and raised public concern. One of the areas is in the field of succession, testate and intestate where the Probate and Administration Act 1959 and the Small Estate (Distribution) Act 1955 have no application in the Syariah Courts. Hence upon the death of a Muslim, all matters relating to administration of estates, testate or intestate are governed by the two statutes and are within the jurisdiction of the Civil Courts. The Syariah Courts merely certify the shares allotted to the beneficiaries under Islamic law and issue '*Farid* Certificate'. It is merely a rubber-stamping job.

Another problematic area of the law is when a Muslim changes his or her religion or when a non-Muslim converts to Islam. The strict application of Art 121(1A) has caused injustices to many as the Civil Court has no jurisdiction to hear cases which involve Muslims and Islamic law. The Syariah Courts cannot hear and determine cases which involve non-Muslim and the civil law. The conflict came to a climax in the case of Moorthy Abdullah, which has already been discussed above.

IV FAMILY LAWS FOR MUSLIMS

In the area of Islamic family laws, internal conflicts have arisen due to jurisdictional problems. This is because Islam and Islamic law are state matters and each state is sovereign, and therefore has no authority over the citizen of another state. At worst, an order from a Syariah Court in one state cannot be enforced in another state unless a special application for enforcement of an order is made. Application to enforce an order from another state may take time and is also costly. An example of the conflict can be shown by the case of *Aishah bt Abdul Rauf v Wan Mohd Yusuf*.[17] In this case the defendant applied to the Syariah High Court of Selangor to marry X. The Syariah High Court allowed the application on the basis that the defendant was able to support his present and future wives. The plaintiff wife appealed to the Syariah Appeal Board of Selangor. The Appeal Board held that the High Court Judge had overemphasised the requirements of financial ability to support both present and future wives (s 23(b)) and ignored or overlooked the other requirements of s 23(a), (c) and (d). All these requirements need to be proved and this was not done. The Board of Appeal therefore allowed the appeal.

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15 Federal Constitution, Art 121(1A).

16 *Abdul Ghani v Sherliza* [1989] 3 MLJ 153; *Shahamin Faizul Kung v Asma* [1991] 3 MLJ 327 and *Habibullah v Faridah* [1992] 2 MLJ 793.

17 (1991) JH (1412) H, 152.

Unsatisfied with the decision, Wan Mohd Yusuf, the defendant who was born and brought up in Trengganu decided to go back to his home state and applied for permission to practise polygamy in his own state. The Syariah High Court of Trengganu allowed his application and he finally married X.

The decision made in Trengganu certainly made the order by Syariah Court in the state of Selangor of no value. This also has made it possible for others to abuse the system. For example, a man from the state of Johor may leave his wife in Kuala Lumpur without any news or money. His wife may apply and obtain a maintenance order from the Kuala Lumpur Syariah Court. She then finds out that her husband now lives in Kedah and in order to get the maintenance order enforceable she has to apply to the Kedah Syariah Court to endorse the order made by the Kuala Lumpur Syariah Court. She also will need to apply for an order to enforce an order out of jurisdiction. However, for many women who face similar problems, since most of them are unemployed or single mothers, they usually never bother to do anything more, leaving the maintenance order a beautiful piece of paper.[18]

In a very recent case,[19] a man who lived in Selangor applied to practise polygamy in the state of Negeri Sembilan while his wife applied for a divorce in the state of Melaka, her hometown. The couple had been married for more than 10 years. They have four children and the youngest is only 5 months old. The petitioner wife could no longer tolerate the husband's behaviour. She left the matrimonial home with the four children and returned to her parents' house. She is a full-time housewife. She filed for maintenance and custody order in Melaka and her husband refused to negotiate. He later used an old address in Negeri Sembilan and applied to marry another woman in that state while his marriage to his first wife is still subsisting.

V UNIFICATIONS OF ISLAMIC LAWS IN MALAYSIA

Cases cited above are some of the examples of the problems faced by Muslims in Malaysia as the Islamic laws are not unified. Efforts have been made to harmonise Islamic law. This began in 1988 with the setting up of the Syariah and Civil Law Review Committee.[20] Later the Technical Committee was set up by the Prime Minister Department.[21] This committee is responsible for reviewing all Islamic laws in Malaysia and to make recommendations to unify them. The National Council for Religion of Islam met for the 39th time on the 10 October 1997 and agreed that all Islamic law in all the states in Malaysia should be harmonised, coordinated and unified. The draft Bills that were looked at were the:

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[18] Noor Aziah Mohd Awal *Enforcement of Maintenance order in the Civil and Syariah Courts in Malaysia, Fundamental Research* (UKM 2005).

[19] The petitioner wife is the author's client. The author is the chairperson of the Legal Advice Services Program, SUKMANITA, UKM.

[20] The committee was set up on the 6 May 1988.

[21] Its first meeting was on the 28 June 1988.

(a) Islamic Family Law Bill;

(b) Syariah Court Evidence Bill;

(c) Syariah Court Civil Procedure Bill;

(d) Syariah Court Criminal Procedure Bill;

(e) Administration of Islamic Law Bill;

(f) Syariah Criminal Law Bill.

All these bills were modelled on the Federal Territory of Kuala Lumpur except the Civil Procedure Bill which was modelled on the laws enforceable in the state of Perak. All these Bills were tabled before the Kings' Council of Malaysia on the 22 May 2001 and the Kings' Council accepted them all except the Syariah Criminal Law Bill. From that date the five approved Bills have been taken to all states to be approved by the State Legislative Body. To date all states except Perlis and Federal Territories have taken these Bills to their respective State Legislative Body and passed them. The state of Kedah has passed it but has not enforced it.[22] The state of Trengganu passed four of the enactments except the Islamic Family enactment.

The Department of Syariah Judiciary has also set up the *Naziran* Committee in 2004 where anyone may file a complaint with the committee about any overlapping application or dual application on the same matter relating the same parties in any of the Syariah Courts in Malaysia. There is also a Chief Judge Directive dated 2003 on the same matter. This means that any matter relating to the same parties which has been brought before one court in one state cannot be brought in another state. If there is one, then one of the proceedings will be stayed until the other has been disposed of.

VI SOME SALIENT FEATURES INTRODUCED BY THE ISLAMIC FAMILY LAWS IN MALAYSIA

It must be pointed out that before 1983 Muslim marriages and divorce were conducted by imams or religious officials of every state. Islamic laws from the Shafie School of thought applied,[23] obtained directly from written and unwritten texts. The Islamic family statute was the first attempt to have Islamic law codified and unified. It introduced procedures for marriage and divorce, application for custody, maintenance and recognised the concept of matrimonial property. It recognised polygamous marriages but introduced

[22] Telephone conversation with Mr Azmi of the Department of Syariah Judiciary, Putrajaya on 14 July 2005.

[23] Muslims are divided among Sunni and Shiah groups and with the Sunni groups, they are divided between the Hanafi, Hambali, Maliki and Shafie school of thought.

proper procedures for applications under which such second, third or fourth marriages can only be conducted with written permission from a Syariah Court judge. Talaq[24] can no longer be pronounced at the whims and fancies of husband but must be with the permission of the court and pronounced before a Syariah judge. Wives are given the right to apply for divorce not only through *fasakh*[25] but *khul*[26] and *takliq*.[27] Matrimonial property is divided upon divorce between parties where a wife is automatically entitled to one-third of the total amount of property even if she did not contribute anything towards buying the property in monetary terms.

The laws which were accepted by the Kings' Council in 2001 are not new laws but a much improved version of the old one where a number of new clauses have been added to it. These new provisions are to enhance further the position of women and many are gender neutral clauses. For example, the Islamic Family laws statutes which have been passed and enforced in all states except Perlis, Kedah, Trengganu and Federal Territories have the following additional provisions.

(a) Application to contract a polygamous marriage

Under the Islamic Family Law Enactment, Selangor 1984, the provision on polygamy provides for an application being made to the Syariah Court judge by the man who wishes to contract a polygamous marriage. In his application he is required to submit his payslip, name and number of wife and children, amount of liabilities and financial responsibilities that he has to commit himself to, reason why the second or third or fourth marriage is necessary and his declaration that he shall be fair to present and future wife or wives. Under the new Islamic Family Law Enactment of Selangor 2003, s 23 requires him to make the application as follows:

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[24] Talaq is divorce by pronouncing the word 'talaq'. It can be pronounced once, twice or three times but three talaqs is an irrevocable divorce.

[25] Fasakh is a divorce pronounced by the Syariah Court, made after an application made by a wife based on the following reasons:
(a) husband is mentally ill;
(b) physical, mental and sexual abuse by the husband;
(c) husband serving imprisonment for more than one year;
(d) if husband has more than one wife, he has not treated all his wives fairly, etc.
Fasakh requires strong evidence from the person making the allegation and if the court is satisfied, it will pronounce the couple to be divorced.

[26] Khul is a divorce by redemption where the wife pays the husband back whatever he gave her at the solemnisation of marriage but today khul is determined by the Syariah Court judge as he thinks reasonable.

[27] Takliq is a conditional divorce. This is where the husband declares immediately after solemnisation of marriage that if he were to abuse his wife physically or leave her without maintenance for more than 4 months continuously, and she complaints to the Syariah Court about it, she is automatically divorced by him by one talaq. Takliq relies on the conditions mentioned by the husband and, if acted upon it, divorce will take place.

'(4) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by an iqrar[28] stating the grounds on which the proposed marriage is alleged to be just or necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependents, including persons who would be his dependents as a result of the proposed marriage, and whether the consent or views or the existing wife or wives on the proposed marriage have been obtained.

(5) On receipt of the application, the Court shall summon the applicant, his existing wife or wives, the woman to be wedded, the wali[29] of the woman to be wedded, if any, and other persons who in the opinion of the court may provide information relating to the proposed marriage to be present at the hearing of the application, which shall be in camera, and the Court may grant the permission applied for if satisfied:

(a) that the proposed marriage is just or necessary, having regard to, among others, the following circumstances, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;
(b) that the applicant has such means as to enable him to support, as required by Hukum Syarak,[30] all his wives and dependants including persons who would be his dependents as a result of the proposed marriage;
(c) that the applicant would be able to accord fair treatment to all his wives as required by Hukum Syarak; and
(d) that the proposed marriage would not cause darar syari'e[31] to the existing wife or wives.'

Another addition to s 23 is s 23(10) which provides that:

'Every court that grants the permission or orders that a marriage to be registered under this section shall have the power on the application by any party to the marriage:

(a) to require a man to pay maintenance to his existing wife or wives; or
(b) to order the division between the parties of the marriage of any assets acquired by them during the marriage by either joint efforts or the sale of any such assets and the division of the proceeds of the sale.'

These additional provisions had caused a stir among Muslims in Malaysia, particularly men who claimed that polygamous marriage is almost prohibited if not illegal. These new sub-clauses give better protection to women, where now

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28 Iqrar means an admission made by a person, in writing, or by gesture, stating that he is under an obligation or liability to another person in respect of some right.

29 Wali is the father of a legitimate child and if he is dead, his father (child's grandfather) or his brother (child's uncle) or the child's own brother. No marriage can be solemnised without the bride's wali.

30 Hukum Syarak is Islamic law.

31 Darar Syari'e is harm, according to what is normally recognised by Hukum Syarak, affecting a wife in respect of religion, life, body, mind, dignity or property.

they can apply for division of matrimonial property and maintenance if the Court decided to grant permission to the husband to contract a polygamous marriage. The reason for including this sub-clause is because many men tend not to maintain their first family when taking a second wife. Furthermore, under Islamic law, if a husband dies intestate leaving two wives, each wife will only get one-sixteenth of the whole estate whereas if he dies leaving one wife, her share is one-eighth. Usually upon death, a wife may claim matrimonial property first and the remainders are divided in accordance with Islamic law of succession. Hence, if a man has RM800,000 worth of property applies to practise polygamy, his present wife could easily get one-third of all his property on the date of the approval. If the couple remain husband and wife until he dies, she can still claim matrimonial property first upon his death, then of the remainders of the estate, she is still entitled to one-sixteenth if he has a second wife at the time of his death.

(b) The division of matrimonial property

Matrimonial property is defined as any property acquired by joint efforts of both parties or by one party to a marriage during their marriage. Property means movable and immovable property. Before 1983 matrimonial property was claimed through the Civil High Court as part of Malay custom. In the civil courts it is an accepted right of a wife against her husband upon divorce to claim her share of the matrimonial property. According to case-law some were given one-third or half of the total amount of the matrimonial property. When the Islamic family laws were passed from 1983–1991, matrimonial property which belongs to Muslims was codified and became part and parcel of Islamic family laws. However, most states would allow such claim to be made upon divorce. There are some states, for example Negeri Sembilan, which allowed a claim to be made upon death and before the estate is distributed in accordance with Islamic law of succession. Hence, if a man has two wives and he dies intestate in the state of Selangor, his wives would be entitled only to one-sixteenth of his total estate, whereas if he dies in the state of Negeri Sembilan, both wives would be entitled to claim matrimonial property first; for example, the first wife might get one-third and the second might get one-sixth, and the remaining estate to be divided in accordance with Islamic law of succession where both are still entitled to the one-sixteenth. The new provisions further provided that a first or present wife or wives may claim matrimonial property upon the husband's application to practise polygamy. Hence, now a wife has the right to claim her share of the matrimonial property when the court grants permission to her husband to take a second, third or fourth wife, upon divorce and/or upon the husband's death.

(c) Power to prevent disposition of property intended to defeat claims to maintenance

This is where the Syariah Court has the power to stop a husband from disposing of any assets with the intention of defeating any claims made by the wife or children for maintenance.

(d) Injunction to prevent disposal of matrimonial property

Another new provision is where the Court may, on the application of any party to a marriage, make an order to prohibit either party to the marriage from disposing of any property jointly acquired during the subsistence of their marriage if the Court is satisfied that it is necessary to do so. This provision is very important as it protects the wife's share and ensures that at the end of the trial she is still entitled to it.

(e) Introduction of Sulh (mediation)

In the Syariah Courts *sulh* simply means amicable settlement. The *Mejelle* defines sulh as 'a contract removing a dispute by consent. And it becomes a concluded contract by offer and acceptance.'[32] Sulh is divided into three categories:

(a) an *iqrar sulh* – a compromise based on the admission of the defendant;

(b) an *inkar sulh* – a compromise following the denial of the defendant;

(c) an *sukut sulh* – which takes place upon the silence of the defendant, who neither admits nor denies.[33]

The Quran says:

> 'If two parties among the believers fall into a quarrel, make ye peace [sulh or compromise] between them … with justice and be fair; for Allah loves those who are fair [and just].[34]
>
> The believers are but a single brotherhood, so make peace and reconciliation [sulh] between two [contending] brothers; and fear Allah, that ye may receive mercy.[35]

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32 *The Mejelle,* translated by Tyser et al of Majallah Al-Ahkam Al-Adliyya (reprint of 1901 edn, Lahore, 1980) art 1531.

33 Ibid, art 1535. A compromise which is achieved when someone drops all charges he has against another is called ibra (release).

34 Surah al-Hujurat: ayat 9.

35 Surah al-Hujurat: 10.

> In most of their [people's] secret talks. There is no good; but if one exhorts to a deed of charity or injustice or conciliation between men [secrecy is permissible] to Him who does this; seeking the pleasure of Allah, We shall soon given a reward of the highest [value].'[36]

It can also been seen from the *Hadith* (traditions) that sulh is an important element which was given a priority by the Prophet Muhammad (pbuh) where it was narrated by Abu Huraira that the Prophet pbuh said: 'There is a sadaqa (giving charity) to be given for every joint of the human body (which number 360); and for every day on which the sun rises, there is a reward of a sadaqa for the one who establishes (sulh) and justice among people.'[37] While discussing disputes between husband and wife, Nawawi wrote:[38]

> 'In a case of very grave discord the court should appoint two arbitrators, one from the husband's family and one from the wife's, who should then arrange the matter as if they were the agents of the parties; or according to one jurist, by virtue of their nomination by the court. If they are considered as agents, the interested parties must approve their nomination, and the arbitrator for the husband must be authorized by him to pronounce repudiation, or to accept compensation for a divorce; while the arbitrator for the wife should be authorized by her to offer compensation for a divorce, or to accept repudiation, also for compensation.'

The historical development of Sulh in Malaysia

Sulh was first introduced in the Federal Territory of Kuala Lumpur beginning in July 2001. This was done via the Syariah Court Civil Procedure (Federal Territories) Act 1998, s 99 which states that:

> '. . . the parties to any proceedings may, at any stage of proceedings, hold sulh to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Hokum Syarak.'

The introduction of sulh in Kuala Lumpur as a pilot project was agreed upon by the Syarie Chief Judges Meeting on the 28 June 2001. It was also agreed that it was to be expanded in all other states by July 2002 by states which accepted the unification of Islamic laws in their state. In another meeting held by the Department of Syariah Judiciary, it was agreed that a Practice Directive will also be issued by the Department to all Syariah courts in Malaysia relating to sulh. The state of Selangor was the second state to have introduced the sulh mechanism as an alternative dispute resolution in an attempt to reduce backlog of cases in particular cases related to divorce applications.[39]

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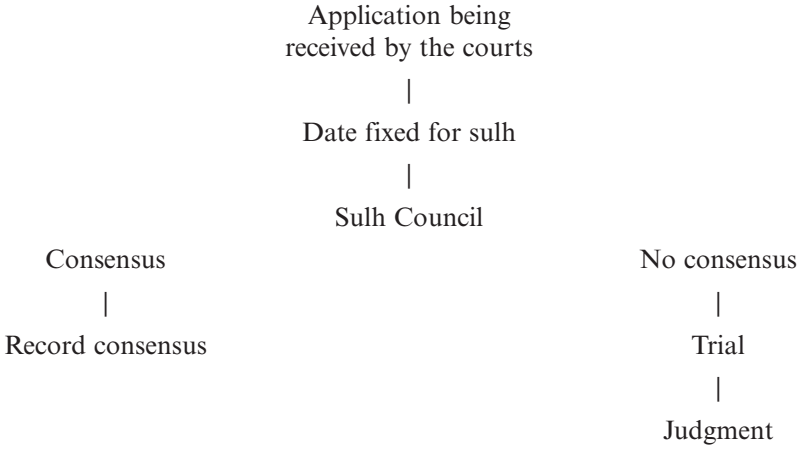
36 Surah an-Nisa: 114.
37 Sahih Bukhari, vol 3, 543.
38 *Nawami, Minhaj et Talibin*, (Eng) translated by Howard (London, 1914) 318.
39 At present the state of Melaka has also implemented sulh and the state of Negeri Sembilan is in the process of appointing its sulh officer.

Sulh: process and procedure



From the above it can be seen upon an application being made to the Syariah Court, the Registrar will sort out all the applications and determine whether such a case should be sent to the Sulh Council or trial. This assessment of which case is suitable for sulh and which is more suitable for trial will depend solely on the Registrar's wide experience in this field. Cases which can be settled through sulh are:

(a) breach of promise to marry;

(b) applications related to divorce:
  (i) muta'ah (consolation payment for divorce);
  (ii) maintenance of wife and children;
  (iii) matrimonial property;
  (iv) custody of children;
  (v) enforcement of maintenance order;
  (vi) any other matters which the Registrar thinks reasonable and suitable.[40]

It must be pointed out that an application for divorce will not be referred to sulh council.[41]

The 'Sulh Council must be held within 3 months from the date of the registration of the case'. In fact, the date for the Sulh Council must be fixed within 21 days after its registration.[42] As soon as the date is fixed by the Registrar for the Sulh Council, a sulh notice must be issued and delivered to all parties concerned.[43] Attendance of parties is compulsory in such a manner that wilful refusal to attend is a contempt of court. However, no contempt

[40] Syariah Court, Federal Territory Kuala Lumpur.
[41] Syariah Court Civil Procedure Rules of Federal Territories, 1998, s 1(2).
[42] Practice Directive, Department of the Syariah Judiciary, JKSM 2/2001.
[43] Practice Directive, Department of Syariah Judiciary, JKSM 8/2003.

proceeding has been taken for such a refusal to attend but instead it is recorded as a refusal to sulh itself. The sulh officer will record such non-attendance as sulh being unsuccessful and the case will proceed to trial.

As soon as parties come to a mutual agreement or consensus, the agreement shall be brought before a judge to make it into a judgment and decision of the court. It should also be noted that parties may revoke their consensus agreement with the permission of a judge at any time before a judgment is made as long as a notice is given of such intention given to the Court and the other party to the agreement. Should parties take a longer time to come to a consensus, they will carry on with negotiation and discussion until they are able to reach a consensus. The continuation of a Sulh Council will not be affected by the date of the trial which has been fixed. The Registrar and parties concerned must consent to the continuation of such a Sulh Council.

What is a Sulh Council?

Sulh Council consists of a sulh officer or Registrar and the husband and wife whose case is being heard. Special rooms have been allocated for Sulh Council and such rooms must be comfortable and able to give a more informal and relaxing atmosphere to all parties concerned. Syarie lawyers are not allowed to attend Sulh Council except with the permission of the sulh officer. This is to allow parties to discuss their problems openly and without influence from anyone else. The role of the sulh officer is to guide parties to come to a consensus.

The sulh officer will first ask the plaintiff to put forward his or her case and recommendations or suggestions as to how it should be resolved. Then he will hear the defendant's side of the conflict and his or her suggestions as well. This is done individually or through private caucus. Thereafter the sulh officer will map out the problems or the conflict where he will identify the causes of the conflict, limitations to resolutions and other actions that may be taken to resolve the conflict. The sulh officer must be able to sort all the information and determine the following:

(a) the issue or the conflict that needs to be resolved;

(b) the position of parties;

(c) the interest of parties;

(d) the alternative resolutions.

After a private caucus, the sulh officer will invite both parties to attend the Sulh Council. It is during this session that an agreement may be achieved.

The difference between sulh, conciliation, Hakam and counselling

In any application for divorce in the Syariah Court the processes that may be taken are as follows.

Meeting with the counselling officer at the Department of Religious Affairs

This procedure is not compulsory but very useful to the parties, and the officer usually will try to assist parties through counselling of the marital problems. If either party refused to attend counselling, the officer will write a report that counselling has been unsuccessful. If the applicant is the wife, such letter will be attached to her application for divorce and will enhance her application. However, counselling at the Religious Department has been heavily criticised as one of the reasons for causing delay in hearing divorce applications.

Submitting an application for divorce at the Syariah Court

Usually an application is made under s 47[44] of the Family Enactments. As soon as they come before the court, the judge will ask the parties if they consented to the application. Should one party object, the court will order the case to be sent to a Conciliatory Body. This is provided by s 47(5). Parties may reconcile and the case will be withdrawn. However, if they do not reconcile and could not come to any compromise, the trial will begin. During the trial the court may at any time postpone the case and send it back to a Reconciliatory Body or *Hakam*.[45] Again parties may reconcile after the mediation done by *Hakam*. If they do, the case will be withdrawn. If they do not, the Court may dismiss the first *Hakam* for its failure to reach an agreement. Usually the second *Hakam* is appointed with a power to pronounce *talaq*.

From the above it can be seen that in an application for a divorce, there are already in existence at least three ways in which parties are given the opportunity to settle their dispute within or outside the court system. These are:

(a) *Counselling*
This is voluntary and the counselling officer is at the Department of Religious Affairs. He or she is a permanent staff member of the Department. Counselling is free.

(b) *Conciliatory body*
A conciliatory body consists of a religious officer, who acts as the chairman and two other persons, one to act for the husband and the other

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[44] Islamic Family Law Enactments of Selangor 2003; Islamic Family Law Enactment of Negeri Sembilan 2003 and all of the other states who have passed and enforced the new Islamic Family Law Enactments.

[45] Islamic Family Law Enactments, s 48.

for the wife. Preferences are given to relatives of the parties. The appointment is under s 47(5) of the Islamic Family Law Enactments of each state.

(c) *Hakam*
The appointment of *Hakam* is provided under s 48 of the Islamic Family Law Enactments of each state and is made by a judge where he shall appoint two persons as arbitrators, one acting for the wife and the other for the husband. In making such an appointment, priority is given to close relatives of each of the parties concerned. The Court shall give direction to *Hakam* as to how the case should be settled. If *Hakam* were unable to come to an agreement, the court may appoint a new *Hakam* with the power to pronounce *talaq* or divorce on behalf of the husband.

As can be seen sulh is not applicable in an application for divorce. It is only applicable for ancillary relief such as maintenance, custody, matrimonial property and muta'ah. Even though sulh officers are court officers and in some states they are also judges or a Registrar, the process is not within the trial as in the case of conciliatory body or Hakam. It is an alternative dispute resolution within the court system but not within the trial. It therefore reduced the time period for a trial and most trials are merely endorsing the agreement made by parties in Sulh Council.

VII FAMILY LAWS FOR NON-MUSLIMS

The Law Reform (Marriage and Divorce) Act 1976 (hereafter known as LRA) was gazetted in 1976 but came into force on 1 March 1982. Before its existence, family matters for non-Muslims were governed by customary laws, religious laws, various statutes which were modelled on the English laws on marriage and divorce and also the common law. These laws were as follows:

(a) Chinese customary marriages;

(b) Hindu marriages;

(c) Christian Marriage Ordinance 1956;

(d) Civil Marriage Ordinance 1952;

(e) Divorce Ordinance 1952.

The LRA has certainly unified all matters relating to marriage and divorce for non-Muslims in Malaysia. All marriages solemnised after the enforcement of the LRA shall be registered and marriages solemnised prior to the Act are deemed to be valid and registered. Marriage shall be monogamous and any

person who contracted a marriage while his or her earlier marriage is still in existence shall be guilty of the offence of bigamy.[46]

However, it is not easy to change a society which was built on culture and religious belief. Many still marry in accordance with custom, religion and usage and the validity of such marriages came before the court for determination. In *Chong Sen Sen v Janaki a/p Challamuthu*[47] the respondent was a widow of the deceased and had filed an action at the Sessions Court against the appellant pursuant to the Civil Law Act 1956 on behalf of his estate. The deceased was killed in a road accident and the respondent claimed that the appellant was solely or partly negligent for the tort. The appellant alleged that the respondent and the deceased had undergone a customary marriage on 31 August 1991 and the marriage was never registered under the LRA, and therefore was void. Hence, the respondent had no *locus standi* in the case. The appellant also argued that she was not the 'wife' of the deceased which was intended by s 7(2) of the Civil Law Act 1956. The Sessions Court dismissed the application to have the summons struck out. The appellant appealed. The High Court dismissed the appeal and stated that, although the customary marriage was void 'on the face of it' and may preclude the respondent from bringing the action against the appellant, she was a 'wife' within the meaning of s 7(2) of the Civil Law Act.

In *Leong Wee Shing v Chai Siew Yin*[48] the High Court was again faced with the same issue. The plaintiff applied for an order that her marriage to one Lau Yen Yoon (deceased) which was performed according to Chinese customary rites be declared valid. This would enable her to have a legal right to claim properties registered in the deceased's name and also in their joint names. The plaintiff contended that she married the deceased on the 19 November 1995 in accordance with Chinese rites and thereafter lived with him as husband and wife in Kuala Lumpur. There were wedding photos and invitation cards which were tendered as evidence of the wedding. The defendant (plaintiff's mother-in-law) contended that the wedding dinner referred to by the plaintiff would not validate the marriage between the plaintiff and the deceased. The marriage was never registered and was therefore void for non-registration. The defendant relied on s 21 of LRA which states that:

> '. . . the marriage of every person ordinarily resident in Malaysia and every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act.'

The defendant also argued that her son never moved to Kuala Lumpur with the plaintiff and the plaintiff never contributed to the business, and therefore should have no right to any claim upon it.

The High Court held the marriage to be valid and relied on s 34 which states:

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46 Penal Code, s 494.
47 [1997] 5 MLJ 411.
48 [2000] 5 MLJ 411.

> 'Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.'

The defendant appealed to the Court of Appeal. The Court of Appeal concurred with the High Court's decision that lack of registration does not affect the validity of the marriage. The decision of the High Court and the Court of Appeal certainly have raised a number of issues particularly the question of registration of marriage under the LRA. It must be pointed out that the sole reason for passing the LRA was to unify marriage procedures and solemnisation and to have all marriages recorded and registered. Otherwise, LRA would not have provided s 4(2) which states that:

> '. . . such marriages, if valid under the law, religion, custom or usage under which it was solemnized, shall be deemed to be registered under this Act.'

Such marriages referred to here are marriages solemnised prior to LRA. Furthermore, non-Muslims are still allowed to solemnise their marriage in accordance with their religion, custom or usage but must be performed in accordance with Part III, in particular ss 22 and 25 of the Act. The decision of the Court of Appeal has certainly much to be desired and it is timely the Federal Court or Parliament should intervene before much damage is done.

Another important issue which has been the centre of discussion in Malaysian family laws is the problematic s 51 of the LRA. According to the LRA, after 1 May 1982, all non-Muslim marriages are governed by Law Reform (Marriage and Divorce) Act 1976[49] (Act 164) where it provides that every marriage, unless void under the law, religion, custom or usage under which it was solemnised, shall continue until dissolved:

(a) by death of one of the parties; or

(b) by order of a court of competent jurisdiction; or

(c) by a decree of nullity made by a court of competent jurisdiction.[50]

Thus if parties have been married under this Act, they can only dissolve their marriage if they satisfy one of the above requirements. Conversion to Islam is a special ground of divorce under this Act which is provided by s 51 where it states that:

> '. . . where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce: Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.'

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[49] Act 164.
[50] Ibid, s 4.

The effect of s 51 is that, if after years of marriage, solemnised in accordance with Act 164, one of the parties to the marriage converts to Islam, the following questions arise:

(a) If the non-converting party did not apply for divorce – the question that arises out of this is whether the non-Muslim marriage is still in existence or has it been dissolved by conversion to Islam by one of the parties to that marriage?[51]

(b) If the party that has converted to Islam marries a Muslim woman – what is the status of the second marriage and is she entitled to his estate upon the death of her husband?

(c) Who has the right to custody of the children from the non-Muslim marriage and in which court should the case be heard?

(d) What happens if after many years living as Muslim and married to a Muslim woman, the man decided to convert back to his old religion?

Section 51 has also been used by the converted spouse as an excuse not to pay maintenance. In *Letchumy v Ramadason*,[52] the petitioner obtained a divorce from the respondent on the ground of desertion. After the decree was made she applied for maintenance and the matter came before the Judicial Commissioner after the decree became absolute. The Judicial Commissioner ordered the respondent to pay the petitioner $200 a month as her maintenance. The respondent subsequently applied for the order to be set aside on the ground that he had become a Muslim and under Islamic law the petitioner has no right to claim maintenance because she has not converted to Islam with her husband during the *eddah*[53] period. The High Court held that since s 3(1) of LRA precludes the operation of the Act to a Muslim, and as the respondent had become a Muslim, the Act cannot be made to apply to him.[54]

This certainly creates what the conflict of laws terms a 'limping marriage'. On the one hand, a non-Muslim couple was married according to the civil laws where the marriage is monogamous. Some years later one of the party converted to Islam. According to Islamic law the marriage is terminated after the expiration of 3 months if the other party does not convert to Islam as well. Thus the party who has converted is free to marry according to his or her personal law, ie Islamic law. In Malaysia this is what has happened. If the party that has converted is the husband, he can then marry another woman in

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51 *Esswari Viswalingam v Government of Malaysia* [1990] 1 MLJ 86 – in this case the non-Muslim wife was entitled to her deceased Muslim husband's pension, as they were never divorced.

52 [1984] 1 MLJ 141.

53 Eddah is the 3 months' waiting period after her husband has divorced a Muslim wife. It is like a 'cooling off' period where the couple may 'juju' (get back together) without going through the solemnisation of marriage. After the 3 months has expired, should the couple wish to live together again, they have to go through a fresh solemnisation of marriage.

54 *Tan Sung Mooi v Too Miew Kim* [1991] 3 MLJ 117.

accordance with Islamic law. Now, there are two marriages in existence. According to the Penal Code,[55] he shall be guilty of bigamy because he is still married under the LRA . However, this law on bigamy is not applicable to Muslims. Thus no action has been taken on the many occasions where non-Muslim men who have converted married according to Islamic law even though his first marriage under the LRA has not been terminated because the non-Muslim wife did not petition for divorce. The conflict continues when the husband died as in the case on *Eeswari*[56] where the husband converted to Islam and the non-Muslim wife never petitioned for divorce. When he died, his non-Muslim wife sued the Government for his pension and the Court held that she was entitled to it. As far as the Court is concerned since there was no divorce, she is considered the widow of the deceased despite the fact that he has converted to Islam. Had he been married under Islamic law, his Muslim wife is entitled to his estate including his pension. Is she not a dependant too? Had they had any children, these children are also entitled to the estate of the deceased. What is their legal status? Who would be more entitled to his estate: his first wife and children from the civil marriage or his Muslim wife and children? These are common problems that have arisen out of the application of s 51 of the LRA. Unfortunately, neither the court nor the legislature has been able to address them adequately. The common excuse was to avoid the issue because it is too sensitive.[57]

The saga finally comes to a climax in the case of *Sharmala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah*[58] where the couple were married in 1998 in accordance with Hindu rites. They have two children aged 4 and 2 years old. On the 19 November 2002, the husband (defendant) converted to Islam and later on the 25 November converted the two children with him. The plaintiff wife left the defendant and went back to Kedah. On the 31 December 2002, she applied for custody of children. Trial was fixed for 16 January but the defendant applied for postponements as he needed time to appoint a lawyer. Trial was fixed for 25 February 2003. Meanwhile on the 7 January 2003, the defendant through his lawyer made an *ex parte* application to the Shah Alam Syariah Court for a custody order and this was not related to the High Court. On 12 April 2003, the High Court heard arguments on the issue of jurisdiction and held that it had jurisdiction to hear the application and fix trial on 17 April 2003. Meanwhile the Shah Alam Syariah Court, based on the husband's *ex parte* application, issued a warrant of arrest on the plaintiff wife for her failure to attend the trial at the Syariah Court. On the 14 April 2003, the High Court in Kuala Lumpur turned down the application of the plaintiff to revoke the conversion of the two children to Islam as the matter is within the jurisdiction of the Jabatan Agama Islam and the Syariah Courts.

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55 Penal Code, s 494.

56 *Eeswari Viswalingam v Government of Malaysia* [1990] 1 MLJ 86.

57 *Genga Devi a/p Chelliah v Santanam a/l Damodaram* [2001] 2 AMR 1485 and *Kung Lim Siew Wan v Choong Chee Kuan* [2003] 6 MLJ 260.

58 'Sharmala Gets Custody of Converted Children', *New Strait Times*, 21 July 2004.

On 17 April 2003, the High Court heard the custody application made by the plaintiff (wife) and, on 8 May 2003, the Shah Alam Syariah Court made an order giving custody to the defendant (husband). The defendant did not observe the interim order made by the Kuala Lumpur High Court and took the children out of Alor Star. The plaintiff applied for a committal order. At the trial Dato Faiza Thamby Chik J held that according to s 51 the defendant could not apply for divorce as he had converted to Islam and he could not apply for divorce in the Syariah Court as his wife was not a Muslim, and therefore Syariah Court had no jurisdiction. He also held that the plaintiff was not bound by the Syariah Court order and in fact the order had no effect on the interim order given by the High Court in Kuala Lumpur. This is due to the fact that the jurisdictions of the Syariah Court are within state jurisdiction. That is not the end of the case. Shamala having obtained the interim custody order took the children to Australia which is a clear act of contempt. Hence, the High Court on 20 July 2004 when it convened to finally decide the issue of custody only decided for academic purposes as the children were no longer within the jurisdiction. The High Court held that the non-Muslim mother who was the plaintiff was entitled to care and control the two Muslim children and as plaintiff and defendant were parents of the children, appointed them as joint custodians of the child. The decision raised eyebrows and concern among Muslims and it is believed that the defendant has applied for an appeal to the Court of Appeal.

These cases above illustrate that freedom of religion is exercised, but to a certain extent is abused. Conversion to Islam does not mean that one can escape from one's own obligations and responsibilities created before the conversion. It is also not a way to take away a child from his or her mother or father, as in Islam, difference of religion does not sever the relationship and responsibilities. Amendment to the LRA has been suggested,[59] and it is Parliament, which has the power to resolve these problems.[60] However, merely amending ss 3 and 51 of the LRA will not be a sufficient solution to this issue as the issue of conversion from and into Islam is a national problem which touches on the issue of religious and racial harmony in Malaysia.

VIII FAMILY LAWS IN MALAYSIA: THE FUTURE AND ITS CHALLENGES

(a) Legal impediments towards unification of Islamic laws in Malaysia

Harmonisation and unification of Islamic laws in all states in Malaysia have taken a long time and the process actually begun immediately after Malaysia

[59] Noor Aziah Mohd Awal 'Section 51 of Law Reform (Marriage & Divorce) Act 1976: An Overview' (1999) 3 No 2 *IKIM Law Journal* 127.

[60] The Attorney General Department is believed to have drafted the amendments to be taken to Parliament early this year but to date nothing has been done.

became an independent nation. One of the main obstacles towards unification and harmonisation of Islamic law is the Federal Constitution itself. Malaysia is a federation consisting of 13 states and three Federal Territories. Each of the states has its own written constitution and seven of the states have their own King or Sultan as the head of state. The seven kings take turn every 5 years to become the Yang di Pertuan Agung of Malaysia. It is also provided in the Federal Constitution that all matters relating to Islam and Islamic law shall be under the jurisdiction of State Legislatures.[61] Article 76 of the Federal Constitution provides that the Federal Parliament has the power to legislate in matters that fall under the State List but this power is limited in the following circumstances:

(a) for the purpose of enforcing an international treaty or treaty made with another nation;

(b) to encourage unification of laws between two states or more;

(c) being asked to do so by the State Legislature.

However, in relation to (a) such law can only be made after consultation with the State Government concerned. In relation to (b) such a law can only be enforceable if, after being passed by the Federal Parliament, it is adopted by the State Legislature as if it is a state law and shall remain so and may be amended or repealed by the State Legislature.

Hence, the unification of Islamic laws in Malaysia comes under heading (b) of Art 76 of the Federal Constitution. So long as this Article and Art 74 remained as part and parcel of the Constitution no real unification could take place. The insertion of (1A) into Art 121 further enhanced the demarcation of Civil and Islamic law and its jurisdiction. To amend these Articles in order to pave the way for unification of states laws will lead towards other legal and social implications. It must be pointed out that the Federal Constitution was drafted based on negotiation made by Malaysian leaders way back in 1956/57. The multiracial and multireligious backgrounds of its inhabitants have a lot to do with the division of powers between the Federal and State Lists.

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[61] Federal Constitution, Art 74, List 11(1), Sch 9 – Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts, wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustee and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities, and charitable institutions operating wholly within the state; Malay custom; zakat, Fitrah and Bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List: the constitution, organisation and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except insofar as concerned by federal law; control of propagating doctrines and beliefs among professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

The establishment of the Department of the Syariah Judiciary under the Prime Minister Department is intended to act as a coordinator of all the Syariah Courts in all the states as the Chief Judge of the Syariah Judiciary has no real power over judges in all the states as these judges are appointed by the King or Sultan of each state. However, he may direct them through the Chief Judge Directive which may be adopted by each state as the same process as the drafted Bills. This certainly is the main impediment towards unification of Islamic laws. Since all statutes must be brought before the Legislative Body of each state, the chances of its being modified or changed are quite high. This was what had happened previously. Having compared the Islamic Family Laws Enactments of Selangor and Negeri Sembilan, it is submitted the provisions are the same or similar but the wording is slightly different. It is hoped that no more changes or modifications will take place in the other states.

Apart from the Federal Constitution, the jurisdictions of the Syariah Courts need to be increased. Otherwise, Syariah Courts can only adjudicate on small and unimportant matters. All matters relating to probate and succession, land matters, contract, Islamic banking and insurance are still within the jurisdiction of the Civil High Court.[62] All these laws, to a certain extent, conflict with Syariah laws passed in each state, and in a conflict between states and federal laws, federal laws shall prevail.[63]

(b) Issue of conversions to and from Islam

The issue of conversion to and from Islam is a sensitive issue in Malaysia. The Government must be able to tackle the issue sensibly and without causing racial disharmony. Merely amending ss 3 and 51 of the LRA will not totally solve the problem. Conversion to Islam must be made transparent and public. This will reduce the act of abusing religion and using it to avoid personal liabilities. Both civil and Syariah Courts must come to terms with the fact that only one of the courts should have jurisdiction to determine matter of conversion, ie Syariah Court. Once the conversion has been decided as valid or invalid the original court which has jurisdiction to dissolve or determine the parties' marriage shall have the jurisdiction to decide on the marriage, custody and matrimonial property.

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[62] Other laws that need to be amended in order to enhance the position of Islamic laws are:
(a) Probate and Administration Act;
(b) Evidence Act 1956;
(c) Guardianship of Infants Act;
(d) s 51 of the Law Reform (Marriage & Divorce) Act 1976;
(e) National Land Code;
(f) Civil Law Act 1956;
(g) Married Women and Children (Enforcement of Maintenance) Act 1968.

[63] Federal Constitution, Art 75.

(c) Status of transsexual marriages in Malaysia

It must be pointed out that under the LRA marriage must be between a man and a woman. It is not only monogamous but it does not recognise same-sex marriage or marriage between a man with another man who has undergone a sex-change operation.[64] What lies ahead for this type of marriage in Malaysia is very difficult to determine. As for Muslims, a sex-change operation is strictly prohibited and any such change is punishable under the Islamic criminal laws of each state.

(d) Rights of illegitimate children

As the number of illegitimate births increase, there is a need to decide on the rights and status of these children. At present, they have very few common law rights and under Islamic law their rights are further limited. Most illegitimate children are brought up and maintained by their mothers. Illegitimate birth is still stigmatised. Many unmarried mothers prefer to give up their illegitimate children as they were not able to face society. Hence, illegitimate children suffer discrimination for being born illegitimate.

IX CONCLUSION

Family laws in Malaysia have undergone tremendous changes from the time of colonisation until the present day. These changes are slow but progressing. The beauty of it all is that Malaysia has dual family laws that stand side by side and, occasionally, one may lean a bit too far onto the other causing uproar and displeasure. To apply a single law for all may cause injustices to many. As it is, the two types of law will continue to wriggle their way through the lives of the Malaysian families.

[64] *Corbett v Corbett* [1970] 2 All ER 33; *Lim Ying v Hiok Ming Eric* [1992] 1 SLR 184.

The Netherlands

OVERVIEW OF MATRIMONIAL DEVELOPMENTS

*Gregor van der Burght**

Résumé

Nos contributions des années précédentes portaient presque toujours sur des questions de paternité, de droit de garde, du droit des enfants, etc. L'aspect patrimonial du mariage et de la vie commune, représente une dimension importante de la famille et du droit familial. La pertinence de ce sujet est encore plus évidente maintenant que l'on assiste à l'augmentation du niveau de vie du couple moyen et que le niveau de divorce atteint aux Pays-Bas presque les 40 per cent! Dans le présent texte, nous ne pouvons que donner une vue d'ensemble sommaire de l'état actuel du droit patrimonial de la famille aux Pays-Bas.

I NEW MATRIMONIAL PROPERTY LEGISLATION NEEDED

In case-law and in doctrine, the question has been raised whether it is possible to have a compensation claim in a system of exclusion of community in cases in which the capital gain of a spouse is partly due to the (labour) efforts of the other spouse.[1] The other partner has worked without wages and has contributed to the growth of wealth of his or her spouse, but that fact was always foreseeable since both parties wanted (to keep) their estates separated. By contract, parties excluded any community. This entails that the fluctuation in wealth only occurs in the property of the spouse involved. One neither suffers the losses of the other spouse nor enjoys the growth in wealth.

The spouse who 'invested' by free labour in the undertaking of the other and/or in the common household often claims a part of the increase that occurred in the capital of the latter. Although that seems to be a very reasonable desire, a rather difficult problem has to be solved: what about the contract that the

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1 Van der Burght *Heemskerkbundel 1991*, 43f; Van Duijvendijk-Brand *Afrekenen bij echtscheiding* (diss Leiden, 1990), 55, Van Duivendijk-Brand and Hidma, KNB 1994.

spouses made as to separation of the estates? The Dutch Supreme Court (Hoge Raad) found almost no legal ground to interfere in the contractual matrimonial position of spouses.

Only in the very rare case of clearly unforeseen circumstances do the Hoge Raad judges allow some compensation in favour of the 'poorer' spouse.[2]

A growing number of countries empower the judge to distribute property in cases of divorce: the equitable distribution system. This includes only the former Commonwealth countries but many states of the US and the Scandinavian countries. That system leads in my opinion to more satisfying rulings.

II NEW LEGISLATION

So practice and doctrine were happy to hear the Dutch Minister of Justice announce a project to 'modernise' the matrimonial property system.

In the Explanatory Memorandum the Minister refers to the problems described above and declares that is 'not an easy subject'!

The Minister held that research would have shown that the system of equitable distribution (among many others) in the UK that empowers the judge to distribute property was in the experience of practitioners not working satisfactorily. Many legal procedures and unpredictable outcomes of court decisions would be the result.

However, when checking the research documents it appears that out of the four prominent British experts who were consulted, three of them – among which Lord Justice Matthew Thorpe – were in favour of the current legal system in the UK and only one theoretician had *minor* objections because sometimes the judge was inclined to be paternalistic.

Unfortunately, the Minister of Justice declared furthermore that equitable distribution was not an issue that fitted into his project.

Practice and doctrine were surprised to experience that apparently other subjects in the field of matrimonial law needed 'modernisation'.

III THREE 'TRANCHES'

The project consists of three chapters – called 'tranches'.

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[2] HR 29 September 1995, NJ 1996, 88 (Milk quota); comp HR 12 June 1987, NJ 1988, 150, EAAL (Kriek-Smit).

The first one needs little describing since it does not contain many very important changes. Only two of them will be mentioned.

Until 2001 married couples were obliged by virtue of the law to live together. As one may understand, no judge ever ruled that unwilling spouses had to live under the same roof. Besides, when you have to drag your 'loved one' to court to have him or her 'sentenced' to live with you, the future of your marriage will not be looking very bright! The new Act has skipped that provision. The Act did the same with the provision that in cases where parties desired to change their matrimonial regime, the court should check whether it was a reasonable desire or not.

Much more important are tranches 2 and 3. A good understanding of the relevance of the new Act requires some introduction to Dutch matrimonial property law.[3]

IV COMMUNITY AND NETTING COVENANTS

Communities pursuant to the law of property have been known to exist for a very long time. The Netherlands embraces as its statutory matrimonial system the complete community of property.[4] From the moment of entering into a marriage or registered partnership,[5] a complete community of property exists, *ipso jure*. Spouses can only prevent this by a notarial[6] marriage covenant – before or during marriage – in which they make provisions with regard to the legal (financial and proprietal) consequences of their marriage.

V COMMUNITY

The principle of communal property is simple: both parties become owners of all assets gained before and during marriage; (almost) no administrative duties

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[3] See Van der Burght *Dutch matrimonial property and inheritance law, and its fiscal implications* (Kluwer-Deventer, 1990).

[4] Also applicable for the registered partnerships phenomenon, which has existed since 1998. It is open to same- and different-sex parties as is the case with the traditional marriage: as of 1 April 2000 open to all! In this article when spoken of marriage, husband and wife, etc the registered partnership or registered partners are included.

[5] Existing as of 1 April 1998; see Van der Burght, in Dewar and Parker (eds) *Family Law, processes, practices, pressures* (Hart Publishing, Oxford and Portland, Oregon, 2003), 403 ff.

[6] In The Netherlands, as in the greater part of Europe, the official who draws up contracts and designs regulations in the field of family law is the civil law notary. This officially appointed civil servant should not be compared with the public notary known in the Anglo-American legal system, since, as opposed to the latter, the civil law notary is an entirely specialised lawyer with an academic education followed by at least 6 years of practice experience, during the first 3 years of which the young notarial lawyer has to do, in addition to his day-to-day practice, a post-academic professional training and teaching course all concluded by an examination. This notarial lawyer is among others (real estate, corporate law) an expert in the field of the matrimonial property and inheritance (tax) law.

are necessary. The enjoyment of the growth in wealth and suffering – via the community – of the losses too are all part of the game. The first aspect may give rise to conflicts and questions, for instance, concerning the moment at which an asset arises (eg a life insurance policy is paid out). But the second issue – the losses – creates discussion too about the moment liabilities arise. Does a liability arise at the moment of condemnation (ie during the marriage) or does it arise at the moment the defendant in the action of account does not meet the duties to which he was condemned (ie after the marriage)? On the one hand, the community contains all the parties' assets, but on the other hand the community contains every debt of both spouses. The debts of both spouses become part of the community; recourse against the community may be had for all debts of the spouses. This is however not extraordinary since both spouses are entitled to the entire community. Therefore, the community is part of the respective assets of spouses and is, as such, by virtue of Art 3:276 DCC,[7] an object of recourse for creditors against the respective spouses.

It is that latter fact that some couples want to avoid, especially when one or both of them intend to start a business of their own. They wish to limit their personal liability. Therefore, they choose another regime that will not endanger the wealth of both parties in case one of them goes bankrupt. Consequently they often enter into a (pre)nuptial covenant, excluding (any) community of property. The 'solution' of the exclusion of all community bears the danger that one of the spouses may leave the marriage empty handed. This danger may materialise when the party involved earns less than the other; if that party devoted more energy to the family, raising children and therefore they finished their career permanently or for a period of time. In that case, if the spouses are divorced, the party mentioned will in most cases end up with less money and assets than the other one.

VI LIMITED COMMUNITY

By a marriage covenant, spouses may enter a limited community. This community will limit the amount or kind of communal assets but that limited community will still be the object of recourse for all creditors' liabilities too. Examples are the community of movables or the community of benefits and income, or of profits and losses.[8] Such a regime of two or three estates however requires an administration: what is common; which assets are owned by spouse A and which by spouse B; with whose money has that particular asset been financed totally or partially?

[7] Dutch Civil Code.
[8] Art 1:124 ff DCC.

VII NETTING COVENANTS

During the last 50 years, netting covenants have become increasingly popular. It is a fact that they outshine the aforementioned classic limited communities in popularity. Under this contract parties are obliged to compensate along lines other than those resulting from their external relationship pursuant to property law. These agreements do not change the relationship in terms of property law; they only create contractual duties. It could concern the case in which parties enter into a marriage covenant excluding any community, on the understanding that they shall settle as if there had been a full community of property, or one of profits and losses or one of proceeds and income. However, another possibility is that, with the same exclusion system based on their marriage covenant, parties agree to settle nothing except lottery prizes. Or, parties marry in a limited community but include a stipulation in their marriage covenant that when the marriage ends and there are children, they shall settle as if they had been married in full community of property.[9] The conclusion is that netting covenants systems may be applicable where there is a partial or an entire separation of property; the spouses may have to nett certain asset values, periodically or after termination of the marriage: the final netting covenants.

VIII REAL LIFE

A very popular version of a periodical netting covenant is the so-called 'Amsterdam-netting covenant'.[10] One gets married without any community of property and it is stipulated that, each year, the surplus of the incomes of both parties will be netted on a 50:50 basis, after the costs of the joint households have been deducted. A perfect combination of the advantages of the community and those of the regime of exclusion of community: pleasure without pain! In practice, spouses who are married under a periodical netting covenant very rarely settle accounts in time: one has to be a descendant of a family of bookkeepers in order to meet the doctrine of the notarial deed! As early as 1985, the Hoge Raad[11] ruled in the following case: the spouses were married without community of property combined with a netting covenant regarding the husband's earned income. However, no money had ever been transferred from the husband to the wife. During the divorce proceedings the wife sued for half of the capital acquired by the man, whereas the husband refused to pay more than the nominal value of the yearly settlement of debts. The Hoge Raad said that it was normal, within a matrimonial relationship, that

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[9] A specification of the netting covenants was the statutory joint-participation system (Art 1:129 and Art 1:132 through 145 old DCC): 'wettelijk deelgenootschap'. This concerned a final netting covenant: one settling accounts at the end of the regime. Application of the rules of that system however resulted in complicated calculations and rather unreasonable financial obligations (as described already in 1973 in Gregor Van Der Burght *Het wettelijk deelgenootschap* (diss University of Amsterdam, Deventer, 1973). The 'wettelijk deelgenootschap' was fortunately abolished in September 2003.

[10] Over 75 per cent of marriage covenants contain such a system.

[11] HR 15 February 1985, NJ 885, EAAL *(Investments)*.

monetary claims resulting from a marriage covenant are not made. By dividing the capital in equal shares the intention that parties had when they entered into their marriage covenant would be met. Basically the line of thought of the Hoge Raad is that where spouses never settle, the spouses have to settle all results of their investments gained with income each of them saved after contributing to the household. Although the explanation of the Hoge Raad is logical, a lot of problems and complications occur in real life and have to be faced.

IX FORFEITURE CLAUSES

A part of the covenant is often a forfeiture clause: parties must settle within one year after the preceding year or the claim will expire. When in that case the marriage is breaking down, at least one of the parties suddenly remembers the marriage covenant. The result would be that the original spouse-creditor (generally the wife) will have lost all the rights to netting or compensation. This result is objectionable. It may be true that a netting after many years offers considerable problems in terms of bookkeeping and of proof, but that is no ground to deny the spouse all financial claims. She generally has not been able to pursue her career. But she did help to raise the degree of prosperity of the family and of its members through domestic care and educating the children. Fortunately, in 1996, the Hoge Raad[12] ruled that to invoke the dissolution clause of a netting covenant is, by criteria of reasonableness and fairness, unacceptable unless the spouse who relies on expiration states circumstances and, if necessary proves them, justifying the extinction.

X MORE PROBLEMS TO BE SOLVED

If parties do not nett in time, a lot of problems and complications occur in real life and have to be faced. Which objects are the result of the saved incomes? What is their value? What is the value of the 'investment' of that money saved? These objects must be part of the final settlement. A possible solution is this one:[13] one calculates the relationship between the value of the financed object and the instalment or redemption. At the appropriate time of the settlement for that same relationship the increase of the value should be settled. There are however (too) many schedules and systems of financing real estate, that make it often impossible to give a sound outcome: everything can be challenged and discussed. We find similar problems when we look at the fact that many people marry or enter a registered partnership while they have unpaid debts, especially those originating from mortgages. How should we act when during marriage the debts have been paid off? The payments are '*ipso facto*' made from income saved.

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[12] HR 19 January 1996, NJ 617, WMK (*Rensing-Polak*).
[13] HR 6 December 2002, JOL 457 (*Schwanen-Hundscheid*).

Another problem arises from the position of the spouse-entrepreneur, acting as a owner-shareholder of the private limited company. That spouse is able to decide on the policy of the company as to whether to pay dividends and at what amount; to reward the spouse-shareholder with a salary of €xx to be decided by that same spouse. In other words: where the couple lives under a netting covenant regarding earned incomes, the spouse-shareholder is able to influence his part in it. To counter that problem doctrine[14] and case-law[15] developed standards which are not easy to apply. One should check whether the spouse involved, compared to managers of similar companies, did receive a reasonable salary and a reasonable part of the profits. If this is not the case, one may regard (part of) the spouse's assets resulting from investment as 'income saved'. Lots of questions arise. Does one have to do that investigation for each year? What about the economic position of that specific undertaking in that specific year; its prospects in that year; the extent of its reserves needed in that year? It is not difficult to imagine that this approach to the execution of the marriage contract may cause tensions, especially when the spouse-entrepreneur is forced to pay a considerable sum of money to his ex-partner. In some situations that obligation may even endanger the existence of the company itself. In such a case the Hoge Raad[16] ruled that one is not obliged to 'suffer' that much: the obligation should be modified and reduced to a level at which the continuation of the company is no longer endangered. Nevertheless, this is a battlefield.

XI NEW LEGISLATION

In 2002 a bill was enacted to regulate netting covenants in marriage and registered partnership covenants. This Act is applicable to all existing and future marriage contracts containing a netting covenant whether it is periodical or final. Article 1:132 DCC stipulates that the provisions are applicable on netting of income and/or of capital. Netting obligations apply neither to capital acquired pursuant to hereditary succession, bequest, the vesting of a beneficial title under a testamentary obligation or gifts *nor to benefits thereof*. Rules of substitution are applicable. Not all spouses are trustworthy, especially not in a divorce situation.

Article 1:139 DCC states that, where a spouse conceals an asset that forms part of the nettable capital or causes its loss or keeps it hidden as a result of which its value is not included when netting is made, there shall be no netting of its value but the other spouse shall be compensated in full. That sounds very threatening, but the main problem before one may apply this provision is to discover that the spouse involved has acted as described. When in the case of a periodical netting covenant at the end of the marriage it appears that parties have not acted in compliance with their covenant, the then present capital is

[14] Pitlo-Van Der Burght *Personen- en familierecht* (Kluwer-Deventer, The Netherlands, 2003) nr 534 ff.

[15] HR 2 March 2001, NJ 583, (*Slot v Ceelen*).

[16] HR 2 March 2001, NJ 584 (*Fishery Company*); High Court of Amsterdam 20 November 1997, WPNR 6306 (1998).

presumed to be formed from what had to be netted unless there is a different obligation on account of the requirements of reasonableness and fairness. In that case the periodical netting contract is treated as a final one. Another issue the new Act rules on is the applicable date at which the composition and the extent of the nettable capital shall be determined. The date is the end of the marriage or registered partnership in case of death, but when it is terminated by divorce, it is the date of the lodging of the divorce petition. When the registered partnership is ended by mutual consent, it is the date of the agreement for its termination.

As one may conclude, the Act in general reflects some of the case-law developed over the previous 20 years.

XII NOT SATISFYING

Although the Explanatory Memorandum mentions all kind of difficulties and practical issues concerning the execution of netting covenants, the Act provides no solution for many of them. For example, the Act lacks a definition of 'income' and of 'property', whereas Art 1:132 DCC stipulates that the provisions are applicable on netting of income and/or of capital. That omission is rather 'fatal' because many conflicts concern the scope of those two concepts.

Another very important issue is the concept of 'profits' of an undertaking owned by a spouse in relation to the matter discussed above. We have got several concepts of 'profits', the results of which differ extremely: the annual profits; profits gained during the existence of the marriage; the fiscal profits and many more are known. It is important to decide on that issue since according to Art 1:141 DCC, s 4 where a spouse has a dominant position allowing that spouse to provide that the profits of an undertaking conducted in his or her own name will accrue, directly or indirectly, to his or her benefit, the non-distributed profits from that undertaking, to the extent that this is generally considered reasonable, shall also be taken into account when determining the netting obligation of such a spouse. As discussed before, in cases like these the obligation of the entrepreneur to settle with his spouse may endanger the existence of the enterprise. Contrary to what the Hoge Raad decided, now the law obliges the spouse-debtor to pay the full amount. However, he may request for important reasons the court to order that the sum of money due, increased with the interest specified by the court order, or without such an increase, be paid in instalments or only on the expiry of a specific period, either in lump-sum or in instalments. The court may oblige the spouse-debtor to put up security within a specific period *in rem* or personally.

Another item that the Act unfortunately lacks is a provision as to the meaning or application of the extinction rule in the dissolution clauses, which was the subject of the 1996 Hoge Raad case. Many scholars as well as practitioners regret that the Dutch legislator has missed the opportunity to design a well thought out piece of legislation.

XIII NEW COMMUNITY OF PROPERTY

The third tranche concerns a dramatic alteration of the statutory system of matrimonial property law. The alterations are highly technical as usual. But according to the proposal the citizen should re-enter school to obtain his bookkeepers certificate. The proposal has met extremely strong opposition from all scholars and experts in the field and critics forced the Minister of Justice to alter the draft dramatically. It is no use elaborating this subject, since it is not[17] likely that even this new draft will pass through Parliament at all or at least without fundamental changes.

[17] Breedsveld/deVoogd and Huijgen 'To a limited community: Don't do it!' (2004) WPNR 6562; Van der Burght, Luijten and Meijer 'A mission impossible' (2003) WPNR 6545; and in favour of the draft see Verstappen 'Between dream and reality' (2004) WPNR 6568 who was/is however working with the ministry!

New Zealand

REFLECTIONS ON NEW ZEALAND'S PROPERTY REFORMS 'FIVE YEARS ON'

*Bill Atkin**

Résumé

Le régime du partage des biens en Nouvelle-Zélande fut adopté en 1976, mais des changements majeurs y ont été apportés en 2001. Bien que cinq années se soient écoulées, l'effet complet de la réforme ne s'est pas encore fait sentir et l'on attend encore l'arbitrage des plus hauts tribunaux sur plusieurs points. Il y a tout de même eu une importante activité jurisprudentielle en la matière et le présent article en examine plusieurs aspects. Il s'intéresse en particulier aux questions suivantes: les conséquences de la prise en considération des relations hors mariage et l'inclusion des conjoints survivants dans le régime, le droit prévoyant la conversion des biens propres en biens communs, l'importance des fiducies familiales, la perspective des autochtones Maori et les nouveaux pouvoirs discrétionnaires en matière d'attribution de montants compensatoires en cas de déséquilibre économique entre les parties. Ce dernier est l'aspect le moins satisfaisant des reformes, générant un nombre important de litiges et créant une grande insécurité juridique.

I BACKGROUND

Law reform can be generated in a variety of ways. Sometimes it is forced by social change, sometimes it is sparked by a random court case or two, sometimes by ideology, sometimes by the earnest drive of those who want to see the law improved. The result may in some instances be a revolutionary revision of the law; in others it may be a tinkering with existing rules, so that change is done on a piecemeal basis. The history of New Zealand's matrimonial property legislation exemplifies a little of all of these things.

The purpose of this article is to consider the impact of changes which were enacted in New Zealand in 2001 and which came into force at the beginning of 2002. However, a brief trip over the major historical developments is warranted in order to understand the context and influences of the current law. The story will be echoed in other jurisdictions but there are always lessons to be learnt.

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New Zealand is a common law country, rooted in the British tradition. It thus inherited the unitary concept of marriage and marital property. This meant that property was owned and controlled by the husband, largely to the detriment of the wife – or at least that is how it appears to our eyes today. It also appeared so in the late 19th century when the women's movement flourished. As a result of a vigorous campaign that included women's suffrage, the Married Women's Property Act 1884 was passed to enable wives to hold property in their own right. This Act stood the test of time for many decades and was not put under any real pressure until the post Second World War era. Arguably, the intervention of a long war upset many relationships, the effect of which filtered through for some time to come. Suddenly, with more divorces, questions about property arose that had not been tested before. The 1884 Act was unable to cope with the changing lifestyle patterns. The main reason was that wives, who would not have worked after the birth of the first child (although this would have been interrupted during the war effort), had little property of their own unless the home had been put into joint names. In fact, co-ownership was not uncommon and was positively encouraged: the Joint Family Homes Act was passed in 1950 and 'settlement' of the house as a joint family home was often a necessary requirement for obtaining cheap government post-war finance. That still left a number of wives unprovided for, and it also failed to tackle property other than the home. As a result, Parliament passed laws, primarily the Matrimonial Property Act 1963, that moved away from the concept of separate property found in the 1884 Act and allowed the courts to make orders that overrode legal and equitable title.

The changes in the 1960s look like tinkering in retrospect. In fact, they were radical in that they laid the seeds for more sweeping reform in the 1970s. Allowing departure from traditional property concepts must surely have changed the mindset of the day. Once it is accepted that the old concepts are not sacrosanct, then there is no logical stopping point in the development of new rules. The 1963 Act was a milestone but it soon proved unsatisfactory. Much of its operation depended on judicial discretion, which was hardly consistent. Furthermore, the Court of Appeal had interpreted the scope of the courts' discretion narrowly,[1] so that wives struggled to obtain a share of any property in the husband's name other than the home and it contents.

In response to the inadequacies of the law, the government prepared what can properly be described as a revolutionary scheme for a common law country. The Matrimonial Property Bill heralded a deferred community regime with strong echoes of the civil law tradition. Equal division of matrimonial property was the catch cry and in its original version the Bill was even extended to de facto relationships, a very early foreshadowing of the need to give them statutory provision. Although the Bill was significantly amended during its passage, including the removal of references to de facto couples, a change of government did not alter the underlying revolutionary nature of the legislation.

[1] *E v E* [1971] NZLR 859. Ironically, the Privy Council later took a much broader approach in *Haldane v Haldane* [1976] 2 NZLR 715 but momentum for comprehensive reform was already too great to be scaled back.

Under the Matrimonial Property Act 1976 the home and chattels were divided equally on separation or divorce, with only a couple of narrow exceptions – where there were so-called 'extraordinary circumstances', and where the marriage had lasted less than 3 years. Other matrimonial property was also divided equally but it was easier to escape the rule by showing a clearly greater contribution to the marriage. Separate property, eg property owned before the marriage, gifts and bequests, excluding the home and chattels, was in general beyond the reach of the other party.

The 1976 Act led to a considerable flurry of litigation as its principles were bedded in. A series of Court of Appeal decisions confirmed the rigour of the scheme as against a much looser interpretation. For example, the extraordinary circumstances exception for the home and chattels invited parties to try their luck but in *Martin v Martin*,[2] the Court of Appeal described the test as a stringent one, the circumstances having to be remarkable in degree and unusual in kind. In another foundational judgment, *Reid v Reid*,[3] Woodhouse J set out the core principles including the notion that the Act was social legislation that differentiated it from the more familiar concepts of ordinary property law.

After this early period of testing, the new legislation became generally accepted. Given the number of marriage breakdowns, there continued to be plenty of litigation but not as much as, for example, litigation involving children. While some of the cases before the courts essentially sorted out factual questions, others dealt with specialised legal issues. For example, the significance of superannuation policies (ie retirement packages) took some time to be worked through until several Court of Appeal judgments determined that future contingent benefits had to count and be valued.[4]

From one point of view, the 1976 Act appeared to be operating very effectively. Lawyers were in general able to offer clear advice and the equal division rule was readily understood. However, from other points of view, there were concerns. First, there was the question of what to do with two categories left out of the legislation: de facto couples and widowed persons. Secondly, there was a desire to iron out some of the detailed drafting deficiencies that had emerged, along with the widespread use of family trusts and companies which had the effect of depleting the property available for division. Thirdly, the Act took little account of indigenous Maori perspectives.

Finally, and perhaps most importantly, the view gained currency that the Act provided for equality in theory but not necessarily in reality and that many wives (in particular) failed to leave the marriage on the same footing as husbands. To a large extent, international research was relied on for this assertion and little or nothing was done in New Zealand to back it up. There is a risk, for instance, in relying on United States data where the social and

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2 [1979] 1 NZLR 97, 102–103.

3 [1979] 1 NZLR 572, 580–583.

4 *Haldane v Haldane* [1981] 1 NZLR 554; *Callaghan v Callaghan* [1987] 2 NZLR 374; and *Clark v Clark* [1987] 2 NZLR 385.

economic circumstances are very different. Nevertheless, it can be surmised that as a generalisation wives who were not in paid employment but who were caring for the children of the marriage struggled much more than the husbands. One reason for saying this is the extent to which mothers from broken homes dominated the figures for state support. For example, following the historical pattern, 90.3 per cent of people receiving the state-funded domestic purposes benefit are female (as at March 2006). What is not so clear is the exact effect of equal division of matrimonial property, especially compared to earlier statutory regimes, and the extent of re-partnering. Entering into a new marriage or de facto relationship may alleviate hard times for the caregiver, and create new financial responsibilities for the non-caregiver. One further confusing factor is the drift towards shared custody, now seen in the Care of Children Act 2004 provisions for day-to-day care.[5]

In 1988 the Minister of Justice set up a Working Group to look at the Matrimonial Property Act 1976 along with de facto relationships and certain inheritance matters. The Group's report addressed the matters just discussed but eschewed any radical solution to the issues in the last paragraph.[6] One of the reasons for this was that any fundamental moves would have upset the basis of the legislation. In particular the Group avoided any recommendation that took future needs into account, this being something that the law of maintenance tackled, or that gave the courts any broad discretion to allow for unequal sharing in order to address the differences in earning capacity.

It was only in the latter part of the 1990s that the 1988 report was given effect to, initially by a Bill amending the 1976 Act and a separate one providing for a regime for de facto relationships. After the eventual passage of the new laws in 2001, de facto relationships had been incorporated into the matrimonial property laws. The 1976 Act became the Property (Relationships) Act but, because the changes were all effected by amendment, it remained the 1976 Act. As proposed by the 1988 Group, widowed parties came under the Act, but crucially and contrary to the Group's report, two new sections gave the courts power to grant compensation for economic disparity. It is not unfair to say that the 2001 package of reforms has increased the flow of litigation and the economic disparity provisions in particular have left lawyers and judges floundering.

The rest of this contribution looks briefly at some of the principal changes and draws some preliminary conclusions about their operation. I follow the four concerns mentioned above.

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5 Care of Children Act 2004, s 48(2), which provides that a parenting order may specify that day-to-day care is to be provided by one person alone or jointly with one or more other persons.

6 *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988).

II DE FACTO RELATIONSHIPS

The rise in de facto relationships has been a phenomenon of profound significance in the Western world and New Zealand is no exception. Results from the 2006 New Zealand census are not entirely easy to decipher. The category of 'partnered' was ticked by 48,174 people (which included a small number of civil union partners). 'Other partnerships' (mostly de facto relationships) accounted for 379,956 people. A large number of people, 207,075, did not answer the marital status question in the census. These figures are out of a total population aged 15 and over of 3,160,371. According to the 2001 census the number of people living in de facto relationships was 300,846, compared with 87,960 in 1981 when statistics were first collected. The figures speak for themselves. Reflecting another change in lifestyle, in 2001, 10,134 people were in same-sex relationships, compared with 6,520 in 1996, male partnerships involving 4,464 men and female partnerships 5,670 women.

The legal response to this phenomenon was controversial. The incorporation of de facto relationships into the regime for married couples was challenged on two fronts.[7] Some regarded it as an attack on marriage, while others saw it as an intrusion on personal freedoms. Nevertheless the political opposition acknowledged that a statutory system was needed to replace the unwieldy rules of the common law and equity. A separate statutory system for de facto couples in many respects merely duplicated the matrimonial rules and, where they parted company, the real rationale was hard to find. From a legal point of view, there were many advantages in bringing the two different kinds of cohabitation under the same roof, later added to by civil unions.

Generally speaking, the changes to de facto relationships have produced no greater difficulties than could have been predicted. Some people may complain about the consequences of the law, but they probably fail to realise that the common law and equity had consequences for them anyway. This applied not only when parties separated but also when one of them died. A deceased person's family may today be surprised to learn that their loved one had an unmarried partner whose share of the property will reduce the size of the estate, but a survivor in these circumstances had a potential claim under the previous law, for example if they could show an interest under a constructive trust.

Furthermore, the issues that arise in de facto couples' cases are usually not that different from those that arise for married couples. A separate statutory regime would have covered the same ground, and the distinctive issues, for example whether two people are actually in a de facto relationship, would have arisen whether the scheme was a separate or unified one. By and large, the only real value in the separate approach would have been symbolic: marriage and other forms of relationship would have been kept quite distinct, with the implication

[7] See Atkin 'Family Property' in Henaghan and Atkin *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington, 2007).

that marriage was superior. The later arrival of civil unions would have been a complication for this picture, because civil unions are not marriages nor are they de facto relationships. In the end, when the Civil Union Bill and accompanying amendments were passed, civil unions were aligned with marriages for most purposes, but the difference between marriages and other partnerships was rather mutely maintained by retaining the word 'spouse' for married people and 'partner' for civil union and de facto partners. Yet, little or no legal significance hangs on the phrase 'spouse or partner' that has found its way into several parts of the law.

Unsurprisingly, the definition of a de facto relationship is critical, because an association that does not satisfy the definition falls outside the statutory rules. At the same time, the questions of when a relationship begins and ends are also vital for the following reasons:

- The new rules apply only to de facto relationships that ended before 1 February 2002, the commencement date of the 2001 amendments.[8] Thus, it is important in transitional cases to know whether a relationship ended before or after the cut-off date. One that ended before 1 February 2002 will have to be decided under the general law.

- Most de facto relationships must last 3 years before the Family Court has jurisdiction (exceptions will be discussed later). Thus, the beginning and ending of the relationship will be crucial in determining whether there has been sufficient passage of time.

- The automatic right to apply under the Act expires 3 years after the ending of a relationship. Later applications depend on the court's granting an extension of time.[9]

The definition of a de facto relationship is somewhat problematic. While those in a marriage or civil union rely on registration which tells the truth in all bar the very rare cases where the marriage or civil union is void, those in a de facto relationship rely on the factual nature of their association. This gives ample scope for dispute especially where the association has gone in fits and starts or where there have been other partners at various times. Each party will endeavour to interpret their lives to suit their legal situation. Section 2D of the Property (Relationships) Act 1976 sets out the meaning of 'de facto relationship'. The core question is whether the parties (who may be heterosexual or homosexual) lived together as a couple (so long as they are 18 or over). Section 2D(2) then lists a non-exclusive range of factors which help determine this core question: duration, nature and extent of common residence, sexual relations, finances, property, the 'degree of mutual commitment to a shared life', children, household duties, reputation and public aspects of the relationship. Section 2D(3) states that no factor is a necessary

[8] Property (Relationships) Act 1976, s 4C(2).
[9] Property (Relationships) Act 1976, s 24.

condition for the existence of a de facto relationship. Thus, for example, two people may be in a de facto relationship even though they do not reside at the same place. Nor need they be financially inter-dependent, a factor that the Court of Appeal determined was essential in another context – social security support from the state.[10]

The courts were not initially inundated with de facto relationship cases, perhaps because it takes a little while for any new system to filter through to a court hearing. There is now a steady stream of such cases, mostly turning on their facts. The most helpful is that of a two-judge High Court bench in *Scragg v Scott*.[11] The parties had begun seeing each other in 1990 after the woman's marriage had broken down. It blossomed into a full sexual relationship. Later, the man had a business on the island of Guam in the Pacific Ocean. The woman lived with him whenever she was in Guam, and likewise he with her whenever he was in New Zealand. The man showered the woman with generosity and she was largely dependent on him. Crucially, the man, unbeknownst to the woman, started another relationship in Guam in 2000, ie before the new law came into effect. The Family Court judge held that there was a de facto relationship that lasted until July 2002, meaning that the new law applied. This was upheld on appeal.

In commenting generally on the task, Gendall J and Ellen France J said the following:[12]

> '[t]he complexity and diversity of human nature and behaviour is such that many types of associations may properly fall into the category of a de facto relationship as envisaged by Parliament. For there to be a relationship there must be an emotional association between two persons . . . [t]he test must inevitably be evaluative, with the Judge having to weigh up as best he or she can all of the factors – not just those contained in s 2D, but also any others there may be – and applying a common sense objective judgment to the particular case . . . Generalisations are to be avoided because every case is fact specific.'

The judges note here that the inquiry is essentially a factual one that will differ from case to case. They are also aware of the variety of associations that exist, some falling inside and some outside the statutory definition. A couple of odd cases that have arisen make the point. In one case the court had to decide whether a pimp and a prostitute were in a de facto relationship.[13] It was held that it was 'a parasitic business relationship' up until the time when the woman ceased being a prostitute and only then did it constitute a de facto relationship. In another case, a 41-year-old student boarded with a 78-year-old who in due course died. Despite intimacies, it was held that the relationship lacked the necessary commitment to be a de facto relationship.[14]

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10 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154.
11 [2006] NZFLR 1076.
12 Paras 31 and 37.
13 *Dravitzki v Methven* (New Plymouth Family Court, FAM 2004-043-000714, 18 January 2006) para 81.
14 *PZ v JC* [2006] NZFLR 97.

The level of commitment between the parties, especially when they are not always together or when one of them has been unfaithful, is perhaps one of the key elements of the definition. *Scragg v Scott* illustrates this. The judges refused to lay down a bright line:[15]

> 'Sexual fidelity may be a factor which, depending on the circumstances, may indicate a lack of commitment but it depends on all the circumstances . . . Mere unfaithfulness cannot, of itself and without more, end a de facto relationship which has already formed and which continues through having necessary characteristics.'

Adultery does not mean that a marriage is automatically over, so there is no reason why its equivalent should have the opposite effect for a de facto relationship. Yet it is complicated in a case like *Scragg v Scott* where the parties are not habitually living together. Could it be argued, as Mr Scragg did, that there was not one de facto relationship but several, each lasting short periods of time? The legal significance of this is that a short duration relationship, ie one of less than 3 years, will likely fall outside the Act. The judges were not prepared to accept this argument. Common residence is only a factor and not a requirement, so the fact that the parties have physically separated does not necessarily bring the relationship to an end. Whether a de facto relationship has ended will be determined similarly to the question of whether a married couple is living apart, the test for which has traditionally been tight. If the courts too readily accepted that relationships had ceased and when parties got back together again a new relationship was formed, there is the risk that the object of the Act in dividing property on a rational basis would be undermined.

As mentioned already, the length of a relationship may be crucial for the Act's application. A relationship of short duration usually falls outside the Act, unlike marriages and civil unions of short duration, which fall within the Act but with modified division rules. Section 14A sets up the exceptions. There is a twofold test: (i) there must either be a child from the relationship or the applicant must have made a substantial contribution to the relationship; and (ii) failure to make an order must result in 'serious injustice'. In relation to (i) the main problem area is what is meant by 'substantial'. On one view, a party needs to have contributed more than 50 per cent to the relationship,[16] whereas another approach suggests that the contribution need not be far beyond the norm at all.[17] Perhaps the real question is whether the second step is satisfied: would there be serious injustice? One High Court judge has said that the phrase indicated 'a relatively high threshold' but nevertheless held that the test had been met, being swayed in part by the fact that a contrary decision would force the parties to revisit the same issues in ordinary civil proceedings.[18] In another situation, the Family Court judge had denied that there would be serious injustice because the benefits of the short relationship had to be weighed in

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15 Paras 44 and 59.
16 *M v H* (Tauranga Family Court, FP 070/210/03, 19 May 2004).
17 *LS v ZJ* [2005] NZFLR 932, para 66.
18 *S v W* [2006] 2 NZLR 699, paras 133-136, Chisholm J.

with the contributions. However, this was reversed on appeal where Ronald Young J held that insufficient account had been taken of all the indirect contributions which outweighed the benefits.[19] He refused to define 'serious injustice' saying that it means what it says: 'It is more than an injustice. It is a serious injustice. Substituting synonyms for "serious" has the obvious danger of changing, perhaps subtly, the legislative test.'[20] While the reader may be left wishing for a clearer statement of the law, this approach is consistent with what the Court of Appeal has said in some other contexts where the amorphous phrase 'serious injustice' has been used[21] and it remains for each case to be worked out according to its own facts.

III WIDOWED PARTIES

The extension of the law to cover widowed parties is logical. Why should the divorced or separated party be in a privileged position compared to someone who has had the misfortune to lose their partner through death? While the latter may have a claim for financial provision under the Family Protection Act 1955, known in some jurisdictions as testator's family maintenance, this is at the discretion of the court and is unlikely to equate to what would otherwise be a definite half share of the relationship property. Furthermore, the now outdated rules of the Matrimonial Property Act 1963 remained available to widowed parties after the passage of the Matrimonial Property Act 1976 (until the 2001 changes). It was rather anomalous to have two distinct regimes operating, one for *inter vivos* claims and the other for post-death claims.

On the other hand, the surviving partner is not the only person with an interest in the deceased's property. The beneficiaries, who will often be other family members (very likely children from an earlier relationship), or persons who have potential claims against the estate under, for example, the Family Protection Act or the Law Reform (Testamentary Promises) Act 1949,[22] could stand to miss out if the partner's share is increased. The policy position taken in the New Zealand law was to secure the partner's rights at the expense of all others. Thus, for example, there is a rule that the deceased's property is presumed to be relationship property, available for division, unless there is evidence to the contrary.[23] In other words, given that the deceased cannot offer direct evidence, any difficulties about classifying property are in the first instance removed from the survivor and the onus is on the estate to prove otherwise.

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19 *Schmidt v Jawad* [2006] NZFLR 410.

20 Para 34.

21 *Harrison v Harrison* [2005] 2 NZLR 349 (setting aside agreements, s 21J) and *Public Trust v Whyman* [2005] 2 NZLR 696 (claim by executors against survivor's property, s 88(2)), to be discussed shortly.

22 This allows anyone, not necessarily a family member, to claim against the estate where the deceased made a promise to make a testamentary bequest in favour of the claimant in return for services offered during the deceased's lifetime.

23 Law Reform (Testamentary Promises) Act 1949, s 82 – this does not apply to property received by succession, survivorship, gift or as a beneficiary under a trust.

The issue that has given rise to greatest concern relates to the right to apply for an order under the Property (Relationships) Act. The Act is activated only if an application is made. In many instances, the survivor will be well provided for under the terms of the deceased's will or, in respect of jointly owned property, is likely to take the whole of the property under the 'survivorship rule'. There will nevertheless be residual situations where the widowed person is not adequately provided for. So, under s 88, the survivor who so chooses has an unqualified right to apply. This is consistent with the policy position already mentioned. The deceased's personal representative is, on the other hand, in a quite different situation. The enigmatic phrase already discussed, 'serious injustice', rears its head again, for the personal representative must obtain leave of the court to apply, which will be granted only if refusal would 'cause serious injustice'. As discussed in the context of de facto relationships, the phrase is not one that lends itself to precise definition, and yet it is critical in determining the balance between competing parties.

The first attempt to address this balancing exercise was a case, *Kinniburgh v Williams*,[24] which saw a widow pitted against her stepdaughter. The widow was content to leave matters where they lay because she obtained virtually all the property under the 'survivorship rule'. Only a small sum of $8,000 remained to pass under the laws of succession. The deceased's daughter wished to apply under the Family Protection Act but this would only make practical sense if the size of the estate were increased. An application under the Property (Relationships) Act would have achieved this as proceedings under the Act effectively override the survivorship rule, clawing the widow's property back into the division pool. However, Heath J refused to grant leave, taking the view that the stepdaughter would likely inherit from her natural mother. His interpretation of 'serous injustice' set a very high bar: the injustice had to be intolerable, the kind 'that the Court cannot, in conscience, countenance'.[25] The judge also referred to the need for predictability in the law of succession, a very laudable aim but one that barely rates in the light of legislation such as the Family Protection Act and the Property (Relationships) Act itself.

The approach just outlined is now of doubtful validity because of a decision of the Court of Appeal in *Public Trust v Whyman*, where the Court said:[26]

> 'We think that the "serious injustice" test can be applied directly and that there is no need to put a gloss on the words chosen by Parliament. In particular, we think that Heath J went too far when he suggested that the level of injustice required to warrant leave is "intolerable". If that is what Parliament intended, it would presumably have said that leave should only be granted if necessary to avoid "intolerable injustice".'

Further, the Court went on to suggest that the *Kinniburgh* case was the type that the 'serious injustice' exception was designed to address: 'Accordingly, it

[24] [2004] NZFLR 467.
[25] Para 52.
[26] [2005] 2 NZLR 696, paras 47–48.

seems sensible to apply the serious injustice test in such a way as to facilitate the making of claims in such circumstances.' The result of *Whyman* is that the balance has swung markedly in the opposite direction from that in *Kinniburgh*. While the Court of Appeal was not prescriptive and refused to define 'serious injustice', the path for personal representatives is greatly eased and as a result beneficiaries and family members stand a much greater chance of success than Heath J had foreshadowed. It may not be going too far to suggest that leave should be granted whenever there is a person, typically one of the deceased's children, waiting in the wings with a seemingly legitimate claim to a share of the estate. The facts of *Whyman* itself illustrate this par excellence. The battle was essentially between the deceased's de facto partner and his minor children who were living with his divorced wife. His properties were owned jointly with the de facto partner and, in the absence of relationship property proceedings, went to her as the survivor. He had cancelled a life insurance policy designed to benefit the children, apparently because of difficulties over access to the children, and thus the estate was 'largely devoid of assets'. The High Court had held that the situation was not one of intolerable injustice and refused leave, a decision reversed on appeal.

To summarise, the extension of the 1976 Act to widowed parties harmonises the law and removes the final vestiges of the pre-1976 legislation. In this sense, change was inevitable. However, the law has added complexity to the winding up of estates. Executors have in the past needed to be mindful of possible claims under the 1963 Act as well as family protection and testamentary promises claims. This has become a little more acute with the 2001 amendments, but, while the serious injustice barrier placed before personal representatives has not helped, the Court of Appeal has made it much more easily crossed.

IV CHANGES TO THE CLASSIFICATION AND DIVISION RULES

Sections 8–10 of the Property (Relationships) Act 1976 set out with some complexity the rules for determining what falls into the pool of relationship property that is available for division. Subject to some exceptions, relationship property is divided equally. In addition, the court has power to make come compensatory adjustments, for example in relation to trusts and companies and where there has been economic disparity (discussed later).

The 2001 reforms made relatively minor changes to the classification rules. For example, superannuation schemes (ie retirement packages) were relationship property even with respect to contributions made after the parties separated. This was changed so that the value of the scheme is restricted to that which is attributable to the marriage, civil union or relationship.[27]

[27] Property (Relationships) Act 1976, s 8(1)(i).

Another change relates to the possible conversion of separate property into relationship property. This process can be vital in assuring some parties of a fair share of the property. Property acquired before cohabitation will usually be the person's separate property but in some cases it may be a core asset like a farm or a business, which over the years the parties treat effectively as a joint enterprise. Where this happens, it would be unfair for the non-owner to miss out on a share, so the 1976 Act has from the beginning had a provision whereby the increase in separate property that is attributable to the application of relationship property or to the actions of the other party becomes relationship property.[28] This provision has throughout the Act's history given rise to considerable litigation, primarily revolving around the effect of the 'actions' of the other party. What evidence will suffice for the provision to kick in? What level of causation is necessary? How much of the increase in value is converted to relationship property? As a generalisation, prior to the 2001 changes, the courts had slowly been liberalising their interpretation of the provision in favour of the non-owner, which usually meant the wife.[29] Even where the non-owner was unsuccessful, the court could award compensation for 'sustaining' separate property under s 17, although the amount of compensation was discretionary and therefore rather unpredictable.[30] The changes in 2001 cut both ways. What was s 9(3) became a new s 9A. On the one hand, the scope of s 9A was widened by allowing actions which not only directly but also indirectly caused an increase in value of the separate property to be taken into account. On the other hand, the outcome for the non-owner was restricted because the division of the increase in value is now not on the basis of equality but according to contributions to the increase, which for the non-owner is likely to be far less than 50 per cent.

The leading case on s 9A is the Court of Appeal decision in *Nation v Nation*.[31] The facts were rather complex and complicated by the use of trusts. The Nations had been married for 28 years and had three grown-up children. They were farmers and worked a farm that had been in the husband's family. In 1978, several years into the marriage, the husband bought half the farm from his grandfather's estate and as an ordinary acquisition made during the marriage it was relationship property. The other half of the farm had been owned by an old family trust, which was wound up in 1990 with the result that the husband acquired the other half of the trust. As the second half was received in the husband's capacity as a beneficiary under a trust set up by a third party, it was his separate property by virtue of s 10(1)(a)(iv). In 1999, one year before the parties separated, the husband transferred the farm into a new trust that he set up, financed largely by a loan back to him. The law relating to whether the courts can reach property transferred into a trust in this way is discussed in the next part. The focus for now is on the debt owed by the trust to Mr Nation. It was accepted that one-half of the loan was relationship property because it represented the half acquired in 1978 which had been relationship property.

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[28] See the original s 9(3) of the Matrimonial Property Act 1976.
[29] The leading case is *Hight v Hight* [1997] 3 NZLR 396 (Court of Appeal).
[30] The leading case is *French v French* [1988] 1 NZLR 62 (Court of Appeal).
[31] [2005] 3 NZLR 46; [2005] NZFLR 103.

The question was whether Mrs Nation could claim any interest in the other half by reason of her efforts as a farmer's wife over many years. Property values had increased markedly over the years. In 1978 the half that the husband acquired was worth NZ$163,719. A valuation in 2002 valued the whole of the farm at NZ$1,725,000, or NZ$862,500 for one-half. Mrs Nation relied on s 9A but her argument failed.

The Court of Appeal's interpretation of s 9A was a liberal one. The Court accepted that the legislative changes were 'significant' and importantly stated 'that the Court should look at matters in the round and not take an overly technical approach'.[32] The addition of 'indirect' actions was seen 'as a substantive change' but nevertheless an onus of proof remained on the non-owning party to show a causal connection that is more than trivial between the actions and the increase in value. The Court largely repeated its earlier comment that 'matters must be looked at in totality'.[33]

In view of all this, which sounds very good for a farmer's wife like Mrs Nation, it is somewhat ironical that she lost when the law was applied to the facts. In the High Court, a bench of two judges had considered the wife's actions over the period 1978 until 2000 when parties separated. The earlier Court of Appeal decision in *Hight v Hight*, mentioned above, had accepted that contributions of a domestic character could be causative of an increase in value, let alone activities on the farm itself. The addition of 'indirect' actions surely reinforces this even further. The High Court judges found for the wife. However, the half of the farm in question was devolved to the husband on the wind-up of the trust only in 1990. The Court of Appeal leapt on this fact and in considering actions prior to 1990 the High Court had made a mistake. The High Court should have considered the period 1990–2000, not 1978–2000, and there was a fatal gap in the evidence for the former period. The Court of Appeal held that actions pre-ownership, ie pre-1990, could not be taken into account on an anticipatory basis and therefore the wife had not satisfied the onus on her to show that her actions had effected an increase in value. The appellate court also rejected another potentially cunning argument, that the husband actually had an interest in the trust from a much earlier date, either because he was a discretionary beneficiary under the trust or because his contributions on the farm created a constructive trust over the formal trust. The first was declined as a matter of law because a discretionary beneficiary has no legal or equitable interest in a trust's assets until the trustees make a distribution and the second because of a lack of evidence.

The result of the Court of Appeal's decision was that the wife had no interest as such in the second half of the farm, ie that half which was the husband's separate property, now represented in the debt owed by the trust. After further deliberation, the Court of Appeal granted her $35,000 under s 17 for helping to sustain the farm, but this is far less than a likely interest under s 9A and hardly

[32] Paras 68–69.
[33] Para 71.

represents her role over many years as a farming wife and mother. Is it wrong to suggest that the Court of Appeal took a technical approach to the question rather than looking at matters in the round or in their totality? Surely looking at matters in the round, as the Court had prescribed, would have led to the conclusion that the wife had played a considerable part in the farming enterprise, certainly sufficient to justify a finding that her actions had indirectly affected the farm's value. The preliminary result would then have meant that the increase in value of the second half of the farm from 1990 would have been relationship property. The Court's more difficult task would then have been to determine each party's contribution to that increase, bearing in mind that a good part of the increase would have been because of inflation and rising land prices.

Another case further illustrates what might be regarded as a mean-spirited approach to s 9A. *Vowles v Vowles*[34] was similar in many respects to *Nation* but simpler. Again there was a family farm. The marriage had lasted from 1974 until 1995 and there were three children. The farm was the husband's separate property because he owned it when the marriage took place. At that date it was worth $91,000 but now $1,625,000. Under s 12, the wife was entitled to a share of the farmhouse, the so-called 'homestead', but even after deducting a notional figure for this, the farm was worth over $1.3m. An expert was used to value the wife's contribution to the farm and it was concluded that this amounted to no more than $10,000, described by the Family Court judge as 'a trivial contribution' and therefore to be discounted.[35] The judgment refers to various specific activities such as fencing and appears not to have taken into account the indirect effect of domestic work. On the other hand, Judge Murfitt also drew attention to 'the colossal effect of inflationary pressures in market forces, which have overwhelmingly driven the extraordinary increase in the value of the farmland'. Add in the fact that the farm was already well established at the date of marriage and it looks rather hard for even the most industrious of farming wives to be able to satisfy the causation test. Nevertheless it is surely unsatisfactory for such a vital asset in the relationship and the cornerstone of the parties' life together not to deliver the wife a significant share of the farm itself. Why should they both not share in the effect of inflation, not simply the husband? The injustice was recognised by an award of $262,000 under s 17 for sustaining the property. The husband had conceded that an award should be made but disputed the amount. In the end, the judge decided that, in order to avoid 'sabotaging' the concept of separate property, it was not appropriate to make an award which had the effect of dividing the separate property equally. Instead, he awarded $262,000, which was approximately 20 per cent of the capital gain and recognition of a contribution of $13,000 per annum during the marriage.

Apart from the rules just discussed that relate primarily to classification, the 2001 amendments also made changes to the basic division rules. Prior to these

[34] Unreported, Family Court, Palmerston North FAM-2005-054-000401, 8 December 2006.
[35] Paras 33–34.

amendments, the house and chattels were divided equally unless there were extraordinary circumstances that rendered equal division 'repugnant to justice'. Another exception arose where the marriage was one of short duration, 3 years' cohabitation or less. Other matrimonial property was divided equally but this could be departed from if one of the parties could show a clearly greater contribution to the marriage partnership – a decidedly easier test to satisfy than the exceptions that applied to the house and chattels. The 2001 amendments were radical, removing the exception that applied to the other property. Now, all relationship property is treated the same: equal division applies unless there are extraordinary circumstances or unless cohabitation has been of short duration.[36] Given that the new legislation makes it harder to avoid equal division, it is not surprising that litigants tested the waters to see if the remaining exceptions could avail them. The extraordinary circumstances exception is the principal one.[37] As already pointed out, early in the history of the 1976 Act, the Court of Appeal had indicated that this was a stringent test and thus to be satisfied only rarely.[38] One Family Court judge thought that, with extraordinary circumstances now applying to all relationship property, it was not as limited or restricted as before.[39] However, any suggestion of a softening of approach was thoroughly dampened by Priestley J in the High Court decision of *de Malmanche v de Malmanche*,[40] when he said that the policy remained unchanged and that the substantive thrust of the exception is the same as before. The only change is that it applies to a wider range of relationships than traditional marriages and a wider range of property. There has been no serious challenge to the position that Priestley J advanced.

V TRUSTS AND COMPANIES

The use of family trusts is very widespread in New Zealand both for family, business and professional reasons. Traditionally farms have been placed in the name of a trust and it has also been a useful way for running a professional practice but ordinary people have also established trusts in the belief that they offer more security, for example, for their children. At one stage trusts were a useful device to escape estate duties, the tax paid on estates after someone died, but these duties were abolished in the early 1990s. Trusts, however, continue to appear attractive, one reason being to minimise the effect of asset testing on the senior citizens who seek state help when they enter rest homes. Trusts can also serve other purposes, such as protection against creditors and avoidance of the relationship property division rules. The latter may in some instances be mischievous but may also be a way of ensuring that children from an earlier

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36 This ignores other ways in which equal division is upset, such as ss 9A and 17, discussed above, and compensation for economic disparity, discussed below.

37 Property (Relationships) Act 1976, s 13. Prior to the 2001 amendments, it was found in s 14 of the Matrimonial Property Act 1976.

38 Eg *Martin v Martin* [1979] 1 NZLR 97.

39 *P v P [relationship property]* (2002) 22 FRNZ 380, para 59 per Judge Inglis QC.

40 [2002] 2 NZLR 838.

relationship are provided for. Similar purposes can also apply to family companies, although these are usually associated with a business because of the profit motive.

One of the critical consequences of property being held by a trust or company is that it is not owned by one of the parties on a relationship breakdown. Prima facie therefore it is not available for division under the Property (Relationships) Act 1976. This can greatly disadvantage the party who does not get the benefit of the trust or company. Indeed in some cases the parties may own very little relationship property even though in a broader sense they are wealthy and have enjoyed a high standard of living. It is not surprising therefore that attempts have been made to reach property held by trusts and companies, the success of which has been spasmodic. The chances are now far better because of the considerable boost given by the 2001 reforms, which contains provisions, ss 44A–44F, enabling the courts to make compensatory adjustments where relationship property has been shifted to a trust or company. However, except in one respect, the new provisions do not allow the courts to reach the trust itself. The exception applies only in residual situations, where there is insufficient other relationship or separate property to pay compensation, and enables the courts to make orders only in relation to the income from the trust and not from its capital. There is no equivalent for companies. The powers are therefore somewhat restrictive.

The new provisions have generated quite a bit of litigation, without however preventing the use of other strategies to try and attack trusts. A Family Court judgment illustrates rather neatly the kinds of arguments that may be raised. *Olliver v Sparkes*[41] involved a de facto couple who separated after 10 years. The dispute concerned the proceeds of sale of the family home that had been owned by a family trust. Both parties and their respective children were beneficiaries under the trust. The woman claimed an interest in the proceeds, which the man and the trustees resisted.

The woman's first line of attack was to argue that the trust was a sham, being the man's alter ego. Recent judgments had supported this approach[42] and, after considering the evidence, Judge O'Dwyer concluded that the trust was in reality regarded as if it was under the man's sole control. She noted that the trustees did not treat the woman as an equal primary beneficiary as the man and were not acting independently or even-handedly but at the man's behest. This sounds very propitious for the woman, but the judge held that, even if the trust was the man's alter ego, it did not necessarily render the trust void and therefore make the property available under the Property (Relationships) Act. According to the judge, a trust will be set aside if it was a sham from the beginning or has developed into a sham over time because of an intention to mislead, but such an intention must be shared by all the parties including the trustees. The trust

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41 Unreported, Dunedin Family Court, FAM-2004-002-000080, 12 December 2006, per Judge O'Dwyer.

42 Especially *Prime v Hardie* [2003] NZFLR 481 and *Glass v Hughey* [2003] NZFLR 865, both High Court decisions.

in *Olliver v Sparkes* was not one that was a sham at the beginning and the difficulty with the alternative analysis was that there was nothing to suggest that the trustees had the necessary common intention to mislead.

The next argument was that the man's interest as a beneficiary under the trust could be considered property capable of being divided. It is now firmly established that a discretionary beneficiary does not possess a property interest in the trust.[43] The man's position was however different because he was also a final or residual beneficiary, who benefited when the trust was finally to be wound up and the assets distributed. Judge O'Dwyer held that a final beneficiary may hold a property interest but: (a) it was the man's separate property as he had acquired the interest because he was a beneficiary under a trust;[44] and (b) the interest was incapable of being quantified, presumably because it was dependent upon too many future contingencies.

The woman next attempted to use s 44 of the Act, a provision that existed in the original form of the Act and enables the court to set dispositions aside that have been made in order to defeat a person's claim or rights under the Act. Judge O'Dwyer accepted that s 44 could be used even where the vendor of property transferred it directly to the trust, and also accepted that an intention to defeat could be found even where the man at the same time intended to provide for the woman in other ways. However, the sticking point was a restriction on using s 44 where the third party from whom relief is sought has acted in good faith and for valuable consideration. In this instance, the trustees who were professionals did act in this way and the judge accepted that they would possibly have seen the woman's position as a discretionary beneficiary as offering her sufficient security.

The woman's argument under the new provisions in the Act was however successful. Judge O'Dwyer was prepared to grant compensation under s 44C because relationship property in the form of an initial deposit and then mortgage payments had been disposed of to the trust. The claim that she would otherwise have had to a half share of the family home was defeated and the judge was happy to calculate the amount of compensation at 33 per cent of the proceeds of the sale of the property, which equated to $75,000. Yet the woman faced another challenge: there was virtually no relationship property and the man submitted that he had no separate property out of which the compensation could be paid. Section 44C empowers the court to order a sum of money or the transfer of property by way of compensation, whether from relationship property or separate property, but can it grant compensation in isolation like an ordinary civil remedy? The judge got round this in two ways: first, she thought that the trust must owe the man a debt, even though there was

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[43] Eg the Court of Appeal decisions in *Hunt v Muollo* [2003] 2 NZLR 322 and *Johns v Johns* [2004] 3 NZLR 202.

[44] Property (Relationships) Act 1976, s 10(1)(a)(iv), but the trust must be one that was settled by a third party and it appears from the judgment that the man was the settlor.

no record of such a debt, and this debt would be his separate property;[45] and secondly, she thought that the man could raise capital himself in order to pay compensation. The latter appears to be stretching the literal words of s 44C but the broader merits of the point are hard to fault.

Finally, Judge O'Dwyer advanced an alternative route to ensure that the woman obtained some relief. It will be recalled that the judge had found that the trust was the man's alter ego. She also held that in this situation 'the Court can impose a constructive trust over the express trust to recognise and compensate the applicant for her contributions to the trust property',[46] but only if there are no satisfactory statutory remedies. The reason why statutory remedies must be considered first is that the Act is a code that supersedes other legal and equitable claims. As the judge had awarded the woman compensation under the Act for the disposal of relationship property to the trust, a remedy by way of constructive trust was neither necessary nor proper. However, if she had failed to find for the woman under the Act, an equitable remedy against the trust, in the form of a trust over a trust, would have been legally possible: the remedy would have been against a third party and therefore would not breach the concept of the Act being a code. In the end and in the alternative, the judge discussed the possibility of a constructive trust which is based on similar legal principles to those that applied to de facto relationship claims before the 2001 reforms brought such relationships under the umbrella of the 1976 Act. These turn in particular upon contributions to the property giving rise to reasonable expectations that the non-titleholder would have a share in the property.[47] On the facts, the judge held that the woman had satisfied these criteria and would have awarded her $75,000, ie the very same amount she came up with as compensation under s 44C.

We have lingered over *Olliver v Sparkes* because it demonstrates very well the various legal ramifications of the use of trusts in a family context. Similar issues may arise where a family company is involved but the greater proportion of cases that have come before the courts have been about trusts. Other issues concerning companies tend to relate to shareholding and the classification of shares as relationship or separate property, issues that arose in any event under the original 1976 Act. *Olliver v Sparkes* may suggest that the new provisions in ss 44A–44F have proven successful in dealing with the potential injustices of trusts and companies. However, these sections have their limitations, most notably in relation to the ability directly to attack the trust or company itself. Furthermore, the early track record of the sections was equivocal, only to be rescued by the Court of Appeal, the history of which we now turn to.

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45 In fact, one might ask why such a debt is not relationship property to which the woman would also have some entitlement, because it was generated during the course of the relationship.

46 Para 67.

47 See especially *Gillies v Keogh* [1989] 3 NZLR 327 and *Lankow v Rose* [1995] 1 NZLR 272 (both Court of Appeal).

One Family Court decision, *P v P*,[48] adopted a very restrictive approach to s 44C. In order to understand this, it is necessary to explain a little more how the typical family trust operates. A couple may establish a trust and transfer an item of property such as the family home into the trust's name. This cannot be a straight out gift to the trust because any gift over $27,000 per annum attracts gift duty, a tax on gratuitous financial transactions. So, the property will be sold to the trust, with a debt then owed back to the settlors by the trust. The debt can be slowly forgiven over a period of time taking advantage of the $27,000 annual exemption from gift duty. Where, for example, the family home is transferred to a trust, the consequential debt will be relationship property and be subject to division between the parties. In this sense, there has been no defeat of any claim under the 1976 Act. However, the value of the debt remains the same or is in fact reduced by the gifting regime, while the value of the asset now in the name of the trust will increase with the market. One of the parties, usually the wife or female partner, will miss out on the capital increase and to this extent will be able to claim against less property under the 1976 Act than would otherwise have been the case. The judge in *P v P* made two rulings that, had they been later upheld, would have undermined the operation of s 44C. First, he held that some improper action had to be shown before it could be said that the disposition had the effect of defeating the other party's claim or rights under the Act. Secondly, he held that the date for considering the disposition was the date of the disposition, not the date of hearing, thus excluding subsequent events including changes in capital value from consideration. These two rulings would make it very hard to obtain compensation because only in rare instances would it be possible to show something improper about the transactions with a trust and because at the date of disposition, if there was a debt back to the settlors, nothing had been lost.

In peremptory fashion, the Court of Appeal rejected both these rulings. The case of *Nation v Nation*[49] has already been discussed in the context of the conversion of separate property into relationship property. It will be recalled that the farm in that case had been transferred to a trust (financed partly by a debt back and partly by the trust's raising a mortgage) and the Court of Appeal determined that it was a 'paradigm' case for s 44C. The judges stated that '[t]he meaning of the word "defeat" is mechanical; it does not turn on bad faith or an improper motive',[50] and '[a]s to the date at which the effect of the disposition is to be assessed, in our view that should be as at the date of hearing'.[51] The value of the farm had increased enormously from $991,812 at the date of disposition to the trust to $1,725,500 at the date of hearing, but the judges decided not to fix the amount of compensation, because the husband ought to have the opportunity to offer evidence of post-separation events that may affect what would be an appropriate amount. Nevertheless, the Court of Appeal signalled

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48 [2003] NZFLR 925. The case was appealed to the High Court which, a little surprisingly given the intervening decision of the Court of Appeal in *Nation*, upheld the negative result with respect to s 44C: *P v P* [2005] NZFLR 689.

49 [2005] 3 NZLR 46; [2005] NZFLR 103.

50 Para 146.

51 Para 150.

that s 44C is 'a new and important part of the relationship property reforms in 2001',[52] which, by implication, should be construed liberally.

VI MAORI AND PROPERTY

One of the features of New Zealand law over the past two decades has been the impact of the perspective of the indigenous people, the Maori. This is felt more particularly in matters relating to children than property but not entirely so. The traditional Maori attitude to property is more communal than individualist, and so traditional Maori land is exempt from the property division rules of the 1976 Act. However, in relation to all other property there have been few concessions to the Maori position. As a general rule, a couple of whom one or both are Maori will on separation divide their property according to the same rules as everyone else.

There is one exception to this, brought in by the 2001 reforms. Family chattels are divided equally, no matter what their origin is. They include a wide range of items including cars and pets, not simply furniture. However, the definition was amended in 2001 to exclude 'heirlooms' and 'taonga'.[53] Neither of these words is defined and while 'heirlooms' will be a familiar concept to readers, 'taonga' will not be. The latter word is usually translated into English as 'treasures' and may relate especially to precious Maori artefacts or, like heirlooms, items that have been passed down over time. However, the word has a much wider meaning than this and is, for example, used of children.

The reference to 'taonga' has not caused great difficulty but was explored in one interesting case where neither party was Maori. The issue in *Perry v West*[54] concerned a painting in the wife's possession by one of New Zealand's greatest artists, Colin McCahon. The husband had bought the painting in question shortly before the parties' marriage, using money received as a student prize. On separation, the parties had in fact drawn lots for two McCahon paintings, the husband retaining the other one. He now claimed that the paintings were not family chattels because they fell within the category of 'taonga'. Laurenson J rejected the husband's argument, but on the facts rather than the law. As a matter of law, the judge accepted that 'taonga' were not limited to Maori items but could be extended to property of New Zealanders of other ethnicities. This is a little surprising for one would think that the deliberate use by the legislature of a Maori word would indicate a specialised Maori meaning of special significance to the collective Maori population rather than to non-Maori.

Laurenson J also thought that an item could be 'taonga' through having special significance, attaching for a variety of reasons, for example because it is 'sacred and inviolate' at one extreme to simply being 'deserving of respect' at the other.

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52 Para 143.
53 Property (Relationships) Act 1976, s 2.
54 [2004] NZFLR 515.

It could be of special significance to the individual concerned or because its significance was ascribed by others (eg someone who had made a gift of the item). The distinction is important because it was suggested that the husband intended to sell the painting if it came back to him. Laurenson J took the view that in the second category:[55]

> '. . . the nature of the gift may be such that it would be quite inimical to the recipient's receipt and possession of the object for it even to be sold for a monetary return. In the first case however, if an individual, having acquired the object without reference to others, simply because it was of special significance to him or her, then decided to sell it, then that would not to my mind, necessarily indicate that the object had not, to that point, been regarded as an object of taonga to the owner.'

On the facts, Laurenson J thought that the painting may have been taonga when originally bought but subsequent dealings indicated that it had lost any such quality. Drawing lots for the painting and confirming this in a subsequent agreement were actions which counted against the painting's being taonga to the husband. It was therefore a family chattel, falling within the pool of property to be divided. While this makes sense from the parties' subjective point of view, objectively a McCahon painting, like a Rembrandt or a Constable, surely has special significance as ascribed by others and should thus be regarded as a treasure or taonga.

VII ECONOMIC DISPARITY

Many of the changes brought in by the 2001 reforms were designed to reinforce the core principles of the 1976 Act, namely, that domestic partners should enjoy equally the fruits of the relationship. In this sense, deferred community, which is sometimes used to describe the New Zealand regime and which indicates that the enforced common property rule is deferred until separation, is still definitely the prevalent concept driving the legislation.

However, contrariwise, the Act has gained a new principle accompanying the emphasis on equality, viz regard for 'the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union or from the ending' of their association.[56] To further this goal Parliament gave the courts power to award compensation based on economic disparity between the parties so long as it can be sheeted home to the time when they lived together.[57] Although the statutory wording sets out certain criteria before the power can be exercised, ultimately the award of compensation is a matter of discretion for the court and the amount of any compensation is a matter on which there is no statutory guidance at all. So, in a scheme that has extensively defined rules for the equal division of relationship or community property on separation or

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[55] Para 37.
[56] Property (Relationships) Act 1976, s 1N(d).
[57] Property (Relationships) Act 1976, ss 15 and 15A.

death (and sometimes also during the course of cohabitation), it is somewhat incongruous to find a far-reaching discretion that has the effect of undoing the otherwise carefully crafted structure. Oddly, economic disparity compensation intentionally leads to unequal division in an equal division regime. Indeed, one judge has even foreshadowed that in the right circumstances the effect of a compensation award may be to reduce the other party's share of relationship property to zero, a result that is surely totally contrary to the Act's aims.[58]

On the other hand, there can be little doubt that a significant enough number of relationships end with one party in a healthier financial position than the other, usually because of their better income-earning capacity. The 1990's Court of Appeal decision in *Z v Z (No 2)*[59] illustrates this and was part of the impetus for the new economic disparity provisions. A marriage ended after 28 years, the wife having spent most of her time supporting her husband's career and, by the time of the hearing, not being in a position to embark on paid employment. Her husband had been a successful accountant earning over NZ$300,000 per annum (approximately US$210,000) and thus in a vastly better position than the wife to maintain himself. The Court of Appeal rejected the notion that earning capacity could itself be an item of property capable of division, but, obviously highly sympathetic to the wife's position as an older woman without employment opportunities, directed its guns on the husband's professional partnership interests: although his goodwill was rated at zero, the Court of Appeal held that the husband had a bundle of rights including super-profits that could be valued and divided. For this latter purpose the case was returned to the lower courts but the parties settled before any further hearing on valuation took place. As an aside, the Court of Appeal in another case, *M v B*[60] to be discussed again shortly and involving a partner in a law firm, reversed a High Court ruling that there were no super-profits to be valued, but, in so doing, the three judges adopted totally contrasting approaches to the valuation exercise. Although they agreed on the same figure, one judge drew a comparison between the husband and a person practising at the bar, another used rough and ready rules of thumb, while a third went for 'quite sophisticated actuarial techniques'.[61] Compensation for economic disparity, had the law existed at the time, could have been a much more straightforward way of addressing Mrs Z's situation and no doubt she is the classic kind of person for whom such compensation is designed. However, we should note that the new provisions on economic disparity do not remove the precedent value of *Z v Z (No 2)*, as indeed *M v B* exemplifies: in that case the wife obtained $75,000 compensation in addition to half of the super-profits.[62]

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58 *B v B* [2004] NZFLR 633, para 103 per Judge Ullrich QC.

59 [1997] 2 NZLR 258.

60 [2006] 3 NZLR 660. See *B v M* [2005] NZFLR 730 for the judgment of Allan J in the High Court.

61 Para 241.

62 It is worth noting as well that the Court of Appeal's decision to award the wife half the super-profits did not affect the quantum of economic disparity, yet surely ought to have been taken into account in determining her financial position.

So, there may be justification for the policy but its implementation is problematic. In addition to the doubt about the awkward interposition of economic disparity powers into a deferred community regime (the point is far less valid in the more discretionary regimes found, for example, in Australia and England), there are some other underlying problems. First, the Court of Appeal in *Nation v Nation*[63] (discussed above) identified a particular difficulty about the goal of the economic disparity provisions:

> 'In particular, there is the conceptual problem whether the provisions are properly to be regarded as being directed to economic equalisation in the larger sense of that term, on the breakdown of the relationship; or whether they are to be regarded as being directed to the loss of opportunity (by way of earning capacity) that one party has had to embrace by reason of the division of functions in the relationship. There are then the consequential problems of the appropriate ways of calculating awards.'

The first theory echoes the idea that formal equal division of property does not necessarily mean equality in reality. Thus, the court may instead award formal unequal division in order to achieve equality or equalisation on a broader basis, ie accepting that the higher income-earner's advantageous position owes something to the period of cohabitation with the other party. If this is the aim, the court ought to be very interested in what unequal percentages of the property each party should end up with, but there is an inevitable air of speculation in determining whether broader equalisation has been obtained and whether it is fair overall. One of the initial objections is that the advantaged party may be in that position not so much because of the marriage, civil union or de facto relationship but because of innate abilities, qualifications gained earlier in life or sheer luck.

The second theory in the quote from *Nation* focuses less on the gain made by the higher income-earner and far more on the loss suffered by the lower income-earner. This person may have given up a career in order to support the other party, or in order to care for children, or for some other reason associated with domestic life. The loss of career opportunities should be compensated for, so that the party can be put roughly in the position that they would have been in had they not given up the career. This sounds promising and sits well with the concept of compensation. However, there are difficulties here as well. As with the first theory, there is a great deal of speculation involved. How do we know whether the party would have continued with the career? With what success? And with what return? Furthermore, if we are to take losses into account, why not the benefits of the relationship?[64] While out of paid work, the party concerned has contributed in other ways to the relationship but has received tangible financial support, which should surely be factored in. But how is this to be measured? If at the end of this calculation the party appears to

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63 [2005] 3 NZLR 46; [2005] NZFLR 103, para 162.

64 This point is picked up in particular by Judge Clarkson in *X v X [Economic disparity]* [2006] NZFLR 361, where she declined a claim for economic disparity on a number of grounds (discussed later).

have suffered a considerable loss, should it matter what its effect on the division of property is? Under s 15 of the Act, by far the most commonly used of the two economic disparity sections, compensation can be awarded only out of relationship property. But if someone can show a loss at the hands of the ex-partner, why should that loss be restricted? The concept of compensation for loss in the civil jurisdiction does not depend at all on whether the liable party can afford to pay. There is one other issue: if we concentrate on loss, where does that leave the party who can prove little or no loss, e g the person who had no career to give up? That person could be like Mrs Z above, meriting some assistance and getting it under the equalisation approach but not under the loss one.

Parliament failed to address these rather complex and formidable problems. However, it also failed to tackle another fundamental question that the plight of a person like Mrs Z throws up. Her real need after taking out her share of the capital is how she will live from day to day. Economic disparity based on future earnings is really about future income sharing rather than property division. The inclusion of economic disparity compensation into a deferred community property regime simply obfuscates capital and income. New Zealand's maintenance law, found in the Family Proceedings Act 1980, is drafted in a very confused way but its emphasis is on satisfying income needs and aiming for self-sufficiency. While the criteria in the 1980 Act arguably should be widened and clarified, they at least provide a reasonably coherent basis for income sharing. The economic disparity provisions mean that there is duplication, with the further result that the courts have been in dispute over which comes first: maintenance or economic disparity compensation? An award of one ought to affect the award of the other. Court cases have been inconsistent on this[65] and the Court of Appeal in *M v B*[66] has not resolved the issue. Furthermore, the judges in *M v B* expressed very different views about the nature of economic disparity, Robertson J describing it as the 'functional equivalent of a lump sum for future maintenance', William Young P denying this.[67]

Apart from these concerns about the theory of economic disparity, what about the practical implementation of the new law? The elements of an economic disparity claim are as follows:

(1) a significant difference in likely income;

(2) a significant difference in likely living standards;

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65 *P v P* [2005] NZFLR 689 held that economic disparity had to be calculated first, *B v M* [2005] NZFLR 730 the opposite. In *de Malmanche v de Malmanche* [2002] 2 NZLR 838 Priestley J expressed the view that the court ought to assess whether maintenance and child support would be sufficient alternatives to economic disparity compensation, implying that they should be calculated independently of economic disparity.

66 [2006] 3 NZLR 660.

67 Paras 272 and 191.

(3) these differences are because of the effects of the division of functions while the parties lived together;

(4) the court's discretion to grant compensation, having regard to each parties' likely earning capacity, childcare responsibilities and 'any other relevant circumstances';

(5) the amount of compensation;

(6) the form of the order, either a sum of money or the transfer of property.

The first three elements give the court jurisdiction to make an award and must be met. The remaining elements give the court a large measure of discretion. There are two sections that contain these powers: s 15, which is almost invariably used, is simply about economic disparity; s 15A relates to the situation where there is economic disparity coupled with an increase in the value of the higher income earner's separate property, brought about by that party's actions. The author is not aware of any case where s 15A has been successfully invoked but it has the advantage over s 15 that an order can be made with respect to separate property, not only relationship property.

It will be evident that all the elements listed above contain ample potential for argument. Not surprisingly, there has been a stream of cases before the courts with varying success rates. An analysis of judgments reported over the years 2002–06 in the New Zealand Family Law Reports reveals that seven claims have been successful, nine unsuccessful, and one returned to the Family Court for more evidence. This suggests something like a 50/50 chance of success, but it is only the tip of the iceberg, as the author has seen many unreported judgments where the trend is not dissimilar. Few awards are for more than NZ$100,000 (approximately US$70,000) with at least one as low as NZ$5,000. Claims are often much higher. In one unsuccessful case, the wife had sought over $1.7m. Anecdotally, many property disputes are now settled with an economic disparity component contained within them. In other words, legal representatives are (rightly) advising their clients to consider economic disparity claims as part of the negotiating process.

Many of the unsuccessful claims fail at the jurisdictional hurdles. The decision of Family Court judge, Judge Clarkson, in *X v X [Economic disparity]*[68] typifies this, although it can be classified as a 'big money' case in New Zealand terms and in that sense a little atypical. The parties both completed degrees before their marriage and then the husband went to Harvard. His career burgeoned and he soon earned four times as much as his wife. Seven years after the marriage took place the wife gave up work and looked after the first child, to whom was added a second. The parties separated after roughly 20 years together. The judgment was mainly about the wife's claim for economic disparity but it should be noted that she was entitled to a sizeable amount of

[68] [2006] NZFLR 361.

relationship property. In addition, before dealing with economic disparity, Judge Clarkson considered a long-term incentive payment that Mr X received amounting to Aust$1,383,362 and she held that, subject to some adjustments, two-thirds of this payment could be related to the marriage and be classified as relationship property. Although the precise worth of the relationship property component was not determined in the judgment, we can be sure that it was substantial and was to the wife's great advantage.

Judge Clarkson held that there was no jurisdiction to award compensation in this case. At first sight, there appears to be a massive difference in the parties' income positions, as the wife was earning $10,000 with the potential to rise to $65,000 while the husband, the judge found, was likely to earn $180,000 from company management and directorships. However, this left out of account earnings from investments, including the investment of relationship property following its division. After doing this calculation, the wife's full income potential was $290,000 while the husband's was $355,000. Although the differential now looks far less, the judge still accepted that there was a significant disparity. The judge then had to consider whether there was also a significant disparity in living standards, for a disparity in both income and living standards must occur. Her Honour examined various aspects of the parties' situation, comparing homes, cars, the influence of new partners (Mr X had re-partnered but Mrs X had not), Mrs X's use of a beach house, Mr X's greater overseas travel (not unimportant in an island nation like New Zealand) and the impact of the children's expenses, and she concluded that taking an overall view there was no significant disparity. She noted that at a lower level of earning and living standards, disparities were likely to occur together, but this was not necessarily so when there were very high standards of living.

Although she declined jurisdiction for the reason just outlined, Judge Clarkson offered an alternative reason, namely that if there were significant disparities they could not be accounted for by the division of functions within the marriage, the causation element. She determined that, whatever the initial reasons, the wife had remained largely out of the workforce not out of necessity (in bringing up the children for example) but out of choice. The mutual decision that the wife care for the children was now a 'spent force' in causation terms. Likewise, while the wife had supported the husband to gain his Harvard qualifications, that was a long time ago and the progress of his career now had much more to do with his personal abilities than formal qualification. There were other considerations but enough has been said to show that any disparity can be explained by reasons other than the marriage. This causation element is where numerous economic disparity claims have been upset.

Judge Clarkson then went on, as a further alternative, to consider whether the case was one where the discretion to grant compensation should be exercised, ie even if it were held that there was jurisdiction to make an award, should one be made? She concluded that she would have decided against the wife and in so doing emphasised that she had to consider both the advantages and disadvantages of the marriage. While the husband had the benefits of his

high-paying career and the wife had lost out on the development of hers, the husband had nevertheless had far less time to enjoy his children's early years because of his long work hours and travel away. Furthermore, the wife had enjoyed the enhancement in the husband's earnings and the benefits of this were shared in the form of the relationship property acquired by them.

The judge's rulings in the case meant that she did not have to tackle the intractable issue of determining what the level of compensation should be if it is decided to make an award. In the only Court of Appeal decision to examine this, little was added to the existing jurisprudence and if anything the position was further obscured. *M v B*,[69] mentioned already above, upheld the High Court award of $75,000, even though the wife sought over half a million dollars. One judge thought that the calculation should be a matter of impression and not according to some rote formula.[70] Of course, law determined by impression is inevitably vague and uncertain. Another judge thought that the court needed to spell out how it reached its figure,[71] but a formula represents a major gloss on the words of the statute. The reality is that judges in most cases have relied on specialist evidence and, in some instances, then tested the result by seeing what it does to the respective shares of relationship property. The parties will therefore often bring in their individual actuarial experts, whose approach will tend to be grounded in formulaic terms, but given the nature of the exercise, any approach must incorporate a great deal of speculation: how long will a disparity last, how long can it still be linked back to the marriage, union or relationship, what future unknowns need to be factored in, and so forth? A key question is what is the starting point of any calculation: the financial differential, the increase in earning capacity, the loss in earning capacity? All these point to greater time and cost on the part of experts, lawyers and the courts. Whether the return in terms of justice and fairness justifies the effort is very unclear.

VIII CONCLUSION

The original matrimonial property regime of 1976 ushered in a form of deferred community for New Zealand law. Major changes that were part of the 2001 package of reforms in some senses strengthened the community aspects of the scheme, for instance by provisions relating to trusts and companies and by making it harder to avoid equal division. The community concept was also extended to survivors following the death of one of the parties and to de facto couples, with civil union partners being included following their creation in 2005. However, at the same time, a highly discretionary element was brought into the scheme, the power of the courts to award compensation for economic disparity. From one point of view, such compensation undermines the notion of community because it does not relate to an existing asset and it undermines

[69] [2006] 3 NZLR 660.
[70] Paras 146–147 per Hammond J.
[71] Paras 266 and 271, per Hammond J.

the simplicity of the rule of equal division of community or relationship property. On the other hand, it could be seen as embracing a new vision of community, namely one that reaches beyond property to income-earning potential.

The 2001 package of reforms have been in place for less than 5 years. They are not yet fully bedded in and await definitive judicial rulings. The conclusion at this stage is that they have proven to be a mixed bag. The inclusion of de facto relationships has led to a predictable number of cases that wrestle with the question of whether a 'de facto relationship' existed. This is largely a factual inquiry and insofar as one can discern a trend, it has tended to include rather than exclude relationships. Perhaps one can surmise that the level of litigation is little different from what it would have been had the law not changed and parties had continued to rely on common law and equity remedies. The inclusion of widowed parties has not given rise to vast numbers of cases, but inevitably there are some where family members fight over the deceased's estate. The circumstances when the personal representatives can apply will probably be the principal ongoing area of dispute. Changes have been made to the classification and division rules but the impact of these has not been great in terms of litigation, and the continuing difficulties in converting separate property into relationship property suggest that the law should be changed to ensure that the surplus from the time of cohabitation falls within the pool for division. On the other hand, there has been a solid stream of cases involving trusts. While the new provisions are not perfect and the powers of the court are somewhat cut off at the knees, they do ensure justice for many parties who might otherwise have missed out on a fair and reasonable payment. Little concession has been made to Maori perspectives and, ironically, where that has happened by the exclusion of 'taonga' from the definition of family chattels, the concept has been turned into one available for non-Maori.

Doubtless the most controversial and least satisfactory aspect of the 2001 package is the new discretion in relation to economic disparity. While the policy is understandable, the shape of the law is poorly thought through. It has led to a large number of cases, the outcomes of which have been equivocal. It challenges the underlying structure of the regime and introduces a massive element of uncertainty both for parties and their lawyers and for the courts. A re-think embracing the law of maintenance as well as the economic disparity provisions is essential.

Nigeria

DEVELOPMENTS IN NIGERIAN FAMILY LAW: 2002–06

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Résumé

La dernière contribution au International Annual Survey, en ce qui concerne le droit nigérian, fut celle de l'édition 2003. Depuis ce temps, quelques nouvelles lois fédérales ont été adoptées, dont le *Child Rights Act* de 2003, ainsi que le *Trafficking in Persons (Prohibition) Law Enforcement and Administration Act* de 2003. Nous présentons ici ces deux législations.

Le présent texte traite également de la position du droit islamique à l'égard du mariage, de la dissolution du mariage et du droit des successions. Le droit islamique a toujours fait partie du système juridique pluraliste du Nigeria. Des tribunaux spéciaux, tels les tribunaux Alkali et la Cour d'appel de la Sharia, ont été mis en place afin de connaître des procédures civiles en matière de droit des personnes dans les cas où toutes les parties sont musulmanes.

Finalement, cet article fait état de l'arrêt de principe de la Cour suprême dans l'affaire *Mojekwu v Iwuchukwu (By substitution for Caroline Mgbafor O Mojekwu – deceased)*. Cette décision porte sur le droit testamentaire et met le doigt sur certaines coutumes qui sont discriminatoires à l'égard des femmes.

I INTRODUCTION

The last contribution on developments in Nigerian family law was in the 2003 edition of the Survey.[1] Since then not much has really transpired and or changed in terms of fundamental developments in the area of family law. Within the period under review, a few federal laws were enacted, including the Child Rights Act 2003 and the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003. An overview of these laws is herein presented.

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1 A Bainham (ed), *The International Survey of Family Law 2003 Edition*, (Jordans, 2003) 337–351.

This chapter also presents an overview of the Islamic law position on marriage, dissolution of marriage, inheritance and succession. Islamic law has always been part of Nigeria's plural legal system. Specialist courts such as the Alkali Courts and the Sharia Court of Appeal[2] were created to adjudicate on civil proceedings involving questions of Islamic personal law where all the parties are Muslims.

Finally, this article considers the Supreme Court decision in the landmark case of *Mojekwu v Iwuchukwu (By substitution for Caroline Mgbafor O Mojekwu – deceased)*.[3] The Court of Appeal decision in this case was reviewed in the article of Professor ENU Uzodike.[4]

II CHILD RIGHTS ACT 2003

Nigeria, having signed and ratified the United Nations Convention on the Rights of the Child 1989[5] and other international and regional instruments including the African Charter on the Rights and Welfare of the Child 1990[6] that prescribe the protection of the rights of the child, was under pressure to domesticate these instruments in accordance with the constitution so that they can be made justiciable. Consequently, the Child Rights Act 2003[7] was first drafted in 1993 but it was not until July 2003 that it was adopted and passed into law by the National Assembly.

The Child Rights Act 2003 (CRA) in many respects is modelled on the provisions of the African Charter on the Rights and Welfare of the Child (ACRWC) which in itself was modelled on the provisions of the Convention on the Rights of the Child (CRC). The CRA sets out the rights and responsibilities of the child and provides for a system of child justice administration as well as the care and supervision of the child. The CRA specifically provides:[8]

> '. . . in every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.'

This provision seeks to ensure that in all actions and decisions to be taken in relation to the child only those that serve the best interest of the child are to be taken and or considered. This therefore nullifies the situation where parents or guardians make decisions affecting their children without necessarily considering the best interest of the child. It is submitted that, laudable as this

2 Constitution of the Federal Republic of Nigeria 1999, s 262.
3 (2004) 11 *Nigeria Weekly Law Report* (Pt 883) 197.
4 E Uzodike 'Developments in Nigerian Family Law: 1991–1997' in A Bainham (ed), *The International Survey of Family Law* (Martinus Nijhoff, 1999), 325–344.
5 www.ohchr.org/english/countries/ratification/11.htm.
6 www.africa-union.org/child/home.htm.
7 *Federal Republic of Nigeria Official Gazette* No 116, Vol 90.
8 CRA, s 1.

provision is, it may pose some challenges with respect to its enforcement. One person's construction of what is in the best interests of a child may differ radically from another's, especially when it comes to the upbringing of female children. They may be subjected to harmful practices including early marriage or female genital cutting because a parent or guardian constructs these as being 'good' for the child.[9] As minors, children may not have the capacity to challenge these actions nor avail themselves of the protection of the CRA.

In addition to the rights and responsibilities of the child enumerated in Part II of the CRA, the provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 are incorporated into the CRA.[10] This chapter of the constitution provides for fundamental human rights. Other rights of the child as provided by the CRA include:

- right to survival and development;
- right to a name;
- right to private and family life;
- right to freedom of movement;
- right to freedom from discrimination;
- right to dignity;
- right to leisure, recreation and cultural activities;
- right to health services, right to parental care, protection and maintenance;
- right to free compulsory and universal primary education;
- contractual rights.

The CRA provides for corresponding responsibilities on the part of the child[11] towards family and society, the country and other legally recognised communities, nationally and internationally. The child is expected to, among other things:

- work towards the cohesion of family and community;
- respect parents, superiors and elders at all times and assist them in case of need;

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[9] Cf A An Na'im 'Cultural Transformation and Normative Consensus on the Best Interests of the Child' (1994) 8 IJLFP 62.

[10] CRA, s 3(1),(2).

[11] CRA, s 19.

- serve the Federal Republic of Nigeria by placing his or her physical and intellectual abilities at its service;
- contribute to the moral well-being of the society;
- preserve and strengthen the independence and integrity of the Federal Republic of Nigeria;
- respect the ideals of democracy, freedom, equality, humaneness, honesty and justice for all persons.

The idea of responsibilities of the child is in line with Art 31 of the ACRWC and seeks to respect African culture and tradition.

A very important provision of the CRA is the prohibition of child marriage by fixing the marriageable age at 18 years.[12] This is indeed a welcome development as the issue of child marriage has been a recurrent problem in Nigeria. Early marriage before the age of 16 years is common in different communities in Nigeria. In most of these communities culture forbids a girl from having her first menstrual period in her parents' home.[13] This has affected the child as she is often withdrawn from school and married off at a very tender age. The statistics of female child enrolment in school has been dismally poor.[14] Overall, the female child is discriminated against in terms of access to educational opportunities in preference to the male child. She carries a heavy burden of farm work as well as housework.[15] All these scuttle her chances of acquiring education and or skills needed for survival. It is hoped that this provision will achieve the desired result of eliminating child marriage.

The CRA passed by the National Assembly can only apply to the Federal Capital Territory until the different state legislatures adopt and enact the CRA in their respective states. This has ensured that children in some of the 36 states excluding the Federal Capital Territory cannot yet celebrate. As at 2006, less than ten states have enacted the CRA in their states. Consequently, no court can prosecute violators of the CRA in the states where the CRA has not been enacted.

A crucial issue that has been most contentious and has impeded the rapid enactment of the CRA, especially in the northern states, which are predominantly Muslim, has been the issue of marriageable age being pegged at 18 years. The Muslim community has always protested this and many other provisions of the CRA. They have argued that some of the cardinal provisions

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12 CRA, s 21.

13 O Agboghoroma and E Emuveyan 'Reproductive Health Problems in Nigeria: The Role of adolescent Sexuality and Traditional/Cultural practices' (1998) 8 *Nigerian Quarterly Journal of Hospital Medicine*, 27–33.

14 www.unicef.org/infobycountry/nigeria_statistics.html#26.

15 S Anyanwu 'The Girl-child: Problems and Survival in the Nigerian Context' (1995, March–June) 14(1–2) *Scandinavian Journal of Development Alternatives,* 85–105.

of the CRA are alien to African culture and Islam. The Supreme Council for Sarah in Nigeria was quoted[16] as saying that any law that seeks to give equal rights to male and female children in inheritance or seeks to give an illegitimate child the same rights as the legitimate one, and establish a court (family court) that ousts the jurisdiction of Shariah Courts on all matters affecting children, is unacceptable to Muslims.

It is hereby posited that the rights of the child are continuously being violated with impunity in the name of culture and religion. This situation is undesirable. The Committee on the Elimination of Discrimination against Women (CEDAW[17]) in its concluding comments[18] to the combined fourth and fifth periodic report of Nigeria on CEDAW[19] expressed concern on the existence of three legal systems, namely statutory, customary and religious laws, which results in a lack of compliance of the state party with the obligations under the Convention and leads to continued discrimination against women. It urged the Government to ensure full compliance in all parts of the country with the CRA which sets the statutory minimum age of marriage at 18 years.

This article shares Banda's[20] view that specifying a minimum age of marriage, though a good starting point, is not enough, that legal sanction must necessarily go hand-in-hand with strong social rights provisions, including appropriate schooling, access to resources and employment opportunities.

It is apparent that the promotion and protection of the rights of the child ultimately secure a future for the child as well as the nation at large. There is need therefore for political will on the part of the federal government and the state governments to ensure that the CRA is replicated in all the states of the federation and that all mechanisms that will ensure the implementation and enforcement of the CRA are all in place. It is only then that the laudable provisions of the CRA can have a meaningful impact on the life of the child and the country in general.

III TRAFFICKING IN PERSONS (PROHIBITION) LAW ENFORCEMENT AND ADMINISTRATION ACT 2003

Human trafficking has become a highly organised transnational crime that has criminal, moral and social implications.[21] It was reported by the National Agency for Prohibition and Trafficking in Persons and Other Related Matters (NAPTIP) that more than 15 million Nigerian children are being transported from rural to urban cities for child labour and slavery.[22] Nigeria, which is

16 http://religionclause.blogspot.com/2005/08/muslim-council-in-nigeria-protests.html.
17 UN Convention on Elimination of all forms of Discrimination against Women.
18 CEDAW/C/SR.638 and 639.
19 CEDAW/C/NGA/4-5.
20 F Banda *Women, Law and Human Rights in Africa* (Hart Publishing, 2005) 122.
21 www.crin.org/violence/search/closeup.asp?infoID=6608.
22 www.crin.org/violence/search/closeup.asp?infoID=6608.

Africa's most populous country, is a major source, transit route and destination for women and children who fall prey to traffickers in persons. These victims are mostly trafficked for domestic servitude, street hawking, agricultural labour, slavery and sexual exploitation such as prostitution both nationally and internationally.[23] This alarming situation coupled with pressure and sustained advocacy from international agencies and local non-governmental organisations like WOTCLEF[24] culminated in the enactment of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003.

This Act was enacted to prohibit and criminalise harmful traditional practices against vulnerable groups such as children and, in particular, the female child who is constantly being exploited and abused sexually and physically, both domestically and internationally. The law makes trafficking in children and exploitation of children for sex or other immoral acts a grievous crime liable to long prison sentences upon conviction.

In December 2005, the Government demonstrated increased efforts to combat trafficking by amending the law to allow for forfeiture and seizure of traffickers' assets.[25] It also created the Victim Trust Fund through which assets seized and forfeited from traffickers will fund victim reintegration. What this means is that in addition to the prison term, convicted traffickers will forfeit their assets which are deemed to have been acquired from trafficking proceeds. This serves to take away the profit in trafficking and serves as a deterrent to other traffickers. Perhaps this is a right step in the right direction as it may take away the 'shine' from trafficking.

NAPTIP was established as an agency to enforce the anti-trafficking law by identifying and bringing to justice those who engage in the trafficking of children. It also operates rehabilitation and reintegration programmes for trafficked children in various centres across the country. The Agency in collaboration with UNICEF has established an anti-child trafficking network covering 11 states, with additional expansion planned.

In the US State Department Trafficking in Persons Report, June 2006,[26] NAPTIP is credited to have investigated 85 trafficking cases, opened 21 prosecutions and convicted six traffickers. The report stated that the Agency's dedicated anti-trafficking investigators continue to actively investigate cases, but coordination between the investigators and other law enforcement officials was weak. The importance of effective collaboration and networking with other related law enforcement agencies cannot be over-emphasised. To achieve their mandate, they need to work in tandem with other law enforcement agents.

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23 www.news24.com/News24/Africa/News/0,,2-11-1447_1915245,00.html.
24 Women Trafficking & Child Labour Eradication Foundation.
25 www.gvnet.com/humantrafficking/Nigeria-2.htm.
26 www.gvnet.com/humantrafficking/Nigeria-2.htm.

IV ISLAMIC FAMILY LAW[27]

(a) Marriage

As earlier stated, Islamic personal law applies only to Muslims. The principles of Islamic law are not to be applied to parties who are non-Muslims without their consent. Under the Islamic law, Sharia is a body of sacred injunctions enforced as divine law to govern the lives of all Muslims. It is binding on all Muslims, as it is not just law but a way of life. A Muslim may not opt out of the sacred precepts of Sharia, for if he or she does so he or she will be in breach of Allah's law and ceases to be a Muslim. In a purely Islamic society, positive manmade laws will necessarily have to be consistent with the injunctions of Sharia for them to be valid.

Under Nigerian law, Islamic law is regarded as a part of the corpus of customary law to be applied subject to a validity or repugnancy test as stipulated by statutory law. Sharia as law has no automatic application in Nigeria except where it has been so adopted at the state level. The advent of democratic rule in Nigeria, after more than a decade of despotic military rule in 1999, brought with it a plethora of new laws. One of these was the adoption of Sharia penal law by some states in northern Nigeria. This created quite an upheaval. At the end of the day, Sharia law and the Penal Code are being implemented side by side in these states. The legality or otherwise of this phenomenon is not within the purview of this chapter. It is also important to state at this point that where Sharia law is applicable in Nigeria, the jurisprudence of the Maliki School is adopted.

Marriage under Islamic law as a matter of general principle requires no particular or formal rites. The essential constituents of a valid Islamic marriage are as follows:

- there must be two consenting parties of legal capacity;
- there should be a marriage guardian for the woman (wali);
- two male Muslims of integrity are needed as witnesses;
- dowry must be paid or agreed upon and which must be paid at any time even after divorce;
- marriage formula. There must be an offer (ijab) from the man and acceptance (qabul) from the woman.

Dissolution of marriage under Islamic law can take three forms:

- by the death of either, or both of the spouses;

[27] See SI Nchi and SA Mohammed *Islamic Personal Law and Practice in Nigeria* (Makurdi, Oracle Publishing, 1999).

- through the voluntary act of any or all of the parties;
- by the means of a judicial decree.

(b) Inheritance and succession

Testamentary disposition

Islamic law allows the testamentary disposition of property and so Muslims may make wills. This is only a general rule. The foundation of the Islamic law of wills or wasiyyah is to be found in a tradition of the Holy Prophet (Peace Be Upon Him). On the basis of this tradition, wills are permitted. A Muslim may give away, while alive, the whole of his property. This gift, if *inter vivos*, shall be valid but no Muslim shall be allowed to interfere by will with the divinely prescribed mode of devolution of his property on his becoming deceased except for one-third of his estate. The devolution of property is divinely defined since it is regulated by the Holy Qur'an. As long as a testator does not interfere with the prescribed mode and extent of devolution, his testament will be valid.

The testamentary capacity of a Muslim is limited by two injunctions:

- A Muslim may not bequeath more than one-third of his property by will.
- No Muslim can bequeath property to his lawfully prescribed heirs.

Intestate succession

On intestate inheritance and succession, Islamic law puts the following as impediments to succession:

- differences in religion. A non-Muslim cannot share part of the property of a deceased Muslim;
- a beneficiary is not allowed to inherit the property of the person he intentionally killed;
- an illegitimate child cannot inherit;
- where a father denies the paternity of a child by 'li' the implication is that such a child has no right of inheritance;
- a child unborn has a share in the property of his deceased father, unless it is established that he was born dead;
- when two people die simultaneously without knowing who died first;
- a slave does not inherit and his property will also not be inherited but it belongs to his master.

Legal heirs are those who are connected with the deceased by blood, affinity, marriage or emancipation. The other beneficiary of a person's estate is the Muslim treasury. It is not all the blood relatives who inherit from the estate of their relatives. According to the doctrine of the Maliki School, the relatives from the maternal side or distant relatives are excluded.

V PROPERTY RIGHTS AND INHERITANCE ON INTESTACY

The rejoicing that followed the case of *Mojekwu v Mojekwu*[28] which recognised women's inheritance rights in Ibo land was rather short-lived. In that case, the appellant Chief Augustine Mojekwu (who was the plaintiff in the court of first instance) had sued Mrs Caroline Mgbafor claiming to be entitled to inherit the property (No 61 Venn Road, South Onitsha) which his uncle (the defendant's husband) had acquired from the Mgbelekeke family of Onitsha by way of kola tenancy,[29] in accordance with the Nnewi custom of 'oli-ekpe'.[30] The court of first instance had dismissed the case and held that there was no evidence in support of the relief sought by the appellant under the kola tenancy. Aggrieved by this decision, the plaintiff had appealed to the Court of Appeal where the Court dismissed the appeal on the basis that the applicable law was the kola tenancy law of Onitsha and not the 'oli-ekpe' custom of Nnewi. The Court went on to declare the 'oli-ekpe' custom as repugnant to natural justice, equity and good conscience. Dissatisfied with the judgment of the Court of Appeal, the appellant appealed to the Supreme Court.

It was contended on behalf of the appellant at the Supreme Court that the Court of Appeal raised the issue of the repugnancy of the 'oli-ekpe' custom *suo motu* and, without hearing parties on it, made its declaration on repugnancy.

The Supreme Court in unanimously dismissing the appeal held inter alia that kola tenancy under the Mgbelekeke family customary law is inheritable by the children of a deceased kola tenant, regardless of their sex, and, this is only upon production by the succeeding child and acceptance by the Mgbelekeke family of further kola. Therefore, as long as children survive a deceased kola tenant, male or female, the question of the deceased's brother or any such stranger inheriting would not arise. In the instant case, there was evidence that female children were entitled to inherit the Mgbelekeke kola tenancy held by a deceased kola tenant. Consequently, the appellant is ruled out from inheritance.

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28 (1997) 7 *Nigeria Weekly Law Report* (Pt 512) 283.

29 Kola tenancy like most customary tenancies, confers on the grantee full rights of possession, although it confers no more than a mere possessory right; that is, a right of occupancy of the tenancy. It is a right to the use and occupation of any land which is enjoyed by any native in virtue of a kola or other token payment made by such native or predecessor-in-title in virtue of a grant for which no payment in money or in kind is exacted.

30 The 'oli-ekpe' custom of Nnewi recognises only the male descendants of the deceased for the purposes of inheritance.

The Court held further that the 'oli-ekpe' custom of the Nnewi, which recognises only male descendants of the deceased, is inapplicable to the matter concerning the devolution of the property, which is situated in Onitsha. In essence, the law of *lex situs* is applicable on the property.

It appears, from the reasoning given by the Court, that it would not have hesitated in upholding and applying the 'oli-ekpe' custom if the property in the instant case was acquired through outright sale and or assignment. Then it would have been a case of applying the law governing inheritance and succession of Nnewi where the parties hail from.

On the issue of repugnancy, the Supreme Court condemned the dictum of Niki Tobi, JCA (as he then was) on the basis of the irregularity of his pronouncement. The Court was of the opinion that a custom cannot be said to be repugnant to natural justice, equity and good conscience just because it is inconsistent with an English law concept or some principle of individual rights as understood in any other legal system. It went further to say that before a court can declare or pronounce a custom repugnant, it must hear all the parties and act with solemn deliberation over all the circumstances, which was not the case in the instant case. The Learned Justice, Uwaifo, JSC had this to say:

> 'The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi 'oli-ekpe' custom and that is quite understandable. But the language used made the pronouncement so general and far reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs, which fail to recognise a role for women . . . It would appear, for these reasons that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest *even if it had been made upon an issue joined by the parties, or properly raised and argued***.** I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.'[31] (Emphasis added)

It is submitted that this decision of the Supreme Court particularly with respect to the repugnancy of the 'oli-ekpe' custom is regrettable as it served to cut short the jubilation of Nigerian women on the victory over discriminatory and oppressive customs in Nigeria. Indeed, it is sad to note that even though the 1999 Constitution prohibits outright any discrimination on the basis of sex, women in Nigeria continue to suffer untold discrimination and oppression in the name of customs and traditional practices, albeit, with the acquiescence of the courts.

VI CONCLUSION

In conclusion, it is important to commend the milestone achieved in enacting some of these laws by the Government. But whether or not there is political will in translating the provisions of these laws into concrete life-transforming

[31] (2004) 11 *Nigeria Weekly Law Report* (Pt 833) 197, 216–217.

provisions for the Nigerian child is yet to be seen. It is disheartening to note that 3 years since the enactment of the CRA, the family courts which have the exclusive jurisdiction to hear and determine matters relating to children[32] are yet to be constituted. This development leaves much to be desired. Suffice it to say that these laws will not have any meaning as long as discriminatory customs and traditions continue to hold sway on the lot of women and children. They may well only be worth the paper on which they are printed.

Also with regards to the controversy on the issue of the enactment of the CRA in some states of the federation due to conflict of laws, the government must endeavour to put in place mechanisms for removing such conflicts to avoid confusion in the implementation of the CRA. It is instructive to note that the CEDAW also in its report[33] had urged the Government to take proactive and innovative measures to remove contradictions between the three legal systems applicable in the country and to ensure that any conflicts of law with regard to women's rights to equality and non-discrimination are resolved. Ensuring that this is done will go a long way towards achieving the desired result of balanced development and well-being of the family and the society at large.

The issue of discriminatory customs and traditions against women, particularly with respect to property rights and inheritance, is one that needs to be adequately addressed by the Government in light of its international and regional commitments to eliminate discrimination against women. The CEDAW in its concluding comments to the combined fourth and fifth periodic report of Nigeria on CEDAW[34] expressed concern that, although Nigeria ratified the Convention in 1985, the Convention has still not been domesticated as part of Nigerian law. It notes with concern that short of such full domestication, the primacy of the Convention over domestic law is not clear, nor is the Convention justiciable and enforceable in Nigerian courts.

It is important to note that non-governmental organisations have contributed immensely to some of the developments recorded in this area. As rightly noted by Owasanoye,[35] the non-governmental organisations, members of the civil society and international development agencies continue to play key roles in sustaining these issues in the public domain. They worked tirelessly with the support of UNICEF to ensure that the CRA was eventually passed by the National Assembly. And they are still working in different states of the federation to also replicate this law in the states.

It is only hoped that Government will exert its political will by taking proactive steps in ensuring that it matches its actions with its international and regional commitments for the well-being of its citizens in particular and the world at large.

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32 CRA, s 149.

33 CEDAW/C/SR.638 and 639.

34 CEDAW/C/SR.638 and 639.

35 B Owasanoye 'Development in Family Law and Welfare Services in Nigeria (1997–2002)' in A Bainham (ed), *The International Survey of Family Law 2003 Edition* (Jordans, 2003) 337–351.

Serbia

FAMILY LAW RELATIONS BETWEEN PARENTS AND CHILDREN

*Olga Cvejić Jančić**

Résumé

Cet exposé porte sur les nouveaux développements du droit de la famille serbe et, plus particulièrement, sur les relations juridiques parents-enfants. La nouvelle loi sur le droit familial est entrée en vigueur en 2005. Un des éléments majeurs de la réforme est l'introduction du principe de l'imprescriptibilité de l'action en recherche de paternité ou de maternité lorsqu'elle est initiée par l'enfant lui-même. Par ailleurs, la réforme emporte la reconnaissance d'une plus grande autonomie des mineurs dans de nombreux secteurs, que ce soit en droit familial ou en droit médical, pour ne citer que ces exemples. La loi introduit un nombre de seuils d'autonomie qui dépendent de l'âge de l'enfant (10, 15 ou 16 ans). Le présent texte dresse le portrait de ces nouveaux droits de participation de l'enfant. Il fait également état de certaines questions relatives au droit alimentaire, à la perte des droits parentaux, à la violence familiale et, finalement, au droit judiciaire.

I MOTHERHOOD AND FATHERHOOD

The new Family Act was enacted in early 2005,[1] ie exactly 25 years after the previous one. This paper discusses some of the most significant novelties introduced by the Law of 2005 (hereinafter: new Law or just Law) in the field of parental law.

The new Law, unlike the previous one, explicitly provides that the mother of the child is the woman who gave birth to it. The absence of the explicit provision on the determining of motherhood in the previous Law was not an obstacle in practice, as it was implicitly encompassed by the Law, since the old Roman maxim '*Mater semper certa est*', as well as the provisions of Birth Registers and on the obligatory registration after a child's birth, were enough to determine

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1 The Law was enacted at the session of the National Assembly of the Republic of Serbia on 17 February 2005 (published in Official Gazette of RS No 18 of 24 February 2005) and entered into force on 1 July 2005, except for provisions of Art 203, paras 2 and 3 (dealing with the composition of the judicial panel having jurisdiction over proceedings in family relations, by which a certain form of specialised courts is being introduced), the implementation of which began one year later, ie on 1 July 2006. Until that time, it was necessary for judges to specialise in family proceedings.

motherhood. The new Law further explicitly provides that the motherhood of a woman who gave birth to the child but was not entered into the Register as the child's mother can be determined by the court. The right to determine motherhood has been granted to the child and to the woman claiming to be the child's mother (Art 43).

The Law also contains provisions on the challenging of motherhood, which differs from the previous Law primarily with respect to the time-limits for the realisation of this right, while the circle of authorised persons has more or less remained the same (these are the child, the woman entered into the Birth Register as the child's mother, the other woman claiming to be the mother, if she, in the same action, requests the establishing of her maternity, and the man who is by law considered to be the father).[2] While the time-limit for the child, in accordance with its right to know his or her parents regardless of the child's age, is not provided, time-limits for the other authorised persons in motherhood disputes are stipulated in the same way. Moreover, the subjective time-limit has always been one year from the date of the revealing of some relevant circumstance, while the objective time-limit is 10 years from the date of the child's birth. So, if a woman claiming to be the child's mother files an action for the establishing of her motherhood within one year of finding out that she had given birth to the child, and no later than 10 years from the date of birth of the child, she can challenge her motherhood within the same time-limits as the woman who has been entered into the Birth Register as the mother. Under Serbian law the challenging of motherhood is not allowed in the following three cases:

(1) if maternity was established by a legally binding court judgment;

(2) after the adoption of child; and

(3) after the death of child.

The provisions on the establishing and challenging of fatherhood have also undergone changes. The general legal presumption of the previous Serbian Law, that the father of the child born in wedlock within 300 days from the cessation of marriage is considered to be the mother's husband from the marriage which has ended/has been abandoned. This rule is still applicable, but only for children born in wedlock within 300 days from the cessation of marriage due to the *death of the mother's husband* and under the condition that the mother had not entered into a new marriage in the meantime. In other words, this means that if a marriage ended with divorce or annulment, the child born within 300 days from its cessation will be born out of wedlock and without a father, unless his mother in the meantime entered into a new

[2] There is, however, a difference with regard to the man who is actively authorised to challenge motherhood. While pursuant to the previous Law, the man was not actively authorised in such disputes, the new Law recognises this right in the man who according to this Law is considered the child's father.

marriage, since in that case, the father of the child will be considered to be the husband from the mother's new marriage.

Significant changes in this part of the Law also refer to the terms for the institution of a legal action on fatherhood disputes (for the establishing or challenging of fatherhood), and as in the case of motherhood, these are not restricted if the plaintiff is the child, while the others are limited by the time-limit of one year from the revealing of a certain relevant circumstance (subjective time-limit) and 10 years from the date of the child's birth (objective time-limit). After that period of time challenging of fatherhood is not allowed.[3]

In the situations of establishing a non-marital fatherhood with acknowledgment, the substantive and formal presumptions for the validity of the acknowledgment are basically the same[4] with minor alterations. So, for example, there is no longer the possibility of a valid acknowledgment in a document certified by a state body. Now the acknowledgment can be made solely before the Registrar, Center for Social Work, court or in a will. The Center for Social Work no longer has the authority to, under certain conditions and on behalf of the child, *ex officio* institute proceedings for the establishment of non-marital fatherhood, which the previous Law did provide in cases where the mother in the birth application names the man whom she considers to be the father of her child, and if no judicial proceedings for the establishing of fatherhood are instituted within the first year following the birth of the child and if she does not contest the Center for Social Work doing so on behalf of the child.

Regarding the provisions on medically assisted conception, there is a completely new provision according to which cohabiting partners, in addition to married ones, are granted the right to this form of conception with the irremovable presumption of the marital fatherhood of the mother's husband or non-marital fatherhood of the mother's partner, if they give written consent to the medically assisted conception. However, if those persons did not give consent to reproduction with medical help, they were granted the right to challenge his fatherhood. According to the new Law, if no consent is given, this person is not considered to be the father at all, and therefore has no need to challenge his fatherhood. It is unclear who shall in this case reveal to the Registrar that the child is conceived by medical assistance (mother of the child, presumptive father, medical institution which performs the bio-medical conception).

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[3] The European Court of Human Rights has found that the legal impossibility of establishing biological truth is a breach of Art 8 of the European Convention of the Human Rights and Fundamental Freedom (case of *Mizzi v Malta*, App no 26111/02 and *Paulik v Slovakia*, App no 10699/05).

[4] Fatherhood may be acknowledged by a man who is 16 years of age and capable of reasoning, if the child is born alive, if there is a suitable age difference and if the acknowledgment is consented to the child's mother and the child if it is over the age of 16. See in detail: O Cvejić Jančić, Porodično pravo, Knjiga II – Roditeljsko i starateljsko pravo, (Family law, Tom II – Parental law and Custody law) Novi Sad (2004), 22-26.

The husband or a cohabiting partner of the mother may challenge his fatherhood even though he has given consent to medically assisted reproduction, only if he reveals that this reproduction was not carried out with medical help, and must do so within the subjective time-limit of one year from discovering this and the objective time-limit of 10 years from the moment of the child's birth (Art 252/5).

As mentioned, the Serbian Law does not permit the establishment of fatherhood of a man who donated semen if the child is conceived with biomedical assistance (Art 58/5). However, there is no mention of the right of the child to know who his or her father is (identification information about the father) without the establishment of a parental relationship and without legal responsibilities of the donor who is a biological father with respect to his biological child. Under the provision of Art 89/3 of the Law on Family, it is implicitly derived that the child has the right to know who the father is, since it is provided that a child who is 15 years of age or older and is capable of reasoning has the right of access to the Birth Register and *other documents pertaining to her or his origin.* It would certainly be better if the Law contained an explicit provision on the right of the child to know (positive provision) who the male donor of semen is.

Another new provision is the one on the irremovable legal presumption that the mother of a child conceived with medical assistance is the woman who gave birth to it, while the motherhood of the woman who gave the egg cell (genetic or natural, ie biological mother) cannot be established. Also not allowed, of course, is the establishing of fatherhood of the biological father, ie the man who donated semen cells for the fertilisation of another person's wife. These provisions are not new however, as they were provided for by the previous Law as well, which however excluded such a possibility for cohabiting partners.

II RIGHTS OF THE CHILD

In this part of the Law, which regulates the issue of parent-child relations, newly introduced is a series of so-called 'children's rights' by which our legislation has been approximated with international and European conventions on the rights of the child and primarily with the UN Convention on the Rights of the Child (1989) and the European Convention on the Exercise of Children's Rights (1996).

The most important novelties are the following rights of the child who is 15 years of age and capable of reasoning:

(1) The right to access the Birth Register and *other documents pertaining to its origin* (Art 59/3). This right is derived from the general norm of our Family Act that a child has the right to know who her or his parents are

(Art 59/1) and Art 7 of the UN Convention on the rights of the child[5] (ratified by our country in 1990). The importance of this right for the child is undoubted, especially in case of the adopted child and the child conceived by biomedical assistance, but also in case of the child naturally conceived and born in or out of wedlock, if the data in the Birth Register do not coincide with the biological truth. In the realisation of the right of the child to know the truth about her or his origin our law has abolished the time-limit for the child to file an action before the court in order to establish or challenge her or his maternity or paternity (Arts 249/1, 250/1, 251/1 and 252/1).

In the case of the adopted child or the child conceived by medical assistance the legal situation is different. The child has no right to establish her or his origin through the court decision but it has the right to see the data filed in the Birth Register and *other documents pertaining to her or his origin*. Regarding the adopted child, before allowing the child to see the register of births, the registrar is obliged to refer the child to psychosocial counselling in the guardianship authority, family counselling service or in another institution specialised in mediation in family relations (Art 326/3). They have to facilitate the child's acceptance of the truth about its origin and to contribute to the lessening of possible stress, resentment or despair that may affect the child after having found out about its parents.

(2) The right to decide which parent he or she wishes to live with (Art 60/4). If the child has not reached the age of 15 years of age she or he does not have the right to decide about it but only to express her or his opinion in a court proceeding (Art 65).

(3) The right to decide on the maintenance of personal relations with the parent she or he does not live with, unless this right is restricted by a court decision with regard to the best interest of the child (Art 61/2). The parent whom the child lives with must allow personal contact between the child and the other parent, unless she or he can be fully deprived of parental rights. The right of the child to maintain contact with the parents is contemporaneously a duty for the parents and both parents who do not allow contact with the child and those who do not want to maintain contact with the child can be punished by the full deprivation of parental rights (Art 81/3).[6] The child who has reached the age of 15 can independently decide what her or his best interest is and accept or refuse the contact with the other parent.

(4) The right to decide on the maintenance of personal relations with the relatives and other persons to whom she or he is particularly close, unless

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[5] Art 7: 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.

[6] See also Z Ponjavic, Porodicno pravo (Family law) Kragujevac (2005), 238; G Kovacek Stanic, Porodicno pravo (Family Law) Novi Sad (2005), 277.

otherwise restricted by a court decision with regard to the best interest of the child (Art 61/5). It is regrettable that the same right of maintenance of personal relations with the child is not granted to the relatives and other persons to whom the child is particularly close. That is especially important in case the parent with whom the child lives does not allow the maintenance of such contact and the child is too young to decide upon it. Under our law, relatives and other persons could only file an action to be granted the maintenance of personal contacts with the child before the court through the Center for Social Work or legal prosecutor. In our opinion, this is not the best way to protect the best interest of the child, because personal contacts with close relatives (but not only with them) could be very important for the upbringing of the child and for the creation of its family identity. In case one parent is deceased, the family ties between the child and the relatives of a deceased parent are more important and they should have the personal right to protect them through a court proceeding.

After all, the Convention of the Council of Europe on contact concerning children[7] provides in Art 5 that subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child. The Family Act of Croatia (CFA)also provides that the grandfather and the grandmother have the right to maintain contact with their grandchildren, as well as the brother and sister and the half brother and half sister with their minor brother or sister or half brother or half sister, having in mind the welfare of the child (Art 107 CFA).[8]

(5) Also new is the provision on the right of the child who is 15 years of age and capable of reasoning to give consent to a medical intervention (Art 62/2).

(6) Right to independently decide what high school she or he wishes to attend (Art 63/2).

(7) Right to undertake legal acts by which he or she manages and disposes of his or her income or property acquired by his or her own work (Art 64/3). Under our Labor Law, the child who is 15 years old could work independently subject to the written consent of her or his parent, adopter or guardian,[9] and consequently, has the right to freely dispose of her or his earnings and the property thus acquired. She or he is however obliged to support her or his parents and minor brothers and sisters if they do not have enough means for their own support (Art 66). In case the child has other property which is acquired in a way other than by work, it is up to the parent who shall manage and dispose of it. For the acts of disposition of the child's immovables the parent must have permission of the Center for Social Work.

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7 Convention of the Council of Europe, Strasbourg, 15 May 2003.

8 Family Act of Croatia, Narodne novine (Official Gazette) no 116/2003.

9 Arts 24 and 25 of the Labor Law, Official Gazette of the Republic of Serbia no 24/2005.

(8) Every person who has reached 15 years of age and who is capable of reasoning has the right to change his or her personal name independently. The child who has reached 10 years of age and is capable of reasoning has the right to give consent to the change of personal name (Art 346/1, 2), if parents or guardian wish to change it.
The child who is 16 years old and capable of reasoning has also a few rights which are not new, except for one, that will be mentioned later. These are as follows:
   (a) The right to file an action in the court to get court permission to conclude marriage before the age of majority (Art 23/2). The court may, for justified reasons, allow the conclusion of marriage to a minor who has reached 16 years of age and who has reached physical and mental maturity necessary for the performance of rights and duties in marriage (Art 23/2). The court shall also hear the parents of the minor, but their view is not mandatory for the court.
   (b) The right to file an action in the court to get full legal capacity before majority because the child has become a parent and has reached physical and mental maturity necessary for independent care of his or her own person, rights and interests (Art 11/3). This right is a new one and it is granted to the child who becomes a parent in order to give capacity to the young parent to take care of her or his child independently without the necessity to conclude marriage or to be dependent on her or his parents. The decision on the recognition of the full legal capacity prior to the age of 18, on the basis of the aforementioned conditions, is decided by the court in non-contentious proceedings.
   (c) The right to acknowledge the paternity of the child born out of wedlock (Art 46).
   (d) The right to give consent to the acknowledgment of the paternity of the child born out of wedlock. This right applies to both the non-marital mother who is 16 years old and capable of reasoning and the non-marital child under the same conditions (Arts 48 and 49).
   (e) The right to decide on the interruption of pregnancy. This right is not provided for by the Family Law Act but by the Act on the proceeding of the interruption of the pregnancy in the medical institution (Art 2/2 of this Act).[10]

Besides these, provided in Art 65, there is a series of so-called procedural rights of the child. For example, a child who is capable of forming its own opinion has the right to freely express it. It has the right to duly receive all information necessary in order to form this opinion. The Law further provides that due attention, in accordance with the child's age and maturity, must be given to this opinion in all matters important to it and in all proceedings pertaining to the child. A child who is 10 years of age can freely and directly express his or her opinion in any court or administrative proceedings where his or her rights are

[10] Official Gazette of the Republic of Serbia no 16/1995, 12 May 1995.

being decided upon or can independently, through some other person or institutions address the court or administrative organ and request help in the realisation of his or her right to freely express his or her opinion. Court and administrative authorities shall establish the child's opinion in co-operation with a school psychologist or guardianship authority, family counselling service or other institution specialised in mediation of family relations, in the presence of a person the child chooses himself or herself.

These rights of the child are new in our legal system and their implementation is really a challenge for the courts and other authorities who make decisions on the rights of the child. One can expect that these provisions will be implemented in the best way because the judge who can proceed in family disputes has to have special knowledge on the rights of the child and the members of the jury have to have experience in working with youth.

The Law also provides for the duty of the child to help the parents in accordance with its age and maturity and to support them and her or his brothers and sisters under the conditions laid down by the law.

III PARENTAL RESPONSIBILITY

Among the provisions regulating the issue of contents and realisation of parental responsibility, the most important novelties refer to the prevention of parents subjecting children to humiliating actions and punishment which violate the human dignity of the child and the responsibility of the parent to protect the child from such actions of other persons. Parents must not leave their child of a pre-school age alone without supervision. They are required to educate the child to adopt and respect the emotional, ethical and national identities of his or her family and society, and it is their right to provide the child with an education in accordance with their religious and ethical beliefs. Religious education is introduced in our school system, but it is optional having regard to the separation of church and state. The pupils, ie their parents, can choose between a religious and a civil education.

With respect to the exercise of parental responsibility, a new provision gives the opportunity for the joint exercise of this responsibility in cases where the parents live separately. This can only be achieved if the parents consent to carry on the upbringing of children as if there was no separation between them, or if they agree that no decision should be made to entrust the child to either of them after the separation. Parents in this case must come to an agreement on the joint exercise of parental responsibility which is to be evaluated by the court. If the court finds that the agreement is in the best interest of the child it will approve it. The agreement should contain information on the residence of the child. Therefore, the same rule applies to the children born out of wedlock, while the decision as to whether this suits the best interests of children is always made by the court, whether dealing with the separate lives of unmarried or married parents. If it should happen to be the latter, this is regardless of

whether they live separately due to divorce or annulment of marriage or separation. The Center for Social Work is no longer competent to decide on children, as it used to be in certain situations according to the previous law (eg in cases of divorce or annulment of marriage).

The parents can, as before, come to an agreement on the independent exercise of parental responsibility, but the court is always competent to decide whether the agreement is in the best interest of the child.

IV DEPRIVATION OF THE PARENTAL RIGHTS

Parents abusing rights or roughly neglecting duties that are part of parental rights may be fully deprived of parental rights (Arts 81–83).[11]

The abuse of parental rights occurs especially in the following cases:

(1) if the parent physically, sexually or psychologically abuses the child;

(2) if the parent abuses the child by forcing her or him into excessive labour, or labour that endangers the morals, health or education of the child, or labour that is prohibited by law;

(3) if the parent instigates the child to commit criminal actions;

(4) if the parent accustoms the child to indulge in bad propensities;

(5) if the parent in some other manner maliciously abuses the rights of the child.

Under Serbian family law, the parent roughly neglects duties that are part of parental rights:

(1) if he or she has abandoned the child;

(2) if he or she does not take care at all of the child that he or she lives with;

(3) if he or she fails to support the child or to maintain personal contact with the child that he or she does not live with or hinders the maintenance of personal contacts with the other parent and the child that she or he does not live with;

(4) if he or she intentionally or without a justified reason fails to create conditions for common life with the child living in a social service institution;

[11] See also N Ljubojev 'Abuse and neglect of a child in the family' Pravni zivot (Legal life) 10/2006, 145–160.

(5) if he or she roughly violates the rights of the child in any other way.

A legally binding court decision on full deprivation of parental rights deprives the parent of all rights and duties that are part of parental rights except for the duty to support the child. One or more measures for the protection of the child from domestic violence may be pronounced in the same decision on full deprivation of a parental right. Parents' consent for adoption is not necessary, among other reasons, if the parent is fully deprived of the parental right or if she or he is deprived of the right to decide on issues substantially affecting the life of the child.

Another novelty in the new Family Act is the partial deprivation of parental responsibility, which replaces the limitation of parental responsibility, which could be attained according to the previous Law if there was a serious hindrance to the proper upbringing of the child in its own family. The Center for Social Work was previously competent to decide on such a measure. Pursuant to the new Law, the Center can no longer decide on the rights of the child, and therefore, the decisions on the full or partial deprivation of parental responsibility are within the competence of the court. The Law lists several reasons on the basis of which there may be a full deprivation of parental responsibility, whereas partial deprivation is vaguely formulated as *unconscionable exercise of parental rights and responsibilities*. What shall be considered under this and how to discern this from the reasons for the full deprivation of parental responsibility represents a unique challenge for the courts, which will have to pave the way to new approaches with their decisions.

In case of partial deprivation of parental rights, a legally binding court decision may deprive the parent of one or more rights and duties, except for the duty to support the child. The parent exercising the parental right may be deprived of the right and duty to protect, raise, educate, represent the child, as well as to manage and dispose of the child's property.

The parent who does not exercise parental right may be deprived of the right to maintain personal contact with the child and the right to decide on issues substantially affecting the life of the child. Such issues are, in particular, the education of the child, important medical interventions to the child, change of domicile and the disposition of the child's property of great value.

One or more measures for the protection of the child from family violence may also be pronounced by the decision on partial deprivation of parental rights. When the causes for full or partial deprivation of parental rights disappear, parental rights can be returned to the parent by a new court decision.

V LEGAL OBLIGATION OF MAINTENANCE

The parents have the right and obligation to support the child under the conditions provided by the Law, ie up to majority of the child. A child who reaches the age of majority (18 years old) has the right to support by parents in two cases only (Art 155):

(1) if she or he is still incapable of work and does not have enough means for support. This right lasts as long as such state exists;

(2) if a major child continues her or his education and fulfils her or his school obligations regularly, he or she has the right of support from parents commensurate to their capacities. This right expires as the child reaches the age of 26 at the latest.

A major child in the abovementioned cases has the right to support from blood relatives in straight ascending line in proportion to their capacities only if parents are not alive or do not have enough means for support. A major child whose request for support would represent manifest injustice for the parents or other blood relatives shall not have the right to support.

There are also significant changes regarding the determination of the minimum amount of maintenance that has been equated with the payment provided for wards, ie persons placed in a foster family. This is periodically determined by the ministry competent for family protection. The basic criteria for the determination of the amount of maintenance payments remain determined according to the needs of the creditor and the ability of the debtor to pay, while keeping in mind the minimum maintenance sum. The creditor of the maintenance may choose whether the maintenance shall be determined according to a fixed monthly amount or as a percentage of the regular monthly income. Regarding the latter option, there is a novelty with respect to the method of calculation and the amount of stipulated percentages. While pursuant to the previous Law, the calculation was made based on the gross income and amounted from 7 to 22 per cent,[12] now it is calculated based on net income[13] and can be set anywhere from 15 to 50 per cent.

Another significant novelty relates to the maintenance of children by parents, which emphasises that the maintenance payment for children should secure the same living standard for the child as enjoyed by the parent debtor.

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[12] For more about this issue, see O Cvejić Jančić 'Maintenance duties of parents towards children' in A Bainham (ed), *The International Survey of Family Law 2003 Edition* (Jordans, 2003), 453–459.

[13] Ie from the regular monthly income of the debtor minus taxes and payments for mandatory social security, as formulated by the new Law.

VI RIGHT TO HOUSING (HABITATION)

Among the provisions governing property relations between the child and his or her parents, the most important novelty is the introduction of the right to housing (*habitatio*). This is granted to the child and the parent exercising parental responsibility, who have the right to the housing of the house or flat of the other parent, where neither the former spouse nor the child have a ready-to-move-in flat or house (Art 194). This lasts until the age of majority of the child. This right can be excluded only if the recognition of the right to housing represents a clear injustice for the parent who owns the housing.

A similar approach existed in our legal system up until 1995, at which point residential rights were abolished and therefrom the housing can be used only on the basis of ownership or lease. Until then, the court was able to, in cases of divorce (or annulment) of marriage, grant residential rights in favour of the parent entrusted with the child after the divorce. The abolition of residential rights was highly disadvantageous to minor children after divorce, which was solved by the introduction of this right to housing.

VII PROTECTION FROM FAMILY VIOLENCE

This segment of the Law is new and covers the determination of the notion of family violence, defining the actions that constitute violence, persons considered to be family members, as well as measures that may be applied for (Arts 197–200).[14] This is a very important part of our new family law considering that victims of family violence in our country are most often women and children. Although family violence is subject to criminal prosecution contemporaneously and punishment,[15] the family law protection should be faster and more efficient. The Criminal Code lays down that breach of the court order against family violence will be fined or punished with 6 months in prison.[16]

Violence is considered to be the behaviour of one family member that endangers the physical integrity, mental health and tranquility of another member, and particularly:

(1) causing or attempting to cause bodily harm;

(2) provoking fear by way of threat of murder or causing bodily harm to a family member or a person close to him or her;

(3) forcing one to have sexual relations;

[14] For more, see M Tesovic 'Domestic violence', Pravni zivot (Legal life), No 10/2006, 119–127.

[15] See M Jevtic 'Criminal offence of domestic violence', Pravni zivot (Legal life), No 10/2006, 114.

[16] Criminal Code of Serbia, Art 118a/5; see also G Kovacek Stanic, Porodicno pravo (Family law), Novi Sad (2005), 43–48.

(4) prompting one to have sexual relations or actually having sexual relations with a person under the age of 14 or a helpless person;

(5) restricting the freedom of movement or communication with third persons;

(6) insults, as well as other arrogant, careless and malicious behaviour.

Family members are considered to be spouses or former spouses, cohabiting partners, and former ones, children, parents and other blood, in-law and adoptive relatives, as well as persons from foster care relations, persons who live or have lived in the same family household and finally persons who were or still have an emotional or sexual relationship, or persons who have a child together or are on their way to having one, despite never having lived in the same family household together. The violent person and the victim can therefore be any member of the family, man or woman, young or old, etc.

The court may issue the following measures for the protection from family violence: a warrant to vacate the family house regardless of the right to ownership or lease; a restraining order preventing the approach of a certain family member up to a certain distance; a restraining order preventing access to or near the residence or place of work of a family member; or the prevention of further harassment of the family member. The measure can last up to one year, while time spent in custody, as well as under arrest because of a criminal act or offence, is counted into the time for which the protective measure against family violence was prescribed. If necessary, the measure may be extended for as long as necessary until the reasons for which it was prescribed cease to exist, as well as ending prior to the expiration of the prescribed time period if the reasons no longer exist.

VIII FAMILY RELATIONS PROCEEDINGS

It is worth mentioning that the Law has introduced a certain mild form of specialisation of judges adjudicating in family proceedings, for both first instance and appeal proceedings, since it is provided that judges in these cases must be persons who have acquired special knowledge in the field of children's rights, while lay judges must be professional persons who have experience in working with children and young people. The programme and method of acquiring special knowledge for judges in family proceedings are prescribed by the ministers in charge of family protection and the judiciary.

Also new is the provision stipulating that family proceedings are considered urgent if they deal with children or parents exercising parental responsibility, whereby the application is not served on the defendant for a reply. First hearings have to be scheduled within 15 days from the day the action or motion

was received in the court (Art 204/4). The court of second instance is obliged to make the decision within 30 days from the day when the appeal was filed to the court.

As a rule, the proceedings ought to be concluded in two hearings at the most. Whether this is the best way to ensure that the interests of the child are protected will be shown by the jurisprudence.

Also new is the action for the protection of the rights of the child that may be brought by the child, its parents, the public prosecutor and the Center for Social Work. Proceedings for the protection of the rights of the child, the proceedings for the deprivation of parental responsibility and for protection from family violence are especially urgent proceedings and the first hearing must be scheduled within 8 days after the filing of the action, while the decision on the appeal must be rendered within 15 days after it is lodged.

IX CONCLUSION

The new Law on Family of Serbia that was enacted in February 2005 and is in force as of 1 July 2005 has to a great extent taken into account European and international conventions to which domestic legal scholars, particularly those gathered at the Kopaonik School of Natural Law, have pointed to.

Besides this, the issues which were not covered by the Law on Marriage and Family Relations 1980 have to do with the legal regulation of certain new, both substantial as well as procedural, rights of the child. Such are, for example, the right of the child who is 15 years of age and capable of reasoning to give medical consent, to choose a high school, to decide which parent she or he wishes to live with and on the maintenance of personal relations with the parent that she or he does not live with or with the relatives and other persons to whom she or he is particularly close, as well as other ones.

A novelty is also the possibility of emancipation of a minor who has reached 16 years of age and has become a parent on the basis of a non-contentious court decision. New is also the abolition of the time-limit for the right of the child to file an action for the establishment of her or his maternity or paternity and the right to housing in favour of a minor child under certain conditions.

The most important provisions in the field of procedural rights of the child are, for example: the right of the child to express her or his opinion in all proceedings in which her or his rights are being decided upon; the right to receive, on time, all information necessary for forming own opinion; the right to address court or administrative organ, alone or through another person; and the right to request assistance in realisation of her or his right to freely express such opinion as the right to file an action for the protection of these rights.

South Africa

FAMILY AND CHILD LAW IN SOUTH AFRICA: COMMON LAW V CONSTITUTIONAL NORMS AND VALUES

*Robbie Robinson**

Résumé

Cela fait maintenant un peu plus de dix ans que l'Afrique du Sud est devenue une démocratie dans le vrai sens du terme. La Charte de Droits qui est enchâssée dans la Constitution, a représenté un facteur de changement fondamental de façon générale mais également en droit de la famille et en droit des personnes.

Dans une approche large, l'auteur propose une réflexion sur les aspects les plus importants de cette évolution. En première lieu, la question du statut du fœtus a enfin été réglée. La cour d'appel suprême a en effet précisé que la personnalité juridique ne commence qu'à la naissance. En deuxième lieu, le statut des liens conjugaux permanents entre personnes hétérosexuelles a été précisé également. Bien que de telles relations soient très comparables aux relations maritales, la Cour Constitutionnelle a néanmoins déterminé qu'il existe des différences importantes entre les époux mariés et les conjoints de fait. Troisièmement, la Cour Constitutionnelle a déclaré que le 'Matrimonial Property Act' de 1984 réserve un traitement discriminatoire aux personnes mariées en communauté de biens en les privant de tout recours en dommages et intérêts pour cause de violence conjugale. En quatrième lieu, l'auteur fait le point sur le nouveau recours alimentaire dont jouissent désormais les enfants nés hors mariage contre leurs grands-parents paternels. Finalement, le texte s'intéresse au statut des couples de même sexe. Le 'Civil Unions Act' est entré en vigueur le 30 Novembre 2006. L'Afrique du Sud rejoint ainsi la Belgique, le Canada, les Pays-Bas et l'Espagne dans le groupe des pays qui reconnaissent le mariage entre personnes de même sexe.

I INTRODUCTION

The Bill of Rights enshrined in the Constitution of the Republic of South Africa 1996 is progressively becoming a major impetus for fundamental reform in family law and related disciplines. Courts are under the constitutional obligation not only to develop the common law to give effect to the rights in the

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Bill, but must also promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[1]

In this chapter the focus falls on recent decisions that have had a profound influence on family law. However, attention will also be paid to a recent decision that has brought legal certainty to the question of the legal subjectivity of the unborn.

II THE *NASCITURUS* ADAGE

It is trite that legal subjectivity in South African law starts at birth. The requirements for birth are determined by common law.[2] However, a question that has been raised on a number of occasions was whether the *nasciturus* adage[3] could be extended to provide for legal subjectivity to start at an earlier stage, namely conception. The reason for the question typically resulted from the Road Accident Fund's obligation to 'compensate any *person*' in claims for compensation in vehicle accidents in which pregnant women were involved. The issue was obscured in 1963 when the court in *Pinchin and another NO v Santam Insurance Co Ltd*[4] held that an unborn child, if subsequently born alive, is considered as already in existence whenever its own advantage is concerned. The court held that this rule, which derives from Digest 1.5.7, not only applied to questions of succession and status, but could also be extended to the law of delict:[5]

> 'I hold that a child does have an action to recover damages for prenatal injuries. This rule is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of delict.'

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1 See, eg, s 39 of the Constitution which reads as follows:
'When interpreting the Bill of Rights, a court, tribunal or forum – must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; When interpreting legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
Section 8(3) determines that when applying a provision of the Bill of Rights to a natural person a court must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right.

2 These include that the foetus must be separate from the mother's body and that the foetus must have lived independently after the separation, even if only for a moment. See Jordaan and Davel *Law of Persons* (4th edn, Juta, 2006), 12.

3 The adagium states that *nasciturus pro iam nato habetur quotiens de commodo eius agitur* – the unborn may be regarded as having already been born when it is to his advantage. At common law its main field of application was in the law of succession, but it has been extended to cover maintenance claims. See *Chisholm v ERPM* 1909 TH 297; *Ex parte Boedel Steenkamp* 1962 3 SA 954 (O).

4 1963 2 SA 254 (W).

5 At 260A-E.

This judgment evoked serious debate. Staunch supporters of the *Pinchin* line of argument argued that the *nasciturus* adage had to be extended to include actions based on pre-natal injuries on the basis not only that the child suffers damage at birth but that it has already started suffering irreversible damage in its pre-natal state. The process simply continues until birth and thereafter.[6] On the other hand, however, the author Joubert contended strongly that the solution to the legal problems in *Pinchin* was to be found in the ordinary principles of delictual liability, without having to have recourse to an artificial extension of the *nasciturus* adage. The child's claim is based on the damage he or she has suffered not as a foetus, but as a living born person, as a *persona juris*.[7]

The Supreme Court of Appeal has settled the issue in *Road Accident Fund v Mtati.*[8] *In casu* the court specifically addressed the question whether the *nasciturus* adage or the ordinary principles of the law of delict should be used in these circumstances. The court referred extensively to Canadian, English and German authority. The following passage appears to convey the *ratio* of the court's judgment:[9]

> 'In law and in logic no damage can have been caused to the plaintiff before the plaintiff existed. The damage was suffered by the plaintiff at the moment that, in law, the plaintiff achieved personality and inherited the damaged body for which the defendants . . . were responsible. The events prior to birth were mere links in the chain of causation between the defendants' assumed lack of skill and care and the consequential damage to the plaintiff.'

The legal position is clear therefore that no cause of action will arise until the child is born. However, this does not mean that drivers of vehicles do not owe a child *en ventre sa mere* a duty of care. The court quoted with approval from *Duval v Seguin*[10] where it was held that a child *en ventre sa mere* falls in a class within the area of foreseeable risk to whom drivers of motor vehicles owe a duty. Procreation is normal and necessary for the preservation of the human race so that if a driver drives without due care for other users it is foreseeable that some of the other users of the road will be pregnant women and that a child *en ventre sa mere* may be injured. Such a child falls within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.

The judgment in *Mtati* brings legal certainty to the question of legal subjectivity for the unborn. It is also suggested that the decision is in line with South African common law. Delictual damages of this nature are claimed with the *actio legis Aquilia.* It is trite that the elements of a delict may be separated

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6 See Sinclair 'Legal Personality' in *Boberg's Law of Persons and the family* (2nd edn, Juta, 1999), 33.

7 Joubert '*Pinchin and Another v Santam Insurance Co Ltd* 1963 2 SA 254 (W)'(1963) *THRHR* 295–297.

8 2005 6 SA 215 (SCA).

9 *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820 (QBD).

10 (1972) 26 DLR (3d) 418.

in time and space. In essence this simply means that the child should have an action after its birth, which action is based on the fact that the perpetrator's action in the past is causally linked to the loss which the child experiences at present and will experience in the future.

III DEVELOPMENTS IN FAMILY LAW IN THE WAKE OF THE CONSTITUTION

(a) Cohabitation

The status of relationships between partners of permanent relationships between people of the opposite sex who are not married to each other and who are living a life akin to that of husband and wife has recently been the focus of a decision of the Constitutional Court in *Volks v Robinson*.[11] *In casu* the question before the court concerned the interpretation and constitutionality of provisions of the Maintenance of Surviving Spouses Act 27 of 1990 which in substance confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves. The respondent contended that a survivor of a permanent stable relationship should be afforded the same protection that is afforded to the survivor of a marriage under the provisions of the Act. Her argument entailed that the exclusion of survivors of cohabitation relationships violated the provisions of the so-called equality provisions of the Constitution in that it discriminated unfairly on the ground of marital status and furthermore that it infringed her constitutional right to dignity.[12] She submitted that the definition of the words 'survivor', 'spouse' and 'marriage' in the abovementioned Act should include a reference to survivors of permanent life partnerships.[13]

The executor of the deceased estate argued that Robinson chose to live with the deceased without entering into a marriage although there was no legal or other impediment to marrying. There was consequently no reason in law or in principle why the laws of marriage should be imposed upon the deceased, his estate and his heirs. He argued that it would constitute an infringement of the deceased's freedom and dignity to have the consequences of marriage imposed in circumstances where there was a clear choice not to enter into a marriage relationship[14] – the deceased's freedom and dignity would be violated if his fundamental life choices, not to marry and to dispose of his property as he wanted, were to be overridden by the court permitting the maintenance claim.[15] His contention therefore was that, even if the said Act were thought to involve discrimination, the discrimination was not unfair.

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[11] 2005 5 BCLR 466 (CC).
[12] Section 9(3) of the Constitution determines that nobody may be unfairly discriminated against on grounds of, inter alia, marital status.
[13] Para 12.
[14] Para 15.
[15] Para 17.

In coming to a conclusion the court dealt with the history and purpose of the Act. In s 2(1) provision is made that a surviving spouse, as far as he or she is not able to provide therefor from his or her own means and earnings, will have a claim against the deceased spouse's estate 'for provision of his reasonable maintenance needs until his death or remarriage'. The purpose of this provision is plain – it is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The provision is aimed at eliminating the perceived unfairness and no more. The obligation to maintain that exists during marriage simply passes to the estate. It is clear that this provision simply seeks to regulate the consequences of marriage in the sense that it says to people who wish to be married: 'If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations.'[16]

The court then proceeded to interpret the provisions of the Act and came to the conclusion that 'survivor' means the 'surviving spouse in a marriage dissolved by death'. In addition, it would appear that the only possible meaning for 'marriage' in the context of the Act is one recognised either by law or religion.[17] Furthermore, the impugned provision refers to maintenance until 'death or remarriage'. This would be illogical if the phrase 'surviving spouse' included survivors of permanent life partnerships who generally may not have been previously married and could therefore not get remarried.[18]

The court also considered the constitutionality of the Act against the background of *Harksen v Lane and Others*[19] which was decided under the equality clause in the 1993 Constitution, namely s 8. In this case the court set out the stages of enquiry in cases involving the fundamental right to equality.

> '[i] It may be as well to tabulate the stages of enquiry which become necessary when an attack is made on a provision in reliance on section 8 of the interim constitution. They are:
>
> Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

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16 Para 39.

17 Para 40. See also *Daniels v Campbell NO and Others* 2004 5 SA 331 (CC). In *Satchwell v President of the RSA and Another* 2002 6 SA 1 (CC) the court held that where there is no definition in an Act for 'spouse' the ordinary wording of provisions must be taken to refer to a party to a marriage that is recognised as valid in law. *In casu* the court found that a number of relationships were excluded from the definition, including same-sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants.

18 Para 43.

19 1998 1 SA 300 (CC) par 54. See too *Du Toit v Minister of Welfare and Population Development* 2001 (12) BCLR 1225 (T).

> Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
>
> If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause . . .'

The question for determination was whether the exclusion of survivors from permanent life relationships constituted unfair discrimination in the sense that the Act draws a distinction between married and unmarried people by including only the former. As its point of departure the court was prepared to accept that the distinction amounted to discrimination based on marital status. This being the case, the discrimination is presumed to be unfair in terms of the relevant constitutional provisions.[20] However, the question is whether it is indeed unfair discrimination.

The court took as its starting point the fact that, although the Constitution does not provide for any right to marry and to found a family, marriage as an institution is nevertheless recognised therein. This is clear from the provisions of s 15(3) that provide for the recognition of marriages concluded under any tradition or a system of religious, personal or family law. Marriage and family are important social institutions of society, and marriage indeed forms one of the important bases for family life. The court accepted the following decision in *Dawood v Minister of Home Affairs*[21] as binding authority:[22]

> 'Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance, at least in part because

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[20] Section 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in s 9(3) is unfair unless it is established that the discrimination is fair.

[21] 2000 3 SA 936 (CC).

[22] Paras 30, 31.

> human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.
>
> The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born from the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony . . .'

Reference is also made to the fact that marriage is an internationally recognised social institution. Article 23(2) of the International Covenant on Civil and Political Rights provides that '(t)he right of men and women of marriageable age to marry and to found a family shall be recognised'. Article 18 of the African Charter on Human and Peoples' Rights provides that the family is the natural unit and basis of society and that it shall be protected by the state.

On the basis of these arguments the court concluded that the law may distinguish between married and unmarried people and turning to the facts of the case found that there was a fundamental difference between the position of the surviving partner *in casu* and a survivor predeceased by her husband. The litigant in this case was free to withdraw at will, without obligation and without legal or other formalities. In a marriage on the other hand, the rights of spouses are largely fixed by law and not by agreement.[23] In its final conclusion the court found that the distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of rights and obligations uniquely attached to marriage.

The background to this decision is of particular importance. Statistics in South Africa demonstrate a rising trend in domestic partnerships and that a very large number of people live in 'dependence-producing' relationships. Statistical data indicate that only about 40 per cent of African and coloured women are legally married. Figures for Indian and White women show that more than 60 per cent of them are married.[24] These significant numbers mean that the Napoleonic adage that 'cohabitants ignore the law and the law ignores them' is no longer acceptable. In addition, the socio-economic context within which the absence of legal consequences pertaining to these relationships has to be considered is of particular consequence in the South African context. Whereas in a number of developed countries a domestic partnership is a middle-class choice, it is a problem beyond the control of most poor women in South Africa. A number of reasons for the existence of domestic partnerships in South Africa has been noted:

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[23] Para 55.

[24] South African Law Reform Commission Discussion Paper 104 *Domestic Partnerships,* 17.

- In pre-1994 South Africa a battery of apartheid legislation in many instances shattered families and family life. Influx control, group areas and forced removals, coupled with overcrowding caused by rapid urbanisation and inadequate housing have all had an enormous impact on the intimate relationships of black people, often resulting in cohabitation for socio-political and economic reasons.

- A second reason that may be advanced, and in the South African context a particularly important one, is the issue of poverty and unemployment. Men usually have better access to jobs. Women consequently rely on them for their basic needs and accept the man's refusal to marry them as well as economic and physical abuse because their material needs are so great. They also choose to remain in these relationships despite the insecurity they experience. It comes as no surprise therefore, to learn that domestic partnerships are less common in settled townships and in the formal housing areas and more common in the back rooms and shacks. The prevalence of domestic partnerships seems to be partly related to poverty.[25]

It is suggested that the decision in *Volks* correctly reflects constitutional norms and values. However, the facts *in casu* do not represent a comprehensive picture of reasons for cohabitation in South Africa. In fact, it has become imperative for the legislature to take notice of especially poverty as a reason for cohabitation and the particularly insecure position women find themselves in because of circumstances in the labour market. One may also add that HIV/Aids has a major impact on social relations and family forms. It is leaving thousands of children orphaned and has resulted in young children having to act as heads of families of even younger children. It has also increased the number of grandparents taking care of their orphaned children. Millions of people find themselves in 'new' types of family relationships which directly affect their proprietary interests. Seen against this background, law and social policy reforms should aim to provide for both cohabiting couples in general as well as these 'new' family types. This must be done while acknowledging gender inequality and serious levels of violence against women.[26]

(b) Delictual debts and the matrimonial property dispensation

In essence there are two matrimonial property dispensations in South Africa, marriages in and out of community of property. A marriage will be in community of property, inter alia, if the parties have not concluded a valid prenuptial contract excluding community of property and community of profit and loss.[27] This dispensation is regulated exclusively by common law.[28] The spouses in a marriage in community of property each own an undivided and

[25] SA Law Commission, para 2.2(ii).
[26] SA Law Commission, para 2.2.34.
[27] Robinson, Human and Boshoff *Introduction to South African Family Law* (2nd edn, Printing Things (Pty) Ltd, 2005), 95.
[28] See, eg, *Watt v Watt* 1984 2 SA 455 (W).

indivisible half share of the joint estate and they are therefore bound co-owners of the joint estate.[29] As a point of departure regarding the management of the joint estate, s 14 of the Matrimonial Property Act 88 of 1984 provides that both spouses have the same powers with regard to the disposal of assets of the joint estate. The patrimonial consequences of marriages out of community of property on the other hand are (normally) dictated by the provisions of the parties' prenuptial contract. The main characteristic of marriages out of community of property is that the spouses retain their own separate estates and no merging of estates takes place.[30]

At common law spouses married in community of property were unable to institute legal claims against each other. In *Tomlin v London and Lancashire Insurance Co Ltd*[31] the court explained that the fact that the parties were co-owners of the joint estate implied that the patrimonial damages would be paid from the joint estate only to be re-paid into the joint estate. Section 18(b) of the Matrimonial Property Act provides an exception to this rule, namely that spouses are now allowed to claim non-patrimonial damages from each other where it originates from physical injury caused totally or partially by the other spouse. An action for pain and suffering can be instituted by one spouse against the other, or against the other spouse's insurer. Such compensation must be paid from the separate estate of the spouse who committed the delict (if he or she has one) or, alternatively, where there is no such estate or if it is too small, from the joint estate in which case the innocent spouse will have a right of recourse upon the dissolution of the marriage. The compensation will form part of a separate estate of the innocent spouse.

The constitutionality of the legal position set out above was considered in *Van der Merwe v Road Accident Fund.*[32] *In casu* the husband and wife were married in community of property. The husband intentionally knocked his wife over with a motor vehicle and then went on to reverse over her while she was lying on the ground. She suffered severe bodily injuries and also pain, discomfort, loss of amenities of life, permanent disability and cosmetic disfigurement. The question before the court consequently concerned the constitutional validity of s 18(b). In particular the question was why s 18(b) *qua* legislative reform of the common law authorises legal redress for non-patrimonial loss, but not for patrimonial damages arising from bodily harm and also whether there is a legitimate purpose for the distinction between spouses married in and out of community of property.

The court took as its point of departure that the notion of damages was sufficiently wide to include pecuniary and non-pecuniary loss. In fact, the primary purpose of awarding damages was to place to the fullest possible extent the injured party in the same position she or he would have been in, but

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29 *Estate Sayle v CIR* 1945 AD 388. See also *De Wet v Jurgens* 1970 3 SA 38 (A); *Ex parte Menzies et Uxor* 1993 3 SA 799 (K).

30 Robinson, Human and Boshoff *Introduction to South African Family Law*, 118.

31 1962 2 SA 30 (D).

32 2006 4 SA 230 (CC).

for the wrongful conduct.[33] The court pointed out that claims for general damages (that would include claims for pain and suffering, disfigurement and loss of amenities of life) that entitle the victim to general damages, and claims for personality interests (dignity, mental integrity, bodily freedom, reputation, privacy, feeling and identity) that entitle the victim to non-patrimonial damages (*solatium*), are both meant to place the plaintiff in the same position he or she would have been but for the wrongdoing.[34] In principle therefore, the nature of the damages should not preclude a claim for patrimonial damages where parties are married in community of property.

The constitutionality of s 18, however, had to be considered in view of the fact that it differentiated between the proprietary interests and protections of marriages in and out of community of property – on a plain reading of the section it denied spouses married in community of property the right to claim damages for patrimonial loss arising from bodily injury afflicted by the other spouse.[35] The differentiation created by this section therefore was not on the basis of marital status, but rather on the respective matrimonial property regimes. This differentiation was found to be unconstitutional.

> '[51] In my view, the distinction made by s 18(b) on claims for patrimonial damages between spouses married in and out of community is a relic of the common law of marriage, which is simply not useful. The distinction drawn by s 18 displays a preoccupation with the conceptual cohesion of a joint estate. After all in theory "everything is owed and owned in common" and "what he or she recovers from the other comes out of the joint estate and falls back instantly". Thus by refusing the physically brutalised spouse a claim for patrimonial loss against the other spouse, the common law, so too s 18(b), seeks to retain the notional purity of the universal community and to escape the futility of damages that would come from and return to joint patrimony.
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> [52] But the rub is that the government purpose for preserving the unity of the joint estate and to avoid the futility of spousal claims for bodily injury has fallen away . . . It is so that the legislative scheme of the Act and in particular of ss 18(a) and (b), 19 and 20[36] which have a bearing on claims for non-patrimonial loss arising from personal injury, has irreversibly undermined that purpose . . . [S] 18(a) and (b) confer on a spouse in community of property the right to recover damages other than patrimonial damages for bodily injury by reason of delict

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33 Para 37.

34 Para 41. See *Guggeneheim v Rosenbaum* 1961 4 SA 21 (W); *M v M* 1991 4 SA 587 (D) for a comprehensive exposition of the claims for damages and *solatium* in the context of breach of engagement.

35 Para 43.

36 Section 19 recognises a spousal right of recourse against the separate estate of the other spouse, or if there is none, against the joint estate upon its division. In addition, spouses are no longer bound inexorably to a joint estate until death or divorce do them part. Section 20(1) allows a court on application of a spouse on specific grounds to order the immediate division of the joint estate in equal shares or other equitable basis. A court may do this during the marriage to avoid serious prejudice by actual or threatening conduct of the other spouse. Section 20(2) empowers the court to order, subject to the conditions it sets, that the community of property be replaced by another property system whilst the marriage subsists.

committed by the other spouse. The damages do not fall into the joint estate but become the separate property of the injured spouse.

[54] There is no rational account why the scheme or purpose of the Act stops short of granting redress in the form of patrimonial damages resulting from spousal violence. The claim would not be futile because the proceeds of the claim would not accrue to the common patrimony but would become separate property of the battered spouse. In that event, clearly the guilty spouses will not benefit from their wilful or negligent misdeeds.'

The court concludes therefore that it would be absurd to withhold from spouses married in community of property redress against physical abuse, but to grant it to parties married out of community of property – nothing suggests that spouses in the one class merit greater protection from wilful domestic battery or accidental bodily injury than spouses in the other.[37]

A particularly interesting question that was raised was that marriage is a matter of choice and so too are the proprietary consequences of marriage – the applicant chose marriage in community of property and it is only fair and reasonable that she be kept to the immutable consequences of her choice. This argument clearly implies an undertaking by married people not to attack the legal validity of the laws that regulate their marriage. Rejecting this argument, the court found that this line of reasoning faltered on the grounds that the constitutional validity of legislation does not derive from personal choice or preference. Rather, the objective validity stems from the Constitution itself.[38]

The decision can certainly not be faulted on constitutional interpretation. However, the court's willingness to review the so-called invariable consequences of marriage in community of property may bear an influence with regard to insolvency of the parties. The joint ownership that accrues to marriage in community of property is an invariable consequence of marriage even though spouses may not be aware of it. However, it is possible for spouses to possess estates separate from the joint estate.[39] In the instance of insolvency of the joint estate, the separate estate of a spouse is simply considered part and parcel of the joint estate for purposes of debts owed by the joint estate. This is not the case with marriages out of community of property and the question may well be whether this differentiation does not constitute unfair differentiation between classes of community of property. Applying the principles laid down in *Van der Merwe* it is suggested that the purpose of the differentiation must be considered anew. It is trite that the Insolvency Act 24 of 1936 does not provide

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37 Para 55. The court continues that the anomaly and arbitrariness is even more startling when the claim arising from spousal violence lies against a third party insurer. The insurer is not liable in the one instance of marriage in community of property, but is liable in the case of marriage out of community of property. In the court's view no legitimate end dictates this distinction.

38 Paras 59–62.

39 Examples of such assets may, inter alia, be assets excluded in a will or a donation agreement, assets subject to a *fideicommissum,* costs of matrimonial proceedings, etc. See Robinson, Human and Boshoff *Introduction to South African Family Law,* 99.

for the exclusion from insolvency of such separate assets.[40] However, in 1985 already Hahlo opined that there should not be any difference between marriages in and out of community of property in this respect.[41] It is suggested that in the legislative scheme there is no legitimate purpose for excluding such separate assets.

(c) Maintenance for extra-marital children

It is trite that the maternal and paternal grandparents of a child born in wedlock are obliged to support him or her. In respect of extra-marital children it was held in *Motan v Joosub*[42] that in terms of South African common law the paternal grandfather owed no duty of support to the child. The rationale for this rule essentially was to be found in the fact that a presumption of paternity might create evidentiary difficulty for the grandparents.[43] However, in *Petersen v Maintenance Officer, Simon's Town Maintenance Court*[44] the court held that evidentiary difficulties should not serve as a basis for the formulation of a rule of substantive law. It is clear therefore that the common-law rule differentiates between children born in and out of wedlock on the ground of birth. This differentiation amounts to discrimination as birth is a ground specified in s 9(3) of the Constitution. Since discrimination on the basis of birth is a ground listed in s 9(5) of the Constitution, such discrimination is presumed to be unfair unless it can be justified under s 36 of the Constitution.[45]

The Court held that the right to dignity was the central issue to be considered. Dignity is not only a *value* fundamental to the South African Constitution, but it is also a justiciable and enforceable *right* that must be respected and protected.[46] The concepts of equality and dignity, the Court found, convey that all persons have the same inherent worth and dignity as human beings. The common-law rule, which differentiates between children born in and out of

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40 *Badenhorst v Bekker* 1994 2 SA 155 (NPD). See also *Du Plessis v Pienaar* 2003 1 SA 671 (SCA).

41 *The South African Law of Husband and Wife* (5th edn, Juta, 1985), 166.
The Insolvency Act 1936 does not deal explicitly with the position where there are, together with the community estate, separately owned assets of the wife. Where spouses are married out of community of property, the wife's separate estate vests in the trustee of her husband's insolvent estate under s 21(1), but the wife can claim under s 21(2) the release, inter alia, of any property which she had brought into the marriage or acquired during the marriage by a title valid as against her husband's creditors. *Presumably the same applies,* mutatis mutandis, *where the marriage is in community, to separately owned assets of the wife*.

42 1930 AD 61.

43 In *Motan* the court referred to 'great practical difficulties' if both the maternal and paternal grandparents were to be liable for maintenance for the extra-marital child. The father of the mother of an extra-marital child knows full well that it is his daughter's child, and if called upon to pay for its support, the proof of the *nexus sanguinis* is at hand. However, the paternal grandfather may be in a position to either accept the word of the mother or trust the worldly wisdom of his son. 'He is called upon to prove a negative where he has no real means of repelling the claim' (at 70).

44 2004 2 SA 56 (CPD).

45 See s 39 of the Constitution and the exposition of *Harksen v Lane supra.*

46 Para E. See also *Dawood*, para 35.

wedlock, therefore not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but it also conveys to them that they do not have the same inherent worth and dignity as children born in wedlock.[47] This rule, the Court found, not only constituted unfair discrimination on the grounds of birth and not only amounted to an infringement of the dignity of such children, but was also contrary to the best interests of extra-marital children. It must be borne in mind that extra-marital children are a group who are extremely vulnerable so that their constitutional rights should be jealously protected.[48]

There are certain anomalies in the South African law as far as extra-marital children are concerned. One such anomaly is the reciprocal nature of the obligation. In terms of the common law the extra-marital child is under no obligation to maintain his or her natural father since he or she is not (in law) related to his or her father.[49] This argument, it is submitted, is wrong since the father of the extra-marital child does not lack a relationship to the child, but rather parental power – the duty to support is based on the relationship between the parties. In *Petersen* the other anomaly, namely the absence of a reciprocal duty of support between the extra-marital child and blood relations on the father's side, was addressed. This development is to be welcomed. However, due to the *stare decisis* principle that applies in South African law *Motan* must still be considered as the leading authority in South African jurisprudence. There can be little doubt though that the approach in *Petersen* will be followed in future.

(d) The legal recognition of gay/lesbian marriage

Historical background

A further example of the development of the common law to reflect constitutional values and norms pertains to the legal recognition of gay and lesbian relationships. In this instance reference may be made to a number of occasions where patrimonial and personal consequences typically pertaining to marriage have been ascribed to same-sex partnerships. Same-sex partners have been held to be entitled to access to statutory health insurance schemes;[50] the right of permanent same-sex partners to equal spousal benefits provided in legislation has been asserted;[51] the protection and nurturance same-sex partners can jointly offer children in need of adoption have been put on an equal footing with heterosexual couples;[52] the right of a same-sex partner not giving birth to a child conceived by artificial insemination to become the legitimate parent of the child has been confirmed;[53] the equal right of a same-sex partners to

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47 Para 19.
48 Para 21–22.
49 See Spiro *Law of Parent and Child* (4th edn, Juta, 1985), 404.
50 *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T).
51 *Satchwell v President of the RSA* 2002 6 SA 1 (CC).
52 *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC).
53 *J v Director General: Department of Home Affairs* 2003 5 SA 621 (CC).

beneficial immigrant status has been established;[54] and the common law has also been developed by extending the spouse's action for loss of support to partners in permanent same-sex partnerships.[55] However, it was only in *Fourie v Minister of Home Affairs*[56] where the crisp question before the Supreme Court of Appeal was whether two adults of the same sex who loved each other and who had deliberately expressed an exclusive commitment to one another for life ought to be allowed to marry. Departing from the perspective that the Constitution contains particularly generous measures of protection for all South Africans and that non-discrimination on the ground of sexual orientation should be an integral part of the greater project of racial conciliation and social and gender justice, the Court reiterated prior decisions articulating far-reaching doctrines of dignity, equality and inclusive moral citizenship.[57]

The Court held that the capacity to choose to get married, which is denied to gays and lesbians at common law, embraces the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition; it offers a social and legal shrine for love and commitment and for a future shared with another human being to the exclusion of all others.[58] The common law definition deprives committed same-sex couples of this choice and injures gays and lesbians because it implies a judgment on them. It not only suggests that their relationships and commitments are inferior, but

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54 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

55 *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA). See, however, *Volks v Robinson* where it was held that s 2(1) of the Maintenance of the Surviving Spouses Act 27 of 1990 which confers on surviving spouses the right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves, does not discriminate unconstitutionally against a survivor of a stable permanent relationship between two persons of the opposite sex who had not been married to each other.

56 2005 3 SA 429 (SCA).

57 The Court quotes previous decisions with regard to gay/lesbian relationships in which it was decided that s 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected:
gays and lesbians have a constitutionally entrenched right to dignity and equality;
sexual orientation is a ground expressly listed in s 9(3) of the Constitution and under s 9(5) discrimination on it is unfair unless the contrary is established;
prior criminal proscription of private and consensual sexual expression between gays arising from their sexual orientation and which had been directed at gay men, has been struck down as unconstitutional;
gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms, including affection, friendship, *eros* and charity;
they are likewise as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household;
they are individually able to adopt children and in the case of lesbians, to bear them;
in short, they have the same ability to establish a *consortium omnis vitae;* and
finally, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses.

58 Para 14.

also that they can never be fully part of the community of moral equals that the Constitution promises for all.[59] This state of affairs, the Court found, undermines the values that underlie an open and democratic society based on freedom and equality. In the absence of justification, it cannot but constitute unfair discrimination that violates the equality and other guarantees in the Bill of Rights.[60]

The Court reiterates earlier decisions that procreative potential is not a defining characteristic of conjugal relationships.[61] It also finds that the applicants do not seek to limit procreative heterosexual marriage in any way, but rather they wish to be admitted to its advantages. To deny them access to a conjugal relationship would work a deep and scarring hardship on a very real segment of the community for no rational reason.[62]

> 'The focus in this case falls on the intrinsic nature of marriage, and the question is whether any aspect of same-sex relationships justifies excluding gays and lesbians from it. What the Constitution asks in such a case is that we look beyond the unavoidable specificities of our condition – and consider our intrinsic human capacities and what they render possible for all of us. *In this case, the question is whether the capacity for commitment, and the ability to love and nurture and honour and sustain, transcends the incidental fact of sexual orientation. The answer suggested by the Constitution and by ten years of development under it is Yes.*' (emphasis added)

In the last instance the Court refers to the argument that 'most South Africans still think of marriage as a heterosexual institution, and that many may view its extension to gays and lesbians with apprehension and disfavour'.[63] In rejecting this argument the Court conveys that its task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this regard the Court's sole duty lies to the Constitution, but those the Court engages with most deeply in explaining what its duty entails, is the nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.

The decision in *Fourie* hardly comes as a surprise. In fact, one can describe it as a logical conclusion of a line of reasoning that has been coming forth over the last decade.

- First, the founders of the Constitution deliberately refrained from including a provision recognising the family as the basic unit of society. In *In re Certification of the Constitution of the RSA*[64] the Constitutional Court explains that a survey of international instruments conveys that in general states have a duty, in terms of international human rights law, to

[59] Para 15.
[60] Para 16.
[61] Para 17.
[62] Para 19.
[63] Para 20.
[64] 1996 4 SA 744 (CC).

protect the rights of persons to marry freely and to raise a family. The duty on states to protect marriage and family life has been interpreted in a multitude of different ways. There has by no means been universal acceptance of the need to recognise the rights to marriage and to family life as being fundamental in the sense that they require express constitutional protection (para 98). The Court then proceeds to explain that the absence of marriage and family rights in many African and Asian countries reflects the multicultural and multi-faith character of such societies:[65]

> 'Families are constituted, function and are dissolved in such a variety of ways, and the possible outcomes of constitutionalising family rights are so uncertain, that constitution-makers appear frequently to prefer not to regard the right to marry or to pursue family life as a fundamental right that is appropriate for definition in constitutionalised terms. They thereby avoid disagreements over whether the family to be protected is a nuclear family or an extended family, or over which ceremonies, rites or practices would constitute a marriage deserving of constitutional protection. . . . These are seen as questions that relate to the history, culture and special circumstances of each society, permitting of no universal solutions.'

- Secondly, the Constitutional Court prefers not to give a definition of the family. This observation is borne out by the following argument in *Dawood v Minister of Home Affairs:*[66]

> 'The importance of the family unit for society is recognized in the international human rights instruments . . . when they state that the family is the "natural" and "fundamental" unit of our society. *However, families come in different shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.*' (emphasis added)

- From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. This was held in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[67] on the basis that a view to the contrary would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence their relationship or become so anytime thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It may even be demeaning to a couple who voluntarily decide not to have children or sexual relations with one another; this decision being entirely within their protected sphere of freedom and privacy.

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65 Para 99.
66 2000 3 SA 936 (CC).
67 2000 2 SA 1 (CC) par 51.

- In the last instance, the Court has on a number of occasions found that gay or lesbian couples are capable of establishing a *consortium omnis vitae.*[68]

The Constitutional Court endorsed the decision of the Supreme Court of Appeal in *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs.*[69] It afforded the Legislature 12 months from the date of delivery of judgment (1 December 2005) to remedy the exclusion of same-sex couples from enjoying the status and entitlements coupled with the responsibilities that are accorded to heterosexual couples by common law and the Marriage Act.[70]

The Civil Union Bill – an overview

The Bill is the Legislator's response to the Constitutional Court. In essence it provides for opposite and same-sex couples of 18 years and older to solemnise and register a civil union, either by marriage or by civil partnership.[71] It also aims at providing for the legal consequences of the solemnisation and registration of civil unions.[72] Heated and strongly divided opinion preceded the Bill which became law on 30 November 2006. In fact, the ruling party was accused of exploiting its majority status by pushing a Bill through which fails to accommodate public concerns over the proposed law. The Bill will be called the Civil Union Act.[73]

In s 1 the definitions are set out:

- A *civil union* means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed by the Act, to the exclusion of all others while it lasts.

- *Civil union partner* means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of the Act.

A marriage officer may solemnise a civil union in accordance with the provisions of the Act and has all the powers, responsibilities and duties as conferred upon him or her under the Marriage Act 25 of 1961 to solemnise a civil union.[74] A religious denomination or organisation may apply in writing to the Minister to be designated as a religious organisation that may solemnise

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68 See e g *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), para 53.
69 2006 1 SA 524 (CC).
70 Paras 147–156.
71 Section 2(a).
72 Section 2(b).
73 Section 16.
74 Section 4(a)(b).

marriages in terms of the Act.[75] A marriage officer may also inform the Minister in writing that he or she objects on grounds of religion, conscience and belief to solemnise a civil union between persons of the same sex. Such a marriage officer may not be compelled to solemnise such a civil union.[76]

The formula for solemnisation of marriage or a civil partnership is set out in s 11. The marriage officer must enquire from the parties whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed to solemnise the civil union. In terms of s 13 the legal consequences of a marriage contemplated in the Marriage Act apply *mutatis mutandis* to a civil union. A catch-all phrase is employed in s 13(2). With the exception of the Marriage Act and the Customary Marriages Act any reference to:

(a) marriage in any other law, including the common law, will include with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, will include a civil partner.

The Act brings South Africa in line with similar developments in Belgium, Canada, the Netherlands and Spain. South Africa is also the first country in Africa to recognise same-sex marriages. The debate will, however, rage on. On the one hand, the argument will run along the line that civil unions of homosexuals are 'separate but equal' to marriage because the Marriage Act which allows only for heterosexuals to be married, remains on the statute book. Heterosexual couples, therefore, have the right to choose to marry in terms of either of the Acts, while homosexual couples may only marry under the Civil Union Act. On the other hand, arguments of religion and culture will be raised. Essentially the argument has always been, and will remain to be, that the relationship between homosexuals differs fundamentally from that of heterosexuals and furthermore that it is not acceptable in African culture.

IV CONCLUSION

South Africa is a young democracy. The values and norms of the Constitution certainly are the cornerstone on which the democracy is built. The Constitutional Court has made it clear right from the beginning that it was always going to favour a generous interpretation of rights instead of adopting a restrictive approach; the limits of rights were to be drafted as widely as the language in which they are drafted permits. This approach was made clear already in *S v Zuma*[77] in which the dictum of Lord Wilberforce in *Minister of*

[75] Section 5(1).
[76] Section 6.
[77] 1995 2 SA 642 (CC).

Home Affairs (Bermuda) v Fisher[78] was reiterated that a generous interpretation was required; *one suitable to give to individuals the full measure of fundamental rights and freedoms.* The developments discussed above, clearly bear testimony to this approach. It also gives expression to the importance of constitutional values as expressed in the 1991 Namibian case of *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State:*[79]

> 'It is . . . a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions, and further having regard to the emerging consensus of values in a civilized international community . . . This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable . . . some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.'

[78] [1980] AC 319 (PC); [1979] All ER 21.
[79] 1991 3 SA 76 (NmSC) 76 at 91 D–E.

Tonga

FOR BETTER OR WORSE: MARRIAGE AND DIVORCE LAWS IN THE KINGDOM OF TONGA

*Jennifer Corrin Care**

Résumé

Tonga est un petit royaume indépendant dans le Pacifique Sud, très marqué par les influences de l'Église et de la tradition, de même que par son passé colonial. Après une brève présentation du système juridique de Tonga, ce texte s'intéresse plus particulièrement au droit familial de ce pays, incluant le mariage, le divorce, la séparation, le droit alimentaire et le partage des biens. Jusqu'à récemment, la législation anglaise 'd'application générale', permettait de combler les lacunes du droit local, mais ceci a changé avec l'adoption du *Civil Law (Amendment) Act 2003*. Même si le *Guardianship Act* fut adopté en 2004, d'autres domaines du droit familial, dont le droit patrimonial de la famille, sont restés en plan. Ces lacunes, avec leur potentiel de discrimination à l'égard des femmes, doivent être comblées et elles sont l'occasion de s'attaquer à la réforme globale du droit de la famille.

I INTRODUCTION

The Kingdom of Tonga is an archipelago in the South Pacific Ocean, to the east of Fiji Islands. It has a population of 114,000 people, 98 per cent of whom are Tongans who are Polynesian with a small mixture of Melanesian. The official languages are Tongan and English.[1] Tonga is a constitutional hereditary monarchy. The King of Tonga, who traces his line back to Taufa'ahau Tupou, who established himself as the first high chief and King of Tonga in the 1850s, has until recently been given unquestioning loyalty by his subjects. However, in the last few years, there has been unprecedented criticism of the King's autocratic rule and pressure for a more liberal form of government from pro-democracy groups.[2] This opposition escalated after the death of King

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1 Central Intelligence Agency, The World Factbook 2007 (2007) at www.cia.gov/library/publications/the-world-factbook/index.html.

2 See further the Human Rights & Democracy Movement Tonga's website at www.planet-tonga.com/HRDMT/.

Taufa'ahau Tupou IV, in September 2006, culminating in the eruption of riots in November 2006, following which a number of activists were arrested.[3]

Despite the fact that it has never been a colony or protectorate, Tonga has a legacy of adopted common law from its period as a Protected State[4] of England. In addition to these remnants from the colonial era, two other influences have helped to shape the family law regime of Tonga: the Church and traditional authority. Over time these two forces have become intertwined, each sometimes relying on the other to promote its legitimacy and status.[5] These factors contribute to the complexity of the pluralistic legal regime which governs family law in Tonga.

This chapter commences with a brief outline of the laws in force in Tonga. It then discusses the laws governing marriage, divorce and separation. It also examines the law governing financial relief and property division. Some of the issues discussed are common to a number of small island countries in the South Pacific region. Others, such as the problems posed by the recent enactment of the Civil Law (Amendment) Act 2003, are unique to Tonga.

II THE LEGAL SYSTEM IN TONGA

The sources of law in Tonga consist of the Constitution, local legislation, colonial legislation, English Acts of Parliament specifically applied to Tonga,[6] and common law and equity. Since 1990 the Constitution, enacted in 1875,[7] has been expressly stated to be the supreme law.[8] Local legislation is next in the hierarchy, and includes Acts made by the Legislative Assembly; Ordinances made by the King and Privy Council,[9] the last of which was made in 1972;[10] and subsidiary legislation. Between 1893 and 1952, Kings and Queen's Regulations were made by the High Commissioner of the Western Pacific. Only three Regulations appear to still be force, including the Births and Deaths Registration Regulation 1952.[11] English common law and equity are in force in

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3 M Fonua, L Folau and P Fonua *Riot In Streets of Nukualofa* (16 November 2006) Matangi Tonga Online at http://archives.pireport.org/archive/2006/November/11-16-up.htm and J Fraenkel *Pacific Democracy: Dilemmas of Intervention* (28 November 2006) Open Democracy at www.opendemocracy.net/globalization-institutions_government/pacific_democracy_4135.jsp.

4 *Treaty of Friendship between Great Britain and Tonga 1900* (18 May 1900). See J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (Cavendish Publishing Ltd, 1999), 12 and M Ntumy *South Pacific Islands Legal Systems* (University Press of Hawaii, 1993), 315.

5 Chiefly authority was also closely interwoven with traditional religion in Tonga: see S Latukefu, *Church and State in Tonga* (University Press of Hawaii, 1974), 4.

6 Tonga Orders in Council 1952-65 (UK)

7 Constitution of Tonga 1875.

8 Constitution of Tonga 1875, s 82, as amended by the Constitution of Tonga (Amendment No 2) Act 1990, s 9.

9 Constitution of Tonga 1875, s 50(1).

10 Royal Proclamation 1972.

11 The other two are the Judicature Regulation 1961 and the Tonga (Amendment of Title of Governor and of British Agent and Consul) Regulation 1961.

Tonga,[12] so far as they are compatible with local circumstances and subject to such qualifications as those circumstances render necessary.[13] Common law and equity are inferior to the Constitution[14] and other legislation.[15]

Until 2003, English Acts of 'general application' were in force in Tonga.[16] As in many other South Pacific countries, these Acts were intended to provide a legislative framework where no local legislation existed.[17] Areas governed by English Acts of general application included admiralty, bankruptcy, contract law and sale of goods.[18] More relevantly for the current discussion, it also included adoption, guardianship and matrimonial property law.[19] The Civil Law (Amendment) Act 2003 amended the Civil Law Act 1966 by deleting the reference to English Statutes of general application. This fundamentally changed the legislative landscape, as English Acts were no longer available to effectively fill 'gaps' in Tongan law where there was no locally enacted legislation. While the lacunae relating to guardianship and adoption (a common customary Tongan practice) were quickly addressed by the enactment of the Guardianship Act 2004, there is still a void in relation to the division of matrimonial property and this is discussed further below.

Unlike many of its neighbours, Tonga has not recognised customary law as a formal source of law.[20] Despite this, the Tongan courts have occasionally applied customary law interstitially, when exercising a discretion, interpreting the law or assessing the weight given to evidence.[21] In practice, matrimonial disputes are often resolved within the extended family, where customary law may be far more relevant than the formal law.

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12 Civil Law Act 1966, s 3.

13 Civil Law Act 1966, s 4.

14 Constitution of Tonga 1875, s 82, as amended by the Constitution of Tonga (Amendment No 2) Act 1990, s 9.

15 Civil Law Act 1966, s 4.

16 For an explanation of the term 'general application' see J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (Cavendish Publishing Ltd, 1999), 56.

17 See further, J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (Cavendish Publishing Ltd, 1999), 49.

18 The Sale of Goods Act 1979 (UK) was in force in Tonga: see *Tu'iva v Fifita & JSP Auto Trading Ltd* [1991] Tonga LR 63. See also *Corbett v Si'i Kae Ola Holding Co Ltd* (unreported, Supreme Court of Tonga, Webster CJ, 1 September 2006), accessible via www.paclii.org at [2006] TOSC 32, where the court took a creative approach to the fact that the English Sale of Goods Act was no longer in force, determining that the common law embodied similar principles.

19 Transparency International *National Integrity Systems: Transparency International Country Report: Tonga* (2004) Transparency International Australia at www.transparency.org.au/documents/tonga.pdf.

20 See further J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (Cavendish Publishing Ltd, 1999), 25, 27.

21 See, eg, *Nainoa v Vaha'i* [1926] II Tongan LR 22.

The family law regime

Family law in Tonga is governed mainly by the Births, Deaths and Marriages Registration Act Cap 42 and the Divorce Act Cap 29. These Acts were locally enacted in 1926 and 1927 respectively. However, both Acts[22] follow the colonial pattern prevailing in family law statutes in the region. Other relevant Acts include the Maintenance of Deserted Wives Act Cap 31, the Maintenance of Illegitimate Children Act Cap 30, and the more recently enacted Guardianship Act 2004. Since the passing of the Civil Law (Amendment) Act 2003 the Matrimonial Causes Act 1973 (UK) is no longer in force in Tonga.[23] The UK Act bestowed wide powers on the court to divide matrimonial property. The absence of legislative authority to alter property rights on the termination of marriage has resulted in a more significant role for common law and equity, which has been used to supplement the often ambiguous provisions of the Divorce Act.

III MARRIAGE

(a) Requirements of a valid marriage

Formalities

The formalities for a valid marriage are set out in the Births, Deaths and Marriages Registration Act.[24] Before a marriage can be solemnised, a marriage licence must be obtained from the district sub-registrar.[25] This will only be granted if:

- one of the parties has lived in the district for at least 16 months prior to the application for the licence.[26] However, a special licence may be granted if at least one of the applicants has an established a link with the Kingdom;[27]

- both parties are at least 15;[28]

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22 Cap 29.

23 *Halapua v Tonga* (unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004), accessible via www.paclii.org at [2004] TOCA 5, at para 26.

24 Cap 42. See also, Solemnisation of Marriage Regulations Cap 42B, which specifies the documents required to be exhibited to the affidavit required to be sworn by the parties prior to the issue of the licence to marry (reg 2(1)), the duties of the sub-registrar (regs 2(2) and 5) and other details.

25 Birth, Deaths and Marriages Registration Act Cap 42, s 9. See further Solemnisation of Marriage Regulations Cap 42B.

26 Birth, Deaths and Marriages Registration Act Cap 42, s 9.

27 Section 3. This section purports to amend s 8 of the principal Act, which refers to the prohibited degrees of relationship between the parties to the marriage, in the manner noted in the text. However, it appears that reference should have been to s 9, which refers to the precondition of residence in the district to the issue of a marriage licence.

28 Birth, Deaths and Marriages Registration Act Cap 42, s 6.

- in a case where a party is under 18, the written consent of his or her guardian has been obtained;[29]

- the parties have provided evidence of their age[30] and an affidavit that there are no impediments to marriage.[31]

The marriage must be solemnised by a registered minister of religion[32] before at least two witnesses.[33]

Prohibited relationships

The Birth, Deaths and Marriages Registration Act expressly prohibits marriage to a close relative, either by blood (consanguinity) or marriage (affinity).[34] The prohibited degrees of relationship include immediate family and extend to cousins, aunts and uncles, grandparents, parents-in-law and step-parents.[35] Further prohibitions apply in the case of divorcees who may not marry the sibling or half-sibling of their former spouse while that former spouse is still alive.[36]

(b) Registration

After the marriage has been solemnised, a marriage certificate must be signed by the officiating minister and the witnesses.[37] The minister must deliver a copy[38] to the sub-registrar within 3 weeks of the ceremony.[39]

(c) Customary marriage

Customary marriages are not recognised by Tongan law.

IV NULLITY

Either party to a marriage may apply to the Supreme Court for a decree of nullity on the basis that the marriage is void. Unlike most other countries of

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29 Birth, Deaths and Marriages Registration Act Cap 42, s 6.
30 Birth, Deaths and Marriages Registration Act Cap 42, s 9.
31 Birth, Deaths and Marriages Registration Act Cap 42, s 9 and Sch 1. The contents of the affidavit are specified in the Solemnisation of Marriage Regulations Cap 42B.
32 Registration is carried out by the Chief Justice, acting as a minister for solemnising marriages: Birth, Deaths and Marriages Registration Act Cap 42, s 12.
33 Birth, Deaths and Marriages Registration Act Cap 42, s 14.
34 Birth, Deaths and Marriages Registration Act Cap 42, ss 7, 8.
35 Cap 42, ss 7, 8.
36 Divorce Act Cap 29, s 12.
37 Birth, Deaths and Marriages Registration Act Cap 42, s 14(1).
38 Birth, Deaths and Marriages Registration Act Cap 42, s 14(2). Two copies are required in certain districts: s 14(2).
39 Birth, Deaths and Marriages Registration Act Cap 42, s 14(2).

the South Pacific region, there are no grounds for granting a decree of nullity on the basis that the marriage is voidable. Formerly, the Matrimonial Causes Act 1973 (UK) supplemented the Birth, Death and Marriage Registration Act by providing grounds on which a marriage might be declared voidable[40] such as lack of consent,[41] as well as additional grounds for declaring a marriage void.[42] As discussed above, the UK Act no longer applies. The common law presumption of validity of marriage applies and, therefore, the onus is on the party seeking a declaration of nullity to prove otherwise.[43]

(a) Failure to comply with formalities

A marriage will be void if it is celebrated without a licence[44] or if the licence was falsely obtained.[45] In addition to these statutory provisions, a marriage may be void for failure to comply with the prescribed formalities under common law. The failure will only render the marriage void if the statutory requirement is mandatory and requires strict compliance.[46] In *Cowley v 'Aholelei*[47] the Supreme Court held, obiter, that a marriage was not an agreement within the meaning of s 6 of the Constitution and would, therefore, not be rendered void by that section's prohibition of entering into agreements on a Sunday.[48]

(b) Bigamy

Under the Matrimonial Causes Act 1973 (UK) a marriage was void where one of the parties was already married to someone else who was still alive.[49] Since the Civil Law (Amendment) Act 2003 was brought into force, this Act no longer applies. However, bigamy is a crime under the Criminal Offences Act[50] and, as discussed below, it is a ground for divorce.[51]

(c) Lack of consent

Consent of the parties to the marriage was required under the Matrimonial Causes Act 1973 (UK),[52] which applied as an Act of general application prior to the enactment of the Civil Law (Amendment) Act 2003. Although there is now no legislative provision regarding consent, any pressure amounting to

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40 Matrimonial Causes Act 1973 (UK), s 12.
41 Matrimonial Causes Act 1973 (UK), s 12(c).
42 Matrimonial Causes Act 1973 (UK), s 11.
43 *Cowley v 'Aholelie* [1908-1959] Tonga LR 74, 75, citing *Piers v Piers* [1849] 2 HL 331.
44 Birth, Deaths and Marriages Registration Act Cap 42, s 16.
45 Birth, Deaths and Marriages Registration Act Cap 42, s 11.
46 *Montreal Railways Co v Normandin* [1917] AC 170.
47 [1908-1959] Tonga LR 74, 77.
48 Constitution of Tonga 1875, s 6.
49 Section 11(b).
50 Cap 18, s 79. It carries a penalty of imprisonment for up to 3 years: s 79(1).
51 Divorce Act Cap 29, s 3(1)(b).
52 Matrimonial Causes Act 1973 (UK), s 12(c).

duress would vitiate the agreement under normal contractual principles. In *Cowley v 'Aholelei*[53] the Supreme Court appeared to consider that a marriage would be void at common law for lack of consent due to intoxication, although this was not established on the evidence in the case before it.

(d) Marriage within prohibited degrees of relationship

A marriage between parties in prohibited degrees of relationship is illegal[54] and therefore void under the common law.[55]

V DIVORCE

(a) Jurisdiction

A petition for divorce may be presented to the Supreme Court by either spouse provided that the petitioning party is domiciled in Tonga.[56] Where neither party is domiciled in the Kingdom a petition may be presented by the wife on the grounds of desertion[57] or deportation,[58] provided that the husband was domiciled in Tonga prior to the desertion or deportation and that the wife has been ordinarily resident in Tonga for 2 years immediately prior to the proceedings.[59]

(b) Grounds

Fault based grounds

The fault based grounds on which a petition may be presented are:

- adultery;[60]
- wilful desertion;[61]
- a sentence of imprisonment of 5 years or more imposed on the respondent;[62]
- bigamy, where the respondent's other spouse is still living;[63]

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53 [1908-1959] Tonga LR 74, 75.
54 Birth, Deaths and Marriages Registration Act Cap 42, ss 7, 8.
55 *Fakatava and Fakatava v Kalomatangi and Minister of Lands* [1974–80] Tonga LR 16.
56 Divorce Act Cap 29, s 3(1).
57 Divorce Act Cap 29, s 20(1)(a).
58 Divorce Act Cap 29, s 20(1)(b).
59 Divorce Act Cap 29, s 20(1)(c).
60 Divorce Act Cap 29, s 3(1)(a). Adultery is also a criminal offence under the Adultery and Fornication Act Cap 21.
61 Divorce Act Cap 29, s 3(1)(c).
62 Divorce Act Cap 29, s 3(1)(a).
63 Divorce Act Cap 29, s 3(1)(b).

- the respondent's affliction with an incurable disease capable of being transferred to the petitioner;[64]

- the respondent being of unsound mind and having been continuously under care and treatment for at least the last 5 years;[65]

- the respondent's incapacity to consummate the marriage or incurable mental or moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner;[66]

- the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him or her.[67]

Unlike most of the other countries where grounds for divorce are fault based, cruelty is not a specific ground for divorce in Tonga.[68] However, such behaviour would no doubt constitute behaviour that the petitioner cannot reasonably be expected to live with. In *Faingata'a v Tau'alupe*[69] a husband who spent all day, everyday, and at least 2 nights a week overnight at his taxi business, refused to communicate with his wife for 2 months, and prevented her having access to the family car, was held to have behaved in such a way that she could not reasonably be expected to live with him.[70]

Tonga is not the only small island country in the South Pacific to have fault based divorce grounds.[71] These were modelled on English laws, which have now been reformed in many other parts of the Commonwealth. The fault based grounds for divorce were one of the areas requiring reform which was

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64 Divorce Act Cap 29, s 3(1)(d).

65 Divorce Act Cap 29, s 3(1)(d). The Act specifically sets out the circumstances in which the respondent will be deemed to be under care and treatment: s 3(3).

66 Divorce Act Cap 29, s 3(1)(e).

67 Divorce Act Cap 29, s 3(1)(g). For an example of such behaviour see *Faingata'a v Tau'alupe* (unreported, Supreme Court of Tonga, Ford J, 17 November 2003) accessible via www.paclii.org at [2003] TOSC 45.

68 See J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (2nd edn, Taylor and Francis Group, 2007), ch 7.

69 (Unreported, Supreme Court of Tonga, Ford J, 17 November 2003) accessible via www.paclii.org at [2003] TOSC 45.

70 *Faingata'a v Tau'alupe* (unreported, Supreme Court of Tonga, Ford J, 17 November 2003) accessible via www.paclii.org at [2003] TOSC 45.

71 In Vanuatu and Kiribati (in divorce involving expatriates) divorce is solely fault based: Matrimonial Causes Act Cap 192 (Vanuatu), s 5; Matrimonial Causes Act 1950 (UK), s 4. There is a mixed system in the following countries: Divorce Act Cap 29 (Tonga), s 5; Matrimonial Proceedings Act 1963 (NZ), s 21(1) (Cook Islands); Matrimonial Causes Act 1973, ss 8, 9 (Nauru); Niue Act 1966 (NZ), s 534(3) (Niue); Islanders Divorce Act Cap 170 (Solomon Islands) as amended by the 1998 Islanders Divorce (Amendment) Act, ss 2, 3; Divorce Regulations 1987 (Tokelau), reg 3; Matrimonial Proceedings Act Cap 21 (Tuvalu), ss 8, 9; Native Divorce Act Cap 60 (Kiribati), s 55 (in divorce between i-Kiribati), Matrimonial Causes Act 1963 (Papua New Guinea), s 17; Domestic Relations Act, Marshall Islands Revised Code 2004 (Marshall Islands), s 115; Domestic Relations Title 42, American Samoa Code (American Samoa), s 42.0202 at www.asbar.org/.

highlighted by women's groups[72] during Tonga's recent consultations[73] regarding the ratification of the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).[74]

No fault ground

There is an additional ground for divorce, which is not fault based. However, unlike the no fault grounds that apply in some other regional countries, it requires more than separation for a prescribed period. The following must be established:

- separation for a continuous period of at least 2 years;
- no payment of maintenance or intention to maintain by either party;
- no intention by either party to renew normal marital relations or cohabit with the other party.[75]

In *Halapua v Tonga*,[76] this ground was interpreted by the Court of Appeal as applying even where the decision to separate was not made by mutual agreement. It was also held that, once separation for at least 2 years is proved, proof of lack of intention to 'maintain or renew normal marital relations or cohabitation with each other' may be established from the intention of one party whatever the wishes or intentions of the respondent.[77] In other words, the ground may be established by unilateral conduct and intention.[78]

In calculating the period of desertion or separation no account is taken of any one period not exceeding 3 months, during which the parties lived together with a view to reconciliation.[79]

Where the parties resume cohabitation in an attempt to reconcile, this will not prejudice their right to apply for divorce on the grounds of desertion or

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72 For a summary of the South Pacific countries that have ratified CEDAW and the applicable dates see J Corrin Care 'Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post Colonial South Pacific Societies' (2006) 5 *Indigenous Law Journal* 51, 58.

73 See M Fonua 'Tongan women may get right to register husband's land' (2 September 2006) Matangi Tonga Online at www.matangitonga.to/article/tonganews/women/cedaw020906.shtml.

74 Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 513 (entered into force 3 September 1981).

75 Divorce Act Cap 29, s 3(1)(f).

76 (Unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5, [20].

77 *Halapua v Tonga* (unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5, [22].

78 See also *Pita v Vaiola* (unreported, Supreme Court of Tonga, Thomas J, 1 March 2005) accessible via www.paclii.org at [2005] TOSC 28.

79 Divorce Act Cap 29, s 2.

separation, provided it is not for any one period exceeding 3 months. Such period will be excluded from the calculation of time spent apart.[80]

(c) Bars to divorce

Before the court may grant a divorce on any of the above grounds it must be satisfied that there is no applicable bar. The bars are:

- collusion between the parties in the presentation of the petition;
- adultery;[81]
- unreasonable delay in presenting or prosecuting the petition;[82] and
- cruelty.[83]

Where the petition is based on adultery, there are two additional grounds:

- wilful desertion or separation by the petitioner before the adultery occurred;[84] and
- wilful neglect or misconduct which conduced the adultery.[85]

Tonga has a provision that is unique to the South Pacific region, which applies where the Attorney-General has reason to believe that the parties have colluded or suppressed material facts. In such cases, the Attorney-General may apply for leave of the court to intervene to show why the decree nisi should not be made absolute.[86]

(d) Procedure

Proceedings for divorce are commenced by petition.[87] Where the petition is based on adultery, the third party involved must be joined as a co-respondent, unless the court orders otherwise on special grounds.[88] The co-respondent may be removed as a party if there is insufficient evidence against him or her.[89] The petitioner may claim up to $1,000 in damages for adultery from the co-respondent.[90] Damages are calculated by reference to the 'actual value of

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80 Divorce Act Cap 29, s 2.
81 Divorce Act Cap 29, s 5(4).
82 Divorce Act Cap 29, s 5(4)(a).
83 Divorce Act Cap 29, s 5(4)(b).
84 Divorce Act Cap 29, s 5(4)(c).
85 Divorce Act Cap 29, s 5(4)(d).
86 Divorce Act Cap 29, s 11(2).
87 Divorce Rules 1991, r 4.
88 Divorce Act Cap 29, s 4.
89 Divorce Act Cap 29, s 6.
90 Divorce Act Cap 29, s 13(1).

the wife' in terms of money and companionship, and an amount to compensate for injury to feelings, honour and family life.[91] However, such applications are 'uncommon and infrequent'[92] and will only be awarded where the co-respondent has 'seduced or enticed away the respondent'.[93]

If a ground for divorce is established and no bar applies the court will grant a decree nisi. Application for the decree to be made absolute may be made after the expiry of 6 weeks from the grant of decree nisi.[94] If no such application is made by the petitioner within 3 months, the respondent may apply for a decree absolute.[95] On application for decree absolute the court may grant the decree, revoke the decree nisi, require further inquiry or make such other order as it sees fit.[96]

VI SEPARATION

An order for judicial separation legally sanctions the parties to a marriage to live apart. There is no legislative provision for such an order in Tonga. However, the parties may separate without a court order; all that is required is physical separation. The parties may also separate by formal agreement and, like an order, such agreement will prevent a party being in desertion. An agreement may also be desirable to govern ancillary matters.

VII FINANCIAL RELIEF

Maintenance

Maintenance on divorce

On or after granting a divorce the court may make a maintenance order in favour of a spouse[97] or a child of the family.[98] The court is also empowered to make an interim order at any time after presentation of a petition.[99] Maintenance may be in the form of annual payments for such term as the court considers reasonable or a lump sum.[100]

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91 *'Afa v Tali and Sika* [1990] Tonga LR 185, 186.
92 *'Afa v Tali and Sika* [1990] Tonga LR 185, 186.
93 *'Afa v Tali and Sika* [1990] Tonga LR 185, 187.
94 Divorce Act Cap 29, s 8.
95 Divorce Act Cap 29, s 11(3).
96 Divorce Act Cap 29, s 11(2)(a)–-(d), (3).
97 Divorce Act Cap 29, s 18(1)(a), (b), (c).
98 Divorce Act Cap 29, s 19. Children of the family are defined by the Divorce Act Cap 29, s 2, as amended by the Divorce (Amendment) Act 1996.
99 Divorce Act Cap 29, s 17.
100 Divorce Act Cap 29, s 18(1)(a), (b), (c).

An order for maintenance may be varied, suspended or revoked at any time.[101] It will cease upon the remarriage of the payee.[102]

Maintenance on desertion

A deserted wife may apply to the magistrates' court for maintenance under the Maintenance of Deserted Wives Act.[103] If the court is satisfied the husband is in desertion and has wilfully refused or neglected to maintain his wife and any children it can order him to pay a weekly sum to his wife. Instead of an order for the payment of cash, the court may make an order for an 'in kind' payment of food, clothing or other necessaries for the wife and any children.[104] The court may also make an order for the husband to provide accommodation for his wife and any children,[105] and make any other order that seems 'just and proper' in the circumstances of the case.[106] No order will be made in favour of the wife if she has committed adultery (which has not been condoned).[107] Adultery after a maintenance order has been made will result in its discharge.[108]

The level of payment is at the discretion of the court except that it must be in accordance with the husband's means.[109] If the husband is in default of maintenance payments or is absent from Tonga, the court may order his tax and town allotment of land to be given to the wife along with any produce to support herself and any children.[110]

VIII PROPERTY DIVISION

The Divorce Act provides that, on the grant of a divorce, each of the parties retains their own property.[111] This provision is unclear, but would appear to be referring to property other than jointly acquired matrimonial property, for example property acquired before the marriage or inherited by one party from a relative. This appears to be the construction favoured by Chief Justice Ward in *Nakao v Afeaki*.[112] In that case, His Lordship noted that the Divorce Act gave no guidance in relation to matrimonial property and suggested that 'it might be a reasonable interpretation of the provisions of s 15 to conclude that any joint matrimonial property should be divided in proportion to each party's

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[101] Divorce Act Cap 29, s 18(2).
[102] Divorce Act Cap 29, s 18(3).
[103] Cap 31.
[104] Maintenance of Deserted Wives Act Cap 31, s 2(a).
[105] Maintenance of Deserted Wives Act Cap 31, s 2(b).
[106] Maintenance of Deserted Wives Act Cap 31, s 2(d).
[107] Maintenance of Deserted Wives Act Cap 31, s 3.
[108] Maintenance of Deserted Wives Act Cap 31, s 3.
[109] Maintenance of Deserted Wives Act Cap 31, s 2(a) and (b).
[110] Maintenance of Deserted Wives Act Cap 31, s 5(1).
[111] Cap 29, s 15.
[112] (Unreported, Supreme Court of Tonga, Ward J, 17 December 2002) accessible via www.paclii.org at [2002] TOSC 37.

contribution'.[113] However, that case was decided at a time when the Matrimonial Causes Act 1973 (UK) conferred wide powers on the court to alter property rights on termination of a marriage.[114] As discussed above, since the enactment of the Civil Law (Amendment) Act 2003, English Acts of general application, including the Matrimonial Causes Act, are no longer part of the law. As neither the Divorce Act nor any other local legislation in force in Tonga makes specific provision for the division of matrimonial property, this is one of the areas where the Civil Law(Amendment) Act 2003 appears to have left a legal lacuna.

In *Halapua v Tonga*[115] the Court of Appeal confirmed the absence of any jurisdiction to divide matrimonial property and pointed out that this might be particularly unfair to wives:[116]

> 'There is now no matrimonial property legislation in the Kingdom. We appreciate that different social and economic conditions in the Kingdom may mean that the English legislative provisions are not suitable. However, it is our recommendation that the legislature should consider whether there should be legislative provisions relating to the division of matrimonial property on the breakdown of the marriage, appropriate to the social and economic conditions in Tonga. Without any such provisions, there remains the distinct possibility that one party to the marriage, usually the wife, may be unfairly disadvantaged.'

As stated by the Court of Appeal, English Legislation may not suit the conditions of Tonga. However, some form of legislative provision for alteration of property rights on breakdown of marriage is usually regarded as desirable. It is justified by reference to two interrelated matters: first, the variety of contributions that parties to a marriage may make to property and the welfare of the family; and, secondly, the inadequacy of common law and equity to recognise such contributions.[117] With no applicable legislation in force, courts will have to look to common law and equity for assistance. There is no accessible case-law to shed light on how Tongan courts will approach this problem. However, in other countries of the South Pacific where there is no applicable legislation, such as Solomon Islands[118] and Samoa,[119] the courts have sometimes found common law and equity inadequate to resolve property

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113 *Nakao v Afeaki* (unreported, Supreme Court of Tonga, Ward J, 17 December 2002) accessible via www.paclii.org at [2002] TOSC 37 per Ward CJ.

114 (Unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5, [26].

115 *Halapua v Tonga* (unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5.

116 *Halapua v Tonga* (unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5, [26]–[27].

117 See further, A Dickey *Family Law* (Lawbook Co, 2007), 473–475.

118 The Married Woman's Property Act 1882 (UK), which applies in Solomon Islands, as an Act of general application does not provide for the division of matrimonial property, although some Solomon Islands courts appear to have overlooked this fact: see, eg, *Kuper v Kuper* (unreported, High Court of Solomon Islands, Ward CJ, 18 November 1988). See further J Corrin Care, T Newton and D Paterson *Introduction to South Pacific Law* (2nd edn, Taylor and Francis Group, 2007), ch 7 (in press).

issues.[120] The main problem is that relief relies on the complicated notion of a constructive trust. This requires the parties to have actually, or at least apparently, formed a common intention for the property to be held jointly.[121]

Another problem stems from that fact that courts have not given due recognition to the value of unpaid work, which contributes to the well-being of the family.[122] This approach, which clearly puts women at a disadvantage, has been followed in Samoa. In *Nickel v Nickel*[123] it was argued that a spouse's indirect contributions should be taken into consideration when determining how matrimonial property was to be divided. While agreeing that contributions might be indirect and that they might be in the form of services rather than financial contributions, Sapolu CJ held that only contributions that assisted 'in the acquisition, improvement or maintenance of the relevant property asset' could be taken into account. His Lordship also stated that such contributions 'must clearly exceed the benefits which the relationship itself conferred upon the claimant'. The Chief Justice went on to assess contributions purely on a financial basis without taking into account the value of clearance and cultivation of the land with food crops by one party. Similarly, in *Elisara v Elisara*[124] Sapolu CJ refused to make any order in favour of the wife even though she had carried out secretarial work in the surveying firm owned by her husband in addition to having 'performed the normal duties of a housewife'.

The absence of an adequate regime for property division has been highlighted during the recent consultation process prior to Tonga's ratification of CEDAW.[125] Tonga is one of the few remaining countries in the region which has not become a party to the Convention.[126] During the consultatation process, pressure groups noted that the areas of Tongan law which needed improvement included the problems relating to the division of marital property.[127]

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[119] See, eg, *Elisara v Elisara* (unreported, Supreme Court of Western Samoa, Sapolu CJ, 22 November 1994) accessible via www.paclii.org at [1994] WSSC 14.

[120] See, eg, *Pusau v Pusau* (unreported, High Court of Solomon Islands, Kabui J, 28 November 2001) accessible via www.paclii.org at [2001] SBHC 86.

[121] See, eg, the Solomon Islands case of *Tavake v Tavake* (unreported, High Court of Solomon Islands, Kabui J, 19 August 1998).

[122] See, eg, *Gissing v Gissing* [1971] AC 889.

[123] (Unreported, Supreme Court of Western Samoa, Sapolu CJ, 18 November 2005) accessible via www.paclii.org at [2005] WSSC 26.

[124] (Unreported, Supreme Court of Western Samoa, Sapolu CJ, 22 November 1994) accessible via www.paclii.org at [1994] WSSC 14.

[125] Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 513 (entered into force 3 September 1981).

[126] For a summary of the South Pacific countries that have ratified CEDAW and the applicable dates see J Corrin Care 'Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post Colonial South Pacific Societies' (2006) 5 *Indigenous Law Journal* 51, 58.

[127] These views were presented by the Pacific Regional Rights Resource Team (RRRT) in collaboration with the Langafonua National Council of Women, the Catholic Women's League and the Civil Society Forum of Tonga and are reported in M Fonua 'Tongan women may get right to register husband's land' (2 September 2006) Matangi Tonga Online at www.matangitonga.to/article/tonganews/women/cedaw020906.shtml.

IX REFORM ISSUES

The family law regime in Tonga is obviously in need of reform, particularly now that the disappearance of the Matrimonial Causes Act 1973 (UK) has created a chasm in the legislative scheme. Tonga is not the only small Pacific island country with an outdated family law regime.[128] Although no fault grounds have been gradually introduced in some other jurisdictions,[129] Fiji Islands is the only country of the region to have divorce based solely on a no fault ground.[130]

The Family Law Reform Act 2003 of Fiji might seem a logical choice as a model for new legislation. That Act is the most comprehensive legislation in the region. It provides for no fault divorce on the sole ground that the marriage has irretrivably broken down. Further, it empowers the court to vary property rights[131] and specifies the factors which may be taken into account in making such orders.[132] However, it is necessary to exercise caution when such complex systems of law and society are involved. Transplanting law, even from neighbouring countries with strong ties and cultural similarites, is a tricky exercise.[133] One must not lose sight of the different interests at play, including those of the Church and traditional leaders, referred to at the beginning of this chapter.

In this context, political and financial restraints faced by developing nations[134] may not be the only factors inhibiting reform. For example, the Church and conservatively biased public opinion may not favour divorce reform. It is worth noting that the Adultery and Fornication Act Cap 21, introduced in 1919 to make adultery with an unmarried woman a criminal offence, was amended as recently as 1993 to increase the maximum fine from T$40 to T$1,000 and the maximum period of imprisonment from 10 months to a year.[135]

Further, the patriarchal and status based norms of customary society may mean that rights of a wife are not regarded as so important as those of her

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[128] See, eg, J Corrin Care 'For Better or Worse: Marriage and Divorce Laws in Solomon Islands' in A Bainham (ed), *International Survey of Family Law 2005 Edition* (Jordans, 2005), 483.

[129] Divorce Act Cap 29, s 5 (Tonga); Matrimonial Proceedings Act 1963 (NZ), s 21(1) (Cook Islands); Matrimonial Causes Act 1973 (Nauru), ss 8, 9; Niue Act 1966 (NZ), s 534(3) (Niue); Islanders Divorce Act Cap 170 as amended by the Islanders Divorce (Amendment) Act 1998 (Solomon Islands), ss 2, 3; Divorce Regulations 1987 (Tokelau), reg 3; Matrimonial Proceedings Act Cap 21 (Tuvalu), ss 8, 9; Native Divorce Act Cap 60 (Kiribati), s 55 – for divorce between i-Kiribati); Domestic Relations Act, Marshall Islands Revised Code 2004 (Marshall Islands), s 115

[130] Family Law Act 2003 (Fiji), s 30.

[131] Family Law Act 2003 (Fiji), s 160.

[132] Family Law Act 2003 (Fiji), s 162.

[133] O Kahn-Freund 'Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.

[134] Economic and Social Commission for Asia and the Pacific, 20 March 2006, Policy Issues for the ESCAP Region: Strengthening Pacific Island Developing Countries and Territories Through Regional Cooperation at www.unescap.org/62/English/E1361e.pdf.

[135] Adultery and Fornication (Amendment) Act 1993, s 2.

husband. These norms may also conflict with notions of equality underlying the desire to effect reforms allowing property division. As commented by the Prime Minister of Tonga in 2006:[136]

> 'Tonga, like most Pacific Nations, is a country whose culture, traditions and welfare, are based on their kinship or family system. In this very basic human unit, namely the family, there has to be an organization. In this organization, the Father is the Head, not only in Tonga but in most human societies. For this reason, men become the custodians of family property, and especially land. This concept was inscribed into our laws of inheritance and land ownership, and this provision is among the main concerns addressed by CEDAW worldwide. Tonga, like most kinship-based communities, has possible ways of enabling women to acquire registered/customary land rights, without destroying the traditional headship of our families by men, which is one of the main foundations of our society, and one which both Tongan men and women fully accept and do not want to destroy.'

The novel land tenure system in Tonga is predicated on the superior position of males. The system bestows on all male Tongans over 16 the right to rent an 'api' (a plot of bushland of 8.25 acres) and a village allotment (about three-eights of an acre) on which to build a home for life, at a nominal fee.[137] Once registered this land is inherited through the male line in accordance with the principle of primogeniture.[138] On the death of her husband his widow inherits only a life estate in the land, which terminates if she remarries, 'fornicates' or commits adultery.[139]

There is also an emphasis on the community in Tonga, which may result in the rights and wishes of individual parties to a marriage being regarded as subordinate to those of the community in which they live. This approach is encapsulated in the following comment by Tonga's Solicitor General:[140]

> 'We don't believe in individual rights . . . The Tongan way of life is not based in the right of the individual but that of the extended family, the church and the whole country. We have a collective people's value, and that is where our strength is, and we do not want to give that up.'

X CONCLUSION

In the light of the enactment of the Civil Law (Amendment) Act 2003, the time appears ripe for legal reform in Tonga. The passing of that Act is an important step in the patriation of Tongan law. However, it leaves the country without a

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[136] Prime Minister, Dr Feleti Sevele *Hon. Prime Minister Opens CEDAW Workshop: Address by the Prime Minister, Hon. Dr. Feletie Sevele, To Open the CEDAW Workshop for Members of Parliament, Nuku' Alofa, 1st September 2006* (2006) available at the Official Website of the Kingdom of Tonga www.pmo.gov.to/artman/publish/article_164.shtml.

[137] Land Act Cap 132, s 7.

[138] Constitution of Tonga 1875, s 111.

[139] Land Act Cap 132, s 80.

[140] 'A Taumoepeau 'We don't believe in individual rights' (2003) 18(2) *Matangi Tonga* at www.matangitonga.to/scripts/artman/exec/view.cgi?archive=3&num=282.

legislative scheme for property division on the breakdown of a marriage. Both the judiciary[141] and civil society groups[142] have urged Parliament to address this lacuna, particularly as it has a potentially discriminatory effect. This state of affairs offers the opportunity for Parliament to introduce a statute to reform the law, not just in relation to property division on divorce, but in relation to family law generally.

However, the prevailing culture in Tonga tends to culminate in a conservative approach to family law which is reflected in the existing legislation, which some may feel serves the country well. Accordingly, caution must be exercised in the approach to reform. In particular, the temptation to rely on transplanted laws should be resisted. The legislative review that is being undertaken to assess conformity to CEDAW's standards provides a starting point for tackling reform.[143] The international attention may also offer avenues for obtaining the necessary support to carry out a more holistic investigation. Ingenuity is required to devise a *sui generis* statute capable of accommodating the religious, collectivist, and customary influences underpinning Tongan culture, while seeking to provide a just family law system for all, including women.

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[141] *Halapua v Tonga* (unreported, Court of Appeal of Tonga, Burchett, Tompkins and Salmon JJ, 30 July 2004) accessible via www.paclii.org at [2004] TOCA 5, [26].

[142] See M Fonua 'Tongan Women May Get Right to Register Husband's Land' (2 September 2006) Matangi Tonga Online at www.matangitonga.to/article/tonganews/women/cedaw020906.shtml.

[143] See M Fonua 'Tongan Women May Get Right to Register Husband's Land' (2 September 2006) Matangi Tonga Online at www.matangitonga.to/article/tonganews/women/cedaw020906.shtml.

The United States

PROTECTING CHILDREN THROUGH STATE AND FEDERAL LAWS

*Sanford N Katz**

Résumé

Les abus sexuels sur des enfants commis par des prêtres catholiques et dont firent état les médias à la fin du 20ième siècle, représentent une réalité qui existe depuis longtemps mais qui n'était pas dénoncée auprès des autorités. En effet, les sévices dont étaient victimes les enfants, commis par des adultes en position d'autorité, font partie de l'histoire sociale américaine. Les enfants étaient exploités dans le courant des 18ième et 19ième et au début du 20ième siècle par le simple fait qu'on les laissait occuper, à la ville comme à la campagne, des emplois qui aujourd'hui seraient considérés comme inappropriés pour des enfants.

Aux Etats-Unis, les services sociaux et des institutions comme les législateurs et les tribunaux ont été les principaux protecteurs publics des enfants. Les législateurs au niveau des États ont, généralement sur ordre du pouvoir fédéral, adopté des lois qui confient aux services sociaux la mission de protéger les enfants et qui financent ces services. Le présent texte se concentre sur les institutions juridiques de protection de l'enfance. Historiquement, les parents ont été autorisés à élever leurs enfants comme ils l'entendent et ils ont été mis à l'abri de poursuites civiles et pénales en ce qui regarde plusieurs comportements qui aujourd'hui pourraient bien être considérés comme des abus.

Dans les années 1960 et 1970, la violence familiale, qui était considérée comme un problème de santé publique, devint un sujet de toute première importance pour le gouvernement fédéral. Le Département de la santé, de l'éducation et du bien-être social (aujourd'hui le Département de la santé et des services aux personnes) a pavé la voie en matière de protection des enfants victimes de violence familiale, en élaborant une législation modèle devant être adoptée par les législateurs étatiques et prévoyant l'autorisation pour l'État d'intervenir dans la vie familiale en vue de protéger les enfants. De plus, le Congrès américain a adopté une législation qui finance des programmes au profit des Etats qui respectent les demandes qui leur sont adressées par le Congrès en matière de législation visant la protection des enfants victimes d'abus, le placement en famille d'accueil lorsque nécessaire et la déchéance des droits parentaux dans les cas où des parents sont, à l'issue d'un procès juste et équitable, déclarés indignes.

* © Sanford N Katz 2007. Darald and Juliet Libby Professor of Law, Boston College Law School. This chapter is a revision of material from Sanford N Katz *Family Law in America* (Oxford University Press, 2003) 130–152.

I INTRODUCTION

At the close of the 20th century and the beginning of the new century, the vulnerability of children, especially, but not exclusively, prepubescent boys, was brought to the attention of the American public by the front page news reports of the sexual abuse of those children by Roman Catholic priests. Indeed, according to a study commissioned by the United States Conference of Catholic Bishops, from late 1999 to 2002, nearly 4,392 priests were reported to have sexually abused 10,000 children[1] over approximately 50 years by 4 per cent of diocesan priests in ministry during that time.[2] Through 2006, the numbers have continued to increase so that the number of credible victim reports has exceeded 12,000, and nearly 5,000 priests have been implicated.[3]

The sexual abuse scandal in the Roman Catholic Church has led to thousands of legal claims, at least hundreds of which remain unsettled as of 2006.[4] Through April 2006, United States dioceses had spent over $1.38bn in settling sexual abuse claims, leading to concern that the Church will not be able to afford the full economic consequences of the sexual abuse scandal.[5] Many plaintiffs in Massachusetts,[6] California,[7] Kentucky[8] and the Pacific Northwest,[9] the areas hardest hit by the scandal, have already settled their claims for

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1 Report of the John Jay College of Criminal Justice (Commissioned by the US Conference of Catholic Bishops) 'The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002' (March 2006 Supp), 4. I wish to acknowledge the research assistance of M Patrick Moore on the issue of sexual abuse in the United States Roman Catholic Church.

2 Ibid.

3 N Banerjee 'Diocese to Sell Headquarters to Help Settle Abuse Claims', *NY Times*, 26 May 2006, A16.

4 Associated Press 'Catholic Church's Costs Pass $1 Billion in Abuse Cases', *NY Times*, 12 June 2005, A33. The exact number of plaintiffs who have filed claims, and the number of claims still outstanding, is difficult to ascertain. A number of the victims of sexual abuse repressed memories of the abuse, only to regain them as the larger scandal unfolded. See, eg, *Powell v Chaminade College Prep*, 197 SW3d 576, 582 (Mo, *en banc*). In that case the court allowed the plaintiff to pursue a sexual abuse complaint concerning conduct that occurred between 1973 and 1975, despite the 4-year statute of limitations. Other plaintiffs failed to successfully demonstrate repressed memory, but still were allowed to file suit. California, for example, allowed plaintiffs to file a claim of action regarding sexual abuse in their childhood, regardless of statute of limitation issues, provided that the lawsuit commenced prior to 1 January 2006. Cal CCP, s 340.35 (2005).

5 R Willing 'Church Battling Plans to Ease Abuse Lawsuits', *USA Today*, 13 April 2006, A2. Some lawsuits have been held up as claimants battle judicially and legislatively to extend the statute of limitations on abuse claims dating back to 1950. See ibid. Others claims have been extended as a number of archdioceses have declared for bankruptcy. AS Green and S Woodward 'Portland Settles Abuse Suits, to Leave Bankruptcy', National Catholic Reporter, 22 December 2006, 10; see also C F Fain and H Fain 'Sexual Abuse and the Church' (2006) 31 *Thurgood Marshall L Rev* 209, 227.

6 The Archdiocese of Boston, Massachusetts settled with over 500 claimants for roughly $85m in September 2003. S Ebbert 'Diocese Property Deals Net $90M; Unused Real Estate Being Liquidated', *Boston Globe*, 6 November 2005, A1.

7 The Diocese of Orange, Orange County, California settled with 87 claimants for $100m, and the Los Angeles Archdiocese in Los Angeles, California settled with 45 claimants for $60m, though hundreds of claimants remain. J Leovy and J Garrison 'Priests' Victims are

staggering sums. Some claimants, concerned about the ability of local dioceses to compensate the abuse victims, have even attempted to seek damages directly from the Vatican.[10]

The sexual abuse by priests made the issue of the maltreatment of children both highly visible and public. No longer was the subject taboo. Yet child abuse and neglect can be traced as far back as the founding of the Americas.[11] Children have suffered at the hands of parents, teachers, social agencies and even the state although the suffering has often been justified as in the child's best interests. A law in the Massachusetts Bay Colony during the 17th century and taken directly from the Book of Deuteronomy provided that if a son did not 'obey the voice of his father', he could be stoned.[12] Children were as vulnerable in certain respects as enslaved people.

During the 18th and 19th century children were exploited in the work force. It took the child labour laws of the 19th century to free children from the control of their employers who took advantage of the children subjecting them to all sorts of dangers. The 19th century was a period in which American state legislatures enacted child neglect laws that gave the Government the legal authority to intervene into the parent-child relationship. Some of those laws are still on the books today.[13]

Children were subject to all sorts of indignities. Late in the 19th century and early in the 20th, many children found on the streets in Boston, New York and

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Emboldened', *LA Times*, 4 December 2006, B1; Associated Press 'Catholic Church's Costs Pass $1 Billion in Abuse Cases', *NY Times*, 12 June 2005, A33.

8 The Diocese of Covington, Kentucky settled with more than 70 victims for over $120m. M Paulson 'KY Diocese Will Pay Record Settlement, $120M Approved to End Abuse Suit', *Boston Globe*, 4 June 2005, A1.

9 The Diocese of Spokane, Washington settled with more than 100 victims for at least $48m; and the Diocese of Portland, Oregon settled with roughly 150 victims for $75m. JI Tu 'Spokane Diocese Reaches $48 million Settlement', *Seattle Times*, 5 January 2007, B1; S Howe Verhovek 'Church Abuse Claims Settled', *LA Times*, 12 December 2006, A24.

10 See *O'Bryan v Holy See*, slip op 2007 WL 11416, *6, 9-10, (WD Ky 2007) (allowing suit to go forward against the Vatican, on the claim that the Holy See exercises substantial control over the archbishops, bishops and other Catholic clergy in the United States); see also J Riley 'Suit Against Vatican Can Proceed', *Courier-Journal* (Louisville, KY), 12 January 2007, A1.

11 See JM Giovannoni and RM Becerra, *Defining Child Abuse* (Free Press, 1979), 31–75 ; SL Page, 'The Law, the Lawyer, and Medical Aspects of Child Abuse', in E Newberger (ed), *Child Abuse* (Lippincott Williams and Wilkins, 1982), 105-11; JEB Meyers, *Child Protection in America* (Oxford University Press, 2006). Although Professor Meyers' excellent study was published in 2006, much of the major social science and legal research on child abuse and neglect began in the 1960s and continued during the 1970s and early 1980s. The results of that research, funded by private foundations and the United States federal government, are still considered sound, and many of the books and articles published during those decades and cited in this chapter are considered classics in the field.

12 See SN Katz and WA Schroeder, 'Disobeying a Father's Voice: A Comment on Commonwealth v. Brasher' (1973) 57 MASS L Q 43. For a discussion of father's rights in Colonial America, see MA Mason *From Father's Property to Children's Rights*, (Columbia University Press, 1994), 1-47.

13 See SN Katz, M McGrath and R-AW Howe *Child Neglect Laws in America* American Bar Association Press, 1976).

Philadelphia, whether homeless or not, were subject to being rounded up and sent to the mid-west and west where they were sold to farmers to assist them in their work. These children who were later to be called 'the children of the orphan trains' were basically kidnapped by social service agencies in the name of advancing children's welfare. The agencies said that the children would be freed from the foul air of the cities and experience the openness of the mid-west and west where the air was clean and the opportunities limitless. Such statements were, of course, nonsense. Children of the orphan trains were lied to and sold to farmers for farm hands or kitchen maids.[14]

Throughout the history of the laws governing the complex relationship of parent, child and state, there has been a struggle between parental authority and family privacy on the one hand and the state's responsibility of guarding the best interests of the child on the other. The struggle has also been stated as parental rights versus children's rights.[15] The rhetoric has been that parents have the basic right to raise their children as they see fit, subject to their not overstepping the bounds of reasonableness in all aspects of child rearing. Parental rights are not unlimited. Historically the state, the ultimate parent who looks after all the children in society under the *parens patriae* concept, has a right to subject parents to public scrutiny and legal examination. In the United States, in the main, child protection in the form of child welfare services in the latter part of the 20th century and the beginning of the 21st is basically the responsibility of the states, although earlier in the past century those services were performed by local authorities, like counties or cities. State social service agencies under the executive branch deliver certain social services themselves but more commonly for reasons of economy contract for foster care and adoption services with private social service agencies, which they monitor.[16]

The executive and legislative branches of the federal government also play a role in child protection. The executive branch through the US Department of Health and Human Services develop model laws for states to adopt if they wish and technical services in order for states to conform to federal legislation including social security. The legislative branch through the US Congress enacts laws that basically fund child welfare programmes but provide certain requirements for states to fulfil in order to meet federal mandates. State and federal courts hear cases involving child protection depending on the issues involved. Normally, a state court is the venue for a child protection case

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[14] For a full discussion of the orphan train children, see MI Holt *The Orphan Trains – Placing Out In America* (University of Nebraska Press, 1992) and L Gordon *The Great Arizona Orphan Abduction* (Harvard University Press, 1999). See also Meyers, *Child Protection in America,* 19–6.

[15] A leading proponent of children's rights is Professor Martin Guggenheim of New York University Law School. In his latest book, *What's Wrong With Children's Rights* (Harvard University Press, 2006), he traces the history of children's rights in a variety of contexts including divorce, termination of parental rights and juvenile delinquency and the role of lawyers in protecting those rights.

[16] The state's contracting with private social service agencies is part of a national trend, begun in the latter part of the 20th century, to privatise services traditionally delivered or performed by the state.

brought under a state statute, ie child neglect and abuse law, a domestic violence law, or criminal law, but if a federal statute is involved then the federal courts have jurisdiction to hear the case.[17]

In this chapter, I shall explore the struggle that exists between parental rights to rear their children and the state's responsibility to look after the best interests of all children. In the United States, this area of law is called Child Protection Law as contrasted with Child Custody Law, the area of law that deals with children of divorce and Juvenile Law, the area of law that deals with children who have committed acts, which if the children were adults, would be considered criminal. I shall begin by examining the historical basis for the state's intervention into the parent-child relationship, and then I shall summarise the federal government's impact on the child protection systems in the states. That influence cannot be underestimated.

II THE CONCEPT OF PUNISHMENT

In American law, parents have used 'parental immunity' as a defence in criminal and civil actions brought by the state's (or county's, depending on the jurisdiction) attorney or a department of social services in actions against them for child abuse. The parents' argument usually is stated in terms of their right to discipline their children according to their own religious beliefs or culture. Over the past century, parents have become less and less successful in justifying their abusive behaviour on religious grounds.

The maxim, 'spare the rod and spoil the child', thought to be based on the Old Testament, but actually from Samuel Butler's poem *Hudibras*, has been part of American child rearing for centuries,[18] and has even been incorporated into American law. The idea is that parents and those in authority over children have the right to punish a child in order to inculcate values of obedience and respect. In the 19th-century North Carolina case of *State v Jones,*[19] Mr Jones was tried for an assault and battery on 16-year-old Mary C Jones. During the trial, the young woman testified that Mr Jones had a severe temper and when angry whipped her without any reason. She said that on one occasion he gave her about 25 blows with a switch, or small limb, about the size of one's thumb or forefinger with such force as to raise welts upon her back, and then going into the house, he soon returned and gave her five blows more with the same switch, choked her, and threw her violently to the ground, causing dislocation of her thumb joint.[20]

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17 See discussion of *DeShaney v Winnebago County Dept of Social Services*, 489 US 189 (1989) in this chapter.

18 Professor Philip Greven discusses the religious roots of punishment in his excellent study; see P Greven, *Spare The Child* (Knopf Publishing Group, 1990), 48.

19 *State v Jones*, 95 NC 588 (1886).

20 Ibid.

Mr Jones' defence, substantiated by his wife, Mary's stepmother, was that Mary was habitually disobedient, had several times stolen money, and was chastised at the time spoken of for stealing some cents from her father, that he never whipped her except for correction, and this he was often compelled to do for that purpose, and that had never administered punishment under the impulse of high temper or from malice.[21]

The judge's instruction to the jury expressed the North Carolina law at the time:[22]

> '. . . a parent had the right to inflict punishment on his child for the purpose of correction, but the punishment must not be "excessive and cruel," nor must it be "to gratify malicious motives;" that if the whipping was such as described by the daughter, there would arise a question as to the severity and extent of the punishment; that if the jury was convinced that it was cruel and excessive, the defendant would be guilty; that it was not necessary that it should result in a permanent injury to her, and if it was *excessive and cruel* it would be sufficient to make the defendant guilty.'

Mr Jones was found guilty.

In setting aside the trial court's verdict, Chief Justice Smith of the North Carolina Supreme Court stated the 19th-century view of family privacy that would allow for parents to have enormous discretion in raising their children, and at the same time minimise governmental supervision. He wrote:[23]

> 'It will be observed that the test of the defendant's criminal liability is the infliction of a punishment "*cruel and excessive" and* this it is left to the jury without the aid of any rule of law for their guidance to determining.
>
> It is quite obvious that this would subject every exercise of parental authority in the correction and discipline of children – in other words, domestic government – to the supervision and control of jurors, who might, in a given case, deem the punishment disproportionate to the offence, and unreasonable and excessive. It seems to us, that such a rule would tend, if not to subvert family government, greatly to impair its efficiency, and remove restraints upon the conduct of children. If, whenever parental authority is used in chastising them, it could be a subject of judicial inquiry whether the punishment was cruel and excessive – that is, beyond the demerits of the disobedience or misconduct, and the father himself exposed to a criminal prosecution at the instance of the child, in defending himself from which he would be compelled to lift the curtain from the scenes of home life, and exhibit a long series of acts of insubordination, disobedience and ill-doing – it would open the door to a flood of irreparable evils far transcending that to be remedied by a public prosecution. Is it consistent with the best interests of society, that an appeal should thus lie to the Court from an act of parental discipline, severe though it may be, and unmerited by the particular offence itself, perhaps

[21] Ibid.
[22] Ibid.
[23] Ibid.

> but one of a series of evincing stubbornness and incorrigibility in the child, and the father punished because the jurors think it cruel and immoderate?'

Although the opinion is short, it includes the assumption that physical punishment may reflect parental affection. The linkage of physical pain with affection may have been an acceptable proposition in the 19th century but it is clearly thought to be misguided today. For example, Chief Justice Smith stated that physical punishment as a manifestation of parental affection 'must be tolerated as an incident to the relation, which human laws cannot wholly remove or redress'. He adopted the position taken by another judge in another case who wrote that the relationships of master and apprentice, teacher and pupil, parent and child and husband and wife should not be interfered with by trivial complaints 'not because these relations are not subject to law, but because the evils of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government'.[24]

Following that policy, the North Carolina Supreme Court held that although 'the punishment seems to have been needlessly severe', it refused to consider it a criminal act, believing that 'it belongs to the domestic rather than legal power, to a domain into which the penal law is reluctant to enter, unless induced by an imperious necessity'.[25] It is this kind of attitude that has given currency to the statement that the family can be an enclosure for all kinds of violence between husband and wife and parent and child, and one in which the state (the police) is reluctant to enter.

In many of the cases dealing with punishment, defendants often invoke the Bible for support of the proposition that corporal punishment is justified by the Old and New Testament, and thus proper parental conduct. As late as 1988, in a South Carolina case, the parents' lawyer quoted Proverbs – 'Withhold not correction from the child; for if thou beatest him with the rod, he shall not die' – to justify the father's beating of his 13-year-old daughter while her mother stood by because the daughter had lied about her whereabouts instead of telling her parents that she had been to a friend's party.[26] Her punishment included the father whipping her with his belt and beating her until she was black and blue. He also slapped her in the face resulting in his daughter having ringing in her ears for a day.

The case arose because of the parents having been reported to a social service agency for child abuse. The agency investigated the case and thought the allegations serious enough to bring an action under the South Carolina child protection law. The lower court found that there had been child abuse and ordered both parents to participate in an agency counselling programme.[27]

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[24] *State v Rhodes*, 61 NC (Phil Law) 349, 453 (1868).
[25] *Jones*, 95 NC 588.
[26] *South Carolina Dept of Social Services v Father and Mother*, 366 SE2d 40 (So Carolina 1988).
[27] Ibid.

To support the defendants' argument that the Old Testament justified punishment a clergyman acted as a witness, and testified that the Bible was the 'ultimate binding authority'.[28] The defendants claimed that the free exercise of religion was constitutionally guaranteed to them. The South Carolina court addressed the argument with the following:[29]

> ' . . . the First Amendment embraces two concepts: the freedom to believe and the freedom to act. The first is absolute, but the second is not. The law cannot regulate what people believe, but the law can regulate how people act, even if how they act is based on what they believe . . . Indeed if the law were otherwise, the father in this case could beat his daughter into submission.'

In the concluding paragraph the court stated:[30]

> 'We believe the mother and father love their daughter and, despite what had happened, we believe she loves them. We also believe the mother and father can, if they will, learn to express their love in better ways, and the child can, if she will, learn to obey her parents – a requirement, coincidentally, of both the Bible and the law.'

The court did not accept the parents' justification. However, equating affection with physical pain is a curious child rearing principle. It suggests that children will learn positive behaviour through experiencing pain. There appears to be no contemporary research results that confirm this conclusion.[31] To what extent has the Bible justified corporal punishment? Professor Greven argues that while the Old Testament is replete with references to physical violence and punishment against children, the New Testament generally speaks of love, emphasising paternal restrain and advocating the affectionate nurturing of children rather than punishing them. Nowhere does he find corporal punishment ascribed either to the teaching of Jesus or to Paul.[32]

Culture was used as a defence in the New York case of *Dumpson v Daniel M.*[33] In that case the New York Commissioner of Social Services brought an action to remove three children from their mother and father's home because of the father's use of excessive force in punishing one of them. The father had allegedly struck his 7-year-old son 'with his hands, a belt and his feet'. The result was that the boy suffered a cut lip and bruises.

An interesting fact in the case (for cultural understanding) was that the father was a taxi driver and was taking courses at Brooklyn College in order to become an engineer. His wife was a high school teacher of chemistry and biology in the New York school system. Thus the parents were educated and upwardly mobile.

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28 Ibid.
29 Ibid.
30 Ibid.
31 See Greven, *Spare The Child*, 155 n 6 and 174.
32 Ibid, 46–54.
33 *NY Law J*, 17, c7 (16 October 1974).

The father claimed that his actions were a response to his son's poor school behaviour, which he said brought shame on the family. The father said that according to his Nigerian culture, 'if a child misbehaves in school and causes shame to the family, the parent has the duty to punish immediately and in any manner he sees fit'. He further testified that in Nigeria if a 'villager is summoned to court for any reason, he cannot return home until he has purified himself by way of a special cleansing ritual. No matter what the reason, it is a cause for embarrassment and shame if one has to appear in court'.

The New York Family Court decided that the father's form of corporal punishment was 'excessive' and as such would be considered 'neglect' under New York law. The judge ordered that the father and mother should undergo counselling; that the father should not physically punish his children; and three of the four children who had been temporarily removed from the custody of their parents should be returned to their parents' home. Further the court ordered that the child who had been beaten should remain under the care of the Department for the present.

The case raises interesting questions about the role of custom and culture in defining child rearing and the extent to which American law will tolerate or even sanction customs that deviate from the dominant American methods of child-rearing if such methods can be defined.[34] Eunice Uzokike states that 'the Nigerian Criminal Code authorizes parents and school teachers to inflict a "blow or other force" for the purpose of correcting children under the age of sixteen'.[35] The author then states that Nigerian law does not authorise physical punishment that would 'exceed reasonable physical chastisement'.

According to Uzokike, children are considered the personal property of their parents in Nigerian culture and consequently incidents of physical force on children are ordinarily not of great concern to the police who would be the proper authority to intervene. As of 1990, Uzokike states that there have been no recorded cases of physical abuse in Nigeria.

If Uzokike is correct about Nigerian culture, the father in *Dumpson v Daniel M* was truthful about the treatment of children in Nigeria. Uzokike makes the point, however, that physical punishment is more prominent among the poor, uneducated, and illiterate in Nigeria. The father in the *Dumpson v Daniel M* case did not have any of those characteristics.

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[34] For an excellent discussion of cultural differences regarding child rearing and the ways in which such differences should be assessed by the state, see M Freeman, 'Cultural Pluralism and the Rights of the Child', in J Eekelaar and T Nhlapo (eds), *The Changing Family* (Hart Publishing, 1998).

[35] E Uzodike, 'Child Abuse and Neglect in Nigeria – Socio-Legal Aspects' (1990) 4 *Int'l J L & Fam* 83, 86.

III THE DEFINITION OF CHILD ABUSE

Is there a dominant American practice of child rearing that could be used to define appropriate punishment and differentiate it from child abuse? The answer is probably no. The research that comes closest to determining whether there is a consensus on what kind of parental misconduct should be reported to social service agencies for investigation to determine if there has been child abuse is that conducted by Giovannoni and Becerra in the late 1970s.[36] They reported that child maltreatment is 'not an absolute entity but, rather, is socially defined and cannot be divorced from the social contexts in which it occurs'.[37] In trying to discover whether there was a consensus on the definition of child maltreatment, the researchers developed vignettes and presented them to lay persons and professionals to determine how they would categorise the conduct of the parents in each vignette. Giovannoni and Becerra reported that:[38]

> 'Although the respondents concurred on the boundaries of different kinds of mistreatment, there was not always agreement about the valuations placed on each. Community members saw most kinds of mistreatment as more serious than did professionals, and among professionals, lawyers especially dissented from the other groups, generally regarding mistreatment as less serious than the others did.
>
> However, there was amazing similarity in the judgments of the relative seriousness of different *kinds* of mistreatment.
>
> There were some notable exceptions to this general pattern. Among the professionals, police and social workers saw most kinds of mistreatment as more serious than did lawyers or pediatricians. This difference in opinion was most clearly related to the roles they play in the protective network as gatekeepers who make the initial decision as to whether a situation will be defined as one of mistreatment at all. This role provided them with particular kinds of responsibilities and experiences. Among the community respondents, differences in opinions related to ethnicity and social class. Contrary to common speculation, Black and Hispanic respondents, and those of lower socioeconomic statuses exhibited greater concern about all kinds of mistreatment. Further, socioeconomic status of the respondents, while shown to be related to their perceptions of mistreatment, was not a factor that operated independently of their ethnicity. Rather, the ways in which social class and cultural values affected opinions about mistreatment were demonstrated to be very complex and not uniform across all ethnic groups.'

The Giovannoni and Becerra study is over 25 years old. Yet it confirms generally held beliefs about the lack of uniformity in defining child abuse at that time. The debate over definitions and the question of state intervention in

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[36] Giovannoni and Becerra, *Defining Child Abuse*. For definitions of child abuse under the Child Abuse Prevention and Treatment Act, see text discussing that Act below.

[37] Ibid, 239.

[38] Ibid, 241.

the parent-child relationship took place in the early 1970s and was prompted by the federal government's concern about violence in the home that occurred in the 1960s.[39]

Indeed, violence in the home was a phenomenon that was not widely studied or taken very seriously before about 1970 although reported divorce cases are filled with wife abuse that was not even discussed in terms of domestic violence, but whether the abuse justified a ground for divorce. Husbands could beat up their wives or subject them to sexual assaults with legal immunity for all practical purposes because of the old notion that wives were essentially the property of their husbands as well as the adage that a man is king in his household. Wives were supposed to serve their husbands and not question his authority.[40] Children were in a worse position than their mothers because children could be dominated by both parents and could be subjected to all sorts of abusive conduct in the name of parental rights. Domestic violence, whether between adults or adults and children, is really an expression of power and aggression over the dependent and vulnerable.

While the issue of child abuse generated legislative reform and response relatively quickly once it became a widely acknowledged problem, violence against women did not. The problems revolving around violence against women were finally recognised and addressed by Congress through the Violence Against Women Act of 1994. Among its major purposes were the encouragement of mandatory arrest of domestic abusers, and increased awareness of the pervasiveness and severity of violence against women.[41]

IV THE ROLE OF THE FEDERAL GOVERNMENT

The federal government's role in child welfare is basically two fold: (1) to provide technical assistance to states by developing model legislation for states to use in their law reform; and (2) to provide financial assistance for federal or federal and state child welfare programmes, but with the mandate that the states fulfil certain requirements. It is because of the second role that the federal government can influence state legislation. To put it bluntly, if the states do not enact certain laws or promulgate certain administrative regulations, they are not eligible to receive funds for a number of vital state child welfare programmes.

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[39] For a discussion of the problem of state intervention that was a major issue in the 1970s, see SN Katz *When Parents Fail* (Beacon Press, 1971) and MS Wald, 'State Intervention on Behalf of Neglected Children' (1975) 27 *Stan L Rev* 985.

[40] These issues are discussed in WO Weyrauch, SN Katz and F Olsen, *Cases And Materials On Family Law – Legal Concepts And Changing Human Relationships* (West Publishing, 1994) 212, 348. For an illustration of wife battering that is not even discussed as such, see *Warner v Warner*, 76 Idaho 399, 283 P2d 931 (1955) reproduced and commented on in that book.

[41] See EM Schneider, 'The Law and Violence Against Women in the Family at Century's End: The U.S. Experience' in J Eekelaar, SN Katz and M McClean (eds), *Cross Currents* (Oxford University Press, 2000); EM Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, 2000).

The role of government in child protection is enormous and the power of a judge who decides child protection cases is profound. Often, the concept of *parens patriae* is invoked not necessarily to justify the governmental role, but to explain it.[42] With all that power, does the government have any responsibilities? To help answer that question, one should look to history.

In his study of wardship jurisdiction,[43] John Seymour explains the origins of the law of wardship and its relationship to the concept of *parens patriae*. He discusses the conflict in English cases between those judges who believed that the Chancery Court judge stood in the shoes of the parents and those who were held to the idea that the jurisdiction of the Chancery Court was wider than parents and was not derivative from parents but from the Crown. Seymour quotes from Lord Donaldson's observation in *Re R*: the jurisdiction of the Chancery Court 'is not derivative from the parents' rights and responsibilities, but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children'.[44] In other words, with the invocation of *parens patriae* comes the duty to protect children. But what kind of duty did Lord Donaldson mean?

From the 1960s until the 1980s, child welfare specialists and American legislators interested in the plight of children struggled with the question of what can government do to prevent the break up of families and if such a phenomenon occurs, how to reorganise them in such a way as to facilitate a child's entry into another family where the child can be safe and thrive. Leadership from the federal government took the form of the US Department of Health, Education, and Welfare providing a Model Mandatory Child Abuse and Neglect Reporting Law,[45] Model State Subsidised Adoption Act[46] and the Model Act to Free Children for Permanent Placement.[47] Congress enacted the Child Abuse Prevention and Treatment Act of 1974[48] and the Adoption Assistance Act of 1980.[49]

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42 For a discussion of *parens patriae* and its origins, see HH Clark, Jr, *The Law Of Domestic Relations In The United States* (2nd edn, West Publishing, 1988), 335; SN Katz *When Parents Fail* (Beacon Press, 1970), 17 n.17.

43 J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 *Oxford J Legal Studies* 159.

44 Ibid.

45 Children's Bureau, US Department of Health, Education & Welfare 'The Abused Child-Principles and Suggested Language for the Reporting of the Physically Abused Child' (1963).

46 Reproduced in SN Katz and UM Gallagher, 'Subsidized Adoption in America' (1976) 10 *FAM L Q* 1, 11. The brief summary of the Act is based on that article. The authors of the article, a law professor and a social worker, were the drafters of the model act, which has been the foundation upon which subsidised adoption in the United Sates is based.

47 The Act is reproduced in S N Katz, 'Freeing Children for Permanent Placement Through a Model Act' (1978) 12 *FAM L Q* 203. The brief summary of the Act is based on that article.

48 Pub L No 96-272, 94 Stat 500 (codified as 42 USC ss 620-28 and 670-79).

49 Pub L No 96-272, 94 Stat 500 (codified as amended in scattered sections of 42 USC). This chapter will discuss aspects of ss 620–28 and 670–79.

V MODEL MANDATORY CHILD ABUSE REPORTING STATUTE

It is interesting to observe that child abuse and neglect became important in the public consciousness about 20 years before violence against women. In 1962 the research of Dr C Henry Kempe and his associates in Colorado was published and their article that coined the phrase 'battered child syndrome' was widely read and recognised by both the medical, psychiatric and social work communities.[50] At about the same time, the Children's Bureau of the then US Department of Health, Education, and Welfare (now called the Department of Health and Human Services) held a conference to discuss what the legal response should be to the phenomenon that Dr Kempe and his associates described. In 1963 the Model Mandatory Child Abuse Reporting Law developed from the conference.

To develop a mandatory child abuse reporting law was not without problems. It affected not only family privacy but it also was at first seen as an intrusion into the confidential relationship between doctor and patient. Thus the first laws were limited in scope and in the number of professional persons who were required to report abuse. As the concept of reporting was accepted, the number of mandated reporters grew.[51] For example, initially only physicians and surgeons were mandated to report in California. Now it can be said that mandated reporters often include all healthcare professionals, school personnel, clergy, daycare operators and even film developers.[52] Some statutes include a catch-all category such as other persons who regularly come into contact with children in the scope of their employment[53] and at least one state includes anyone with reasonable cause to believe a child has been abused.[54]

One of the major issues that met with resistance in persuading states to enact mandatory reporting laws was the extent to which those mandated to report were protected from cases where initial observation or diagnosis of the child's injury later proved to be something other than abuse. The resolution of that issue was to give immunity to mandated reporters whose report to the appropriate agency was made in good faith. For those mandated reporters who failed to report criminal sanctions (usually the crime is a misdemeanour with a fine and/or jail sentence) were put in place. The basic elements of mandatory reporting statutes include:

(1) definition of reportable conditions;

(2) persons required to report;

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50 CH Kempe et al 'The Battered Child Syndrome' (1962) 18 *J Of The Am Med Assoc* 17. This is a classic article responsible for highlighting the syndrome and causing the label to become part of the medical and legal vocabulary.

51 See DJ Besharov, 'Gaining Control Over Child Abuse Reports' (1990) 48 *Public Welfare* 34.

52 See, eg, Cal Penal Code ss 11165, 11166 (1990).

53 Ibid.

54 Alaska Stat s 47-17-020.

(3) degree of certainty reporters must reach;

(4) sanctions for failure to report;

(5) immunity for good faith reports;

(6) abrogation of certain communication privileges; and

(7) delineation of reporting procedures.[55]

Although there is no absolute uniformity in all American reporting laws, their passage has, to some extent, accomplished one of its primary goals, which is to make child abuse a public concern. The studies about child abuse reporting laws were mostly completed in the 1980s. One study indicates that nearly ten times the number of cases reported in 1965 were reported in 1985, totalling 1.5 million.[56] According to a US Census Bureau abstract, reports of child abuse increased from 669,000 in 1976 to 2,086,000 in 1986[57] and to 3,000,000 in 1996.[58] The prediction that 2.5 million reports would be expected each year during the 1990s was an underestimation.[59] Even with these statistics, studies show that a majority of child abuse and neglect cases remain unreported. And, there is the ever present problem of unsubstantiated reports, which had comprised of about one half million each year.[60]

Unreported child sexual abuse cases became public in 2000 with national and international newspaper coverage of Roman Catholic priests who engaged in sexual abuse of children.[61] That Roman Catholic priests who were in positions of authority and confidence with children in educational activities, church functions, sports activities or in counselling sessions at church or in the child's home would violate the trust and respect accorded to them was thought to be an outrageous abuse of power.[62] Rather than taking child sexual abuse as a matter for public authorities to take criminal action, Church officials avoided

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55 Educational Commission of the States, Report No 106, *Trends in Child Protection Laws 1977* (1978) 18-21 app.

56 See generally DJ Besharov, 'Doing Something About Child Abuse: The Need to Narrow the Grounds for State Intervention' (1985) 8 *Harv J L & Pub Pol'y* 540, 542-50.

57 Bureau of The Census, US Department of Commerce, Statistical Abstracts of the United States 186 (1992).

58 See PA Schene, 'Past, Present and Future Roles of Child Protective Services' (1998) 8 *The Future of Children* 23, 29 citing the US House of Representatives Committee on Ways and Means, *1996 Green book: Background material and Data on Programs within the Jurisdiction of the Committee on Ways and Means* (US Gov't Printing Office, 1996), 733.

59 US Advisory Board on Child Abuse & Neglect, Office of Human Development Services 'Critical First Steps in a National Emergency 2' (1990), 15.

60 See D Besharov 'The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect' (1978) 23 *Vill L Rev* 458, 556-57. US Department of Health & Human Services 'Study Findings: National Study of Incidence and Severity of Child Abuse and Neglect' (DHHS 1981), 34; A Buchele-Ash et al 'Forensic and Law Enforcement Issues in the Abuse and Neglect of Children with Disabilities' (1995) 19 *Mental & Physical Disability L Rep* 115.

61 See discussion of this topic in the text above.

62 Approximately 218 priests were reportedly removed in 2002, with another 34 known offenders

that approach and treated it as an internal administrative matter. Abusive priests, mostly from Kentucky and Massachusetts, were not only protected by the local church hierarchy by keeping secret the claims of abuse, but were assigned to different parishes within the state or transferred to parishes in other states without reference to the priests' conduct.[63] In some instances the priests were placed on medical leave and sent to special mental health facilities or rehabilitation centres.[64]

The Massachusetts state legislature shared the outrage of the general public and saw the pressing need to protect children from further abuse. For the first time since 1997, the legislature amended its reporting statute to include clergy.[65] Mindful of the sanctity of the religious practice of the Roman Catholic Church and the importance of religious autonomy, they were careful to preserve the confidentiality between Roman Catholic priests and penitents in the confessional, and excluded from the mandate information gained through confession in the confessional booth or in another area but clearly intended to be a personal confession.[66] Thus, the change in Massachusetts law requiring priests to reveal information not obtained in the confessional restricts the confidentiality between Roman Catholic priests and their parishioners, that has traditionally applied to all communications. In so doing, the state may be seen as infringing upon the practices and traditions of the Church. However, in cases of child abuse, the state's compelling interest in protecting children outweighs certain constitutional guarantees.[67]

VI OTHER MODEL ACTS

During the 1960s and 1970s, when government intervened in the parent-child relationship such intrusion was often the result of a report of child abuse. Once the child was removed from his or her parent's control, he or she was often placed in foster care. In many instances, public social service agencies saw their job as having been completed since the child was now safe. Little thought was given to the ultimate disposition of the case. The reason was that there were so many cases that agencies were just not able to process all of them or even to keep track of where the child had been placed and the duration of the placement.

Out of the research that revealed the growing number of children in foster care and the lack of services provided for them came the Model Subsidised

remaining in active service. See, A Cooperman and LH Sun 'Survey Finds 218 Priests Have Been Removed This Year', *Boston Globe*, 9 June 2002, A1.

63 Ibid.

64 See, eg, S Pfeiffer 'Memos Reveal Trail of Charges', *Boston Globe*, 5 June 2002, A16.

65 Mass Gen Laws Ann, ch 119, s 51a (West 2002).

66 Ibid.

67 See, eg, *City of Baltimore v Bouknight* where the United States Supreme Court upheld the state's overwhelming interest in protecting children over a mother's right to remain silent about the whereabouts of her child. In that case, the Court recognised that the state's interest in protecting children trumped the mother's Fifth Amendment right against self-incrimination.

Adoption Act and the Model Act to Free Children for Permanent Placement.[68] To the question, why were so many children in foster care, one response that was often given was that the longer a child stayed in foster care, the more difficult it was to place him or her for adoption and those persons who might be willing to adopt the foster child were not financially able to adopt. Another response was that the children who might be able to be adopted were not legally free.

The Model Subsidised Adoption Act was designed to provide a financial benefit for children who were candidates for adoption but for whom adoptive parents could not be easily found. Usually such children, labelled children with special needs, were in foster care and were medically handicapped, had been abused or neglected and were physically and emotionally scarred, were part of a sibling group, were older children, perhaps from the ages of 6 to 12, or from an ethnic group and difficult to place. The theory was that once these children were approved for a subsidy, they would become attractive candidates for adoptive parents. During the years that adoption subsidies have been made, there has been only marginal progress if any.

The Model Act to Free Children for Permanent Placement was meant to provide state legislatures with a model to replace their outdated termination of parental rights provisions. It had three goals: (1) to provide judicial procedures for freeing children for adoption or other placement by terminating parental rights; (2) to promote permanent placements of children freed from their parents; and (3) to ensure that each party's constitutional rights and interests were protected.

Although state legislatures did not adopt the Model Act to Free Children for Permanent Placement as they did the Model Subsidised Adoption Act, the permanent placement model act along with social science research dealing with the idea of the need for permanency planning for children in foster care provoked the states and Congress to face the crisis in foster care. The Congress responded by enacting the Child Abuse Prevention and Treatment Act of 1974.

(a) Child Abuse Prevention and Treatment Act of 1974

Under the leadership of the then Minnesota Senator Walter Mondale who would later become the United States Vice President, Congress held hearings on the plight of abused children. After the hearings he later wrote that he found the evidence of child abuse at his hearings to be 'horrifying'.[69] Through his efforts, Congress passed the Child Abuse Prevention and Treatment Act of

[68] The number of children in foster care rose sharply after promulgation of the Model Child Abuse and Neglect Reporting Act, reaching 296,000 in 1966. By 1977 more than 500,000 children were living in foster care. The 1966 figures were found in D Fanshel and E Shinn, *Children in Foster Care* (Columbia University Press, 1978), 29. The 1977 figures were found in R-AW Howe, 'Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning' (1979) 13 *Fam L Q* 257, 330.

[69] W Mondale 'Introductory Comments' (1978) 54 *Chi-Kent L Rev* 535, 536.

1974. The Child Abuse Prevention and Treatment Act of 1974 had two central elements: (1) the establishment of a National Center on Child Abuse and Neglect; and (2) the establishment of minimum standards for state child protective systems. The National Center on Child Abuse and Neglect serves as a clearing house for information for developing and disseminating information about child protection research. In addition it provides funding for research, demonstration, training and technical assistance for funded projects.[70]

In order for a state to acquire funding for its child protection programmes, it had to comply with certain federal requirements. For example, the Act required that states 'provide for the reporting of known and suspected instances of child abuse and neglect', broadening in some states the types of abuse reported to include all forms of child maltreatment. The Act also required states to streamline their child protection system to conform to the federal government's model of what a proper system should include. Under the Act, child abuse and neglect means, at a minimum: 'Any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents and imminent risk of serious harm.' It also defined sexual abuse to include:

> 'The employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or the rape, and in cases of caretaker or interfamilial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.'

(b) The Adoption Assistance and Child Welfare Act of 1980

Six years after the Child Abuse Prevention and Treatment Act of 1974 became a federal law, the US Congress passed another child protection law with far-reaching consequences: the Adoption Assistance and Child Welfare Act of 1980. This Act was directed to once again get control of the continuing crisis in foster care. With all the federal intervention in the child protection field, with all its financial incentives to states to manage the problem of child abuse and neglect, still there were far too many children in foster care. The challenge that

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[70] The Act also required individual states seeking to qualify for a grant offered through the Act to provide for the dissemination of information to the public regarding child abuse and neglect and available services, essentially creating individual state Centers on Child Abuse and Neglect, Pub L 93–247, at s 4(b)(2)(I). The Child Abuse Prevention and Treatment Act was amended in 1996. In order to receive federal funds for child abuse and neglect prevention and treatment programmes, a state must submit to the federal government a plan that outlines the provisions and procedures for representation for the child (whether an attorney, a guardian *ad litem* or a special child advocate) in child protection proceedings. See 42 USCA s 5106a(b)(A)(ix) (West Supp 1999). For a discussion of the statutory basis for affording children some kind of representation in child protection proceedings and selected writings on the role of representation of children including passages from the Model Rules of Professional Conduct and the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, see RD Goldstein, *Child Abuse and Neglect Cases and Materials* (West Group, 1999), 937–53. See also Guggenheim *What's Wrong With Children's Rights*.

had to be met was to resolve the conflict that can arise between parental rights to rear their children and society's responsibility to care for children. How can these rights and responsibilities be balanced?

Once again the Act was a funding vehicle for states to obtain money for the structuring and implementing a foster care system according to the Act's requirements. The Act was concerned with family situations before a child enters the foster care system, the child's situation while in the foster care system, and the child's situation at the end of foster care. The Act attempted to improve these situations by providing for the following: (1) the provision of sufficient replacement services to families to prevent the need for children to enter the foster care system; (2) the protection and provision of services for children in the foster care system; and (3) the return of children to their homes or their placement in a permanent setting like adoption.

The most important aspect of the Act was its introduction of the concept of 'reasonable efforts'.[71] The Act required that social service agencies must make reasonable efforts to prevent a child from being removed from his or her parents, and if removed, the agency must make reasonable efforts to provide services to the parents and the child within a certain time frame in order to facilitate the child's return to his or her family.

The reasonable efforts concept was designed to place an affirmative duty on the part of the agencies to try to rehabilitate those parents whose children had been removed from their care. The hope was that by providing parents with services (eg referral to drug and alcohol addiction programmes) that the agency would pay for, and giving the parents a specific time (eg 18 months) to become able to provide proper care for their child, family reunions could occur. In order to protect parents, the Act required that states have in place a procedure by which cases could be reviewed, either administratively or judicially, every 6 months. In this way, it was thought that families would not be lost in the bureaucracy of an agency. If, within the time frame (eg 18 months), a parent did not rehabilitate him or herself, then termination of parental rights would be appropriate.

(c) Adoption and Safe Families Act of 1997

As a result of the shortcomings of the application of the 1980 Act, Congress updated it in 1997. Recognising the reality that family reunification is not possible in many situations, Congress returned to the concept of the permanent placement of children that had been articulated and dealt with in the 1970s. To that end, the 1997 Adoption and Safe Families Act provides more specific definitions of 'reasonable efforts', including delineation of 'aggravating circumstances', which are so egregious that reasonable efforts to reunify need not be made. In such a case, the Act requires that the state hold a 'Permanency Hearing' within 30 days of the determination that such aggravating circumstances exist, where agency representatives are required to present a plan

[71] 42 USCA s 671(a)(15).

for the child's long-term placement. In addition, the Act includes requirements that a state move to terminate parental rights when a child has been in foster care for a given length of time (eg 15 out of the last 22 months). This provision is designed to remedy the broad and various applications of the reasonable efforts standard of the 1980 Act by creating a specific timetable for parental rehabilitation. Further, the 1997 Act creates increased incentives for adoption, and looks to adoption as a primary means of addressing the inadequacies of the foster care system. The great difficulty with quantifying periods for parental rehabilitation is that in the case of drug addicted parents (a common ground for termination of parental rights), recovery may be difficult to assess. In addition, drug addicted persons often experience a relapse and that event would, no doubt, extend the duration of rehabilitation. The emphasis on adoption as the solution for reducing the foster care population in the United States has met with both support and criticism. Basically the question is whether focusing on adoption as the answer to permanent placement takes into account serious mental health and social problems, like poverty, unemployment and inadequate housing, that are associated with child neglect.[72]

VII CHILD PROTECTION PROCESS

The process by which a child protection case moves through the judicial system is designed to balance the interests of the child and the constitutional rights of parents. This balance is reflected in the procedure during each stage of the process from the decision to report child abuse, to the evidentiary issues during trial, and at the dispositional phase. For example, during the investigation phase of alleged abuse cases, some states require not only a decision by the child protection worker that the child is in danger, but also a court order before

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[72] See, eg, E Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift and the Adoption Alternative* (Beacon Press, 1999), where the author presents the case for adoption as the best means of providing permanent homes for children in the foster care system. Professor Bartholet suggests that through adoption, children in the foster care system can be given a new start in a permanent, loving home. Professor Martin Guggenheim, critical of that solution, argues that adoption is not the answer. In fact, he believes that adoption serves to aggravate some of the problems in the system. For example, Professor Guggenheim points out that an inordinate number of those children placed in foster care and ultimately relinquished for adoption come from economically disadvantaged homes. He suggests that, many times, state social workers mistakenly assess poverty as neglect. The result of this designation is the removal of a child from his family when the family is providing all they can within their means. He argues that this trend of removing children from their homes in an attempt to place them in a more advantaged setting results in disparate treatment of parents and children from poor communities, and many times results in unnecessary removal. See M Guggenheim 'Somebody's Children: Sustaining the Family's Place in Child Welfare Policy' (2000) 113 *Harv L Rev* 1716. Professor Guggenheim has written about the consideration of child protection in the United States as a problem of parental failure, using the medical model to categorise issues. He suggests that classifying child protection in that way prevents an opportunity to examine the root causes of child maltreatment. See M Guggenheim 'Child Welfare Policy and Practice in the United States' in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Law and Policy in the US and England* (Oxford University Press, 2000), 547, 563–64.

a child can be removed from parental custody.[73] Some states also have guidelines regulating the circumstances under which a child protection worker can interview an allegedly abused child, effectively preventing children from being interviewed at school without notice to the parents.[74] If the Department of Social Services finds evidence of abuse but the parents refuse to co-operate with it, then the court becomes involved through an adjudicatory hearing. The adjudicatory hearing requires the state to show, by a preponderance of the evidence or clear and convincing evidence, that its petition alleging child abuse or neglect should be sustained. These evidentiary standards serve to protect the rights of parents and other caretakers.[75] If the Department's petition is sustained, the case moves to the dispositional phase at which the court decides who should have custody of an abused child. In making that determination, the court considers the particular problems and needs facing the family at hand, and assesses the best interest of the child. Federal guidelines mandate that a state make reasonable efforts to prevent the removal of children from their families except in the most aggravated circumstances of abuse. The goal is to ensure parental rights are respected on the one hand and the best interests of the child is served on the other.[76]

If a child is not returned to his birth parents and termination of parental rights occurs, the dispositional alternatives are limited to either long-term foster care or adoption. Depending upon the age of the child, long-term foster care usually means that a child will either be living with a foster family related (kinship placement) or unrelated to the child, group home or orphanage until the child reaches the age of majority when he or she is no longer supported by government funds. Adoption is designed to provide the child with a permanent attachment. If the neglected child has been living with foster parents and the placement has been successful, those parents are ordinarily given priority in adopting the child if they so desire, and the child's best interests would be furthered. Subsidised adoption programmes were designed to support that outcome.[77]

As one studies the role that government now plays in the area of child protection, one comes away with the observation that punishing one's own children, once a private family matter, if interpreted as abuse by neighbours, school personnel or governmental officials can become a public matter. That is to say, when a parent strikes a child for being disobedient and the injury that the child sustains is seen by a third person (eg a school teacher or a school nurse) who thinks the injury requires medical attention, the result might be the reporting of the incident to a social service agency. In cases defined as serious by agency officials, the result may be for the parents and the child to become

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73 See, eg, Iowa Code s 234 (2002).

74 See D Heckler, *The Battle and the Backlash; The Child Sexual Abuse War* (Lexington Books, 1988).

75 See, eg, *In re Juvenile Appeal*, 189 Conn 276 (1983); *In re Adoption of KLP*, 735 NE2d 1071 (2000).

76 See discussion of Adoption and Safe Families Act in this Chapter.

77 See discussion of Subsidised Adoption Act in this Chapter.

involved with child protection process. Such a process might conclude a court hearing and a disposition that may involve the child's removal from her home and her placement with foster parents.

I have attempted to review federal legislation in child protection because the federal government has really been the impetus for states to reform its child protection laws and procedures. Now I wish to turn to a famous case, which tested the state's responsibility to children.

(a) *DeShaney v Winnebago County Department of Social Services*

When Joshua DeShaney was 12 months' old, his parents divorced in the state of Wyoming, and his father, Randy, was awarded custody of him. Shortly thereafter Randy DeShaney and his son moved to Winnebago County, Wisconsin. Randy remarried and soon after was divorced again. About 2 years after Randy had moved to Wisconsin, the Winnebago County Department of Social Services learned that Joshua might be experiencing abuse. Randy denied any abusive conduct and the Department did not pursue the matter.

About one year later, Joshua was admitted to a local hospital because of his having multiple bruises and abrasions. The examining physician suspected that Joshua had been abused and notified the Department. After investigating the matter, the Department sought legal action by placing the child in the temporary custody of the hospital. During this time the Department entered into a voluntary agreement with Randy to enroll Joshua in a preschool programme, seek counselling and to have his girlfriend move out of his house. Randy agreed and the court dismissed the child protection case and returned Joshua to his father's custody.

One month later Randy was again seen in the emergency room of a hospital, and again the medical personnel reported Randy's injuries to the Department. With this evidence, the caseworker decided that no action needed to be taken. However, for the next 6 months the caseworker visited Joshua in his home. Randy had not enrolled Joshua in the school programme and he had not asked his girlfriend to leave the house. In addition, the caseworker noticed bruises on Joshua. The caseworker recorded all of this in Joshua's file and took no action. In the same year, Joshua was once again treated in the emergency room of the local hospital. The caseworker took no action. Nor did she take any action when she was not allowed to visit Joshua in his home because she was told that he was too ill.

Four months later, Joshua was admitted to the hospital because Randy had beaten him so badly that he suffered haemorrhages in his brain. Joshua survived brain surgery but suffered so much brain damage that he had to be confined to an institution for profoundly retarded children. Joshua's father was tried and convicted of child abuse.

The criminal action that the state brought against Randy DeShaney and that resulted in his conviction amounts to a certain kind of justice. Joshua's father was punished for the monstrous abusive acts he committed on his child. But the more important question concerns the liability of the state department of social services. Under the common law a parent has a positive duty to care for his child. If the state stands in the shoes of the parent, does the state have a positive duty to protect children?

In *DeShaney v Winnebago County Department of Social Services*,[78] Chief Justice Rehnquist, writing for the majority of the United States Supreme Court, held that it did not. The case arose when Joshua and his mother brought an action under the federal civil rights act against the Winnebago County Department of Social Services in which they claimed that the Department through its employees had deprived Joshua of his liberty without due process of law, in violation of his rights under the 14th Amendment, by failing to actively prevent Joshua from harm from his father. Joshua and his mother claimed that the Department knew or should have known that while in his father's care, Joshua was at an enormous risk of being abused.

Specifically, the Court, held that the state of Wisconsin could not be liable under the Federal Civil Rights Act[79] because the conduct of the state social worker and any other state employees involved in making decisions about Joshua was not considered 'state action' (the 14th Amendment to the US Constitution covers state, not private, actions). Because Joshua was injured by his father (in whose custody he had been placed), a private actor, and not by any state worker, Joshua's rights under the constitution or federal law had not been violated, Chief Justice Rehnquist wrote:[80]

> '. . . nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's powers to act, not as a guarantee of certain minimal levels of safety and security.'

Chief Justice Rehnquist would not interpret that clause to impose an affirmative obligation on the state to protect Joshua.

Justices Brennan, Marshale and Blackmun dissented in the case. Justice Brennan stated that the state agency's actions were not merely passive but active state intervention. He thought that with such active intervention came a duty to protect Joshua.

The case is important in that it is an example of the Court's unwillingness to constitutionalise a tort. One can see the economic consequences of the case if

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78 489 US 189 (1989). *DeShaney* has been commented upon widely. Mostly the academic response has been critical. For a full discussion of *DeShaney*, see A Soifer 'Moral Ambition, Formalism, and the "Free World" of *DeShaney*' (1989) 57 *Geo Wash L Rev* 1513.

79 42 USCA s 1983.

80 489 US at 196.

Joshua and his mother had won. If state social service agencies were to be held financially liable for the negligence of its caseworkers and supervisors, the federal courts would be inundated with cases, and the federal courts would be placed in a position of trying to second guess decisions reached by social workers. And, it is probably safe to say that the budgets for state social service agencies would have to take into account the contingencies of law suits. States would probably have to become self-insurers as they normally do when they have to pay victims of the brutality of the police, prison guards and state mental health caretakers – all state actors. Chief Justice Rehnquist stated that if states do want to make themselves liable for the negligence of its state employees that is up to the states, not the United States Supreme Court.

(b) Following *DeShaney*

The Court's holding in *DeShaney* gave rise to several questions about the nature of the relationship between the state and those providing care for children. In particular, when is a state or its agents liable for violations of civil rights stemming from abuse that occurs after the state has placed a child in foster care? The answer is not clear. In *Taylor v Ledbetter*,[81] the 11th Circuit Court of Appeals held that a child in state custody has liberty interests guaranteed by the 14th amendment, which include reasonably safe living conditions, and that if foster parents with whom the state has placed a child injure the child, a deprivation of liberty caused by the state's action or inaction may be shown. However, the same court in *Rayburn v Hogue*,[82] held that foster parents were not state actors, and that consequently parents whose children had been abused in foster care could not recover damages. In 1990, the 7th Circuit Court of Appeals held in *KH v Morgan*[83] that state workers who removed a child from her natural parents and placed her in a foster home where she was subsequently abused would only be liable if the state agency had, without due consideration or justification, placed the child in hands they knew to be dangerous or unfit.

A similar question exists regarding the liability of the state or its agents where the state removed a child from the home of one parent and placed the child with the other parent, and that parent harmed or killed the child. In 1990, the 4th Circuit Court of Appeals found in *Weller v City of Baltimore*[84] that *DeShaney* prevented recovery where a father voluntarily surrendered his son to DSS who then placed the child with the mother, who subsequently abused the child. However, in 1995, a US District Court in Pennsylvania distinguished *DeShaney* from a situation where the state has created the danger. In *Ford v Johnson,*[85] the court held that where the state had taken custody of a child and then returned the child to her abusive father who beat the child to death, no special relationship existed between the state and the child so as to allow relief

[81] 791 F2d 881 (11th Cir 1986) *aff'd in part, rev'd in part on reh'g,* 818 F2d 791 (11th Cir 1987) (en banc), *cert denied*, 489 US 1065 (1989).
[82] 241 F3d 1341 (2001).
[83] 914 F2d 846 (1990).
[84] 901 F2d 387 (1990).
[85] 899 FSupp 227 (1995).

under *DeShaney*. However, the court found liability for violations of the child's due process rights on the theory that the abuse was the result of a state-created danger. Similarly, in 1998, a US District Court for New Mexico held in *Currier v Doran*[86] that where the state removed a child from his mother's custody and placed the child with the father who then killed him by scalding him with boiling water, the fact that the child was not in state custody at the time of his death did not preclude liability because the state had a duty not to consign the child to another dangerous situation.

With the enormous power of government to intervene in the parent-child relationship, one can ask if the state has any accompanying responsibilities. Federal mandates have made state agencies more cognisant of the need to try to keep families together and if separated, the need to reunify them. The courts have underscored the need for social service agencies to provide services. But when the ultimate test came to decide the liability of a state social service agency that failed every test of good social work practice, the United States Supreme Court got the state agency off the hook. The United States Supreme Court decided *DeShaney* by interpreting the United States Constitution narrowly and by distinguishing away cases that were relevant by their specific facts. The hairline distinction between a child being in the custody of his father and not the state, even though the state social worker intervened in the relationship by visiting the home, meant the difference between abdication of responsibility and responsibility itself.[87] One is left with the feeling that the historic concept of *parens patriae* in contemporary child protection law may be pure rhetoric.

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[86] 23 FSupp2d 1277 (1998).

[87] Chief Justice Rehnquist wrote in a footnote in *DeShaney*:
'Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.' (489 US 189 (1989) at 201).

Zimbabwe

DEVELOPMENTS IN ZIMBABWE

*Fareda Banda**

Résumé

Le Zimbabwe a souvent défrayé les manchettes internationales dans le courant des six dernières années. Pourtant, comme c'est souvent le cas dans des pays en crise, l'État semble fonctionner dans un monde parallèle où, d'un côté, il adopte des législations progressistes en matière de violence dans la sphère privée, alors que d'un autre côté il n'hésite pas à commettre ou à se rendre complice d'actes de violence dans la sphère publique. Durant la période couverte par le présent texte, le parlement du Zimbabwe a adopté le *Domestic Violence Act 2006*. Cette présentation fait état des dispositions de cette nouvelle loi et poursuit par un exposé sur la jurisprudence en matière de partage des biens après divorce.

'Even if she earns enough to live, a woman who lives in the shadow of daily violence and has no say in how her country is run is not truly free.'[1]

I INTRODUCTION

Zimbabwe has been in the international news a great deal over the past 6 years. Most of the coverage has been negative, focusing on ongoing gross violations of civil and political and socio-economic rights by the Government.[2] However, as with many states in crisis, the state appears to inhabit a parallel universe allowing it to pass progressive laws on violence in the private sphere, while continuing to commit, or be complicit in, the commission, of violence within the public sphere. In the period under review, the Zimbabwean Parliament passed the Domestic Violence Act 2006.[3] While the justice system has come under tremendous strain with charges of corruption, low staff morale, intimidation of judges and inadequate funding being levelled,[4] those members of the public able to afford lawyers and court fees, have used the court system

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1 *In Larger Freedom: Towards Development, Security and Human Rights for all*, Report of the Secretary-General, 2005, para 15.

2 Amnesty International, Human Rights Watch, Financial Times 'Crunch in Zimbabwe' London, *Financial Times*, 14 February 2007, 14. See also the Zimbabwe section in UNICEF *Humanitarian Action Report 2007* (New York, UNICEF, 2007).

3 Domestic Violence Act, Ch 5:16. The Act was gazetted on 27 February 2007.

4 ZWnews 'Judge President says Judiciary Reduced to Begging' 16 January 2007 at www.zwnews.com/print.cfm?ArticleID=15866.

for family related matters including the distribution of property on divorce and also custody. This chapter considers the provisions of the new Domestic Violence Act before moving on to look at some case-law pertaining to property distribution on divorce.

II DOMESTIC VIOLENCE ACT (DVA)

(a) Background of the Act

The Domestic Violence Act was passed after extensive lobbying by civil society activists. It is, on its face, an ambitious statute, comprehensive in its definition of what constitutes violence and creative in its solutions. The Act also seeks to address many of the criticisms made of the police handling of domestic violence, not least their resistance to taking the report of violence in the home or at the hands of someone known to the complainant seriously. Moreover, the statute goes beyond a 'criminal law only' response with detailed consideration of civil remedies and the use of counselling and anger management to deal with the problem. Showing a formal commitment to tackling this social problem, the Act provides for the setting up of an Anti-Domestic Violence Council whose remit includes keeping the issue under constant review, submitting an annual report to the Minister of Justice, Legal and Parliamentary Affairs making suggestions, including on legislation, education, promoting research and also promoting the establishment of safe houses for victims/survivors of violence including children.[5]

Before moving on to a consideration of the substantive provisions of the Act, a note on terminology. For ease of reference, I will refer to the complainant by the female pronoun and the respondent by the male pronoun. This is not reflective of the statute which appears, for the most part, to be gender neutral using the terms complainant and respondent.[6] Indeed the statute goes beyond a focus on violence between intimates,[7] to include children, both adopted and stepchildren,[8] and also 'any person who is or has been living with the respondent, whether related to the respondent or not'.[9]

The reason for my decision is not based on a belief that it is only men who commit violence against women, for clearly some women also commit violence against men. Rather, it is based on the definition of the United Nations Committee on the Elimination of Violence against Women which notes that

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5 Domestic Violence Act, s 16(9).

6 Exceptions to the 'neutrality' can be found in the sub-section on culturally justified practices (s 3(1)(l)) and the requirement that the three representatives from the voluntary sector who are to be invited to sit on the Anti-Domestic Violence Council should be concerned with 'the welfare of victims of domestic violence, children's rights and women's rights' (s 16(1)(b)).

7 Former or estranged spouses or partners, co-habitants or those who have been intimate are listed as potential complainants. DVA, s 2(1)(a), (d)(i)–(ii).

8 Ibid, s 2(1)(b).

9 Ibid, s 2(1)(c).

gender based violence is violence which affects women *disproportionately*.[10] Moreover, although there is sufficient evidence to point to abuse of children and elderly family members, most domestic violence cases in Zimbabwe involve intimates, meaning husbands and wives or partners.

Specific provisions of the statute will now be considered in greater detail.

(b) Defining violence

In defining violence, the DVA goes beyond the focus on physical, sexual and psychological parameters found in the international human rights system.[11] It even extends beyond the expansive definition of the regional and sub-regional instruments which add economic violence to their definitions and which include many forms of harm including trafficking.[12] To the existing categories of physical, sexual, psychological (to which is added emotional and verbal abuse) violence is added intimidation, harassment, stalking, malicious damage to property, forcible entry into a complainant's residence where the parties do not share the same residence, depriving the complainant of use of the residence, or facilities associated with their residence, the unreasonable disposal of property in which the complainant has an interest[13] and interestingly, abuse perpetrated on the complainant because of their age or physical or mental incapacity.[14] This recognition of intersecting causes of violence is commendable not least because it recognises that violence may impact on people differently because of factors other than their gender.

Further guidance is given on the meaning of specific kinds of violence so that 'emotional, verbal or psychological abuse' is said to include repeated insults, ridicule or name-calling, repeated threats to cause emotional pain or repeated 'obsessive possessiveness' constituting a violation of privacy, liberty or security of the person.[15] The statute is silent on what constitutes 'obsessive'; are two incidences sufficient or does 'repeated' suggest multiple incidents? Interestingly the statute also looks at the impact of emotional abuse in the form of name

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[10] Committee on the Elimination of Violence against Women (CEDAW) General Comment 19 on Violence against Women UN Doc A/47/38, para 6.

[11] See CEDAW General Recommendation 19, para 6, and the UN General Assembly Declaration on the Elimination of Violence against Women, GA Res 8/104, 20 December 1993, art 2.

[12] See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Assembly/AU/Dec 14 (II), art 1(j). The Prevention and Eradication of Violence against Women and Children, an Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government (1998) reproduced in *SADC Gender Monitor* (1999), 37.

[13] See DVA, s 3(1)(a)–(k). It is worth noting that the statute is silent on what constitutes 'unreasonable disposal' of property in s 1(3)(k). Does it mean without the complainant's consent, or for a price far below its market value or something else? Moreover the concept of 'interest' is not defined, is it a legal interest or an interest derived as a result of being resident in the home?

[14] Ibid, s 3(1)(m).

[15] Ibid, s 3(2)(c)(i)–(iii).

calling as constituting domestic violence if done when minors are present.[16] In line with current thinking on child development, it is suggested that the behaviour may be likely to cause them mental injury. This is a positive recognition of the fact that although sometimes directed at one person, domestic violence impacts negatively on all members of the household including children.

Although initially mooted, omitted from this section is the inclusion of the denial of conjugal rights as constituting a form of emotional violence.[17] This is an interesting omission not least because one of the reasons given for men giving bridewealth for wives is to secure uxorial rights, or sexual access. If, then, the wife is denying such rights, should not the husband be able to claim for emotional harm? If yes, is this to suggest that a wife is under an obligation to consent to sex even if she does not want to? Is this not tantamount to sanctioning marital rape?[18] Similarly, if the husband is paying insufficient attention to the wife's needs, should she not also have a claim? The difficulty emerges when one of the parties is HIV positive: is there still an obligation to continue conjugal relations? Is this dependent on whether there is agreement about the use of contraception to try to prevent the transmission of the virus? One can see why the legislature gave up on this particular provision.

An impressive innovation is the inclusion of economic abuse as a category of violence. This is particularly important on a continent where, due to low levels of education and high rates of illiteracy, women have not had the same opportunities as men to access the formal labour market. Although, until fairly recently, women in Zimbabwe had one of the highest literacy rates on the continent, their participation in the formal, paid labour sector was, and is, still lower than that of men, making them dependent on husbands for support. It is for this reason that the definition of economic abuse which takes on board the 'deprivation of economic or financial resources to which a complainant is entitled under the law, or which the complainant requires out of necessity, including household necessities, medical expenses, school fees, mortgage bond and rent payments, or other like expenses'[19] is so important to women. Having financial control of the family purse may be used as a way of exerting control over the wife. It may be, of course, that a person is in a position to work, but is denied 'permission' to do so. The statute includes this within the category of economic harm.[20]

'Harassment' is said to include 'engaging in a pattern of conduct that induces in a complainant the fear of imminent harm or feelings of annoyance and

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16 Ibid, s 3(2)(c)(iv).
17 This was the old s 3(2)(c)(v).
18 It was outlawed in *H v H* 1999 (2) ZLR 358. Discussed in F Banda 'Inheritance and Marital Rape' in A Bainham (ed), *International Survey of Family Law 2001 Edition* (Jordans, 2001), 475.
19 DVA, s 3(2)(d)(i).
20 DVA, s 3(2)(d)(ii).

aggravation'.[21] Again the statute remains silent about how many negative acts it takes before it becomes 'a pattern of conduct'. Interestingly, the examples given to illustrate behaviour that could constitute harassment reflect developments in technology so that making abusive telephone calls or sending faxes, e-mails or even 'snail mail' (ordinary mail by post) may constitute harassment.[22] Although 'old fashioned' stalking (defined as 'following, pursuing or accosting the complainant') seems to fall under a separate category,[23] stalking-like behaviour is also listed under examples of harassment so that 'watching or loitering outside or near the building or place where the complainant resides, works, carries on business, studies or happens to be'[24] is included.

As already noted, also included in the definition section is a separate consideration of 'abuse derived from cultural or customary rites or practices that discriminate or degrade women'.[25] Practices listed include forced virginity testing, female genital mutilation, pledging of women or girls for the purpose of appeasing spirits, forced marriage, child marriage, forced wife inheritance and finally, the rather alarming, 'sexual intercourse between fathers-in-law and newly married daughters-in-law'.[26] Many of these practices have been identified as violating the rights of women and girls.[27] All the practices listed run the risk, in varying degrees, of the transmission of the HIV virus. This is particularly problematic in a country/region with a high incidence of HIV infection and a health system in collapse and unable to offer basic healthcare let alone provide for anti-retroviral treatment for those who may need it. Of these cultural practices, female genital mutilation (FGM) does not, in Zimbabwe, involve cutting off the female genitalia, but may include dry sex practices, which have been included within the definition of FGM by the World Health Organisation.[28]

The prohibition of 'forced wife inheritance'[29] is interesting not least because it begs the question against whom is force proscribed: the woman being asked to marry the brother or male relative of a deceased husband, or the reluctant 'heir', or both? Moreover, there appears to be conflict between statutes, for while the DVA prohibits forced wife inheritance, the Customary Marriages Act[30] seems to recognise levirate or wife inheritance marriage, providing that

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21 Ibid, s 3(2)(e). Cf the English Protection from Harassment Act 1997.
22 Ibid, s 3 (2)(e)(ii)–(iii).
23 Ibid, s 3(2)(g).
24 Ibid, s 3(2)(e)(i).
25 Ibid, s 3(l).
26 Ibid, s 3(1)(l)(i)–(iv).
27 See, for example, F Banda *Women, Law and Human Rights* (Hart Publishing, 2005); M Maboreke 'Understanding Law in Zimbabwe' in A Stewart, *Gender, Law and Social Justice* (Blackstone, 2000) 101. UNICEF *Early Marriage, a Harmful Traditional Practice* (New York, UNICEF, 2005).
28 World Health Organisation (WHO) *Female Genital Mutilation Programmes: What Works, What Doesn't? A Review* WHO/CHS/WMH/99.5 at 3.
29 DVA, s 1(3)(l)(vi).
30 Customary Marriages Act Cap 5:07

such marriage is registered.[31] Does the recognition of this type of marriage suggest that wives inherited 'voluntarily' cannot complain under the DVA? Given women's economic (and at the time of the husband's death emotional as well) vulnerability and their dependence on their in-laws for material and social support for themselves and their children, even apparently 'unforced consent' may be problematic. How realistic is it to expect a woman in this position to mourn her husband while standing up to the in-laws at the same time? Evidence suggests that it is not a realistic outlook.[32] With this in mind, might it not be helpful for the Zimbabwean legislature to clarify its position, which seems to be against culturally harmful practices, and to repeal s 3(1) of the Customary Marriages Act, leaving women free from fear of being asked to become the wife of a deceased husband's brother? Again the impact of a high rate of death caused by AIDS should dictate that women have a right to be protected from this practice and its potentially life threatening consequences.[33]

(c) Orders available and jurisdiction

The DVA provides for two main types of order within the civil law. These include protection orders[34] and interim protection orders.[35] However, the statute appears to mix both criminal and civil remedies and makes clear that the bringing of a civil claim does not preclude prosecution,[36] and, similarly that a prosecution does not limit or in any way curtail the rights of a complainant to apply for redress under the Act.[37] Indeed the statute anticipates that police may be called upon to do 'non-criminal' work, hence the requirement that police stations should have at least one member trained in 'domestic violence, victim friendly or other family related matters'.[38] Moreover, the police are also under an obligation to obtain, or advise on how to obtain, shelter or medical treatment, or to assist the complainant 'in any other suitable way'.[39] The police should tell the complainant about both the availability of protection orders as well as the possibility of filing a criminal complaint.[40] If at all possible, and if requested by the complainant, then a police officer of the same sex should take the complainant's statement.[41] To ensure that the police are not dismissive or contemptuous in their treatment of complainants, provision is made for the

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31 Ibid, s 3(1).

32 Dengu-Zvobgo et al *Inheritance in Zimbabwe: Laws, Customs and Practices* (WLSA, Harare, 1994).

33 M Mhoja 'Impact of Customary Inheritance Law on the Status of Women in Africa: A Challenge to Human Rights Activists' (1999) 11 *African Society of International and Comparative Law* 285.

34 DVA, ss 7, 10, 11. See also s 9(5).

35 DVA, s 9.

36 Ibid, s 10(9).

37 Ibid, s 17(3).

38 Ibid, s 5(1).

39 Ibid, s 5(2)(a).

40 Ibid, s 5(2)(b).

41 Ibid, s 5(2) proviso.

registration of complaints by complainants unhappy about the way in which the police treat them, or handle their complaints.[42]

While cases can be brought to three tiers of courts, Local Courts, Magistrates' Courts and the High Court,[43] the jurisdiction of the Local Court is limited to hearing only cases involving economic and emotional violence.[44] This is because the Local Courts do not have criminal jurisdiction. The Act specifies that economic and emotional violence are not included within the purview of the criminal law.[45]

(d) Bringing the complaint

In addition to the complainant herself, the statute provides for a wide range of people to assist the complainant in applying for a protection order. These include a police officer, social welfare officer, the complainant's employer, or a person acting on behalf of the church or other religious institution, a private voluntary organisation (hereafter NGO), relative, neighbour or fellow employee, a counsellor or any other person that the Minister of Justice may appoint.[46] Additionally, if the complainant is a minor then a person who has care and custody of that minor may seek a protection order on the minor's behalf.[47] The breadth of coverage of people with capacity to bring the claim, or to assist in applying for a protection order, is good not least because it increases the likelihood of the complainant having access to a knowledgeable person to assist in the bringing of the complaint. Moreover, the inclusion of agencies associated with pastoral support, including the church, means that the complainant will receive legal as well as moral support. The inclusion of NGOs as agencies which can assist in the bringing of claims is to be welcomed. However, the statute is clear that only those NGOs registered under the Private Voluntary Organisations Act[48] 'or any law that may be substituted for it' may apply.[49] Potential problems may arise from the registration requirement. It is not unknown for the Zimbabwean Government to refuse to register those NGOs which it considers a 'threat to national security' or which are in receipt of external funding.[50] Coming under the gaze of the Government have been human rights organisations and other lobbying groups focusing on issues of particular concern to women and which simultaneously challenge the state's illegitimate use of power.

Radically, some might argue controversially, the DVA allows for a protection order to be applied for on behalf of a complainant, 'with or without the

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42 Ibid, s 5(3).
43 Ibid, s 2(1) definition of 'court'.
44 Ibid, s 18.
45 Ibid, s 4(2)(a), (b).
46 Ibid, s 2(1).
47 Ibid, s 7(1)(c).
48 Private Voluntary Organisations Act Cap 17:05.
49 DVA, s 2(1).
50 F Banda *Law and Human Rights* (2005), 293.

consent of the complainant'.[51] Is acting without the complainant's consent likely to further disempower her? Realistically it may be that the complainant is not in a position to make the application for herself or to consent, so the intervention of an outsider may be the only way of accessing a remedy. In any case, the statute makes clear that where an application is made on behalf of a person who cannot (has not) given her consent, the leave of the court has to be sought to make the application on her behalf.[52] In deciding whether to grant the request, the court is obliged to consider the reasons why the complainant's consent has not been sought[53] and also whether it is in the complainant's best interests that the application be permitted, lack of consent notwithstanding.[54]

The person bringing the complaint may lodge it with a clerk of court attaching an affidavit deposing the facts. Recognising that many people cannot afford lawyers, the statute provides that where the complainant does not have legal assistance, the clerk of the court is under a duty to inform the complainant about the remedies available, the effect of the orders, the right to lodge a criminal complaint and the right to claim compensation.[55] The procedure is relatively quick requiring the clerk to place an application for a protection order before the court within 48 hours.[56] Recognising that often the situation may be severe or life threatening, there is provision for the granting of a protection order outside normal court hours.[57]

Similarly in criminal cases, police officers have the power to arrest without warrant any person whom she 'reasonably suspects has committed or who is threatening to commit an act of violence' constituting a criminal offence against the complainant.[58] Factors to be considered include the risk to the safety, health or well-being of the complainant, the seriousness of the alleged conduct and any other factors leading the police officer to believe that the respondent has committed or is threatening to commit violence.[59] It is heartening to see that, even in present day Zimbabwe, the accused have some rights, so that the statute provides that a person arrested without a warrant is to be brought before a magistrate within 48 hours.[60] The accused had better hope that the police do not resort to their old 'trick' of arresting a person on a Thursday morning knowing full well that the 48-hour time period expires on a weekend when the courts are shut.

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51 DVA, s 7(1)(d).
52 Ibid, s 7(1)(d).
53 Ibid, s 7(2)(a).
54 Ibid, s 7(2)(b).
55 Ibid, s 7(4)(a)–(d).
56 Ibid, s 7(5).
57 Ibid, s 7(6).
58 Ibid, s 6(1).
59 Ibid, s 6(2)(a)–(c).
60 Ibid, s 6(3).

(e) Emergencies and the making of interim protection orders

If the court receives an application for a protection order and there is prima facie evidence that the respondent has committed or is threatening to commit domestic violence and that it is important to try to prevent that violence from occurring, or to stop it if it is occurring, the court can issue an interim protection order[61] to which a suspended warrant of arrest *shall* be attached.[62] As the order is temporary, and designed to prevent immediate threat of harm or ongoing harm, the statute provides that the order can be made ex parte, that is without the respondent having been given notice of the hearing.[63] However, in line with the principle of *audi alterem partem* (let the other side be heard), the interim order must contain a date for a full hearing inviting the respondent to show cause why, at that future date, the interim order should not be converted to a full protection order.[64] If the court is of the view that the threshold for the making of an interim order has not been met, but that there is cause for concern, then the respondent may be given notice of the hearing of an application for a protection order at a future date.[65]

The interim protection order can also contain a raft of remedies including prohibiting the respondent from contacting or harassing the complainant or other family members.[66] Failure to comply can result in imprisonment of up to 5 years, and, or a level five fine, currently set at Zimbabwe $10,000 which at the 'informal rate' translates into US$1.25.[67] Service of the interim order or notice to appear at a full protection order hearing, can be made as soon as possible, by a police officer, or, if the complainant is prepared to pay for it, by the messenger of the court or deputy sheriff.[68] It is interesting that the statute makes provision for the complainant to pay for service. Given the shortage of fuel and the fact that Police in Zimbabwe now constantly plead a lack of vehicles as the reason for not attending crime scenes in a timely fashion, it is likely that if the complainant wants the violence to stop, or to alert the respondent to the court order quickly, then she will have to pay for service herself. This suggests that only those respondents with means will benefit from the making of interim orders.

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61 Ibid, s 9(1)(a), (b).
62 Ibid, s 9(4).
63 Ibid, s 9(1).
64 Ibid, s 9(3).
65 Ibid, s 9(5).
66 Ibid, s 9(2). The actual remedies are discussed in the section on protection orders. DVA, ss 10, 11.
67 Figure for January 2007. As a result of runaway inflation, pegged in January 2007 at 1,600 per cent, fines in Zimbabwe are gazetted in periodic Statutory Instruments. The most recent is Statutory Instrument 30A of 7 February 2007, listing 14 levels with one being the lowest and 14 (Z$250,000) the highest.
68 DVA, s 9(6).

(f) Issuing protection orders

The DVA provides for a full hearing to consider whether the court should issue a protection order. The test is the civil law one of balance of probabilities.[69] As already noted, the statute retains the possibility of criminal proceedings also being brought.[70] If the respondent is absent and it can be proved that he did receive notice of the hearing, then the case can proceed.[71] This is important not least because in other proceedings such as maintenance claims, it is not unknown for respondents to fail to turn up on multiple occasions knowing full well that the case will be postponed.

In deciding whether to issue the order, the court can hear oral evidence or rely on that provided in an affidavit. It can also examine witnesses and consider evidence presented when the interim order was granted.[72] Once a protection order is made, police are under an obligation to serve it on the respondent within a 48-hour time frame.[73] The complainant retains the option of arranging for service privately if she is prepared to pay for it.[74] Interestingly, the DVA also provides that the complainant and or her representatives are to be supplied with a certified copy of the order. Crucially, a police station nominated by the complainant or her representative is also to be given notice of the order[75] thus making it easy for the suspended power of arrest[76] to be quickly activated should the respondent be found to have breached the terms of the order. Again the penalty for breaching the order is the possibility of a term of imprisonment of up to 5 years and or a fine set at level five.[77] Should the respondent repeatedly breach a protection order, then he will be considered guilty of an offence and liable to imprisonment for up to 5 years.[78] The DVA provides for other orders that the court can make as part of the protection regime. These are considered in the next section.

(g) Type of order court can make

There are a wide range of remedies available to the court. They include staying away from the complainant or a place including the residence or place of work of the complainant.[79] If the respondent had been denying the complainant or children of the family access to the home, then the court can direct that they be allowed to enter the home or use the facilities.[80] Clearly an order excluding one person from the home raises questions about custody of any children. Under

[69] Ibid, s 10(1).
[70] Ibid, s 10(9).
[71] Ibid, s 10(2).
[72] Ibid, s 10(4)(a)–(c).
[73] Ibid, s 10(5).
[74] Ibid.
[75] Ibid, s 10(6).
[76] Ibid, s 10(3).
[77] Ibid, s 10(7).
[78] Ibid, s 10(8).
[79] Ibid, s 11(1)(b)–(c).
[80] Ibid, s 11(1)(f).

the DVA, the court may decide to award temporary custody of a child or dependant to 'any person or institution' and also regulate contact between the respondent and the child or dependant.[81] This order can only last up to 6 months, although it is renewable for 3 months at a time unless a revocation or variation is sought or made.[82]

It may well be of course that the complainant is not in a position to maintain herself, the children or the home. The statute recognises that lack of resources may impact upon a person's ability to remain in the home and so provides that the court may: 'direct the respondent to pay emergency monetary relief in respect of the complainant's needs and those of the any child or dependant of the respondent, including household necessities, medical expenses, school fees, and mortgage bond or repayments.'[83] However, the duration of such an order is up to 6 months with subsequent extensions of up to 3 months at a time.[84] It is of course open to the respondent to seek a revocation of such an order.[85] Crucially there is recognition of the right of the victim/survivor to claim and receive compensation for injury and trauma suffered as a result of the respondent's actions.[86]

Marrying therapeutic with practical considerations, the DVA also makes provision for the complainant and respondent to undergo counselling, which is to be paid for by the respondent.[87] Anti-domestic violence counsellors are provided for in s 15 and include social welfare officers or anyone involved in community work, NGOs working in the area of domestic violence and chiefs and headmen under the Traditional Leaders Act.[88] Counsellors have many functions, including providing advice and mediating the solution of problems that may have caused or led to the violence.[89] Two issues arise here. One is whether the primary purpose of the counselling or mediation is designed to repair the marital/other relationship.[90] If it is, then it must be noted that it should not be at the expense of the victim who may feel pressured or compelled to return to an unhappy situation. The second issue is about the involvement of traditional leaders. While they will no doubt receive guidance from the Ministry of Justice about how they are expected to conduct themselves when carrying out their functions under the DVA, research in other regions has

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81 Ibid, s 11(1)(e).
82 Ibid, s 11(3).
83 Ibid, s 11(1)(d).
84 Ibid, s 11(3).
85 Ibid, s 12.
86 Ibid, s 11(1)(g).
87 Ibid, s 11(1)(h). See also s 10(10).
88 Ibid, s 15(1)(a)–(c).
89 Ibid, s 15(2)(a) and (e).
90 See typologies of mediation advanced by S Roberts 'Three Models of Family Mediation' in R Dingwall and J Eekelaar (eds), *Divorce, Mediation and the Legal Process* (Oxford University Press, 1988) 145.

highlighted the fact that traditional leaders lean towards the 'conservative end' of the spectrum which may not augur well for women coming to them for mediation or assistance.[91]

Also difficult to square with requirements for confidentiality is the fact that counsellors may, acting on the instruction of the court, investigate the financial status of all the parties.[92] While a chief or village elder may know how many cattle and fields a person has, ascertaining how much is in bank accounts may prove to be more challenging. Will the government enact subsidiary legislation empowering counsellors to force employers and other agents to disclose to a third party confidential information? It is doubtful whether, even with the assistance of a police officer,[93] a counsellor can compel financial disclosure. Other duties include assisting in finding accommodation[94] or arranging for a child whom one suspects is the victim of violence to receive medical attention.[95]

(h) Police enforcement of protection orders

Given that the statute provides for a protection order to last for up to 5 years, any breach during that time may result in the complainant or her representative deposing an affidavit to that effect[96] and asking the police to arrest the respondent.[97] If the police officer is satisfied that the respondent has done or is likely to do that which is alleged, then the officer should effect an arrest,[98] bringing the respondent before a magistrate within a 48-hour time frame. The police officer also has the option of serving the respondent with a summons requesting him to appear before a court to answer charges that he has breached his protection order.[99]

(i) Summary

In summary, the DVA attempts to deal with violence holistically going beyond the criminal approach to include 'softer' remedies including counselling. Clearly a great deal of thought has gone into procedural issues not least the added assistance offered to complainants who may be assisted to bring claims by a variety of people and who retain the right to complain about unhelpful police officers. Remedies provided are equally sensitive to the needs of a person who has or is experiencing violence. However, it is worth remembering that a law is only as good as its implementation. With this in mind, it is hoped,

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91 B Oomen *Chiefs in South Africa* (James Currey, 2005).
92 DVA, s 15(2)(b).
93 Ibid, s 15(3).
94 Ibid, s 15(2)(c).
95 Ibid, s 15(2)(d).
96 Ibid, s 14(2).
97 Ibid s 14(1).
98 Ibid, s 14(3).
99 Ibid, s 13(5).

perhaps optimistically in light of current conditions pertaining in Zimbabwe, that the DVA will be rigorously enforced and that complainants will benefit from the provisions of the statute.

The chapter will now move on to consider some of the family law cases that have arisen. They focus on the division of matrimonial property.

III CASES

The Zimbabwean Matrimonial Causes Act 1985 (MCA),[100] which governs registered civil[101] and customary marriages,[102] is modelled on the South African Divorce Act,[103] and the property division section of the English Matrimonial Causes Act 1973, but without incorporating the amendments brought about by the Matrimonial, Family Proceedings Act of 1984.[104] Grounds given for divorce are irretrievable breakdown and incurable mental illness or continuous unconsciousness of one of the parties.[105] Irretrievable breakdown may be evidenced by a variety of facts including that the parties have not lived together for at least 12 months consecutively, that the defendant has committed adultery, that the defendant has been sentenced to a term of imprisonment (of at least 15 years, although there are other considerations), or that the defendant has been cruel, drunk alcohol excessively or has abused drugs.[106] In dividing property, courts are enjoined to have regard to the following factors:[107]

> '(a) the income, earning capacity, assets and other financial resources which each spouse has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any children were being educated or trained or expected to be educated or trained;

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100 Matrimonial Causes Act, Ch 5:13.

101 Under the Marriage Act Cap 5:11.

102 Under the Customary Marriages Act, Ch 5:13. An earlier contribution has considered the difficulties in dividing property when unregistered customary law unions and other cohabiting arrangements end. See F Banda 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe' in A Bainham (ed), *International Survey of Family Law 2002 Edition* (Jordans, 2002) 471.

103 South Africa Divorce Act 70 of 1979.

104 A point of difference is the fact that the Zimbabwean statute retains the minimal loss principle requiring courts to put the parties in the position that they would have been in had the marriage continued. The UK now has in its place the clean break principle introduced into the MCA 1973 by virtue of s 25A.

105 MCA, s 4.

106 Ibid, s 5(2)(a)–(d).

107 Matrimonial Causes Act Cap 5:13, s 7(3). Compare this to s 25 of the UK Matrimonial Causes Act 1973, as amended. See also J Eekelaar *Regulating Divorce* (Clarendon Press, 1991).

(d) the age, physical and mental condition of each spouse and child;

(e) the direct or indirect contribution made by each spouse of the family, including contributions made by looking after the home, caring for the family and other domestic duties;

(f) the duration of the marriage.'

I will now consider some of the cases that have come before the High Court in recent years starting with those pertaining to divorce property division.

(a) *Gonye v Gonye*[108]

In *Gonye v Gonye,* the husband in a registered customary marriage that had lasted 35 years and produced four (now adult) children successfully sued for divorce. Although starting with relatively modest means, the couple had built up an impressive property portfolio, the main asset of which was a farm registered as a company with the wife, husband and two sons being listed as having equal shares. During the marriage the wife had been the home maker, working outside the home for 6 years. The plaintiff husband sought to be awarded sole ownership of all the shares in the company controlling the farm and that the defendant be given the poultry project on the farm, or in short, land for chickens. He acknowledged that he would have to pay her maintenance but proposed that, instead of ongoing maintenance of Z$600,000 per month, he would give her a BMW motor vehicle. He offered her all the movable property except the fridge freezer and washing machine.

In turn, the wife counter-sued for half the value of the farm, 25 per cent of the farm assets and maintenance of Z$2m per month. She further claimed 50 per cent share of a house that the plaintiff had built after her departure (when she left only the foundation had been laid) as well as 50 per cent of the value of a Mazda car. The defendant claimed half of the movable property from the family home and separate property from the farm assets. The court was left to consider how to divide the assets. The first point was whether a person could claim property acquired by a spouse after he or she had left. The general principle appeared to be that 'property acquired by a spouse after the breakdown of a marriage is not matrimonial property'.[109] However, a different issue arose in the present case: 'what happens if proceeds of the matrimonial estate are used to buy property after the other spouse has left? Does property bought using such proceeds fall into the matrimonial estate?'[110] The judge ruled that it did. He based his finding on the fact that the plaintiff had paid for the house using proceeds from the farm. Given that the farm was co-owned by three others, the defendant was entitled to 25 per cent of the house in dispute. This was because only 50 per cent of the house belonged to the matrimonial

[108] *Gonye v Gonye* HH-18-2006.
[109] Ibid, at 7 considering the Supreme Court case of *Mujuru v Mujuru* SC 4/2000.
[110] Ibid.

estate.[111] Using the same reasoning she was awarded 25 per cent of the value of the Mazda car. Assessing the respective contributions of the parties, the judge noted:[112]

> 'Her contribution to the matrimonial estate was mainly indirect while the plaintiff's was direct. She looked after the house, children and the plaintiff. It is common cause the plaintiff's hard work landed the couple on the fortune that they are now in court to share . . . He got to the extent of personally ploughing fields for a fee to raise income to buy Wonder Valley Farm. On her part the defendant bore him children, two sons and two daughters who were through their joint effort raised to be prosperous in their own right.'

The movable property from the home was easier to divide, not least because the plaintiff husband was offering more than the wife was demanding. Invoking the customary rule that says on divorce a wife is entitled to her *mavoko* (hands) property, the judge noted: 'As a wife who used those movables she is entitled to them. In fact she will suffer no harm by being given more than she asked for.'[113]

With the marriage having broken down and neither party wanting to remain legally linked, the judge ordered the husband to buy the wife's 25 per cent share of the company.[114] Confusingly, it turned out that the husband had retained legal title to the farm thus making it matrimonial property. In deciding how to divide the farm, the judge considered the husband to have been the primary mover in its acquisition, with the wife being described as reluctant to participate and as having only 'contributed indirectly to its purchase and that of farm implements'.[115] He therefore concluded that the plaintiff husband should receive 70 per cent and the wife 30 per cent of the total value of the farm, movables and the farm equipment, or one-third of the total assets. National politics intervened with the court being told by the plaintiff that the Government had shown an interest in acquiring the farm. In the event, this did not seem to come to pass.[116]

The final issue in dispute was that of maintenance. Following a maintenance order granted by the Magistrates' Court, the husband was already paying the wife Z$600,000. His original offer of the BMW motor vehicle in full and final settlement of his maintenance obligation towards her was unsuccessful, not least because the car had already been shared under the farm equipment and movables. The judge granted the wife's claim for maintenance of $Z2m, describing it as being 'on the lower side',[117] thus highlighting the extent of the economic collapse in Zimbabwe. It is not in many countries that a monthly maintenance bill in the millions would be considered either modest or reasonable.

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[111] Ibid, at 10.
[112] Ibid.
[113] Ibid, at p 11.
[114] Ibid.
[115] Ibid at p 12.
[116] Ibid at pp 13–14.
[117] Ibid at p 13.

Gonye v Gonye seemed to turn on the judge's assessment of the plaintiff as being the more honest and reliable of the two. Moreover, it is interesting to see the judge appearing to weigh financial contribution as being more significant than domestic contribution, notwithstanding that the marriage had lasted 35 years during which all the property in dispute had been acquired. In resorting to the one-third rule in the division of the farm, the most significant of the matrimonial assets, the judge seemed to have given more weight to the contributions of the money maker over the home maker – a pity in light of s 7(4)(e) of the MCA.[118]

By way of contrast is the *Mabvudza* case.

(b) *Mabvudza v Mabvudza*[119]

The parties had contracted a customary marriage in 1968. In 1995 they converted the marriage into a civil monogamous union by registering it under the Marriage Act. The couple had three sons who were brought up by the wife after the husband went to the UK to study. He did not leave her with any money, nor did he send her any while he was away leaving her to rely on income derived from her crochet work and from assistance given by the Social Welfare Department. She later joined the defendant husband in the UK where she worked as a nurse aide using her income to support the defendant in the UK and also to remit money to her sister-in-law who was looking after the couple's children in Zimbabwe. She stayed on in the UK after the husband returned to Zimbabwe in 1981 to enable her to buy white goods for their home. She returned to Zimbabwe in 1982. She held various paid formal employment jobs using all the income from them for the support of the family.

The defendant neglected the family and conducted an adulterous affair which resulted in the birth of a child. The plaintiff sought a divorce on the basis of the husband's behaviour which included withholding of conjugal affection for 7 years and also the removal of matrimonial property from the home. In his defence, the husband noted that, due to a medical condition he had been unable to engage in sexual relations with his wife, leaving the judge to note: 'the medical condition he suffered from did not seem to affect him when he was with his girlfriend whom he made pregnant and fathered a child.'[120] And with that the die was cast. The judge granted the divorce before turning to a consideration of the division of the matrimonial property.

The defendant's opening gambit was that the plaintiff wife was only entitled to 10 per cent of the matrimonial assets because he had 'taken care of virtually every aspect of the matrimonial home by providing all the requirements of a

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[118] Cf *White v White* [2000] 2 FLR 981. Discussed by M Freeman 'Exploring the Boundaries of Family Law in England' in A Bainham (ed), *International Survey of Family Law 2002 Edition,* 133 at 134–137. See also *McFarlane v McFarlane* [2006] 1 FLR 1186. See J Eekelaar *Family Law and Personal Life* (Oxford University Press, 2006), 145–148.

[119] *Mabvudza v Mabvudza* HH-15-2005.

[120] Ibid, at p 5.

growing family'.[121] He minimised the contributions of the wife. Fortunately for the wife, she had a bundle of receipts and other documents to show that she had made direct and substantial contributions to the family. The judge found the husband to be an unconvincing witness not least when he claimed simultaneously that he had used his entire salary to support the plaintiff and their children, while also admitting that he had been looking after his girlfriend, their child and her relatives. Focusing on the long marriage which had lasted 36 years and the defendant's unreliability, the judge awarded the wife a 50 per cent share of the matrimonial assets including the lion's share of movable property. The wife was given first preference to buy out the defendant from the matrimonial home. In this case, the judge gave full effect to the contributions, both direct and indirect, made by the wife to the marriage. He refused to agree with the husband's attempts to minimise her contributions. In addition the judge's displeasure with the defendant's 'untruthfulness and gross misconduct'[122] led to an order that the defendant should bear the full costs of the suit.

(c) *Sithole v Sithole*

In *Sithole v Sithole* a wife who had applied to divorce her husband, but withdrawn her claim on four previous occasions, finally went through with it on the fifth attempt. The divorce was granted on the basis of the defendant's adultery, drinking, verbal and physical violence. As an example of the latter, the wife recounted how having been severely beaten by her husband many times, her eldest son took revenge on her behalf by pouring hot porridge on the husband/father while he slept. He was hospitalised for 31 days. During that time, she went to visit him in hospital whereupon he assaulted her with a knobkerrie causing her to be hospitalised in the same institution for 19 days. Thankfully the defendant was not permitted to visit her.

Having dissolved the marriage, the court had to consider how to divide the matrimonial property. Although there was other property, the chief point of dispute appeared to be over the matrimonial home which was registered in the defendant husband's name. The plaintiff sought a 50 per cent share of the property when sold. The husband said that she was only entitled to 20 per cent noting that the money used for the deposit and to pay the mortgage had been his. However, the wife introduced evidence, which the husband could not refute, that while she had been a home maker from the time of their marriage in 1969 until 1978, she had, on purchase by the husband of a butchery and a record shop, taken sole responsibility for the running of the two businesses. She had banked all the proceeds in a post office account, which, although held in their joint names, was only ever accessed by the husband when withdrawing money. She noted that she had never received a salary, or expenses, despite asking for them, because the husband had told her that she was working and contributing to the family's income and for their mutual benefit. The plaintiff secured a

[121] Ibid, at p 3.
[122] Ibid, at p 9.

full-time job with the Ministry of Education between July 1986 until her retirement in April 2004. She contributed to the household and the husband did not dispute her assertion that she was in a position to pay the mortgage, but that it had been decided that it would come directly from his salary (pension) by way of a standing order.

During their married life, the husband had sold a house and eventually disposed of the butchery, keeping the proceeds for himself. The court noted that the MCA did not provide a mathematical formula to guide the judge in dividing matrimonial assets. Rather the considerations provided 'are based on the presiding judge's value judgment and his appreciation of the particular facts laid before him'.[123] The judge did note that conduct was not relevant hence he would 'not apportion blame and use the result to distribute the assets at hand'.[124] Rather, he would 'only use the facts presented by the parties to try and place the parties in a position that they would have been in had the marriage relationship continued as contemplated by them when they contracted it'.[125] The result of this was that the wife was granted the 50 per cent that she had asked for. The judge noted:[126]

> 'In my view, had the marriage relationship continued, the two parties would have in both their minds continued to refer to the Mabelreign property as their joint family home. They were both contributing equally, the defendant initially through the provision of capital and the plaintiff through her labour and managerial aptitude, and later, both through their respective incomes from their respective jobs.'

The final case is interesting in highlighting the very different ways in which property is constructed according to whether the couple is divorcing or not.

(d) *Makanza v Makanza*

In *Makanza v Makanza and the Registrar of Deeds*[127] the couple had married in 1973. They had then bought the matrimonial home that was to become the subject of the dispute. The house was registered in the sole name of the husband. In October 2002, the husband decided to return to his rural home and sold the property without consulting his wife. He did however invite her to move with him to his rural home. The wife declined pointing out that her work precluded the move. She would not be able to commute from the husband's chosen place of residence. The husband organised for the house to be transferred to the new owner. The wife objected and refused to vacate the house or to allow the new owner access to the home. Divorce was not raised.

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[123] *Sithole,* p 8.
[124] Ibid.
[125] Ibid.
[126] Ibid, at p 9.
[127] *Makanza v Makanza and the Registrar of Deeds* HH-16-2005.

The plaintiff wife brought the case to challenge the husband's sale of what she considered to be joint matrimonial property. She argued that she should have been consulted and that as a result of her direct and indirect contributions to the acquisition of the property, she was in effect the co-owner of the property thus her consent should have been sought before it was sold. Responding to the attempt to evict her and to demands that she pay rent for the time that she had 'illegally' occupied the property after it had been sold, she counter-sued, seeking an order that the sale and transfer should be set aside and also that she should be declared and registered as the co-owner of the property. The court found for the new owner and against the wife because: 'Under our law of property, the right to ownership over property of whatever nature confers the most complete and comprehensive control one can have over property.'[128]

The judge was discomfited by this finding, noting how unfair and unrealistic this 'individualistic approach' was not least because it failed to take into account that marriage was a partnership to which both parties contributed both directly and indirectly. To focus solely on legal title was to fail to recognise the mutual obligations arising out of the marital relationship. In this instance it rendered the wife's family law rights inferior to the husband's property law rights leaving her unable to stop the sale of the matrimonial home.[129] The judge called on the higher courts (Supreme Court) to address this issue noting:[130]

> 'I am of the firm view that the principles of family law that this court is enjoined to apply to restrict the rights of a wife to the realm of personal rights against her husband are anachronistic and have outlived their raison d'etre.'

IV CONCLUSION

This chapter has looked at legal developments in Zimbabwe. Notwithstanding serious political upheaval, there have been attempts at legal reform evidenced by the passing of the Domestic Violence Act, whose provisions, if properly implemented and enforced, can be of enormous benefit to people experiencing private sphere violence. Impressive have been the attempts of the judiciary to persevere in dispensing justice under very difficult conditions. In cases involving property division of property on divorce, the focus appears to be on the contributions made by the parties. While not always equally weighted, it is heartening to see that judges are now prepared to recognise the 'indirect' contributions made by women by way of labour and other non-financial contributions to the family. Disturbing and ripe for reform is the law of property which resulted in the clearly unjust eviction of a wife from her home in the *Makanza* case.

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[128] Ibid, at p 3.
[129] Ibid, at p 4.
[130] Ibid, at p 5.