The International Survey of Family Law

2009 Edition

Published on behalf of the International Society of Family Law

General Editor: Professor Bill Atkin

Family Law

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HISTORY OF 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 was held in Vienna in September 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 Amsterdam (the Netherlands) and dealt with the centennial anniversary of the establishment of legislation on child protection and the juvenile courts. In 2007 there were regional conferences in Chester (England), entitled 'Family Justice: For Whom and How?' and Vancouver (Canada), entitled 'Making Family Law: Facts, Values and Practicalities'. In 2009 there has been a conference in Tel Aviv, with others taking place in Porto (Portugal) and Sao Paolo (Brazil).

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 2008 the Society had approximately 590 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 €50 (or equivalent) for one year, €120 (or equivalent) for 3 years and €180 (or equivalent) for 5 years, plus €12.50 (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 have been published as *Family Law: Balancing Interests and Pursuing Priorities* (L Wardle and C Williams, eds, Wm S Hein & Co, 2007). The proceedings of the thirteenth world conference held in Vienna in 2008 have been published as *Family Finances* (B Verschraegen, ed, Jan Sramek Verlag, 2009). 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 6140. The Survey is circulated to members or may be obtained on application to the Editor.

PREFACE

This edition of the International Survey contains contributions from many parts of the globe. Especially pleasing are those from Latin America, which has not been well represented in the last few editions. Also notable is the number that herald from Eastern Europe, where in some respects the law may be said to be in catch-up mode. That mode however is true of many parts of the world – many jurisdictions are grappling with fundamental issues about our children and about the way in which adult relationships should be treated by the law. Many nations, particularly in Africa and Asia, are concerned with the tension between Western legal norms and indigenous custom. Even in a solidly Westernised country such as my own, New Zealand, the role of indigenous Maori 'lore' is the subject of keen debate: the recent conviction for manslaughter of family members during a ritual exorcism has led to further calls for a separate Maori justice system. In Britain, the Archbishop of Canterbury attracted media attention when he explored the role of Sharia law operating alongside the Westminster system. Other groups in society demand our attention. Consider the Roma, who are the subject of the chapter from Slovenia. It is safe to say that family law is becoming more, not less, complex. All the more reason therefore why an international collection of essays such as is found in this annual Survey is crucial in helping to come to grips with those complexities.

My thanks first and foremost go to the authors without whom there would be no Survey. We are fortunate to have distinguished researchers and experts at all stages of their careers who have been willing to devote their time to writing for the 2009 edition. The publishers Jordans and particularly the copy editor, Cheryl Prophett, are excellent value and the International Society benefits enormously from their continued commitment to this annual project. Professors Dominique Goubau and Hugues Fulchiron have translated the abstracts into French, and Peter Schofield willingly translated a chapter that arrived (as expected) in Spanish. I have had wonderful assistance from my research assistant, Nathan Crombie, whom I soon lose to one of the larger law firms in the city. He has been so helpful and competent. Finally, I again acknowledge the terrific work that my secretary, Tracy Warbrick, does. She is a real gem. She does a lot of work on each chapter but most importantly she keeps track of everything. The result is that nothing gets lost!

Bill Atkin
Wellington, June 2009

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[1] Or its *counter*value in US dollars.

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[1] Ou la *contre*valeur en US dollars.

CONTENTS

ANNUAL REVIEW OF INTERNATIONAL FAMILY LAW

Elaine O'Callaghan and Ursula Kilkelly[*]

Résumé

Le droit international de la famille a connu en 2007 des développements au sein de différents forums, tant au niveau international que local. La Conférence de La Haye de droit international privé a adopté sa *nouvelle Convention internationale sur le recouvrement des pensions alimentaires pour enfants et d'autres formes de maintenance de famille* et a mis sur pied la Base de données sur les statistiques en matière d'enlèvement international (INCASTAT). Aux Nations-Unies le Comité sur les droits de l'enfant a publié son Observation générale «Les droits de l'enfant dans la justice pour mineurs» et il a organisé une journée de discussions autour de la responsabilité des États dans le cadre de l'article 4 de la Convention relative aux droits de l'enfant. Au niveau européen, le droit de la famille, au sens large, a fait l'objet d'un certain nombre de décisions de la Cour européenne des droits de l'homme en matière de traitement de l'infertilité et de services d'avortement, alors que le Commissaire aux droits de l'homme du Conseil de l'Europe, Mr Thomas Hammarberg, exprimait à l'occasion de ses nombreuses visites au sein des États, ses préoccupations en regard des questions de la violence familiale et de la réunification des familles.

Le foisonnement de sujets abordés ici, ainsi que le nombre importants d'acteurs institutionnels qui doivent composées avec ces problèmes, illustre à quel point le droit international de la famille se compexifie.

I THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The two key events that took place in the Hague Conference on Private International Law in 2007 were the adoption of the new Convention on the International Recovery of Child Support, and the establishment of INCASTAT.

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* Elaine O'Callaghan is a doctoral student at the Faculty of Law, University College Cork supported by the Office of the Minister for Children and Youth Affairs.
Ursula Kilkelly is a Senior Lecturer at the Faculty of Law, University College Cork.

(a) Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ('the Convention') was adopted in November 2007 by the Twenty-First Diplomatic Session of the Hague Conference on Private International Law.[1] The central object of the Convention is to ensure the effective international recovery of child support and other forms of family maintenance.[2] A Protocol on the Law Applicable to Maintenance Obligations was also adopted at that time which sets out the applicable rules to be used.[3]

The Convention governs maintenance obligations towards a person under the age of 21 years arising from a parent-child relationship as well as spousal support.[4] Furthermore, Contracting States may extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons.[5]

The Convention operates by allowing for the recognition and enforcement of maintenance decisions made in Contracting States. Central Authorities in each country are required to co-operate to facilitate the processing of international applications. They are vested with a number of specific functions including transmitting and receiving applications as well as initiating or facilitating the institution of proceedings in respect of such applications. Where necessary, the Authorities must provide or facilitate the provision of legal assistance. Furthermore, the Authorities must help locate the debtor or the creditor and any relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets.

The Convention specifically advocates the amicable resolution of maintenance disputes and in this regard requires the Authorities to encourage the use of mediation, conciliation or similar processes, where possible with a view to obtaining voluntary payment of maintenance.

The Authorities are equally required to facilitate the ongoing enforcement of maintenance decisions, including any arrears as well as to facilitate the collection and expeditious transfer of maintenance payments and documentary or other evidence. They may also be called on to provide assistance in

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1 Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, available at www.hcch.net.

2 Article 1 of the Convention.

3 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, available at www.hcch.net/index_en.php?act=conventions.text&cid=133.

4 Contracting States may, however, make a reservation limiting the application to persons who have not reached the age of 18 years; see Art 2(2).

5 Article 2(3) of the Convention.

establishing parentage where necessary for the recovery of maintenance. Finally, the Authorities are required to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application and to facilitate service of documents.[6] As regards costs, it is the duty of each Central Authority to pay for any such actions.[7]

The effective operation of this Convention requires great commitment from the Central Authorities. Indeed, fundamental to the Convention is the obligation to provide prompt, efficient and cost-effective measures to enforce such orders. In this regard, the Authorities are vested with core powers to ensure its practical implementation and therefore have great capacity to support all those involved in the recovery of maintenance. The Convention has yet to come into force because the necessary two instruments of ratification are awaiting. To date, it has been signed only by the United States of America (23 November 2007) and Burkina Faso (9 January 2009).

(b) Launch of INCASTAT

The Hague Conference on Private International Law has long been associated with the issue of child abduction and efforts to implement its 1980 Convention on the Civil Aspects of International Child Abduction. In September 2007, the Conference launched an electronic statistical database, INCASTAT, the International Child Abduction Statistical Database, to assist the implementation of the Child Abduction Convention. The database, along with INCADAT[8] and I-Child,[9] addresses one of the recommendations made at the Special Commission reviewing the operation of the Abduction Convention in 2001, 2002 and again in 2006, to encourage Central Authorities to maintain accurate statistics concerning cases dealt with by them under the Convention.[10]

The database, which was developed by the Permanent Bureau, will be located in a secured area of the Hague Conference website where the Central Authorities may reproduce their statistics.[11] It will generate Annual Statistical Forms

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6 Article 6 of the Convention.

7 Article 8 of the Convention.

8 INCADAT, the International Child Abduction Database, contains the leading decisions taken by national courts in respect of the 1980 Abduction Convention. See www.incadat.com.

9 I-Child, an electronic case management system for the 1980 Abduction Convention, was launched in November 2005. It was designed to store all essential information concerning a child abduction case. See www.hcch.net/index_en.php?act=events.details&year=2005&varevent=113.

10 See Recommendation 1.14 of the March 2001 Fourth Special Commission and Recommendation 6 of the 2002 Special Commission and 2006 Special Commission, as set out in the Hague Conference on Private International Law, *Report on the iChild Pilot and the Development of the International Child Abduction Statistical Database, INCASTAT: Technology Systems in Support of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, drawn up by the Permanent Bureau, available at http://hcch.e-vision.nl/upload/wop/abd_pd09e2006.pdf.

11 Hague Conference on Private International Law, *Report on the iChild Pilot and the*

concerning return and access applications and facilitate the production of statistical charts. The type of information required on the database ranges from the outcome of applications, to the number of judicial orders made as well as the number of cases arising during the year.

The database has great potential to assist the Permanent Bureau with its statistical needs. Furthermore, it encourages Contracting States to the Hague Convention to collate all relevant information concerning abductions in an easily accessible form and in this regard, marks an important step in terms of overseeing the implementation of the Abduction Convention on a domestic level.

II UNITED NATIONS

In 2007, there were no further ratifications of the Convention on the Rights of the Child (CRC), but states continued to ratify the Optional Protocols to the Convention. In particular, the Optional Protocol on the Involvement of Children in Armed Conflict was ratified by Burkina Faso, Cuba, Jordan, Nepal and Vanuatu.[12] There are now (January 2009) 126 parties to the Protocol. In relation to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, this instrument was ratified by Australia, Gabon, Moldova, Sweden and Vanuatu. This brings the total number of State Parties to 130 as at January 2009. The following section reports on additional activities in the Committee on the Rights of the Child.

(a) General Comment on Children's Rights in Juvenile Justice

The General Comment on Children's Rights in Juvenile Justice, published by the Committee on the Rights of the Child, was a welcome development in 2007.[13] It is a practical, informative document for States as regards the obligation to develop and implement a comprehensive policy on juvenile justice matters. Particular reference is made to the prevention of juvenile delinquency, interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings, the minimum age of criminal responsibility and the upper age limits for juvenile justice, the guarantees for a fair trial and, finally, the deprivation of liberty including pre-trial detention and post-trial incarceration.

Development of the International Child Abduction Statistical Database, INCASTAT: Technology Systems in Support of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, drawn up by the Permanent Bureau, available at http://hcch.e-vision.nl/upload/wop/abd_pd09e2006.pdf.

12 For full details see www.unhchr.ch.

13 Committee on the Rights of the Child, General Comment No 9, *Children's Rights in Juvenile Justice*, CRC/C/GC/10, 9 February 2007. This is available at www2.ohchr.org/english/bodies/crc/comments.htm.

The General Comment draws heavily on the CRC while also highlighting other international standards in this area such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and encourages States to incorporate these into their juvenile justice policy.

While outlining the importance of Arts 37 and 40 as regards juvenile justice, the General Comment also points to the general principles of the CRC: Arts 2, 3, 6 and 12.[14] A particular reference is also made to Art 4 which concerns the implementation of Convention rights as well as Art 39 which relates to the reintegration of a child victim.

The prevention of juvenile delinquency, as well as interventions and diversion, form the core of the Committee's approach to juvenile justice matters. It staunchly advocates the importance of promoting the full and harmonious development of every child and in this regard notes the importance for the child to not grow up under circumstances which may cause an increased or serious risk of becoming involved in criminal activities. To this end, the General Comment outlines the need to properly implement a number of rights: the right to an adequate standard of living (Art 27 of the CRC), the right to the highest attainable standard of health and access to health care (Art 24 of the CRC), the right to education (Arts 28 and 29 of the CRC), the right to protection from all forms of physical or mental violence, injury or abuse (Art 19 of the CRC), and from economic or sexual exploitation (Arts 32 and 34 of the CRC), and the right to other appropriate services for the care or protection of children.

The General Comment notes that the majority of child offenders commit minor offences, and in this respect, recommends that a range of measures involving removal from criminal justice processing and referral to alternative services should be a well-established practice. While it is acknowledged that it is within the individual State's discretion to decide on the type of measures that can be used, a number of measures which are operational in some States Parties are identified as possible alternatives such as community service, supervision and guidance, family conferencing and other forms of restorative justice such as restitution and compensation of victims.

For those children who do become involved in judicial proceedings, a particular emphasis is placed on interventions and procedural rights as outlined in Art 40. For example, the General Comment outlines the importance of social and/or educational measures and the need to strictly limit the use of deprivation of

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[14] Article 37 outlines the child's right to liberty and dignity while Art 40 outlines the child's procedural rights if alleged, accused of or recognised as having infringed the penal law. Article 2, the right to non-discrimination; Art 3, the best interests of the child; Art 6, the right to life, survival and development; Art 12, the right to participation in decisions affecting him or her.

liberty, and in particular pre-trial detention, as a measure of last resort. As regards procedural rights, the General Comment outlines a number of core principles such as that juvenile justice cannot be retroactive (Art 40(2)(a)), the presumption of innocence (Art 40(2)(b)(i)), the right to be heard (Art 12), the right to effective participation in the proceedings (Art 40(2)(b)(iv)), prompt and direct information of the charge(s) (Art 40(2)(b)(ii)), legal or other appropriate assistance (Art 40(2)(b)(ii)), decisions without delay and with involvement of parents (Art 40(2)(b)(iii)), freedom from compulsory self-incrimination (Art 40(2)(b)(iv)), presence and examination of witnesses (Art 40(2)(b)(iv)), the right to appeal (Art 40(2)(b)(v)), free assistance of an interpreter (Art 40(2)(vi)), and finally, full respect of privacy (Arts 16 and 40(2)(b)(vii)).

Article 37 of the CRC outlines the core principles for the use of deprivation of liberty and emphasises a number of principles and rules which need to be observed in all such cases including, for example, in relation to the accommodation needs of children, education, medical care and contact with family and friends. Furthermore, any disciplinary measures must respect the dignity of the child and he or she should have a right to make requests or complaints to an independent authority such as a judge. The need for independent inspections is also recommended by the Committee.

The minimum age of criminal responsibility (MACR) of the child is highlighted as a particularly contentious issue by the Committee and the General Comment does much in terms of offering guidance in this regard. This is a very welcome development given the wide variance of ages of criminal responsibility throughout States Parties and the Convention's silence on the appropriate age at which it should be set. Article 40(3) of the CRC outlines an obligation for States to set a MACR. The General Comment clarifies the purpose of setting a minimum age as follows:[15] 'children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure' and 'children at or above the MACR at the time of the commission of an offence . . . but younger than 18 years can be formally charged and subject to penal law procedures. But these procedures must be in full compliance with the principles and provisions of the CRC as elaborated in the present general comment'.

Crucially, the Committee outlines that a MACR below the age of 12 years is not internationally acceptable. Accordingly, States Parties are recommended to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. Furthermore, the General Comment reiterates the fact that the rules on juvenile justice apply to all those under 18 years. If there is no proof of age, and it cannot be established that the child is at or above the MACR, the child should not be held criminally responsible.

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[15] General Comment, above n 13, para 31.

The General Comment is a strong statement as to the rights of children and young people who come into contact with crime. Its central aim is to act as a template for States Parties in the process of drawing up or reviewing juvenile justice laws and policies. It offers detailed guidance as regards contentious issues such as the minimum age of criminal responsibility as well as practical suggestions, which are drawn from State Reports of some States Parties, for example as regards diversion measures. Particular reference is also made to the importance of training for all those individuals working within the juvenile justice setting including police officers, prosecutors, legal or other representatives of the child, judges, probation officers, social workers and others. Overall, the General Comment is written in commanding language, clearly identifying itself as holding significant weight in terms of the development and implementation of juvenile justice policies on a domestic level.

(b) Day of General Discussion on 'Resources for the Rights of the Child – Responsibility of States'

In 2007, the Committee on the Rights of the Child held its annual Day of General Discussion on 'Resources for the Rights of the Child – Responsibility of States', thereby focusing on Art 4 of the CRC.[16] Article 4 requires States Parties to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights' set out in the Convention. Furthermore, it requires States Parties to 'undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation'. The main purpose of the Day of General Discussion was to enable further discussion among governments, civil society organisations, expert bodies and the Committee regarding the latter part of Art 4 and in particular, the obligations of State Parties with regard to the implementation of economic, social and cultural rights.[17]

The Committee clarified the meaning of a number of key terms related to Art 4. For example, it recognised the need to establish a definition of the term 'available resources' and set out that it must be understood as encompassing not only financial resources, but also other types of resources relevant for the realisation of economic, social and cultural rights, such as human, technological, organisational, natural and information resources. As regards the meaning of the 'maximum extent of available resources', the Committee invited UNICEF to develop child-specific indicators, with a view to assisting States in improving their policy formulation, monitoring and evaluation for the implementation of child rights. It also highlighted international human rights targets such as the Millennium Development Goals as a benchmark for the

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[16] See www2.ohchr.org/english/bodies/crc/discussion.htm.

[17] See 'Background' to the Day of General Discussion, available at www2.ohchr.org/english/bodies/crc/discussion.htm.

implementation of child rights as well as the criteria set out by the Committee on Economic, Social and Cultural Rights in its statement on the 'Maximum of Available Resources'.[18]

As regards the term 'progressive realisation' in relation to economic, social and cultural rights, the Committee recommended that it be understood as 'imposing an immediate obligation for States parties to the Convention to undertake targeted measures to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights of children'. Furthermore, the Committee observed that some obligations require immediate implementation, irrespective of the level of available resources, such as the obligation to guarantee non-discrimination as well as the obligation not to take any retrogressive steps as regards the enjoyment of economic, social and cultural rights.

The Committee made a number of practical recommendations specifically of a legislative and administrative nature as well as other measures which could be adopted by States, in line with Art 4. For example, as regards the legislative framework, the Committee recommended that States Parties ensure that domestic adjudicating bodies are able to give full justiciability to the economic, social and cultural rights of children. Furthermore, States should ensure that judicial procedures are child-sensitive and child-friendly, and that accessible and independent legal advice is made available to children and their representatives through bodies such as the Children's Ombudsperson or the National Human Rights Commission.

The Committee made many recommendations in relation to national budgets and the public expenditure in overseeing the implementation of Art 4. For example, it encouraged all States to consider legislating a specific proportion of the public expenditure to be allocated to children. Such legislation, according to the Committee, should be accompanied by a mechanism that allows for a systematic independent evaluation of the public expenditure on children.[19] Furthermore, the Committee urged States Parties to consider using rights-based budget monitoring and analysis, as well as child impact assessments on how investments in any sector may serve 'the best interests of the child'.[20] The Committee also advocated the participation of children in the budget process, thereby keeping in line with Art 12 of the CRC as well as the Day of General Discussion of September 2006 on 'the Right of the Child to be Heard'.

Of particular note was the recommendation made by the Committee that States Parties consider establishing national priorities guided by the four

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[18] Committee on Economic, Social and Cultural Rights, Thirty-eighth session, 30 April–18 May 2007, Statement, 'An Evaluation of the Obligation to take steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', E/C 12/2007/1, 10 May 2007.

[19] Recommendation No 1.

[20] Article 3 of the CRC.

general principles of the CRC.[21] This, according to the Committee, should be established using a rights-based approach and States should also establish a monitoring mechanism that would allow for an external review of the national priorities vis-à-vis the actual enjoyment of rights by children, with the authority to issue recommendations. The outcomes of the national priorities review should be included in the periodic reports to the Committee.

Overall, the importance of monitoring the implementation of children's rights is continually reiterated by the Committee. For example, every recommendation also includes a reference to a possible monitoring procedure so as to ensure that all measures are in line with the CRC. Additionally, the Committee repeatedly referenced the four guiding principles of the CRC so as to emphasise their importance and relevance in all measures. The importance of other international human rights instruments and targets such as the reports of the Economic, Social and Cultural Rights Committee and the Millennium Development Goals was also made clear.

The Committee also drew on the General Comment on the General Measures of Implementation of the Convention which focused on Arts 4, 42 and 44(6) of the CRC.[22] It reiterated the recommendations set out in the General Comment, in particular in relation to international co-operation, and also noted the possibility of developing a General Comment on issues related specifically to the implementation of Art 4. In this respect, the recommendations made at the Day of General Discussion offer a good insight into the practical application of Art 4 and also establish a solid basis for more in-depth analysis to come.

III COUNCIL OF EUROPE

Recent editions of the *International Survey* have reported on developments in the Council of Europe, including the adoption of international treaties in the areas of adoption and sexual exploitation. This year, it is timely to focus on the work of the Council of Europe Commissioner for Human Rights, an independent body mandated to promote the awareness of and respect for human rights in 47 Council of Europe Member States. The current incumbent Mr Thomas Hammarberg took office on 1 April 2006, succeeding Mr Alvaro Gil-Robles, the first Commissioner, who was appointed in 1999.

(a) Country Reports of the Commissioner for Human Rights

In order to fulfil his mandate, the Council of Europe Commissioner for Human Rights conducts regular country visits throughout the Member States,

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[21] Article 2, the right to non-discrimination; Art 3, the best interests of the child; Art 6, the right to life, survival and development; Art 12, the right to participation in decisions affecting him or her.

[22] Committee on the Rights of the Child, General Comment No 5, *General Measures of Implementation of the Convention on the Rights of the Child,* CRC/GC/2003/5, 3 October 2003.

examining current laws, policies and practice in an effort to determine whether they are effective in protecting human rights at the domestic level. These visits are followed up by reports outlining the Commissioner's findings and recommendations and serve as a useful snapshot as regards the standing of human rights issues for the Member State in question as well as providing a good forum for discussion as regards the present and future direction.

In 2007, the Commissioner published reports concerning its country visits to Austria, Ukraine and Germany as well as a number of memoranda as regards follow-up visits to Estonia, Denmark, Poland, Sweden, Latvia and Lithuania. While the reports addressed a wide range of human rights issues, this section will focus on the areas of violence against women, including domestic violence, family reunification and children's rights to education.

(i) Violence against women, including domestic violence

Violence against women, including domestic violence, remains one of the most acute forms of human rights violations throughout the Council of Europe with estimated figures suggesting that one-fifth to one-quarter of all women have experienced physical violence at least once during their adult lives and that about 12% to 15% of all women have been in a relationship of domestic abuse after the age of 16.[23] Given the gravity of this issue, the Council of Europe has focused on a 'Campaign to Combat Violence against Women, including Domestic Violence' and the Commissioner for Human Rights has sought to ensure the effective implementation of this Campaign on a domestic level.[24]

Raising awareness of domestic violence is a core aim of the Commissioner. In Poland, Lithuania and Estonia, for example, where the Commissioner conducted follow-up visits, he noted that National Strategies had been drawn up, specifically designed to implement the Council of Europe Campaign and highlight the issue of domestic violence.[25] In Germany, the Federal Government was noted to have adopted a comprehensive Action Plan to combat violence against women in 1999 and it also drew up a follow-up Action Plan to be implemented in 2007. Both of these, according to the Commissioner, have created considerable public and political awareness as regards domestic violence issues.

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[23] See www.coe.int/t/dg2/equality/domesticviolencecampaign/Fact_Sheet_en.asp.

[24] See 'Interview with Mr Thomas Hammarberg, Commissioner for Human Rights', available at www.coe.int/t/dg2/equality/DOMESTICVIOLENCECAMPAIGN/.

[25] In Poland, a National Programme for the Prevention of Domestic Violence was drawn up and a working group under the Ministry for Labour and Social Affairs for countering domestic violence was held on 8 February 2007, while in Lithuania, a National Strategy on Reduction of Violence against Women and a Plan for its Implementation for the period 2007-2009 was drawn up. In Estonia, a National Action Plan on Domestic Violence 2008-2011 was established. See §§ 81-82, *Memorandum to the Polish Government*, CommDH(2007)13, Strasbourg, 20 June 2007; § 48, *Memorandum to the Lithuanian Government*, CommDH(2007)8, Strasbourg, 16 May 2007; § 70, *Memorandum to the Estonian Government*, CommDH(2007)12, Strasbourg, 11 July 2007. All of the Country Reports are available at www.coe.int/t/commissioner/Activities/visits_en.asp.

Overall, the Commissioner's central objective as regards violence against women, including domestic violence, is to examine whether current law, policy and practice in the Member States adequately protect and support women. Since the Commissioner's previous visit to Poland, new legislation has been introduced which aims to increase the effectiveness of measures to counter domestic violence.[26] During his 2007 visit, the Commissioner examined this Act and made a number of recommendations, including that the Polish authorities review certain aspects of it, such as in relation to restraining orders, by drawing on the experience and best practice of other Member States. Such a recommendation is a clear example of the Commissioner's approach to his work which encourages Member States to maintain an awareness of human rights measures in other jurisdictions.

Additionally, in the case of migrant families, the Commissioner is concerned to ensure that their rights are equally protected, particularly as regards family reunification laws which may not make adequate provision for domestic violence issues. For example, as regards Denmark, the Commissioner recommended that the Danish authorities grant at least a temporary residence permit to victims of domestic violence who have lived in the country for less than 2 years. Immigrants who have lived in Denmark for at least 2 years, who leave a violent partner, may apply for a residence permit and will normally obtain it, a measure which is in line with the 2004 recommendation of the Commissioner's predecessor.

Furthermore, in the case of Austria, the Commissioner recommended that the provision granting an independent settlement permit for migrant spouses who are victims of violence perpetrated by their partners be made better well known, and efficiently implemented so as to be adequately inclusive of those who do need it.

As regards supporting female victims of violence, the Commissioner advocates the importance of adequate shelter accommodation. This is highlighted as a further area on which Poland, Estonia and Germany could improve in terms of maintaining and establishing more shelters.

A further important issue as regards effectively dealing with domestic violence concerns the need to ensure that adequate training programmes are available for those working with domestic violence victims, such as members of the judiciary and law-enforcement officials. This issue was raised as regards Estonia and Poland.

Overall, in the majority of the countries on which the Commissioner reported in 2007, National Strategies or Action Plans had been adopted specifically to raise awareness of domestic violence issues and also to introduce legal measures to protect and support its victims through a range of sanctions for

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[26] Counteracting the Domestic Violence Act, which came into force on 21 November 2005. See § 80, *Memorandum to the Polish Government*, CommDH(2007)13, Strasbourg, 20 June 2007, available at www.coe.int/t/commissioner/Activities/visits_en.asp.

the perpetrators, training for the relevant personnel working in the area and shelter accommodation for the victims. Specific emphasis has been placed on domestic violence and its effects on women throughout the Council of Europe due to the robust campaign which was launched in 2006. The great need for such a campaign is clear, given the prevalence of the issue throughout Council of Europe States. The Commissioner's commitment to monitoring the implementation of the campaign is admirable.

(ii) Family reunification

The principle of family reunification is a much guarded one within the Council of Europe.[27] In relation to migrant children and the possibility of reuniting them with their families, the Committee of Ministers made a number of recommendations in 2007, including that '(t)he competent authorities should undertake as soon as possible an analysis of the unaccompanied migrant minor's family situation and prioritise the search for the parents or legal or customary guardian in order to establish, as appropriate and always respecting the child's best interests, direct or indirect contacts with a view to possible family reunion'.[28]

The Commissioner for Human Rights has drawn attention to this issue while fulfilling his mandate in 2007. To date, his main focus as regards family reunification on a domestic level has been on the refugee laws and policies which are in place and in determining how this right to family reunification is respected in practice.[29] Of particular relevance here is the issue of admitting migrants into the State including the criteria which are used in the process as well as the administrative aspect involved. Finally, the Commissioner advocates the best interests of the child principle, and that those interests are considered in any decision affecting the child.

In Austria, the Commissioner criticised the quota system for the granting of settlement permits which is used in family reunification cases involving third-country nationals, with third-country nationals who are long-term residents. According to this system, if the quota has been exhausted, the application for family reunification is denied and the applicants may endure a delay of some 3 years. The Commissioner criticised this approach to granting

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[27] See also, UN Convention on the Rights of the Child, UN Convention relating to the Status of Refugees and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[28] See Recommendation No 18 in Appendix to Recommendation CM/Rec (2007)9 of the Committee of Ministers to Member States on 'Life Projects for Unaccompanied Migrant Minors' (Adopted by the Committee of Ministers on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies): https://wcd.coe.int/ViewDoc.jsp?id=1164769&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75. See also, Recommendation 1596 (2003), of the Council of Europe Parliamentary Assembly, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta03/EREC1596.htm.

[29] T Hammarberg, Viewpoint: 'Refugees must be able to reunite with their family members', www.coe.int/t/commissioner/Viewpoints/080804_en.asp and 'Children in migration should get better protection', www.coe.int/t/commissioner/Viewpoints/070806_en.asp.

permits and recommended that the quota system be discontinued so that family members who are entitled to family reunification in Austria are granted settlement permits without unnecessary delays.

Also with respect to Austria, the Commissioner recommended that income requirements for family reunification be reviewed in order to ensure that they are not discriminatory towards women, who are often paid less than men and may not be able to meet the requirements to bring their family members to Austria. Equally, in Denmark, where the government requires a bank guarantee from persons seeking family reunification, the Commissioner recommended that this be removed in order to avoid discrimination on the grounds of economic conditions.

In Sweden and Poland, unaccompanied minors are appointed a guardian ad litem and a legal representative to supervise the provision of appropriate accommodation and access to education and medical care for the minor, as well as to provide assistance in finding family members.[30] In Sweden, the Commissioner recommended that these efforts be carried out as expeditiously as possible, while in Poland, for those unaccompanied minors who fall outside the refugee system, the Commissioner advised that their rights as regards family reunification be equally protected.

In Denmark, the right to family reunification of children ends when a child reaches 15 years. The Commissioner, echoing the recommendation made by his predecessor, urged the Danish authorities to raise the maximum age limit for the family reunification of children to 18 years. In arguing this point, the Commissioner draws on the CRC.

In relation to family reunification, the Commissioner strives to ensure that the core right set out in Art 8 of the European Convention on Human Rights (ECHR), that is, the right to respect for family life, is adhered to on a national level. In this regard, the importance of procedural rights has been emphasised by the Commissioner, particularly as regards administrative delays which can ultimately result in long periods of separation for family members and infringe on their right to respect for family life.

(iii) Children's rights to education

A substantial number of international legal instruments enshrine the child's right to education.[31] On the Council of Europe level, the child's right to education is set out in Art 2 of the First Protocol to the ECHR and there have

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[30] See § 39, *Memorandum to the Swedish Government*, CommDH(2007)10, Strasbourg, 16 May 2007; § 107, *Memorandum to the Polish Government*, CommDH(2007)13, Strasbourg, 20 June 2007. Both Memoranda are available at www.coe.int/t/commissioner/Activities/visits_en.asp.

[31] See ,eg, Art 26(1) of the Universal Declaration of Human Rights; Principle 7 of the Declaration of the Rights of the Child, 1959; Art 13(1) of the International Covenant on Economic, Social and Cultural Rights and Arts 28 and 29 of the CRC.

been a number of cases in the European Court of Human Rights which have generated a great degree of jurisprudence interpreting this Article.[32]

In relation to education, the main issue which arises across Council of Europe States relates to the substantive right of education itself; namely, that education, as a basic, fundamental human right, applies to all children, without discrimination. In particular, this has raised questions as regards children with disabilities, migrant children and children living in poverty.[33]

In addressing this issue, the Commissioner's main aim is to ensure that, where possible, all children participate in mainstream education. According to the Commissioner, an exception to this should only arise where professionally assessed needs for special education cannot be met within mainstream education, despite the provision of support measures.[34] It is therefore clear that mainstream schools must be adequately funded and supported so as to ensure that that children with disabilities, migrant children and those living in poverty are given adequate opportunity to attend them.

During 2007, the Commissioner raised this issue in relation to Germany, Estonia, Ukraine and Poland and recommended that the integration rate of these children into mainstream education be increased. In relation to Germany, the Commissioner recommended that the procedures which are applied in the selection of pupils for special schools are reviewed so that they do not unnecessarily hinder integration efforts. In this regard, particular reference is made to the administrative procedure of identifying pupils with special educational needs which has produced a 'vast over-representation' of children from a migration background and of children from families living under poverty in special schools.

In relation to Estonia, the Commissioner, echoing recommendations made in 2004, recommended that Estonian authorities further their efforts to facilitate the integration of children with disabilities in mainstream schools as much as possible. In particular, the Commissioner noted that access to early

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[32] Article 2 of Protocol No 1 to the ECHR reads as follows: '[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' See, eg, cases such as *The Belgian Linguistics Case*, judgment of 23 July 1968, Series A no 6, (1968) 1 EHRR 252; *Kjeldsen, Busk Madsen and Pedersen v Denmark*, judgment of 7 December 1976, Series A no 23, (1976) 1 EHRR 711; *Campbell & Cosans v United Kingdom*, judgment of 25 February 1982, Series A no 48, (1982) 4 EHRR 293. There have also been a number of important cases in the European Court of Human Rights in 2007 concerning children's rights to education; see further below: 'Case-law of the European Court of Human Rights'.

[33] See, eg, Council of Europe Disability Action Plan 2006-2015, available at www.coe.int/T/E/Social_Cohesion/soc-sp/Integration/.

[34] See § 75, *Report by the Commissioner for Human Rights Mr Thomas Hammarberg on his Visit to Germany*, CommDH(2007)14, Strasbourg, 11 July 2007, available at www.coe.int/t/commissioner/Activities/visits_en.asp.

intervention services for example, which could be recognised as a key factor in ensuring the integration of children with disabilities, is described as being 'very limited'.

In Ukraine, the issue of funding is paramount as regards bringing improvement for all children in relation to their right to education. Particular reference was, however, made to the lack of resources such as infrastructure, textbooks and adequately trained teachers for children with disabilities, as well as for children from minority groups.

In Poland, there have been developments as regards access to education for children from rural areas or small towns. For example, financial assistance in the form of maintenance grants, student benefits and scholarships for pupils from low-income and problem families have been introduced and a government strategy has been drawn up specifically to assist these children.[35]

Language difficulties were also raised in Estonia and Latvia as regards the child's right to education. Both countries, which are historically Russian-speaking, are in the midst of implementing programmes to address this. For example, Estonia has developed a number of initiatives for non-Estonian-speaking pupils to learn Estonian while respecting their rights to be taught in their mother tongue, such as early or late immersion classes. Additionally, the transition to Estonian as the main language of instruction in Russian-speaking upper-secondary schools began in 2007. The major deficit here, as pointed out by the Commissioner, relates to the lack of teachers for Russian and Estonian language schools. This is similarly the case in Latvia and the Commissioner has recommended training for non-Latvian teachers in the Latvian language as well as ongoing assessment of the quality of education in Latvian language and minority language schools.

(iv) Conclusions

The Country Visits and Reports of the Commissioner are a valuable monitoring tool across the Council of Europe. They provide a good assessment of human rights protection measures within individual Council of Europe States and highlight both the positive and negative developments which have taken place. In this sense, they raise awareness of human rights issues and are an important means of ensuring that human rights are viewed as tangible rights which must be respected as opposed to being abstract measures.

The Commissioner repeatedly draws on international human rights instruments such as United Nations and Council of Europe Conventions, EC law and judgments of the European Court of Human Rights as well as various research reports conducted by bodies such as UNESCO, UNICEF and EUROPOL. Such references ensure that the Commissioner's reports are well informed and

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[35] Strategy for the Development of Education in Rural Areas for the years 2007–2013. See *Memorandum to the Polish Government*, CommDH(2007)13, Strasbourg, 20 June 2007, available at www.coe.int/t/commissioner/Activities/visits_en.asp.

establish best practice. This encourages a holistic view of human rights and enables the Commissioner to make recommendations as regards further ratification of international human rights standards, such as conventions and optional protocols.

Furthermore, the Country Reports serve as valuable research in itself as they offer an easily accessible insight into the measures adopted in other Council of Europe States. This is particularly useful given that all of the Council of Europe States are governed by the same umbrella of international instruments and therefore share the same human rights obligations.

The main criticism which must be highlighted as regards these reports echoes similar criticisms which could be made against the issue of monitoring international human rights law in itself: in short, the Commissioner's powers are limited to outlining the obligations on States as regards human rights and publicising any human rights deficits; the Commissioner is not empowered to place any form of sanction on States and in this regard, may be viewed as weak and ineffective in establishing progress. Therefore, while the Commissioner's Country Visits and Reports have brought about a number of positive changes across Council of Europe States, it is clear that the realisation of human rights on a domestic level very much depends on good faith.[36]

(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 focuses on two significant cases concerning, first, the right to decide to become or not to become a parent, which arose in the United Kingdom, and secondly, the right to an abortion on medical grounds which arose in Poland. It also discusses, more generally, the area of children's rights and education.

(i) The right to become or not to become a parent

Article 8 of the ECHR guarantees the right to respect for private and family life. For many years, this provision has been interpreted and applied to traditional family law dilemmas of custody and access, adoption and alternative care. The provision has also been found to be relevant to questions of identity as part of private life, and has been invoked in cases concerning paternity, birth registration and name.[37] Modern social conditions have led to more complex challenges, however, and in 2007 the European Court has been compelled to consider the application of Art 8 in the context of fertility treatment in two very different scenarios. The two cases were the *Evans* case, which concerned a woman's effort to have embryos created during in vitro

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[36] The Commissioner's follow-up visits and reports offer a good insight as regards whether previous recommendations have been implemented. All of the reports are available at www.coe.int/t/commissioner/Activities/visits_en.asp.

[37] See the most recent cases of *Jevremović v Serbia*, 17 July 2007; *Tur v Poland*, 23 October 2007 and *Phinikaridou v Cyprus*, 20 December 2007 on identity/paternity issues.

fertilisation (IVF) transferred to her womb, and the *Dickson* case, which concerned a prisoner's access to fertility treatment.

The applicant in the *Evans* case had sought infertility treatment with her partner, J.[38] A number of months after starting treatment, Ms Evans was informed that she had pre-cancerous tumours in her ovaries and that these would have to be removed. She, along with her partner, consented to having joint treatment for the creation of embryos to be used at a later date through IVF treatment. To this end, the parties gave their consent via forms provided under the Human Fertilisation and Embryology Act 1990. The conditions of consent as outlined under this Act provide that the parties involved can withdraw consent prior to implantation of the embryos in the woman's uterus. In the case of Ms Evans, six embryos were created and stored. She subsequently underwent an operation for the removal of her ovaries. Six months later, her relationship with J broke down and he withdrew his consent, thereby seeking the destruction of the embryos.

Ms Evans' application in the domestic courts seeking to restore her former partner's consent failed, as did her claim that the embryos were entitled to protection[39] and she brought her complaint to the European Court of Human Rights. The application ultimately came before the Grand Chamber of the Court in 2007 and it also found against Ms Evans. The Court held unanimously that there had been no violation of Art 2 of the ECHR, which provides for the right to have life protected by law, as the embryos created by Ms Evans and her former partner did not have a right to life within the meaning of the Article. As regards the applicant's right to private life, protected by Art 8 of the ECHR, the Court held by 13 votes to 4 that there had been no violation. It acknowledged that 'private life', within the meaning of Art 8, incorporated the right to decide to become and not to become a parent. As regards the use of IVF treatment, however, the Court held that the margin of appreciation to be afforded to the respondent States was a wide one as it raised questions of a sensitive moral and ethical nature against a background of fast-moving medical and scientific developments and there was no clear common ground amongst the Member States in relation to the issue. There were, however, clear domestic rules on the issue in the United Kingdom and these had been brought to the attention of Ms Evans. These, according to the Court, struck a fair balance between the competing interests. Finally, the Court also held by 13 votes to 4 that there had been no violation of Art 14, taken in conjunction with Art 8, as the reasons given for finding that there was no violation of Art 8 also afforded a reasonable and objective justification under Art 14.

The second case – *Dickson v UK*[40] – was taken by a man serving a sentence of life imprisonment for murder, and his wife whom he had met in prison. The applicants wanted to have children together and applied for IVF treatment in

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38 *Evans v The United Kingdom,* 10 April 2007.
39 *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727.
40 Grand Chamber, 4 December 2007.

2002. The application was found not to fall within the exceptional circumstances set by the relevant policy governing the availability of IVF to prisoners on the basis of the lack of support for the wife, the length of time any child conceived would be without a father and concern that the punitive effect of his sentence would be circumvented. The applicants' domestic challenge of the decision failed, and they eventually applied to the European Court of Human Rights complaining of violations of their rights under Arts 8 and 12. According to the Court, there had been a violation of Art 8 and there was no need to consider the Art 12 claim separately. The Court noted firstly that a person retains ECHR rights on imprisonment, and any restriction on those rights must be justified in each individual case. Although this justification can flow from the consequences of imprisonment, it cannot be based solely on what would offend public opinion. Whereas the Court accepted that punishment was one of the aims of imprisonment, it considered the evolution in European penal policy towards rehabilitation, particularly towards the end of a long prison sentence. It also noted the obligation to ensure the effective protection of children cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case where the wife was at liberty and able to take care of the child. With respect to the margin of appreciation, the Court noted that more than half of the Member States of the Council of Europe make provision for conjugal visits. However, because the Court had not yet interpreted the ECHR to make provision for such visits, such States have a wide margin of appreciation in this area.

In terms of the substantive issue, the Court held that that in order to be compatible with Art 8 of the ECHR the policy on access to assisted reproduction services, which clearly interfered with the applicants' private and family life interests, must give sufficient weight to the competing interests at stake. In this regard, the Court noted that access to fertility services was reserved to exceptional cases only and that this effectively precluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case. Although the policy had been subject to judicial consideration, it had not been subject to parliamentary scrutiny. In conclusion, the Court held that the policy had failed to strike a fair balance between the prisoner applicant's interest in having children and the public interest inter alia in ensuring confidence in the prison system. A violation of Art 8 was found.

This judgment is significant in reinforcing that the application of the proportionality principle under Art 8 is a meaningful, two-way balancing exercise that requires a genuinely fair balance to be struck between the interests of the individual and that of the public. It is implicit as an important part of that approach that depriving a person of his or her liberty is the punishment, and that further interferences with a prisoner's rights warrants separate justification. More generally, the *Evans* and *Dickson* cases show the capacity of the ECHR to apply to modern social, legal and medical challenges that could not have been contemplated by the drafters. They are testament to its longevity

and continuing relevance to the broader area of family law despite the absence from the ECHR of more specific standards.

(ii) The right to an abortion on medical grounds

Many issues relating to pregnancy and its termination have come before the European Court of Human Rights over the years, and in 2007 the challenge before the Court related to the compatibility with the ECHR of the Polish health authorities' refusal to terminate her pregnancy. The facts of the case concerned the applicant who was a single mother and a long-term sufferer of severe myopia who had been classified for the purpose of social insurance as suffering from a disability of medium severity.[41] She became pregnant with her third child in 2000 and sought medical advice in relation to the potential effect of this on her health. She was examined by three ophthalmologists who concluded that, due to pathological changes in her retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate for the pregnancy to be terminated, despite Ms Tysiac's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

Ms Tysiac subsequently sought the medical advice of a general practitioner who also issued a certificate stating that the third pregnancy constituted a threat to her health. The general practitioner again referred to Ms Tysiac's short-sightedness and to significant pathological changes in her retina as well as a risk of rupture of the uterus, given her two previous deliveries by caesarean section. In the second month of the pregnancy, Ms Tysiac's myopia had deteriorated and she was informed that she needed glasses to correct her vision in both eyes. She subsequently sought a termination of her pregnancy and was examined by the head of the Gynaecology and Obstetrics Department, Dr RD of a public hospital in Warsaw. Dr RD found that there were no medical grounds for performing a therapeutic abortion. As a result, Ms Tysiac's pregnancy was not terminated and her child was delivered by caesarean section. After the delivery, the applicant's eyesight deteriorated considerably and she was diagnosed as having had a retinal haemorrhage. She was also facing a risk of blindness and declared to be significantly disabled. Her efforts to challenge her treatment failed in the domestic courts. At the European Court of Human Rights, Ms Tysiac argued that not allowing her to terminate her pregnancy despite the risks to her health amounted to a violation of Arts 3, 8 and 13. She further complained that no procedural and regulatory framework had been put in place to enable a pregnant woman to assert her right to a therapeutic abortion, thus rendering that right ineffective. Finally, relying on Art 14, she alleged that she had been discriminated against on the grounds of her sex and her disability.

The Court held, by six votes to one, that there had been a violation of Art 8. It concluded that it had not been demonstrated that Polish law as applied to

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41 *Tysiac v Poland*, 20 March 2007.

Ms Tysiac's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. In this regard, it created a situation of prolonged uncertainty for the applicant and she suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health. Overall, the case sets out the need for clear guidelines on abortion on medical grounds in Poland. The Court also held unanimously that there has been no violation of Art 3, and that having found a violation of Art 8, there was no need to consider complaints under Arts 13 and 14 separately.

(iii) Children's rights and education

In 2007, a number of significant cases concerning the child's right to education came before the European Court of Human Rights. At first glance, what is perhaps most striking about the child's right to education, as outlined in the First Protocol to the ECHR, is the great emphasis which is placed on the right of parents to ensure that the education and teaching of their children is in conformity with their own religious and philosophical convictions.[42] Indeed, it is this aspect which has proved to be most contentious in 2007.

Two cases in particular stand out, concerning children's rights as regards religion and how this subject area is to be taught in schools: *Folgerø and Others v Norway and Hasan and Eylem Zengin v Turkey.*[43] In *Folgerø and Others v Norway*, the Grand Chamber held that there had been a violation of Art 2 of Protocol No 1. The applicants in this case, all members of the Norwegian Humanist Association, complained about the introduction of a single subject covering Christianity, religion and philosophy, known as KRL to the Norwegian primary school curriculum. In short, the applicants disputed the fact that it was only possible to request exemption from certain parts of KRL, arguing that this prevented them from ensuring that their children received an education in conformity with their religious and philosophical convictions, and they sought to have their children entirely exempted from the same.

The Court held that 'preponderant weight' was given to Christianity, notably through reliance on the so-called 'Christian object clause' in the 1998 Education Act, which sought to give pupils a 'Christian and moral upbringing'. Furthermore, approximately half of the items listed in the curriculum referred to Christianity alone whereas the remainder of the items were shared between other religions and philosophies.

The Court then moved on to consider whether the possibility for parents to request partial exemption from KRL was sufficient to counter this imbalance.

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[42] Article 2 of Protocol No 1 to the ECHR reads as follows: '[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

[43] *Folgerø and Others v Norway* (Grand Chamber) 29 June 2007*; Hasan and Eylem Zengin v Turkey,* 9 October 2007.

It found that in practical terms the exemption process was not operational as parents needed to be adequately informed as regards the exact content of the curriculum and they also needed to outline 'reasonable grounds' for their request. Furthermore, in the event of a parental note requesting partial exemption, the schools were to replace involvement through participation with observation by attendance meaning that the exemption relates to the activity and not to the knowledge to be transmitted through the activity.

The Court held that Norway did not take sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner for the purposes of Art 2 of Protocol No 1. Accordingly, the refusal to grant the applicant parents full exemption from the KRL subject for their children gave rise to a violation of Art 2 of Protocol No 1.

In the case of *Hasan and Eylem Zengin v Turkey,* the Court held that there had also been a violation of Art 2 of Protocol No 1 of the ECHR. The applicants are followers of Alevism, a branch of Islam, differing in a number of respects from Sunni Islam and claimed that the way in which religious culture and ethics were taught in Turkey infringed Ms Zengin's right to freedom of religion under Art 9 and her parents' right to ensure her education is in conformity with their religious convictions as guaranteed under Art 2 of Protocol No 1. The applicants argued that the course's syllabus lacked objectivity because no detailed information about other religions was included and furthermore, it was taught from a religious perspective which praised the Sunni interpretation of the Islamic faith and tradition.

First, the Court determined whether the course's content matter was taught in an objective, critical and pluralist manner and held that the syllabus gave greater priority to knowledge of Islam than to that of other religions and philosophies. In particular, the syllabus included study of the prophet Mohamed and the Koran and pupils had to learn several suras from the Koran by heart and study daily prayers. They also had to sit written tests. The Court held that the lessons did not respect the religious and philosophical convictions of Ms Zengin's father. The school authorities also put an exemption procedure in place which made it possible for children 'of Turkish nationality who belong to the Christian or Jewish religion' to be exempted from religious culture and ethics lessons. The Court, drawing on a report by the Council of Europe's European Commission against Racism and Intolerance (ECRI), stated that the course was intended to be about different religious cultures, thereby meaning that there was no reason to make it compulsory for Muslim children alone. The Court held that the fact that parents were obliged to inform the school authorities of their religious or philosophical convictions was an inappropriate way to ensure respect for freedom of conviction. Moreover, in the absence of any clear text, the school authorities always had the option of refusing exemption requests, as in Ms Zengin's case.

Consequently, the Court considered that the exemption procedure did not use appropriate methods and did not provide sufficient protection to those parents

who could legitimately consider that the subject taught was likely to raise a conflict of values in their children. That was especially so where no choice had been envisaged for the children of parents who had a religious or philosophical conviction other than that of Sunni Islam and where the exemption procedure involved the heavy burden of disclosing their religious or philosophical convictions. Accordingly, the Court concluded that there had been a violation of Art 2 of Protocol No 1. The Court considered that no separate issue arose under Art 9.

The above two cases have greatly helped to establish concrete jurisprudence as regards the State's obligation to respect parental convictions, and in this respect, merit close examination. This is particularly the case given that Art 2 of Protocol No 1 largely echoes the obligation as regards children's rights as set out in Art 14(2) of the CRC. The case-law also clearly illustrates the difficulties involved in distinguishing between teaching children about different religions and religious instruction in a particular religion. It appears that once the information is conveyed in an objective and pluralistic manner throughout the educational system and that it allows for adequate child attendance measures, the State's obligation as regards the child's right to education as well as the parents' right to respect for their convictions, will be fulfilled.

When looking at the rights of children in minority groups in the school system, it is clear that the issue of the parents' right to ensure that education for their children is in conformity with their convictions is once again raised. In the case of a particular religious or ethnic minority group, it is clear that the importance of this is somewhat accentuated; indeed, '[o]ne of the most important rights for such a group is to preserve its separate identity'.[44] At the same time, however, there is a need to observe the group's relationship with mainstream society and in this ensure that an adequate balance is struck.

Overall, when looking at the rights of children in minority groups in schools, it is necessary to consider their rights, as well as their parents' rights, under Art 2 of Protocol No 1 directly concerning education, as well as at Art 14 which outlines the prohibition of discrimination. In 2007, the Grand Chamber of the European Court of Human Rights considered the interaction of these two Articles in the case of *DH and Others v Czech Republic*.[45]

In this case, the applicants complained that, on account of their Roma origin, they had suffered discrimination in the enjoyment of their right to education. As to the facts of the case, they were placed in special schools for children with learning difficulties who were unable to follow the ordinary school curriculum. Fourteen of the applicants sought a review of their situation by the local Education Authority on the grounds that the tests used to determine that they should attend these schools were unreliable and that their parents had not been sufficiently informed of the consequences of giving consent. The Authority

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[44] J Fortin, *Children's Rights and the Developing Law* (Lexis Nexis, 2nd edn, 2003) p 34.

[45] *DH and Others v Czech Republic* (Grand Chamber) 19 November 2007.

found that the placements had been made in accordance with the statutory rules. Twelve of the applicants appealed to the Constitutional Court, arguing that their placement in special schools amounted to a general practice that had resulted in segregation and racial discrimination through the coexistence of two autonomous educational systems, namely special schools for the Roma and 'ordinary' primary schools for the majority of the population. Their appeal was dismissed in 1999.

The application was lodged with the European Court of Human Rights in 2000 and in 2006 the Chamber held by six votes to one that there had been no violation of Art 14 of the ECHR, read in conjunction with Art 2 of Protocol No 1. The Chamber had observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.

The applicants then requested that the case be referred to the Grand Chamber. The applicants maintained that by being placed in special schools they had, without objective and reasonable justification, been treated less favourably than non-Roma children in a comparable situation. In support of that claim they had submitted statistical data based on information provided by head teachers that showed that more than half the pupils in special schools in Ostrava were from the Roma community.

The Court and Grand Chamber drew on several reports from various non-governmental organisations, such as the Roma Education Fund and the International Federation for Human Rights detailing facts and statistics relating to the treatment of Roma children in the educational system in the Czech Republic. In particular, what emerged from these reports was that Roma children were 'vastly overrepresented' in special schools and indeed formed a majority of the pupils in these schools. The Court relied on this information as being 'sufficiently reliable' and as giving rise to a strong presumption of indirect discrimination so that the burden of proof shifted to the government to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

The Court accepted that the Czech Republic's decision to retain the special-school system had been motivated by the desire to find a solution for children with special educational needs. However, it found that Roma children were often placed in schools on the basis of the results of psychological tests designed for the majority population and did not take Roma specifics into consideration. In that connection, it observed, amongst other things, that the ECRI had 'noted that the channelling of Roma children to special schools for the mentally-retarded was reportedly often "quasi-automatic" and needed to be examined to ensure that any testing used was "fair" and that the true abilities of each child were "properly evaluated"',[46] while the Council of Europe

[46] Ibid, para 200.

Commissioner for Human Rights had reported that Roma children were frequently placed in classes for children with special needs 'without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin'. In those circumstances, the results of the tests could not serve as justification for the impugned difference in treatment.

As for parental consent, which the Czech Government had considered to be the decisive factor, the Court was not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. In any event, in view of the fundamental importance of the prohibition of racial discrimination, the Grand Chamber considered that no waiver of the right not to be subjected to racial discrimination could be accepted, as it would be counter to an important public interest.

The Grand Chamber held that there had been a violation of Art 14 of the ECHR read in conjunction with Art 2 of Protocol No 1 because the applicants had been assigned to special schools as a result of their Roma origin. The Court, under Art 41 (just satisfaction), ordered that the respondent state pay €4,000 to each child.

Overall, in order to avoid such challenges in the future for domestic courts throughout the Council of Europe, it is clear that the approach taken as regards children's rights in schools needs to ensure that the key principles as enunciated in Art 2 of Protocol No 1 to the ECHR as well as in Arts 1, 8, 9, 10 and 14 are respected in practice and in accordance with the case-law of the Court.

IV CONCLUSION

As this survey of international developments in 2007 in the area of family law shows, a range of international organisations continues to actively develop international law on issues related to children and their families. Much of this work is proactive, like the case-law of the European Court of Human Rights, but equally, institutions like the Hague Conference on Private International Law and the Council of Europe Commissioner for Human Rights are involved in proactive work that is essential to the adoption and implementation of international standards in these areas. This work is also important to broadening our common understanding of problems in a range of areas as well as to the dissemination of best practice. In this sense, it is hoped, this chapter serves to reinforce the common nature of these issues and the potential that exists for sharing learned responses.

Albania

FAMILY LAW RELATIONS BETWEEN CHILDREN AND PARENTS ACCORDING TO ALBANIAN LEGISLATION – THE MEANING AND IMPORTANCE OF PARENTAL RESPONSIBILITY

Ledina Mandia[*]

Résumé

Cet article traite des derniers développements du droit familial en Albanie, plus particulièrement le domaine des rapports entre les parents et les enfants. Le Code de la famille de 2003 est le reflet de l'évolution qu'a connu ce domaine du droit depuis 1981. Le nouveau Code de la famille s'harmonise avec la Convention relatives aux droits de l'enfant, ainsi qu'avec d'autres instruments internationaux. Le caractère primordial de l'intérêt de l'enfant est désormais établi. Il constitue le principe de base du Code de la famille pour ce qui est des rapports entre les parents et les enfants. Les enfants sont égaux quelles que soient les circonstances de leur naissance.

Cet article traite de la différence entre «le droit parental» et «la responsabilité parentale», qui est un concept récemment introduit dans le Code de la famille. Ces deux concepts sont abordés d'une manière détaillée, tant pour ce qui est des droits et des obligations personnels des parents et des enfants que des responsabilités parentales quant à l'administration des biens de leurs enfants. Le présent article met en lumière les changements introduits par la réforme de 2003.

Une attention particulière est portée à «la cessation de la responsabilité parentale», à «l'omission de la responsabilité parentale» et à «la perte de la responsabilité parentale», notions définies dans le Code de la famille ainsi que dans la législation répressive en matière de violence familiale.

I PARENTAL RIGHT OR PARENTAL RESPONSIBILITY?

The parental right or parental responsibility has been and remains an ancient and important institution in family law in Albania and all over the world. The Albanian country has been a continuous source of wars and invasions since

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ancient Illiria.[1] These invasions have influenced its life, people, customs and law. Throughout history, the law has changed and evolved under foreign borrowings and influences. Our population however has had its own traditions and customs, which have influenced the creation of an original law, identified as Albanian. We notice this effect on familial relationships, which have always been consolidated.

Since ancient Illiria, family relationships have been the subject of special regulation. Later, as in the whole of the law, foreign law has had an influence on Albanian law, which has been reflected in parent-child relationships. The Civil Code of Zog,[2] which created the first modern Albanian corpus of law, clearly determined parental rights and responsibilities. During the years of communism there was legislation which followed the 'party's line' directly influencing family relationships, including the parent-child one. After 1992,[3] family legislation did not change as legislation in general did, bringing consequences in practice for family relations.

The recent Albanian Family Code, which came into force in December 2003 (FC 2003), is approximated with the United Nations Convention on the Rights of the Child (UNCRC) and other laws, achieving a modern regulation of family relationships in general, including parent-child relationships. Article 27/1 of the UNCRC strictly defines for every child the right to a sufficient standard of living to ensure the child's physical, mental, spiritual, moral and social development and in the second paragraph of this provision it passes the responsibility to the parents who, within the limits of their financial possibilities and means, must ensure a sufficient standard of living for the child's development. Parent-child relationships in the recent Albanian Family Code materialise under the title 'Parental Responsibility'. The changes from the previous legislation become evident in the terminology and content.

The term 'the parental right' used in the previous Family Code of 1981 (FC 1981) was not considered appropriate because in the parent-child relationship the parent has not only the right but also the responsibility of fulfilling the child rights stipulated in Art 27/1 of the UNCRC. 'Parental responsibility'[4] includes at the same time both the rights and the obligations that parents have towards their minor child in order to ensure the child's emotional, social and material well-being, by taking care of him, by maintaining relationships with him, and by securing his growing up, education, legal representation and wealth.[5] The protection of children by parents comes from the nature of the parent-child relationship. The parents' love and care towards their children are

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1 The Albanian State during ancient times was called the state of Illiria.

2 The Civil Code of Zog, dated 1928, is one of the most modern statutes in Albanian law.

3 After 1992, the legislation was totally transformed, approximating with the most modern laws in the world and in international legislation: Civil Code dated 1994, Criminal Code dated 1995, Civil Procedural Code dated 1996, etc.

4 The term 'parental responsibility' was decided on after some discussions with experts of the European Council and relied on the 84/4 Recommendation on parental responsibility.

5 See art 251 of FC 2003.

natural feelings and necessary conditions for the normal development of their children, which raises parental love to a higher level.

The rights and obligations that the law imposes towards minor children are summarised by the legislature as 'parental responsibility'. Parental responsibility is personal, which means that the rights and the obligations the parents have toward their children should be exercised by the parents themselves. They can neither pass them to another person nor inherit them. The content of these rights and obligations, their beginning, performance and end are defined by the parents' agreement.

It is an absolute right. All people are obliged not to infringe the parental right because it is considered as one of the subjective rights. Parental responsibility enables parents to perform all the necessary actions to achieve the educational purpose. As a consequence parents have the rights and the obligations of taking care of the children's life and health, to live with the minor children, to give them a name, to take measures of an educative character, to protect their interests, and to give them the necessary education and culture.

The law in force, like the previous one, in the same way gives parents the right to ask the court at any time for the return of their minor child, when the child does not live near them and is kept by other people, with the exclusion of cases where this infringes the best interests of the child. Only the child who has reached the age of 10 is reserved the right to give his opinion about his placement.

Despite its personal and absolute character, parental responsibility is exercised only in the minor child's interests and with the agreement of both parents. The best interests of the child and the child's right to be heard in a judicial process relating to his interests, or the minor's right to be assisted during a judicial process by a psychologist are principles included in the Family Code, aligning it with respective new international legislation. The law does not give any precedence to either one of the parents in relation to parental rights. These principles have accompanied the regulation of parent-child relationships as found in the legislation of 1981 (arts 63 and 64 of FC 1981) and as in the new legislation (arts 220 and 221 of FC 2003).

In cases of divorce or void marriage, parental responsibility is exercised by the parent in charge of the child's maintenance and education, but this does not mean that in this case the other parent loses parental responsibility. According to the previous law, the parent has the power to exercise it. Therefore if the parent does not agree with the actions or measures taken by the parent who exercises the parental right, he or she can ask the Custody Council to take necessary measures.[6] In this situation under art 221 of FC 2003, the court decides definitely in the child's best interests.

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[6] See art 66 of FC 1981.

II THE EXERCISE OF PARENTAL RESPONSIBILITY

The recent Albanian Family Code, as in other laws in the family field, clearly provides that parental responsibility is exercised by both parents for a child born within marriage or, if both parents are known, outside wedlock (art 64 of FC 1981, arts 220 and 227 of FC 2003). But, in all cases when there are disagreements over the manner of exercising this right, the parents can request the court to decide if agreement is not reached between the parties.

The previous legislation covered cases where it was impossible to exercise the 'parental right', ie when the parent is unknown, is dead, has parental rights removed, or has limited legal competence. Article 224 of FC 2003 extends the cases of impossibility of exercising parental responsibility by adding the case of the parent who is absent and the existence of strong reasons against the parent being able to exercise parental responsibility. But despite the cases where the exercise of parental responsibility is impossible, the legislation has defined that in such cases the child is to be entrusted to a family member, custodian, foster carer or take-care institution. Important in this respect is the opinion of the social services section, which is to protect the child's best interests. In fact in such cases priority is given to the other parent, who can exercise parental responsibility.[7]

The recent legislation, in contrast to the old, defines the way of exercising parental responsibility for children born out of wedlock. In such cases, in general, parental responsibility is exercised by the parent who recognised the child as his or her offspring,[8] whereas in cases where the child is recognised by both parents, parental responsibility belongs to both of them. However, on the father's, mother's or prosecutor's request, the court can alter the conditions for carrying out parental responsibility, consigning the right to one or both of the parents. In the same injunction, the court can also decide on the visitation and supervision rights of the non-custodial parent.

III THE RIGHTS AND OBLIGATIONS OF PARENTS

There are two existing legal relationships between parents and children:

(1) personal relationships, which have no economic content and serve for the protection of the child's rights and interests and their non-ownership interests; and

(2) ownership relationships, which have an economic character and serve for the support of children in need and unable to work.

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[7] Article 65/2 of FC 1981 states: 'When one of the parents is prohibited from exercising his parental right, this can be exercised by the other parent.' Article 225 of FC 2003 states: 'If one parent is unable to exercise parental responsibility or is deceased, the parental responsibility shall be exercised by the other parent.'

[8] See art 227 of FC 2003.

(a) Personal rights and obligations of parents and children

The rights and obligations of parents are determined by the content of art 215 of FC 2003 and in accordance with the basic principles set forth in arts 2 and 3 of FC 2003.[9] Article 215 states:

> 'Parental responsibility includes a set of rights and obligations aimed at assuring the emotional, social and material wellbeing of the child, taking care of him/her, maintaining personal relations with him/her, assuring his/her nurture, education, edification, legal representation and administration of his/her wealth.'

(i) The right of naming the children

The parents have the right to choose the name of their child, which, after being registered in the General Register Census, cannot be changed by them. The name of the child should be chosen and decided by both parents. They are obliged to notify the civil registration office clerk within 15 days of the date of the birth. The child keeps the name and surname of the parents even in cases of divorce or declaration of the marriage as void.[10]

(ii) Childcare

The law recognises the right of parents to take care of and maintain the child. In order to exercise this right, the parents maintain the child in their place of residence. Spouses have an obligation to have a common residence. The residence of the family shall be selected by the spouses by mutual agreement. In case of disagreement, either of the spouses can petition the court, which, after hearing the opinion of the spouses and, if there are any, the opinion of children older than 14 years, shall attempt to reach a solution through settlement. If a settlement cannot be reached the court shall devise a solution that it deems most appropriate for the needs of the family.[11]

According to art 13 of the Albanian Civil Code a minor less than 14 years old shall have the same residence as his parents. When the parents have different residences, their child of less than 14 years of age will have the residence of the parent with whom the child has been living. This solution refers to cases where the parents live separately, even though they are not divorced nor is their marriage invalid. In cases of divorce or invalidation of the marriage, the residence of the child will be the same as that of the parent to whom the child is entrusted for growth and education.

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[9] Article 3 of FC 2003 states: 'Parents have the duty and right to ensure the proper care, development, well-being, education and edification of children born within marriage or out of wedlock. The state and society must offer to families the necessary support to care for their children, in order to prevent their maltreatment and abandonment, and to preserve the stability of the family.'

[10] See arts 36 and 37 of the Law on Civil Census.

[11] Article 55 of FC 2003.

According to the right that the parent has to live with his child and to decide upon his housing and education, the parent has the right to request return of their minor child from anyone who has the child. Thus, for instance, the parents have the right to request return of their minor child from a relative or a third person who objects to returning the child, or when the children are lost or are being kept illicitly by another person. The parents' request for the return of the child is scrutinised by the court. It is in the child's best interests to grow and live with their parents, and, in cases of a dispute between the parents and a third person, the dispute is resolved by returning the child to the parents. In such cases the court asks for the opinion of a child who is at least 10 years old, and the dispute is resolved on the principle of the best interest of the child. However, the law includes the possibility that the court, based on serious circumstances, may decide against return, if it is against the best interests of the child.[12]

(iii) Taking educational measures

In order to achieve the proper education of the child, it is recognised that, periodically, parents have to take measures against their minor child. Such measures can be counselling or warning of restrictions to be imposed on the child, but in each case the parents are not allowed to beat and humiliate their children. Neither previous nor present legislation clarifies the measures of an educational character. The law 'for the measures against domestic violence', that came into force in June 2007, pays special attention to the protection of children who are victims of family abuse, including abuse through being present when violence occurred. This law guarantees protective and preventive measures for children who are violated or risk experiencing scenes of violence in their family environment. Through urgent protection orders, the court, on the request of several persons and by an uncomplicated trial, can decide on a complete protective measure for the child, including the loss or removal of parental responsibility in special cases on the grounds provided by the Family Code.

(iv) The children's life and health care

The parents' obligations to take care of their children's life and health arise from the nature of their parental relationships. It aims to protect as far as possible their minors' interests. So, the parents must maintain their children, nurture them, guarantee housing, clothing, medical help and everything necessary for their upbringing. For the expenses of the children's upbringing and education, parents do not have the right to ask for any refund, because their obligation to maintain and take care of their children's life and health is one of the most elementary moral and legal duties. However, art 235/1 of FC 2003 provides that parents can use the income of the child's wealth that they administer for the children's care, education and edification.

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[12] Article 70 of FC 1981; art 218 of FC 2003.

(v) The provision of necessary education and culture for the child

The parents must take care of the individual children's education and culture in accordance with their financial abilities, considering the children's ability, inclination and wishes. Apropos, the parents should follow the children's inclinations and provide them with the necessary schooling, and make them able to look after themselves and be useful to society. The parental obligations to provide their children with a vocational education and culture continue while the children are minors. The parents must give their children all the moral and material support to acquire a higher education and vocational culture even after they grow up. The parental duty continues also during the time when children go to secondary and higher school until they are 25 years old, in cases where their financial conditions allow it.

(vi) The representation of minor children and the protection of their interests[13]

The parents are the legal representatives of their child. The minor child under 14 years old has no legal competence and is represented by his parents in all legal actions, with the exception of those that, according to the law, can be performed by the minor himself.[14] The minor who has reached the age of 14 has a limited legal competence. He may perform all legal actions personally with the preliminary approval of the parents, with the exception of those that, according to the law, can be performed by the minor himself.

The right of the parent to represent their minor child is not limited to performing legal actions in their name and on their behalf, but extends to representing them in court as in the case of claimant and respondent. As regards minors who have reached 14 years of age, the law grants them the right to carry out procedural actions without the parents' or the guardian's approval in cases that they have regarding their employment agreements, along with the profits derived from employment, with deposits left in savings cashboxes, and in their capacity as members of social organisations. They have responsibility for damage caused by them.

The parents also protect the interests of their child in the case of the child's adoption, by giving approval or opposing it. However, the parents cannot perform in the name of their child some legal actions that are closely connected with him. They cannot enter into marriages and cannot leave any will in the name of the child.

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13 Article 232 of FC 2003.

14 The same regulation existed in art 71 of FC 1981.

(b) Parental responsibility for the child's property

This relates to the legal relations as regards the child's property and alimony between them and the child. These relations have a family wealth character, as they do not derive from contracts, but are the result of the family's living together and mutual care.

(i) Administration of the minor child's wealth

Minor children might have their own personal property, which might be gained through work, inheritance, donation or any other legal method. This property does not become part of the parents' property. The property of the minor child who has not reached 14 years of age is administered by the parents for the benefit of the child, whereas property of the child who has reached the age of 14 is administered by the child, but always with the previous approval of the parents.

Our legislation accepts the right of the parent to use the child's property, or as it is differently called in juridical terms 'legal usufruct'.[15] The parents have the right to use the income provided by the property of the child, who has not reached the age of 14 years, for alimentation, education and edification of the child. They may also use such income for the indispensable needs of the family, when they lack sufficient means to fulfil them personally. Only in those cases where they have insufficient means should they use this income for the fulfilment of the necessary requirements of the family. This is an exception to the rule that the income from the child's property is used for the interests of the child, for the fulfilment of their needs, their upbringing and education.[16] However the legislation in art 239 of the Family Code 2003 has clearly specified that the right to use the child's wealth does not include the wealth the child gains through employment or wealth received as a gift or bequest, if the parent is expressively forbidden to have the right to use such wealth.

In order to secure the highest protection of the children's interests, the law has imposed some restrictions on the parents regarding the alienation of the real estate of their minor children whether the children are under the age of 14 or between the ages of 14 and 18. According to art 233 of FC 2003, the property of the child who has not reached the age of 14 years old is administered by the parents for the benefit of the child, while the property of the child who is 14 years old is administered by the child himself, but always with the previous approval of the parents. The Family Code 2003, in order to secure the good administration of the child's property, provides that for special legal transactions, which override the free administration of a child's property, authorisation should be obtained from the court, which decides according to its judgment and based on law only when required by the interest of the minor.

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[15] 'Legal usufruct' was terminology used in the Civil Code of Zog, relating to cases of the use of the child's property and income.

[16] See art 235 of FC 2003.

Under art 234 of FC 2003 the following are considered as special legal transactions: the sale of real estate of a minor child, under the age of 18, mortgage, charge, loan in the name of a minor, renunciation of heritage, legacy or the non-acceptance of a gift, and any actions beyond the simple administration of the wealth of a child. A legal transaction that was performed without the authorisation of the court can be declared void upon request of the prosecutor, the parent, or the guardian of the child, except where the court later gives its approval.

According to art 236 of FC 2003, parents perform the administration of the wealth of the child mutually, if they exercise joint parental responsibility, and in cases of divorce, invalidity of marriage, etc by the father or the mother as decided by the court. In the case of special legal transactions (according to the meaning in art 234, as mentioned above), and in the case of the use of the child's income according to the meaning in art 235 the administration of the child's wealth is under the control of the court. The right to use the child's wealth is based on the right of legal administration. This right belongs to both parents jointly or to the one who has been appointed as the administrator of the wealth of the child, and such a right terminates:[17]

(a) when the child reaches the age of majority;

(b) when an event occurs that causes parental responsibility or legal administration to cease; or

(c) when any cause occurs that relates to the cessation of the usufruct.

(ii) Support obligation towards the child

The parental responsibility for the child's support belongs to both parents whether they live together or separately. The parents are obliged to support their children in accordance with their financial conditions. This obligation starts from the moment when the child is born until the child becomes 18 years old or marries, when the marriage is entered into before the age of 18 years, and until the child attains the age of 25 years when the child attends high school and university.

IV THE LOSS OF PARENTAL RESPONSIBILITY[18]

This is a new concept in FC 2003. In contrast to the previous legislation, the legislator has provided that the child's parents might lose parental responsibility when the parents are convicted for committing or collaborating in a criminal act toward their children, as a collaborator in a criminal act

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[17] Article 237 of FC 2003.
[18] Article 223 of FC 2003.

committed by their children, or if they have been convicted of family abandonment as long as they have failed to fulfil their family obligations.

V THE REMOVAL OF PARENTAL RESPONSIBILITY[19]

Parental responsibility involves the support and education of children. In the Family Code there are measures that can be taken against those parents who exercise their responsibilities improperly. Parental responsibility should be exercised in such a way as to ensure the rights and interests of their children. When it is not exercised correctly or is exercised in a way that harms the children's interests, the law provides for its removal. In this framework the new law runs parallel to the previous legal regulation (art 76 of FC 1981) as regards the circumstances for which parental responsibility is removed. According to art 228 of FC 2003, parental responsibility is removed when:

(a) the parent abuses parental responsibility;

(b) the parent shows grave negligence in its exercise; or

(c) the parent's actions create a harmful effect on the education of the child.

Removal of parental responsibility is always a court decision, calling the parent as a respondent. This can be decided by the court only when all the other means and forms of convincing the parent have failed to be successful. This might be decided against a parent who lives a promiscuous life and does not take care of the well-being and education of the child, or against parents who maltreat their children. This extreme measure against a parent is not taken by the court against parents who have no legal competence, or against parents who are physically disabled and cannot take care of their children. The active right to request such a thing, according to the law in force, rests with the other parent, the child's relatives, or the prosecutor, which is different from the previous legislation, under which the Custody Council had the right to initiate a similar process (art 76/1 of FC 1981).

Regarding the consequences of the removal of parental responsibility, the current legislation expressively regulates this in art 229 of FC 2003 differently from the previous law, which left gaps for interpretation. Therefore, on the understanding of art 229/1 of FC 2003, the consequences of a court decision have effect over all or some of the children born prior to its issuance. Also, art 229/2 has grouped the respective rights and obligations of parents and children. While the previous law, art 75/2 of FC 1981, clearly stipulated that 'with the removal of parental responsibility, the other rights belonging to the parents, and their duties do not cease', the current law, art 229/2 of FC 2003, discharges the child from the support obligation towards the parent. This is how art 229/2 should be interpreted. On the one hand the parent is not

[19] Article 228 of FC 2003.

discharged from those rights that do not relate to the exercise of parental responsibility and other obligations towards his child, but, on the other hand, he does not enjoy the right of support from his child.

The Family Code does not provide for the duration of the removal of parental responsibilities. It can be restored to the parent upon a court decision, when it finds that the cause for which parental responsibility had been removed ceases to exist.[20] Removal of parental responsibility is accompanied by the separation of the child from the parent and by trusting the child to the other parent, another person who is accepted by the latter as a guardian, a foster family or a childcare institution. The Family Code does not mention if removal of parental responsibility is accompanied by the loss of the right of the parent to a relationship with the child. Removal of parental responsibility does not automatically lift the right of the parent to have relations with the child, unless otherwise provided for by the court.

VI CESSATION OF PARENTAL RESPONSIBILITIES

Parental responsibility as a legal institution ceases naturally when the parent or the child dies.[21] Given that this is a right of a personal character, upon the death of one of the parents, the parental right transfers to his heirs. The other parent continues exercising parental responsibility. It is only when the other parent is also dead[22] or cannot exercise the rights for reasons provided for in the law that the court will decide, taking the opinion of the aid and social services sector into account,[23] to appoint a guardian for the child or send the child to a foster family or childcare institution. Parental responsibility also ceases when the child dies, because in this situation the aim of parental responsibility ceases to function.

Parental responsibility ceases when the child reaches the age of 18 years, because at this age he is a major and can protect his rights and interests personally. The child who gets married prior to the age of 18 years acquires legal competence, which is not lost even where the marriage is declared void or terminates before the child reaches the age of 18 years. As a consequence, parental responsibility ceases even if the marriage of the girl ends prior to her reaching the age of 18 years.

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20 Article 230 of FC 2003, and art 77 of FC 1981.

21 The term 'cessation of parental responsibility' is not mentioned in the old or in the new law, but the jurisprudence mentions such terminology.

22 In the current law, death coincides with the impossibility of exercising parental responsibility.

23 The Custody Council recognised this right, according to FC 1981.

VII PERSONAL RELATIONSHIPS OF OTHER RELATIVES WITH THE CHILD

Article 219 of FC 2003, similar to the previous legislation (art 67 of FC 1981), provides for the rights of the grandparents in respect to their minor grandchildren, not only when the child has parents, but even where one of the parents is dead, and the child is trusted to the other parent, or to third persons. It is understandable that, when parents are alive and in good relations, the relationship between the grandparents and the minors is implemented voluntarily and without problems. Difficulties have emerged from those cases where parents have disagreements and live separately, where one of the parents has died or where the grandparents are not allowed to enjoy their rights with respect to their grandchildren due to disagreements between the dead parent's family and the other parent. In this case, the court should decide on these relationships. The best interests of the child prevail in any case.[24]

VIII OBLIGATIONS OF THE CHILD TO THE PARENTS

This description of the adjustment of relationships between parents and children is not complete without saying a couple of words on the obligations of the child. Parent-child relations are based on the principle of reciprocity. Article 217 of FC 2003 states: 'The parents and children should reciprocally assist, love and respect one another.' The legislator has not defined for how long this type of relationship will last, but, taking into account the continuity of parental responsibility and the cases of losses, removal and cessation of this right, such a relationship continues for as long as the exercise of parental responsibility continues.[25] As understood from the provision, the overwhelming part of the obligations of the child to the parent has a personal and moral character. Apart from respecting the parent, the opinion of the parent and the parent's contribution in providing the family with revenues from its wealth (art 235 of FC 2003), pursuant to the law, the child has no other imperative obligation. In this context, the recent legislation retains the same limits as the old legislation apart from the amendments to the rules relating to the adjustment of family relationships.

IX CONCLUSIONS

The recent Family Code 2003 introduced a change in regards to the adjustment of family relations in general and of the parent-child relationship in particular.

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[24] Other disagreements can emerge between the parent and the child and grandparents who keep the grandchild unjustly and refuse to return him to the parent; these cases, according to art 218 of FC 2003, are resolved by the court.

[25] The Civil Code of Zog, above n 2, in art 277 provides for such a permanent provision, while the Italian legislature has passed another amendment: 'children should respect parents . . . for as long as they keep living with their parents'.

This Code is in compliance with the UNCRC and the other national and international agreements in this field. The best interest of the child is the key principle in the Family Code and the legal relationship between the parents and the children is built on this basis. Children born within marriage or out of wedlock are entitled to equal treatment in respect of family relationships. The best interest of the child prevails over any other principle. This is the novelty of the Family Code 2003. It is in this context that the terminology 'parental right' was changed to 'parental responsibility' and parental and child responsibilities are considered reciprocal.

The Albanian legislation, including the Family Code, the Law on Civil Census, Law on Measures Against Domestic Violence and other laws, mainly consider as important the principle of the best interest of the child, the child's opinion with respect to family relationships, his right to be heard in proceedings related to his interests or deciding on important issues such as domicile, administration of incomes, guardianship, etc. For the first time the Family Code limits the parental right in the administration and alienation of the minor's wealth, putting it in the direct control of the court. The loss of parental responsibility is a new notion in the recent Family Code, under which a parent irrevocably loses the right to exercise parental functions if he commits a criminal offence against or with his child, if he abandons the family or if he totally lacks responsibility as a parent and as a family member.

Also, the Law on Measures against Domestic Violence makes it possible to easily remove parental responsibility in cases envisaged by the Family Code, or to take protective measures for children abused by parents or other persons having relations with them. In this context, importance is given to the establishment of several state structures and services that guarantee the enforcement of such protective measures.

Argentina

THE CHILD'S RIGHT TO BE LISTENED TO IN FAMILY PROCEEDINGS IN ARGENTINA

Cecilia P Grosman and Marisa Herrera[*]

Résumé

Cet article porte sur le droit des enfants et des adolescents d'être entendus par les tribunaux. Les auteurs mettent en lumière les règles du droit argentin en la matière, en s'appuyant notamment sur la doctrine et la jurisprudence. La mise en oeuvre concrète du principe de la reconnaissance de l'enfant comme sujet de droit prend un certain temps à se réaliser. Le présent texte s'intéresse à plusieurs questions: dans quelles circonstances devrait-on entendre un enfant? Quel est le poids de ces déclarations et comment doivent-elles être évaluées? Les réponses devraient-elles varier en fonction de la nature du contentieux? Selon quelles modalités l'enfant devrait-il être entendu? Faut-il permettre au juge d'entendre l'enfant seul à seul? Les auteurs concluent en admettant que le droit argentin a fait des progrès en matière de témoignage des enfants mais ils estiment que le temps est venu de mettre en place les conditions pratiques pour que la parole de l'enfant soit réellement prise en considération.

'Words are one part what the speaker says and one part what the listener hears.' (Montaigne)

I INTRODUCTION

Justice is a transcendental institution which can give approximate reality to what legal rules promise. What do children and adolescents[1] require of justice in order to give force to their rights? Simply to be able to make them work and

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1 We refer to children and adolescents, because, although the Convention on the Rights of the Child (CRC) says childhood continues to the age of 18 years, nowadays many Latin American legal systems have recognised this distinction, which takes account of two stages of development. It is, nonetheless, well to remember chronological age does not always indicate the stage reached.

to defend them in accordance with the stages of their development. Their action to vindicate their rights at the same time both awakens the courts to their responsibilities and better enables them to find effective solutions.

Among the various aspects of the right of access to justice, we think it is of interest to look at the right of the child[2] to be listened to in court, as this forms part of his right to due process on the basis of the legal precepts that guarantee his fundamental rights. This principle was eloquently expressed in the decision of the First Chamber of the Cámara Civil y Comercial de Morón, on 26 June 2008, which held that:[3]

> 'It is vital, if children and adolescents are to be able to exercise their rights, to provide them with authentic judicial support, protection and defence, and this rests on three fundamental pillars: access to justice, their own representation and due process.'

Thus we can identify the rules of Argentine law aimed at ensuring the rights of children and adolescents to be listened to in family proceedings and understand the governing criteria in Argentine doctrine and decided cases relating to this. Bearing in mind that what children and adolescents want is that their words be taken seriously by those interviewing them, and for it not just to result in mere bureaucratic formality, we must determine what are the necessary conditions for them to be effectively heard.

We should first point out that the child's right to be listened to is now indisputable, as it is found not only in Art 12 of the Convention on the Rights of the Child (CRC) but also in most Latin American legal systems which follow these international principles (although difficulties and uncertainty do arise in putting it into practice). Much has been written on this topic, and many disagreements are apparent. We believe it is not enough merely to state the right. Rather, it is necessary to have guidelines to overcome doubts that have appeared regarding its application in actual practice. As can be appreciated, substantial change in the legal position of the child from being an 'object' of protection to having his own voice – being recognised as a true 'subject' of law with rights – requires a long journey of experience to achieve full reality.

Besides this, we have to overcome the belief, still current in social thinking, that children must be kept away from conflicts between adults, because, as it is said, involvement could 'imperil their mental health'.[4] Today, it is well to remember that there is an ever-growing feeling that children and young people should be listened to on matters affecting them where their rights are at stake. The

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2 References to male children and young people include females.

3 Capel Civ y Com Morón, First Chamber, 26 June 2008 *RR, JL and another v S, MA* available at: www.abeledoperrot.com.

4 Oppenheim, Ricardo and Szylowicki, Susana, 'Teoría y realidad acerca de la voz y la presencia de menores en los juzgados nacionales con competencia en asuntos de familia', *Revista El Derecho*, 1994, at 155-616.

intention to keep them away from controversy, however worthy, is utopian. Inevitably, in everyday life, they cannot be saved from it.

Likewise, even though what children and adolescents can do has changed in the social sphere, there is resistance to accepting this in the field of legal rights. Our ideas often rest on stereotypes that do not match the reality that changes with the passage of time. Social perceptions as to the capacity of children condition the models for their participation in judicial or administrative proceedings. As has been said, it is not a question of their inability to express themselves, but of the problems adults have in listening to them. We need to call into question the fitness of the system itself to provide for the participation of children.[5]

II THE PRINCIPLE OF THE CHILD'S EVOLVING CAPACITY OR AUTONOMY

Closely related to the question that concerns us here is that of the evolving capacity or autonomy of the child. It is therefore necessary to devote a few words to this point, which has obvious substantial and procedural impact. When we speak of 'his evolving capacity' we refer to the child's right to exercise a degree of self-determination, insofar as he has gained sufficient competence to understand situations that may affect him personally.

This principle rests on the CRC, Art 5, which has constitutional status in our country under a constitutional reform in 1994 (Constitution, art 75, inc 22). It places a duty on Member States to respect the parents' and other family members' responsibilities, rights and duties to give the child 'in a manner consistent with the evolving capacities of the child, appropriate direction and guidance for him to exercise the rights recognised in the present Convention'. Further, the Preamble calls for him to be prepared 'to live an individual life in society'. Likewise, the CRC calls for an education directed at the preparation of the child 'for a responsible life in a free society'. So there is no doubt that the CRC recognises and encourages the different steps in children's development, whereby being 3 years old is not the same as being 12 or 18, particularly in a country like Argentina where majority used to be attained at 21, as established in the Civil Code in art 126.

In this connection we must note what is said in Consultative Opinion No 17 of the Interamerican Human Rights Court of 28 August 2002 regarding the legal status and human rights of the child. This, in para 101, states:

> 'Evidently there is great diversity in terms of physical and intellectual development, of experience and of the information known by those who are included in that group. The decision-making ability of a 3 year old child is not the same as that of a 16 year old adolescent. For this reason, the degree of participation of a child in proceedings must be reasonably adjusted to allow

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5 Casas, Ferran, *La infancia: perspectivas psicosociales*, Paidós, Barcelona, 1998, pp 25ff.

effective protection of his or her best interests which are the ultimate objective of international human rights law in this regard.'

As we have seen, the conceptual focus has moved from protecting children (we do still speak of 'protecting', but from a different standpoint) to developing policies aimed not only at protection, but also at advancement. This change of paradigm shows itself, among other things, in those rights which focus on the active participation of children and adolescents in their own lives; in this connection we pick out the CRC, Arts 12–16 regulating, respectively, the rights to one's opinion, freedom of expression, of thought, of conscience and of religion, the right to freedom of association and that of privacy. The result of these guarantees of advancement implies not only greater participation of children in family decisions and in the social and communal problems that involve them, but also a broader ability to preserve those rights and to have personal access to justice consistent with their developing maturity.

In Argentina, as in many other countries, those who have not attained the age of majority are classed as 'under incapacity'.[6] In our view, children and adolescents are not 'incapable';[7] an expression injurious to their right to dignity and opposed to the spirit of the CRC, in which they are treated as persons who do have capacity, albeit a progressively evolving capacity.

Consequently, the CRC, coupled with the enactment on 28 September 2005 of the national law (Law 26.061) for the integrated protection of the rights of children and adolescents in our country, operates to require changes in the rules of the Civil Code relating to minors; including the elimination of references to their 'incapacity'. Thus there should be a clear consideration of the varying competence of the child corresponding to his stage of development, with the aim of achieving a proper balance between his rights and the responsibility of parents, legal representatives or carers. This means that ability to take part in proceedings takes various forms, according to the case and the stage of development of the child or adolescent:

(a) to be listened to in judicial proceedings the result of which could affect him;

(b) to take action through representation by parents or legal representatives;

(c) to participate in person with the assistance or 'cooperation' of parents or substitutes;[8] or

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6 In the Argentine Civil Code persons under 14 years old are considered 'impuberal minors' and regarded as under total incapacity, whereas the incapacity of those over that age and up to the age of majority ('adult minors') is relative to particular acts and powers (arts 54 and 55 of the Civil Code).

7 Baldarenas, Jorge A, '¿Son los menores incapaces?', Revista Interdisciplinaria de Doctrina y Jurisprudencia. Derecho de Familia, Abeledo Perrot, no 13, Buenos Aires, 1998, p 79.

8 Famá, María Victoria and Herrera, Marisa, 'Crónica de una ley anunciada y ansiada', Anales de Legislación, ADLA, 2005-E, 5809; see also: Minyersky, Nelly and Herrera, Marisa, 'Autonomía, capacidad y participación a la luz de la ley 26.061' in García Méndez, Emilio (ed),

(d) to act as an independent party with his own lawyer in judicial or administrative proceedings in which he is directly involved.

III AT WHAT POINT SHOULD THE CHILD BE LISTENED TO?

In our view it is first necessary to distinguish between two issues in relation to hearing children. The first is that of admissibility; that is, which children should be listened to? The second is to assess the weight attaching to their opinion in the judicial or administrative decision 'according to their age and maturity' (CRC, Art 12) or, as Law 26.061 puts it, 'in conformity with their maturity and development' (art 24, inc b).

On the first point there are two possible positions in our country.

One holds that it is only possible to recognise this right for a child 'who is able to form his own judgment', based on the CRC, Art 12. That is to say, to have a right to take part in the proceedings he must have intellectual capacity to form a judgment consistent with the rules of logic and to express it freely and rationally.[9] This point of view, which gives the right to be listened to according to the stage of development, in turn splits into two positions: (a) one that, in determining whether the condition is fulfilled, has recourse to chronological age as an element of certainty; and (b) one that, more flexibly, holds that the test of sufficiency of judgment should be applied on a case-by-case basis for each child. Establishing a fixed age at which a child is presumed to have sufficient judgment gives greater certainty according to those who support this view, but at the same time it does not allow for consideration of the 'differing circumstances of individuals and families'.[10] It is argued, on the other hand, that different questions call for very different ages for children to be heard. Hence to fix a chronological age for them to be listened to in proceedings impedes the realisation of the very principle of developing capacity that the CRC proposes and calls for.

The other view, by contrast, holds that every child should be listened to and his judgment and maturity should be a factor in assessing the weight of his evidence in reaching the judicial decision.[11] Within this line of thought, which rejects restricting the hearing of children a priori, are various conflicting opinions as to the minimum age for a child to be heard, and this diversity of

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Protección Integral de Derechos de Niñas, Niños y Adolescentes, Análisis de la ley 26.061, Fundación Sur – Editores Del Puerto, Buenos Aires, 2006, pp 43ff.

9 Montero Aroca, Juan, Flors Matíes, José y Arena García, Rafael, *Separación y Divorcio tras la ley 15/2005*, Tirant lo Blanch, Valencia, 2006, pp 417ff.

10 Carranza Casares, Carlos, 'Participación de los niños en los procesos de familia', LL, 1987-C-1384.

11 Mizrahi, Mauricio Luis, 'La participación del niño en el proceso y la normativa del Código Civil en el contexto de la ley 26.061' in *Protección integral de Derechos de Niñas, Niños y Adolescentes, Análisis de la ley 26.061*, above n 8 at p 75.

opinion was reflected in an inquiry conducted some time ago by family court judges and Defensores de Menores (Defenders of Minors) in the national court of the federal capital.[12] We take the same position as those who hold that it should be possible for all children to be heard regardless of their age, always bearing in mind the particular facts of the case that present themselves. This means the way the child participates should be flexibly adjusted to the nature of the conflict and the child's stage of development. The course, the process[13] and the consequences of his participation will be adjusted accordingly.

Let us look at some issues that arise from this position.

(a) The primacy of the child's interests

One key concept invoked by judges to resolve the many conflicts that may affect children is 'the paramount interest of the child'; this has become a general principle of law.[14] In spite of the inherent risks of an open-ended formula, dependent for its interpretation on judges who are often conditioned by their history and personal experiences, this is a good principle as it constitutes a guarantee of the satisfaction of the child's fundamental rights.[15]

On this principle, we must first recognise that listening to the child is an essential part of deciding what his best interests are in any particular case, as Law 26.061, in common with other Argentine provincial legislation relating to childhood and adolescence, explicitly lays down. This is the way to discover the child's particular psychological and physical characteristics, needs, quality of relationships, feelings, problems, fears or hopes. At the same time it implies treating the child as a subject with rights, not just an object of protection. In short, the child is treated as a non-replaceable protagonist in determining what is most beneficial for him;[16] it is a matter of respecting his demands, arising from his individuality, so as to offer him a personalised response.

Further, children's and adolescents' rights to express themselves are not confined to spoken or written communication, but extend to other non-verbal forms; even lived experiences and observations are not restricted to older children and adolescents. From a psycho-social point of view, it is affirmed that children should be taken into account from a very early age if we are to see their needs and interests in a proper perspective; they naturally manifest

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12 Oppenheim and Szylowicki, above n 4.

13 Arcagni, José Carlos, 'La Convención de La Haya sobre los Aspectos Civiles de la Sustracción Internacional de menores y el Derecho Internacional Privado tuitivo', LL, 1995-D-1024.

14 Méndez Costa, María Josefa, *Los principios jurídicos en las relaciones de familia*, Rubinzal Culzoni, Santa Fe, 2006.

15 Méndez Costa, María Josefa, María Eleonora Murga, 'Protección Integral de los Derechos de Niñas, Niños y Adolescentes. Encuadre internacional latinoamericano y provincial argentino', *Revista La Ley* 1 February 2006, pp 1ff.

16 Perez Manrique, Ricardo C, 'La participación de niñas, niños y adolescentes', informe presentado en el Segundo Encuentro de Armonización Legislativa de Derecho de Familia en el MERCOSUR realizado en la Facultad de Derecho de la Universidad de Buenos Aires, 24 and 25 August 2006.

themselves in different ways according to their stage of development. For very young children one can use pictures or games, gestures or mime.[17] That is to say, there is a broad range of child language – symbols and signs – that are just as effective as actual words.[18]

One essential element in the success of such interviewing is that the judge should have suitable specialised knowledge, although with small children, the judge's training is not a substitute for the involvement of experts in childhood and adolescence. However, it must be remembered that technical information, in the absence of the judge, is not enough. The judge's own appraisal, even with the aid of experts, is indispensable. On this basis, only direct contact between judge and child permits the former to get close to the child's view of the problem. Thus the intervention of specialists in the matter is a necessary complement to, and does not replace, the judge's listening to the child in person. Should we not perhaps analyse the 'paramount interest' of the child in more concrete terms? Is not this notion of listening an eloquent way for the judge to come close to or have full knowledge of what the interest of the child is in the case that presents itself? In this way, listening and the interest of the child relate to each other.

(b) Account must be taken of the nature of the question in issue

Other questions that must be taken into account for a deeper understanding of listening to or giving a voice to children in family proceedings relate to the significance of the nature of the conflict. In some cases, young children can be listened to in order to investigate personal aspects such as: the family situation, relationship with parents, existing conflicts, or psychosomatic reactions relating to the acceptance or rejection of care arrangements or the scheme of visits, which we prefer to class as the right of communication between children and parents. However, in other cases, for example property questions, appointment of a tutor, or opposing one of his transactions, one should assess whether the child has sufficient understanding to form his own assessment of the problem posed. As one precedent has shown, direct contact with the judge does not enable the child to make a choice, but only serves to help find out what the child wants or what his emotional needs are. This means it is not necessary to ensure a particular or minimum level of maturity or discernment.[19] It is clear

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[17] Pettigiani, Eduardo, 'Derecho del Niño a Ser Oído. ¿Cómo Debe ser escuchado?' en AAVV, 'Familia y Sucesiones, Enfoque Actual', Librería Editorial Platense, La Plata, 2006, pp 79ff.

[18] It is even claimed that clinical experience over the last 40 years and advances both in technology and in the understanding of the emotional behaviour of babies show that, small though they are, they can respond emotionally to external stimuli. In recent decades, controlled studies using electroencephalography and other diagnostic procedures indicate that, before the acquisition of verbal expression, their mind can feel complex emotions such as jealousy, empathy and frustration ('La maravillosa mente de un bebé', Diario La Nación del 29 January 2006).

[19] Opinion of Dr Eduardo Pettigiani in the decision of the SCBA, 2 May 2002, *S de R, S R c R, J A*, LL, 2003-A, at 425 and DJ 2003-1, at 522.

that, the more his capacity to make a choice between alternatives develops and progresses the more he can exercise his will and his independent judgment.[20]

Discussion of listening to the child immediately leads to thoughts of conflict between parents over care arrangements or the regime of communication. However, there are many other problems requiring measures of protection that come up before the court on which one must also listen to the child. For instance when we find children exposed to neglect, violence, abandonment or malnutrition, do children need a particular level of judgment for the judge or administrative authority to listen to them in these situations? It is only necessary to see the youngest ones. Their participation does not produce facts that determine which is the most convenient measure to adopt in the case or that help to assess whether those responsible for their care are properly fulfilling their duty to maintain them and advance their development. On this point we cite the words of a judge in a court decision:[21]

> 'Considering the full significance of the ways the decision on what happens to him will affect the fate off the child, it is essential that whoever is going to make it should know him; regardless of what were the circumstances giving rise to the judicial intervention or the child's age; the law makes no distinction. Whatever his age, it will be essential to see him, since that is the true and only way to know him, not just to get certificates, observations, reports, or facts done up in a dossier. To protect the child his judge needs to see him.'

IV WAYS TO GIVE EFFECT TO THE CHILD'S OR ADOLESCENT'S RIGHT TO BE LISTENED TO

A child or adolescent can be listened to before the judicial or administrative authority on his request (Law 26.061, art 27, inc a), made orally or in writing. However, it must be said that, while access to justice presents serious difficulties for any citizen, for children this possibility of recourse to the court to be listened to turns into a chimera, since they are not trained to present petitions or make claims. Thus, while it is often hard to compel adults to recognise the rights of children, it is harder for children to defend their rights and particularly difficult to go to law unaided.

We believe that to give effect to this possibility, given by the law, there has to be a powerful effort in the fields of education and social support, and a real commitment on the part of the community to see that acts that harm children and adolescents are publicly dealt with. Support may come from family members, institutions of civil society (church, school or non-governmental organisations) as well as from the various public institutions: the Defensor Público de Menores Incapaces (Public Defender of Incompetent Minors; under the Ley Orgánica del Ministerio Público 1 art 54 inc d) or the Red de

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[20] Minyersky and Herrera, above n 8, at 51.

[21] SCBA, 2 May 2002 citado y los antecedentes Ac 56.195, dent Del 17 October 1995; Ac 41.181 del 10 October 1989.

Defensorías de Niños, Niñas y Adolescentes (Organisation of Defenders of Children and Teenagers) located in the barrios of the city of Buenos Aires (in the local ambit) regulated by Law 114 de Protección Integral de los derechos del Niño, Niña y Adolescente (see art 60ff), and also various decentralised administrative bodies that specialise in childhood and adolescence, created and regulated by various provincial laws for the integrated protection of their rights. Beside the child's or adolescent's right to take the initiative, the administrative and judicial authorities have a duty to cite them in proceedings that affect them or, as Law 26.061 puts it, 'in matters that concern them and in which they have an interest' (art 24, inc a). This means that any law that contradicts this right is invalidated, and the interpretation of any rule must take account of this directive.

In consequence, those rules of the Civil Code that do not conform to the obligatory norms set out in the CRC, Art 12, or with those of Law 26.061, are regarded as amended by implication.

V CONDITIONS OR REQUIREMENTS UNDER WHICH CHILDREN OR ADOLESCENTS SHOULD BE LISTENED TO

(a) General considerations

We think it is important to draw attention to some basic parameters that our doctrine and decided cases support in relation to the conditions in which children should be listened to. Before we move on to examine some of the guidelines developed in national doctrine and case-law, we should note that the Corte Suprema de Justicia de la Nación (Supreme Court), in Decision 5/2009 of 24 February 2009, pronounced its adherence to the 'Brazilian Rules on access to justice for those in a vulnerable situation'. In this context, noting that minors are in a vulnerable situation as developing persons, it refers in the section on 'Appearance in judicial proceedings' to the 'Participation of children and adolescents in judicial acts', affirming in para 78 that:

> 'In judicial acts in which minors are participants account should be taken of their age and general development, and in every case proceedings should take place in a suitable setting. They should be made easy to understand, using simple language. All unnecessary formality should be avoided, such as robes, the physical distance from the bench and the like.'

This gives an explicit, clear normative basis to some of the lines of development that have recently been emerging in judicial theory and practice.

(b) Making information available in advance

The child or adolescent must have information available to him in advance to enable him to express himself with understanding of the case, naturally

according to his age. In this sense the same procedural guarantees apply as in the case of adults. Could there be any reason to treat them otherwise? As has been indicated, the right to be informed is an indispensible part of the right to be listened to.

(c) Freedom of expression must be given

The CRC establishes the child's right to 'freely express his opinion'. This means no coercion, pressure, threat, inducement or harassment, so that he can speak or challenge in a confident manner, a situation courts are used to in matters of divorce.

We think of the familiar scenario underlying the conflict between parents after separation, when they take their child hostage, overcome by their own negative feelings towards each other, but believing they are acting in his best interests. In such cases, seeing manipulation, the judge has to rely on interviews, skilfully conducted with the aid of specialists, to neutralise such behaviour. He has to do so without prejudice to applying procedural sanctions, apart from evaluating the obstruction as a negative element in the decision with regard to the party concerned (National Code of Civil and Commercial Procedure, art 163, inc 5).[22]

Doctrine supports the idea that it is advisable for judges to presume this will occur in highly contested cases and arrange prophylactic pre-trial conferences with the parties to reach a basic minimum of co-operation to protect the child's or adolescent's right to defend his own wishes and interests.[23] This is the only way to obtain genuine answers rather than a reflection of what adults want him to say.[24]

It may be hard to prevent the representations, ideas, wishes or expectations of the father or mother from influencing what younger children say, bearing in mind the dependence of the child on those adults and his reluctance to call into question the persons he needs. It is up to the judges and the specialists to evaluate, on the basis of what the child says and his behaviour, the quality of his relationship with the adults and the nature of his situation. Older children and adolescents have a better prospect of distancing themselves and withstanding parental demands.

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22 Pettigiani, E, above n 17, at p 102.

23 Cárdenas Eduardo J, *Operatividad del derecho de niños, niñas y adolescentes a ser informados y escuchados en el proceso judicial* (unpublished). Based on his contribution to a Study Day on 'Giving effect to the child's or adolescent's right to be listened to', organised on 29 August 2006 by the Honourable Senate of Buenos Aires Province.

24 Calvo, Silvia L and Kozicki, Claudia G, 'Qué piensan los niños sobre sus derechos', in *Los derechos del niño en la familia*, Dirección Grosman, Editorial Universidad, Buenos Aires, 1998, pp 347–348.

(d) He should be listened to in person

When we refer to listening to the child himself we raise two issues: (1) the child's voice should not be transmitted through an intermediary such as parents or lawyers – on the contrary, he must himself directly take part; and (2) who should do the listening, the judge in person or a representative such as a professional in his technical team?

The first issue was dealt with forcefully by a woman judge of the Tribunal de Familia no 2 of Mar del Plata, Buenos Aires Province, in a decision of 6 February 2009, when she had to rule on the conflict arising from a 12-year-old girl's refusal, on religious grounds to undergo surgery:[25]

> 'I do not doubt the very personal nature of the child's right to be listened to. How should she be listened to? The exercise of the most personal rights is inseparable from the individuality of the person, and so can only be activated by her in person. Her right to be listened to is of a highly personal nature and cannot be exercised through any representative.'

So there is no doubt that being listened to involves a highly personal right exercisable only by the child in person.

As to the second issue, art 27 of Law 26.061 relating to minimal procedural guarantees establishes that children and adolescents have the right '(a) To be heard before the competent authority whenever the child or adolescent so requests'; and '(b) That his opinion be given fundamental attention in reaching a decision that affects him'.

Most writers consider the interview should be personal.[26] The well-known jurist Aída Kemelmajer de Carlucci tells us that judges must interpret Art 12 of the CRC 'so as not to frustrate the object in view'.[27] The CRC reinforces this basic idea, reaffirming that the hearing of the child must take place 'in conformity with the procedural rules of national law' and art 41 provides that the provisions of the CRC do not affect provisions 'which are more conducive to giving effect to the child's rights'.

On this point, we mention the judgment of the Suprema Corte de la Provincia de Buenos Aires of 2 May 2002, annulling a decision concerning custody and contact in a divorce case, on the grounds that the record did not show that the opinion of the children of the marriage had been ascertained, bearing in mind

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[25] Trib, Fam no 2, Mar del Plata, 6 February 2009, *G G S s/ medida cautelar* at www.abeledoperrot.com.

[26] Pettigiani, E, above n 17 at p 95 and Mizrahi, M, above n 11.

[27] Aída Kemelmajer de Carlucci, El derecho constitucional del menor a ser oído, Revista de Derecho Privado y Comunitario No 7, p 173.

that 'representation by the asesor de incapaces neither makes good nor excuses the omission of direct contact between the judge and the minor'.[28] Some of the opinions maintain that:[29]

> '. . . the child's right to be heard is of a highly personal nature and it is inadmissible for it to be exercised through the person of the representante promiscuo del menor [general representative of minors], or of a guardian "ad litem", since introducing an intermediary goes against the intended result.'

We should make clear that this figure of the 'guardian ad litem' provided for in the Civil Code (art 397, c 1), referred to elsewhere in this chapter, means a person appointed by the judge, and in whom the latter has confidence, to represent and defend the child's rights when these conflict with or are inconsistent with the interests of parents or other legal representatives.

Further, going deeper into the conflicts surrounding listening to children in proceedings, it is important to remember this is a right and not an obligation on the child who can choose whether to exercise it. He cannot be made to attend if not ready to do so. This is explicitly provided in the Ecuador Code of Childhood and Adolescence where it says, 'no child or adolescent can be obliged or put under pressure in any way to express an opinion' (art 60).

Also, consistently with the aim of listening to children in a welcoming setting and in the least traumatic manner possible, we share the view that, whether at the child's or adolescent's request or on the judge's decision, the interview should take place at home whenever there are reasonable grounds for this.[30] In such cases the view is that the Defensor Público de Menores and a member of his interdisciplinary team should be present.[31]

VI PROTECTION OF PRIVACY

(a) Neither the parties nor their advocates should be present at the hearings

So as to preserve the child's or adolescent's privacy, hearings must be arranged on the margin of the adversarial system, without the presence of parties or their representatives.[32] The confidentiality of what the child or adolescent says should, in our view, be carefully protected.

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28 SCBA decision of 2 May 2002 cited above n 21.
29 Opinion of Dr Eduardo Pettigiani, above n 19.
30 Kemelmajer de Carlucci, A above n 27, at p 174.
31 Tagle de Ferreira, Graciela and Forcada Miranda, Francisco Javier, 'La audiencia del menor en Argentina y en España. Puntos de reflexión', *Revista Interdisciplinaria de Doctrina y Jurisprudencia. Derecho de Familia*, No 34, Lexis Nexis, Buenos Aires, 2006, p 145.
32 Kemelmajer de Carlucci, A above n 27, at p 174.

We see, in separation or divorce proceedings where children are regularly cited, if they know what they say will be passed on to their parents, they will not speak or may change their evidence and not say what they really think. They may fear the reproach of one of the parents or the aggravation of the conflict. This is a difficult question to resolve as it affects the right of parents to natural justice and due process, including receiving all the information that comes to light in the case.

How can this conflict of interests be avoided or at least mitigated? In our view, we must first ask what is the natural justice of listening to children in proceedings. Is it rooted in the process of 'proof'? We think it is not. Were it so, the parties – primarily the parents – could 'waive' the proof. What can be observed in simply seeing the child is not a matter of 'proving' a fact, but only knowing more deeply the family conflict the judge has to deal with. In particular, what the conflict's impact is and how he can best minimise its repercussions or reduce their seriousness for the child. This means the judge needs to know, from the child, what he feels, thinks and understands of the administrative or judicial process in which he is involved. In this sense, we should draw attention to the 'Directions on the guarantee of the human rights of children and adolescents to give their opinions and to be heard in judicial proceedings in Courts of Protection' set out by the Sala Plena of the Tribunal Supremo de Venezuela on 25 April 2007. Direction 8 states clearly that children's and adolescents' opinions form an additional element to the grounds that support a judicial decision and thus 'it is a matter of a unique procedural act on the part of the judge to ascertain the child's or adolescent's point of view'.

Nor must we lose sight of the technical advantages and the benefits of the so-called 'Cámara Gesell' (observation room) or of digital video recording systems. These allow children to be listened to in a direct, personal manner by the judge, with or without members of his technical team as well as, remotely (in another room, via closed circuit television or a one-way mirror), for others to know what is said in the interview, free from any kind of pressure. This system, made possible by technical progress, is mainly used when it is a matter of statements of child or adolescent victims of, or witnesses to, crime or violence to prevent repeated victimisation, particularly in cases of sexual abuse.

Attention should be directed to the provisions in the national penal system, especially for those suspected of sexual abuse, of Law 25.852, passed on 4 December 2003. It combines two articles of the National Penal Procedure Code, setting up a procedure in matters of victims of crimes set out in the Penal Code, book 2, title 1, chapter 2, and title 3, that is to say the crimes of 'violación' (forcible rape) and 'estupro' (consensual intercourse with a single woman of good reputation, obtained by abuse of confidence or deceit) (arts 119–124) and crimes of corruption, sexual abuse and offences against decency (arts 125–129), all sexual offences against persons under 16 years old. In relation to this, the first article of the law incorporates, as art 250 bis of the Penal Code, as it now stands, that:

> '(a) the minors referred to will only be interviewed by a psychologist specialising in children and/or adolescents appointed by the court that orders the measure, and must in no case be directly questioned by the court or the parties;
> (b) the interview must be carried out in a room appropriately equipped for the age and stage of development of the minor;
> (c) within the time specified by the court the professional involved must make a detailed report with conclusions to those who set it;
> (d) on the request of a party or if the court of its own motion orders it may be followed remotely through one-way glass, microphone, video or any other available technical equipment. In such a case, the court will make known to the professional what are the concerns of the parties as well as those arising in the course of the case, and these will be dealt with taking into account the nature of the facts and the minor's emotional state. When it is a matter of identifying places or objects the minor will be accompanied by the professional designated by the court, the accused in no case being present.'

The 'Fundamentals' of the law emphasise that it was vital to:

> '. . . put an end to a custom practised from time immemorial and, despite objections raised by many of the propositions of those opposed, this point has only been questioned sporadically from a standpoint generally removed from the business of legislation and litigation. The traditional cross-examination of child victims of sexual offences and physical abuse is effectively a violation of the rules set out in article 75 inc. 22 of the National Constitution.'

As regards domestic violence proceedings, before a judge with jurisdiction in family matters in our country, it is worth noting that, in one of the interdisciplinary Study Days on Family, Minority and Mediation, organised by the Colegio de Abogados de Morón in 2005, a majority proposed adding the following text to art 4 of the Family Violence Law of Buenos Aires Province:

> 'In obtaining witness statements from minor victims of maltreatment or abuse these must be taken by professionals specialised in the field of childhood and adolescence using techniques of observation which do not expose them to traumatic situations, recording the evidence with the aid of video recording and techniques of observation so they can be reproduced later, the said statements should be accepted as advance evidence under the provisions of art. 326 of the CPC, even when the makers are under 14 years old.'

Hence, as a minimum, when it is a matter of child or adolescent victims or witnesses of offences and situations of domestic violence or maltreatment, consideration must be given to using technical aids to save them from being interviewed more than once, and putting them in a situation of stress or of falling into 'contradictions' such as arise when so much exposure gives them a vocabulary not appropriate for their age, and they lose spontaneity and transparency. A more general position not restricted to sexual abuse cases and domestic violence is that which adopts the 100 rules of Brazil already mentioned, which, in Chapter IV on the 'Efficacy of the rules', refers to the

'new technology', saying: 'Advantage must be taken of all the possibilities offered by technical progress to improve the conditions of those in a condition of vulnerability.'

(b) Does the Defensor Público de Menores have to be at the interview?

The child's or adolescent's right to privacy also raises the question of the presence at the hearing of the Defensor Público de Menores who represents children's interests in all proceedings involving minors or those 'under incapacity', as laid down in the Civil Code, art 59. This provides:

> 'Besides the necessary representatives, those under incapacity in general are represented by the Ministerio de Menores, as a legitimate and essential party in any judicial or extrajudicial matter, whether voluntary or contentious, brought by or against persons under incapacity, or which have to do with their persons or property, on pain of the nullity of any act or judgment that takes place in his absence.'

In our country, the doctrinal view is that it is convenient for the Defensor Público de Menores to be present at hearings as his conclusions are relevant to the judicial decision, for which reason his presence is in the interest of the child or adolescent. This is without prejudice to the authority of the judge to order that the interview should take place in a strictly confidential manner, at the child's or adolescent's request, or if it is in the judge's view appropriate in the case.

(c) Should he be listened to with his advocate present?

The final part of the above-mentioned art 27 of Law 26.061, relating to the minimum guarantees that must be respected in judicial or administrative proceedings, establishes that it is the duty of the State to:

> '. . . guarantee to children and adolescents in any judicial or administrative proceedings that affect them, besides all the rights given by the National Constitution, the Convention on the Rights of the Child, in international treaties ratified by the Argentine Nation and in the laws passed for their implementation:
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> . . .
>
> (c) To be assisted by a legal practitioner, preferably specialised in childhood and adolescence, from the commencement of judicial or administrative proceedings in which he is involved. If his means are not sufficient the State must, as of right, provide him with an advocate to assist him;
> (d) To take an active part throughout the proceedings;
> (e) To take any decision affecting an appeal to a higher court.'

For its part, regulatory decree 415/2006 provides that the right to such legal assistance includes choosing an advocate to represent his personal or individual interests, without prejudice to the general representation of the Ministerio

Público Pupilar. For that reason there are two figures in Argentine law, the Defensor or Asesor de Menores whose role is to represent in a general or complementary sense, coexisting with the child's own advocate who takes care of the technical defence. On this last question, the regulatory decree requires each province to guarantee legal services to ensure access to this right; basically, to provide a system of advocates specialising in matters of childhood and adolescence.

After that introduction to the question, we need to consider if hearing the child or minor as indicated necessarily requires that he be accompanied by an advocate. Our law does not impose such a condition as it only gives the child or adolescent the right to be listened to in the presence of an advocate. This is a matter of personal choice,[33] since frequently he will want to express himself as privately as possible. This does not mean having a lawyer present is not convenient since, it has been pointed out:[34]

> ' . . . the child does not know the law or the working of the court. Letting the child speak in the proceedings is not enough. There is a right way to ask questions and interpret answers and silences that requires the presence of an advocate to ensure he can express himself freely and authentically.'

In other words participation of children with their own advocate is a right and not an obligation. Hence, if children, given the confidentiality of relations between advocate and client, want one to be present when they are listened to there is no reason not to respect or to deny that wish, save that the child, the judge or another person may take the view that in the given situation a private or one-to-one interview would be better.

This question of what children and their advocates can do when they are listened to is related to another, more complex and controversial one in Argentine law. This relates to what role they can play in the judicial process, with particular focus on the position of the so-called 'child's advocate'.

This calls for an overview of the various positions taken in national cases, by way of a preliminary approach to a topic with some peculiarities that deserves its own particular study.

One view, taken in a case decided in sala K of the Cámara Nacional de Apelaciones en lo Civil (National Court of Appeals in the Civil Case) on 28 September 2006,[35] upheld the decision of the Juzgado en lo Civil No 10 (the Court in the Civil Case No 10)[36] which had refused to allow an advocate of the

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33 Pettigiani, E, above n 17, at p 106.

34 Basile, Carlos, 'La audición del niño en el proceso judicial', *Revista Doctrina Judicial* 2005/10, 379.

35 CNCiv, sala K, 28 September 2006, 'R, M A s/ protección de persona', *Revista Jurídica on line El Dial*, 9 February 2007.

36 JCiv no 10, 6 July 2006, 'R, M A', available at: www.laleyonline.com.ar.

Defensoría Zonal of the City of Buenos Aires,[37] to appear as the legal representative of a 3 year old. It held that the situation of a child's advocate for so young a child is not viable. Specifically, 'the child's being so young prevented this from being considered the legitimate act of a representing advocate as she was not appointed by an interested party capable of understanding the full significance of such an act' (see Civil Code, art 921); hence, and considering that the child was still subject to the representation of his mother whose parental authority had not been removed or suspended, 'the latter, acting jointly with the Defensor de Menores, in his capacity of a functionary of the State, was the right person to look after the interests and rights of the minor'. It added that the representation by the child's advocate should be confined to persons with enough discernment for their acts to be licit, which in Argentine law means 14 years old (so-called 'adult minors'). This made it impossible for younger persons to take part in proceedings with their own lawyer.

This view was followed in the minority opinion of a decision of Sala I de la Cámara Nacional de Apelaciones en lo Civil (National Court of Appeals in the Civil Case) of 4 March 2009.[38] This was a case of parents disputing the custody of children aged 15 and 12 years. The first instance judge allowed both children to act with their own advocate. The father appealed against this. The minority held that the 12 year old could not take part with his advocate for want of discernment, recently fixed at the age of 14.

The other view is supported by the majority decision in this last case. Here the judges Pérez Pardo and Giardulli allowed both the 12 and the 15 year old to act with their own advocate, the same one as their interests were the same, in custody proceedings. In this case it was affirmed that the participation of both children represented by their own advocate and the latter's drafting of procedural petitions in no way diminished the role of the parents or the Defensor de Menores. With regard to the younger boy, aged 12, it was held it would be unreasonable to deny him the possibility of appearing with his own advocate, solely on the ground that he was 2 years younger than his brother 'above all when both children were bound together by common interests'. This position is thus more flexible in not restricting participation of children with their own advocate to an arbitrary cut-off at the age of 14.

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[37] 'Defensorías Zonales' are administrative bodies for child protection set up under the local Executive Authority. They are decentralised offices located in the different barrios of the City of Buenos Aires to deal with particular problems relating to infringement of children's and adolescents' rights. Through them efforts are made to resolve a wide range of questions which are not, in principle, part of the judicial competence. Only if not resolved this way is there a possibility of recourse to a court. The competence and functions of these Defensorías Zonales are duly fixed by Law 114 of the City of Buenos Aires on children and adolescents for 'Protección Integral de los Derechos de Niñas, Niños y Adolescentes'. As can be seen, thanks to National Law 26.061, various provinces have passed their own laws on children's and adolescents' rights – including some before the National law.

[38] CNCiv, sala I, 4 March 2009, 'L, R c M Q, M G', *Revista La Ley* of 16 April 2009 with note of Eduardo A Sambrizzi, pp 4ff.

This same broader position was reinforced in a later judgment of sala B of the Cámara Nacional de Apelaciones en lo Civil of 19 March 2009,[39] also in contested custody proceedings between parents, where the issue was to do with the right of contact which the mother had obstructed between a father and pre-adolescent children. In this case the children's right to have their own advocate was fully recognised, to the extent of defending the position that this was possible at any age and the only element to consider is the level or development of maturity, not the attaining of a particular age.

VII HOW SHOULD THE CHILD'S OR ADOLESCENT'S STATEMENT BE EVALUATED?

At the second stage of the process of hearing the child or adolescent, when it is time to take his opinion into account, his maturity and level of development are assessed (Law 26.061, art 4). A number of factors have to be considered in making this assessment, such as intelligence, education, upbringing, social surroundings and context.[40]

On this point, the Interamerican Human Rights Court, in Consultative Opinion OC/17/2992, noted that there is great variation in the level of physical and intellectual development, in experience and in the knowledge possessed by those included in that group. Those who apply the law, it insists, whether in the administrative or the judicial ambit, must take into consideration the specific condition of the minor and his overriding interest to let him participate as appropriate in determining his rights. The minor must have the fullest access, within the bounds of possibility, to this process of examining his case.[41] Uncontroversial doctrinal opinion, upheld in decided cases, is that to listen to the child does not mean accepting his wishes without more once he has acquired sufficient understanding to express them. While the judge has to consider what the child or adolescent says, that does not mean this has decisive weight in the judicial decision if there is evidence that the preference the child or adolescent expresses is inappropriate.[42] As Aída Kemelmajer de Carlucci wisely underlines, in any proceedings account is taken of the litigants' arguments, but that does not imply accepting them or necessarily applying the

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[39] CNCiv, sala B, 19 March 2009, 'K, M y otro c K, M D', *Revista La Ley* of 15 April 2009, with note by Osvaldo Alfredo Gozaíni, pp 4ff.

[40] Zarraluqui Sanchéz-Eznariaga, Luis, *La participación del menor en el proceso matrimonial de sus padres, en Los hijos menores de edad en situación de crisis familiar*, Dykinson, Madrid, 2002, pp 31ff.

[41] Dr Sabsay stresses that the decisions of the Interamerican Human Rights Court, according to the Corte Suprema de Justicia de la Nación, even consultative opinions, fall within the provisions of the American Convention on Human Rights and so have obligatory effect in the interpretation of local norms and decisions (Sabsay, Daniel Alberto, 'La dimensión constitucional de la ley 26.061 y del decreto 1293/ 2005', en *Protección Integral de Derechos de Niñas, Niños y Adolescentes, Análisis de la ley 26.061*, above n 8, p 25.

[42] Kielmanovich, Jorge L, 'Reflexiones procesales sobre la ley 26.061 (de Protección Integral de los Derechos de las Niñas, Niños y Adolescentes)', *LA LEY* 17 November 2005, 1.

solution the child or adolescent proposes.[43] What the child says – one judgment has declared – does not determine the decision, even though the judge has to consider what he says so far as his interest requires.[44]

Nevertheless, it is recognised that what someone who has attained a certain level of maturity says may have decisive weight in some cases. For example, in cases of separation of the parents, it has been judged prejudicial to compel a child to live with or have contact with someone against his will.[45] The wisest course in these situations is to order therapeutic intervention to try to get a change in the dynamics of the family, a strategy employed by many judges.

When the judge does not take the child's or adolescent's point of view, in our opinion he must state his reasons for setting that opinion aside.[46] Although Law 26.061 does not expressly say so, in our understanding, the judge must take account of the child's opinion in his judgment and give the reasons that led him to reject it in the judicial decision,[47] seeing that art 27(b) establishes that 'his opinion should be fundamentally taken into account in arriving at a decision that affects him'.[48] It is essential that the decision be a reasoned one if it is not to risk nullity. For this reason, this final act in the process must, among other things, reflect and take account of what the child revealed in the interview with the judge and the conclusions the judge drew from what passed then.

The comment of the Uruguayan judge Ricardo Perez Manrique is a wise one: that a child's or adolescent's right to be heard is accompanied by his right, as a subject of rights, to obtain responses based on evidence and reason. For this reason Pérez Manrique believes a judgment is open to attack if the judge fails to show sufficient reasons for accepting or rejecting the minor's opinion in the course of reaching a solution.[49]

It is also considered right, from a psychological point of view, that the judge should inform the child or adolescent what his judicial decision is and explain the reasons for it, naturally in accordance with his degree of maturity.[50]

At this stage in the work one can take in more precisely the following consideration. Up to this point we have spoken of the child's or adolescent's 'holding an opinion', which in the dictionary definition signifies 'judging the reasons, probabilities and conjectures regarding the truth or certainty of

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43 Kemelmajer de Carlucci, A above n 27.

44 CCiv y Com. San Isidro, sala 1ª, 8 July 2002, 'C, M A c C, M A', JA, 2003-I-661.

45 Carranza Casares, C, above n 10; Oppenheim and Szylowicki, above n 4.

46 Opinion of Dr Pettigiani in the judgment of SCBA del 2 May 2002, above n 19.

47 Herrera, Marisa, 'Luces y sombras sobre la voz del niño en la adopción', Document prepared for the 4th Regional Conference and the 1st National Interdisciplinary Conference on Adoption, Mendoza, 7 and 8 September 2006, recently published in www. jusmendoza.gov.ar and Solari, Néstor E, 'Criterios para la privación del patria potestad', Doctrina judicial, 14 June 2006, p 72.

48 Pedro Di Lella, 'Del impacto de la CDN en la normativa argentina', JA, 1998-A, p 163.

49 Perez Manrique, R C, above n 16.

50 Doltó, Françoise *Cuando los padres se separan*, Paidos, Buenos Aires, 1988, p 133.

something'. We must, however, note that when the law refers to taking account of the child's opinion in accordance with his development and maturity this does not mean the judge's assessment and judgment are limited to his statement of 'how things look to him' or his preferences, since, as we have seen, it brings in all the observable information emerging from the interview such as: personalities, quality of relationships, feelings, and anomalies or difficulties, which help to work out the most favourable solution for the child.

VIII THE CHILD MUST IN EVERY CASE BE LISTENED TO – RIGHT OF APPEAL

When a judicial decision of a lower court affects a child's or adolescent's interest, he may lodge an appeal. There is no doubting that it is appropriate for him to be listened to again in the higher courts which hear the appeal,[51] as the factual situation may have changed over time. Besides, one must recognise the significance given by the law to hearing the child in question directly, in person.[52]

We must come to the question of whether the child or adolescent has the right to take the judicial decision on appeal. Law 26.061, art 27(e) gives the child or adolescent the right of 'recourse before a higher court against any decision that affects him'. In every case the child or adolescent must have the right to take the judicial decision on appeal if it affects his interests, in accordance with the above-mentioned Consultative Opinion No 17 of the Interamerican Court of Human Rights, which regards the appeal as a guarantee of due judicial or administrative process. Consistently with this position, various judgments have held that if the appeal is lodged on the ground of failure to listen to the child or adolescent the remedy is that the judgment should be annulled.[53] The child or adolescent can also appeal against a decision that affects his best interests, the basic standard to evaluate the justice of the decision. In this regard, we must not lose sight of the fact that Law 26.061 defines the overriding interest of the child as 'the maximum complete and simultaneous fulfilment of the recognised rights and guarantees'.

Thus, in our view, the child or adolescent can appeal to the higher court, duly assisted by his lawyer, as art 27(c) lays down, when he considers the decision detrimental to his rights and interests. What is more, he can be listened to again at this higher level, which means it is desirable to have divisions of appellate courts specialising in family matters, as are found only in a few jurisdictions in the country such as the province of Córdoba where specialised Cámaras de Apelaciones de Familia are available.

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[51] Ludueña, L G, Derecho del niño a ser oído. Intervención procesal del menor. Revista de Derecho Procesal, 2002-2, Derecho Procesal de Familia, II, pp 157ff.

[52] Opinion of Dr Pettigiani in judgment of SCBA of 2 May 2002, above n 19.

[53] SCBA decision of 2 May 2002, following earlier decisions of the court: Ac 56.195, judgment 17 October 1995; following Ac 41.811 judgment 10 October 1989.

On this point, it has been held that the child's right to be heard is no mere informative process to get a better judicial decision, as it is part and parcel of the guarantee of due process. It is the child's right to intervene and take part in a process directly affecting him, and this represents 'the highest expression of respect for human dignity in the judicial order'.[54] That is why it is natural that he must have a further hearing in the appellate court.

IX IN WHICH JUDICIAL PROCEEDINGS MUST HE BE LISTENED TO?

The child's right to be listened to applies in all proceedings in which the judicial decision could directly affect him. Consequently, the right does not apply to those proceedings in which one of the parents, as a party, can perfectly represent him, notwithstanding that the result, on a personal or property matter, may indirectly have repercussions on the child's life. One example is an eviction order from the home where the child lives. Clearly this kind of conflict involves or impacts on the child, but with the necessary action on the part of the parents the interests of the child are perfectly represented.

We should also consider whether the child or adolescent has to be listened to in third party proceedings brought by or against him, in which he is represented by his parents. In such situations the parents are presumed to act in the interest of the child in question and there are safeguards for the rights of children and adolescents. Nonetheless, even in this kind of case, our view is that the child or adolescent ought to be listened to should he request this.

Having noted these general considerations, we now briefly examine how listening to children in different family proceedings functions, in the light of developments in Argentine judicial opinion.

(a) Disputes over custody of and contact with children

One of the most frequent situations raising the need for the child or adolescent to be listened to is the case of separation of the parents when they cannot reach agreement on the custody and contact regime. Here in its purest form we see the child's right is to express an opinion as to how he will be enabled to 'maintain personal relations and contact with both parents on a regular basis', unless this is against his interest (CRC, Art 9.3).

One can emphasise that in these cases the hearing must be conducted in such a way that having the opportunity to speak is experienced by the child not as making a choice leading him into a conflict of loyalties, and resulting in feelings of guilt, but as an expression of his needs and feelings. One judgment rightly underlined the fact that the child could experience 'a seriously traumatic

[54] Arazi, Roland y otros, *El derecho a ser oído. Eficacia del debate procesal*, Rubinzal Culzoni, Santa Fe, 2003, p 94.

situation, to the extent that he thinks he is hurting one of his parents'.[55] The issue must not appear to be a matter of choice. The task of judges and other specialists involved is to infer the child's feelings and the quality of his relationships with his parents from what he says and the way he behaves.

A question that arises regarding the intervention of children in divorce proceedings is whether it is right to call them when there is no dispute between the parents and they have agreed on the diverse questions that follow from separation. We think that in principle when there is no dispute between the adults it is not compulsory to cite children before approving the parents' agreement. Despite this, as the judgment holds, if it appears in the proceedings and circumstances that there is evidence that the agreed solution may affect the child's interests, there is no doubt that he ought to be listened to, without prejudice to adopting other necessary measures.[56]

(b) Maltreatment or abuse

Besides what has been said about the importance of technical advances in taking witness statements from child victims of crimes and family violence, it is necessary to insist that what the child says needs to be backed up by psychological assistance to avoid retractions under pressure from family members, since the child is locked into a social and cultural family system which deters him from speaking.[57] The child has a sense of guilt at having broken secrecy and disrupted family life. The other parent, generally the mother, must also have suitable assistance and preparation to enable her to assume the duty of protecting the child through the trial. We therefore insist on the need to avoid secondary victimisation of the child or adolescent, saving him from judicial 'handling' that subjects him to having to repeatedly relate the abuse suffered, there being a number of technical resources to avoid this revictimisation.

Among the decided cases we should note one in the Suprema Corte de Justicia de la Provincia de Buenos Aires of 20 September 2006. In proceedings for family violence, the first instance court had refused a request to make an exclusion order, without having heard one of the children involved. The Asesor de Menores lodged the appropriate application and the highest provincial court annulled the decision on the ground, among others, that the judge involved 'omitted to have personal contact with the minors involved before making the decision whereas proceeding in this way violated the right of the children to be heard enshrined in art. 12 of the Convention on the Rights of the Child'.[58]

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[55] Opinion of Dr Eduardo Pettigiani in the judgment of the Suprema Corte de la Provincia de Buenos Aires, 2 May 2002, above n 21.

[56] TSJ, Neuquén, 21 February 2006.

[57] Ferraube, Thierry *Enfance Mayuscule*, Boulogne, France, No 83, agosto 2005, p 6.

[58] SCBA, 20 September 2006, ON L, LLBA 2006, 1324 – DJ 2007-I, 43.

(c) International return of minors

There is no doubt that the child or adolescent should also be heard in cases of the return or the international abduction of minors. The Convention on Civil Aspects of the International Abduction of Minors ratified by Law 23.587 establishes that 'the judicial or administrative authority may . . . refuse to order the return of the minor if it finds that the minor is her/himself opposed to being returned, when the minor has attained an age or degree of maturity sufficient to justify taking account of his opinion' (art 13, para 4).

On the basis of these provisions, in one case it was considered that the child's opposition was a valid ground on which a woman judge could refuse to order return, as the girl in question expressed her wish to stay with her mother, and had shown in what she said that she had sufficient maturity to require her opinion to be taken into account. As a result of this hearing, and in the light of the other circumstances of the case, she rejected the petition for return and decided that the minor should 'remain with her mother, with generous arrangements for visits by the father'. The Cámara de Apelaciones reversed this decision and the mother took the case on appeal to the Suprema Corte de la Provincia de Buenos Aires which reversed the decision of the appeal court for failing to give weight to the opinion of the daughter. As a result the court resolved to let the requesting judge know that the circumstances were such as to prevent it from giving effect to the request.[59]

This line of decisions was followed in the most recent decision of the Suprema Corte de Justicia de la Provincia de Buenos Aires,[60] in a case of international return of minors. By a majority, the court granted the mother's petition for her children to remain in the country. One of the arguments upheld by the majority related to what the minors had said:

> 'In deciding on matters of proceedings for international return, taking the opinion of the minors as to where they wished to live into account could not be omitted, applying art. 13 of the Convention on Civil Aspects of the International Abduction of Minors ratified by law 23.857.' (opinion of Judge Hitters)

For his part, the dissent of Judge Genoud dealt with what the children said, saying:

> 'The minor's right to be heard, set out in art. 12 of the Convention on the Rights of the Child, does not imply that the wish of the child must be unconditionally accepted if that could be detrimental for his upbringing.'

It is easy to see that the dilemma is not whether or not to listen to children or adolescents in a conflict that so clearly involves them, as does their return or their remaining in the country on a petition of a parent, but rather what weight to give to what they say.

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[59] SCBA, 9 February 2005, B d S, D c T, E, LLBA 2006 (febrero), 36.
[60] SCBA, 4 February 2009, B, S M c P, VA, LLBA 2009 (March), 163.

(d) Other questions

However, the cases cited so far are not the only ones in which children and adolescents must be listened to. There is another range of conflicts in which judges must take account of their opinions through listening to them attentively and in person. Examples of these are:

(a) exceptional measures provided in art 39ff of Law 26.061 (which are those ordered in the last resort to remove a child from her or his family);

(b) conflicts over the name;

(c) conflicts over relations with grandparents, other family members, and persons unrelated by blood with whom there is an affective bond that merits respect in accordance with art 7 of the regulatory decree of Law 26.061;[61]

(d) other aspects bound up with the exercise of parental responsibility;

(e) cases on capacity in relation to age and to emancipation;

(f) proceedings relating to pre-adoptive care and adoption;

(g) removal or suspension of parental authority; and

(h) questions relating to guardianship.[62]

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[61] Este articulado expresa que '*Se entenderá por "familia o núcleo familiar", "grupo familiar", "grupo familiar de origen", "medio familiar comunitario", y "familia ampliada", además de los progenitores, a las personas vinculadas a los niños, niñas y adolescentes, a través de líneas de parentesco por consanguinidad o por afinidad, o con otros miembros de la familia ampliada. Podrá asimilarse al concepto de familia, a otros miembros de la comunidad que representen para la niña, niño o adolescente, vínculos significativos y afectivos en su historia personal como así también en su desarrollo, asistencia y protección. Los organismos del Estado y de la comunidad que presten asistencia a las niñas, niños y sus familias deberán difundir y hacer saber a todas las personas asistidas de los derechos y obligaciones emergentes de las relaciones familiares*.' (As a definition section which provides for a broad interpretation of 'family', this could be translated as: 'The terms "*family or family household*", "*family group*", "*birth family*", "*family community*" and "*extended family*" mean, in addition to progenitors, all persons with links to the children and adolescents through consanguinity or affinity or through other members of the extended family. The concept of the family embraces other members of the community with whom the child or adolescent has meaningful emotional bonds through his personal history or their contribution to his development, support and protection. State and community bodies that provide support for children and their families must disseminate and make known to all persons they support the extent of the rights and duties arising from their family relationships'.)

[62] Mattera, Marta del Rosario, 'Tutela: propuestas para una reforma legislativa', *Revista El Derecho*, 8 May 2001.

X CLOSING WORDS: HOW TO ACHIEVE REAL EFFECTIVENESS FOR CHILDREN'S AND ADOLESCENTS' RIGHT TO BE HEARD

We must not lose sight of a vital affirmation: the State is the ultimate guarantor of everyone's human rights, including those of children and adolescents. In this, it is the State itself that has a duty to take every possible positive measure needed to ensure the full force of children's rights (National Constitution, art 75(23) and CRC, Art 4). As a result, the State must implement whatever is needed to guarantee the effectiveness and efficacy of the child's right to be listened to in the field of justice.

If we do not want the hearing of the child in court to turn into a mere procedural formality to comply with the legal requirements, the essential infrastructure must be created to make available to judges the time, human resources and material sufficient to enable them to satisfy that principle themselves, directly. At the same time, interdisciplinary teams that support the court must have a suitable organisation of specialised personnel, capacity and technical resources.

Once more we invoke Consultative Opinion 17/2002 of the Interamerican Human Rights Court which, in para 95 asserts that:

> '. . . the conditions for a child to take part in proceedings are not the same as for an adult to do so. To hold any other view is to deny reality and would neglect the taking of special measures to protect children, to their grave detriment. It is, therefore, essential to recognise and respect the differences in treatment that correspond to the different situations of participants in proceedings.'

Argentine doctrine has emphasised some of the necessary conditions for the child's right to be listened to, to be effective. Among others we mention the following:

(a) the importance of having the right environment to avoid threatening and inhibiting situations, which by their very nature may be detrimental to a child's freedom of expression;

(b) the need for the availability of trained judges to listen to the child since, as we have said, the difficulty is often not rooted in the child's inability to express himself, but in the unpreparedness of adults to listen to him, and this calls for specialised training to permit the interpretation of what the child says clearly and in context; and

(c) the relevance of progress in research in the field, which gathers experiences in applying the child's or adolescent's right to be listened to, as this permits a diagnosis of the successes and the problems that arise in

putting it into practice and, at the same time provides a basis for working out reforms in accordance with the aim of closing or reducing the gap between rights and reality.

We finish this chapter with a sense that Argentine law has taken an important step forward to allow the child to speak in defence of his rights, but it is necessary to create the practical conditions for his voice to be given value and respect. This participation has become more complex through the introduction of the 'child's advocate' by art 27 of Law 26.061 and the resulting notion of 'a technical defence'. If we have advanced some questions with a view to opening new directions towards other concerns that deserve deeper consideration in further work, this analysis will help to complement and deepen yet more the implications and possibilities for extension of a human right so rooted in democratic values as the right of children and adolescents to be heard.

Australia

THE FACES OF THE FULL COURT – FAMILY LAW IN AUSTRALIA

Frank Bates[*]

Résumé

Au regard des développements législatifs de l'année 2006, en particulier l'adoption du *Family Law Amendment (Shared Parenting Responsibility) Act 2006*, l'on aurait pu s'attendre à ce que 2007 soit une année chargée pour la *Family Court of Australia* et ce fut effectivement le cas. Cependant, si les tribunaux de première instance sont loin d'avoir été submergés par les évolutions de la nouvelle législation, l'activité des Cours d'appel a été considérable – la *High Court of Australia* elle-même s'étant prononcée – dans tous les secteurs du droit de la famille. Ainsi, 2007, qui n'a pas fourni de précisions sur cette législation, pourtant révolutionnaire et de grande envergure, se révèle une année globalement intéressante.

Cette contribution traite, sur le plan pratique et processuel, des évolutions juridiques relatives au mariage, aux enfants, aux finances et à la propriété.

I INTRODUCTION

In view of the legislative developments in 2006,[1] one might have appropriately expected that 2007 would have been a busy year for the Family Court of Australia, as, indeed, it has. However, far from being overwhelmed with developments resulting from the Act, especially at first instance, one has seen considerable activity at appellate level, including one High Court decision,[2] across the whole spectrum of family law. Thus, 2007 has been interesting for its general relevance, rather than the explication of one, albeit revolutionary and wide-ranging, item of legislation.

II MARRIAGE

The first reported case in 2007, in which the Full Court of the Family Court of Australia was involved, related to the law of marriage and its evidentiary

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1 Family Law Amendment (Shared Parenting Responsibility) Act 2006.

2 *Mead v Mead* (2007) FLC 93-327 on the issue of contempt. See below text at n 124.

presumption. *Lockhart v Lockhart*[3] involved an appeal by a husband against a declaration made at the first instance that the parties were validly married.[4] Initially, the wife had filed an application for property settlement and in respect of other financial matters, alleging that the parties had been married in Ghana in 1997. They had separated some 8 years later. In response, the husband had claimed that the parties were not married and sought a declaration to that effect and that the wife's application be dismissed. The husband appealed against the declaration that the marriage was valid on two grounds: first, that the trial judge was wrong in law in finding that the marriage based on cohabitation and repute had been established; second, that the trial judge had erred in deciding that the husband had failed to rebut the presumption and had failed to provide adequate reasons for so deciding. The Full Court[5] allowed the husband's appeal.

The first point made by the Full Court was[6] that the trial judge did not find that there had actually been a ceremony of marriage between the parties and that he had not accepted the evidence of either and, indeed, had stated that their evidence could not be relied upon. The Full Court then went on to consider[7] the earlier case-law, especially applicable where it could not be found that there had been a marriage ceremony, and what other circumstances fell to be considered to determine whether the presumption arose.[8]

The Court considered[9] that those cases, notably *Re Taylor* – on which the trial judge appeared to have especially relied – supported 'a proposition that where parties have lived together for a significantly long period of time and there is evidence of reputation from others in favour of the parties having been married the presumption arises and may be rebutted only with clear evidence showing that the parties had not married'. As regards the facts of *Lockhart* itself, the Court took the view[10] that there was little evidence provided about reputation and, in their opinion, it was 'necessary to have sufficient evidence to enliven the presumption where there is either no evidence of marriage or findings are made by a trial judge as in this case'.

The Court also stated that, were the trial judge unable to believe the applicant, a very real question arose as to whether the presumption should be applied, especially if it has the effect of reversing the onus of proof. 'There was no evidence', the Full Court emphasised, 'from any person other than the parties except the documentary evidence which we find, on balance, was more supportive of a de facto relationship than a marriage and was, if necessary, the

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3 (2007) FLC 93-308.
4 See Family Law Act 1975, s 113.
5 Kay, Warnick and May JJ.
6 (2007) FLC 93-308 at 81, 306.
7 Ibid at 81, 307ff.
8 See *Axon v Axon* (1937) 59 CLR 395; *Jacombe v Jacombe* (1961) 105 CLR 355; *Re Taylor Dec'd* (1961) 1 WLR 9; *Sheludko v Sheludko* [1972] VR 83; *Bonderenko v Bonderenko* (1967) 10 FLR 320; *Piers v Piers* (1840) 2 HLC 362; *Re Shepherd, George v Thyer* [1904] Ch 456.
9 (2007) FLC 93-308 at 81, 309.
10 Ibid at 81, 310.

rebuttal evidence.' The Court's final view[11] was that the application of the presumption must be consonant with the evidence, not sit, as here, in an evidentiary vacuum.

It should be said that this commentator is not wholly sanguine about the Full Court's decision in *Lockhart*. Of course it may very well be congruent with earlier case-law and with the general view which had been expressed by Watson J in *Kirby and Watson*,[12] to the effect that too much ought not to be expected of the presumption of marriage. At the same time, it is suggested that *Lockhart* is not congruent with more recent case-law from England, which has been found in circumstances in a multicultural society where the presumption of marriage may be of direct relevance.[13]

Finally, it is hard to reconcile the Full Court's comment[14] about the presumption not being permitted to sit in an evidentiary vacuum with the utility of presumption generally. The purpose, surely, of the presumption of marriage is precisely to do that – to provide an effective and fair solution where there is an evidentiary vacuum. As is apparent, though, despite the parties' apparent mendacity in the present case, records may be lost, destroyed or not properly kept, and the aim of the presumption is to fill the gap which is created by administrative deficiency.

III CHILDREN

Once again, decisions on the law relating to children have covered a significant spectrum: some cases do concern the Family Law Amendment (Shared Parenting Responsibility) Act 2006, whilst others, in dealing with matters not directly germane to its content and operation, touch upon it, and others, at the same time, deal with issues which are always with us, regardless of changes to the legislation.

Thus, shockingly but predictably, the issue of sexual abuse and the related notion of risk are a continuing part of child law in Australia. In *Potter and Potter*,[15] the father had appealed against orders for supervised contact between his 6-year-old daughter and himself. Following, the parties' separation, the child had lived with her mother and had spent time with the father, as had been agreed between them, approximately, once each weekend and overnight on a few occasions. Periodically, the mother and child resided with the maternal grandparents and, from time to time, the child referred to the father and both

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11 Ibid at 81, 311.

12 (1977) FLC 90-261.

13 See *Chief Adjudication Officer v Bath* [2000] 1 FLR 8; *Pozpena De Vire v Pozpena De Vire* [2001] 1 FLR 460; *R (G) 2/70* (Unreported) 6 February 1970; *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage*) [2001] 2 FLR 6. For comment see A Borkowski 'The Presumption of Marriage' (2002) 14 *Child and Family Law Quarterly* 251.

14 Above, text at n 11.

15 (2007) FLC 93-326.

maternal and paternal grandfathers as 'daddy'. When the child was aged about 3 years, she made a disclosure to her mother regarding inappropriate touching of her by 'daddy'. In addition, the child had also been observed at both home and day care indulging in masturbatory behaviour.

At first instance, after hearing expert psychiatric evidence, the judge concluded that the child had been abused sexually, but could not make a finding as to the perpetrator. In so doing, the trial judge returned to the High Court of Australia's well-known decision in *Briginshaw v Briginshaw*[16] and its legislative adoption in s 140 of the Evidence Act 1995, which governs proceedings in the Family Court of Australia, and she concluded that the child would be subjected to an unacceptable risk[17] of harm if she were to spend unsupervised time with the father.[18] At the appeal, the father submitted, first, the trial judge had incorrectly made a positive finding of sexual abuse and, secondly, that the trial judge's findings of unacceptable risk were against the weight of the evidence.

In allowing the appeal, the Full Court[19] referred[20] to the dictum of Fogarty J, albeit in dissent, in *N v S*,[21] that:

> ' . . . the essential importance of the unacceptable risk question is as I see it is in its direction to judges to give real and substantial consideration to the facts of the case, and to decide whether or not, and why or why not, those facts could be said to raise an unacceptable risk of harm to the child. Thus, the value of the expression is not in a magical provision of an appropriate standard, but its direction to judges to consider deeply where the facts of the particular case fall and to explain adequately their findings in their report.'

In that context, the Full Court in *Potter* considered[22] that the trial judge had not properly evaluated all of the evidence in making the finding she had done in respect of the father.

At the same time, though, the Full Court was forced to acknowledge that the trial judge had been encouraged to make a positive finding of abuse by the concessions of counsel. However, on a proper examination of the evidence, *Potter* was not a case where 'a positive finding of abuse enabled the Court to find what kind of abuse had occurred and in what circumstances, and if there were more than one possible perpetrator, to identify him'.

The Full Court further went on to comment that, despite the various concessions, it was never articulated what the nature of the abuse found by the trial judge to have occurred actually was. The Full Court emphasised that such

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16 (1938) 60 CLR 336.
17 See *M v M* (1988) 166 CLR 69 at 76ff.
18 In addition, the mother was to ensure that the child was not left alone with the maternal grandfather.
19 Bryant CJ, Coleman and May JJ.
20 (2007) FLC 93-326 at 81, 636.
21 (1996) FLC 92-655 at 8, 713.
22 (2007) FLC 93-326 at 81, 638.

uncertainty and inexactness would necessarily be reflected in a proper consideration of whether the father did pose an unacceptable risk to the child. That analysis, the Full Court stated, 'would have included a consideration of whether, despite the findings that something had occurred to the child by either the father or maternal grandmother [sic], nevertheless the risk of harm to the child outweighed the possible benefits to her from having that contact'. As the trial judge did not apply that test[23] and, because she had failed so to do, she was in error. In upholding the appeal, the Full Court considered[24] that the matter ought to be reheard. They did so, first, because without the various concessions made by counsel, it was not clear whether the positive finding would have been made. Secondly, in any event, there was likely to be further evidence which might throw light on the findings made originally.

In addition to the father's appeal, there was also a cross-appeal by the Child Representative. Although, given the decision in respect of the father's appeal, it was not necessary for it to be considered, the Court did make various observations. There were two grounds relied upon by the Child Representative: first, that the trial judge was in error in making a positive finding where it was not possible to make a finding as to the identity of the perpetrator; and secondly, where the perpetrator was likely to be in continuing contact with the child. This was strange, as, at trial, the Representative had supported the judge in her positive finding.

Further, the Separate Representative argued that the trial judge had not been specific as regards the child and her maternal grandfather. That was unusual as the basis of an appeal was that the maternal grandfather was not a party to the proceedings and, in addition, the Representative had conceded that it was open on the evidence that both the father and maternal grandfather posed an unacceptable risk were the contact to be unsupervised.

Although the decision in *Potter* contains many features which are welcome, the level of analysis required by the Full Court is, surely, eminently desirable and may also help to clarify the role of trial judges in dealing with this most difficult of areas. The position of the maternal grandfather is most unclear and, given the success of the father's appeal, that person is now in a most unenviable situation. The initial positive finding of abuse, the father's successful appeal and some obiter remarks might place him in a less than happy position at any rehearing.

The decision in *Vasser and Taylor-Black*[25] raised other, though still rather disturbing, issues from those which were discussed in *Potter*. In *Vasser*, the mother had appealed against the decision of a Federal Magistrate in relation to interim parenting orders. That decision involved one child of the marriage, a girl aged 5 years, concerning whom final orders had been made in March 2004. Those orders had provided for week-about shared care arrangements (one week

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23 See *B v B* (1993) FLC 92-357 at 79, 778.
24 (2007) FLC 93-326 at 81, 638.
25 (2007) FLC 93-329.

to the mother followed by one week to the father) made from the child's commencement of school in January 2007.

In that month, the mother claimed that the child had complained of sexually inappropriate behaviour by the father. The mother then refused to return the child to the father in accordance with the existing orders. She claimed that she had done so on advice which she had received from the Department of Community Services, pending an investigation by them. The father then brought an application seeking a recovery order and he claimed that the child was being placed at an unacceptable risk of psychological harm in the mother's care.

The Federal Magistrate made interim orders, against which the mother appealed, that the child should live, subject to particular undertakings given by the father to protect the child from any risk of sexual abuse, with the father and to spend time with the mother twice per week for 3 hours each time. The mother appealed successfully to the Full Court of the Family Court of Australia.[26] The central grounds of appeal will be considered seriatim.

First, the Federal Magistrate was in error by failing to grant an adjournment sought by the mother. The Full Court took the view[27] that, by failing to grant the adjournment, the Magistrate had failed to provide himself with an opportunity to have the best evidence available to determine the child's best interests. The Court also noted that a short adjournment would have permitted the appointment of an independent children's lawyer, whose inquiries and submissions would have been relevant to the orders sought. Such an adjournment would not have prejudiced the investigations to be carried out by child welfare organisations to whom the mother had reported the matter.

Secondly, it was argued that the Federal Magistrate was in error in finding that the child was exposed to an unacceptable risk of psychological abuse whilst in her mother's care. First, the Full Court pointed out that the Federal Magistrate had failed to identify the law, especially that set out in *M v M*.[28] In addition, on the facts of *Vasser and Taylor-Black*, the Full Court commented[29] that they were unable to discern from the reasons provided by the Federal Magistrate the reasons for his finding of an unacceptable risk of psychological abuse in the mother's household. At the same time, they stated that, although they accepted that reasons in an interim matter need only be relatively brief, some limited analysis which sought to link findings to a conclusion of unacceptable risk was necessary.

In addition, the Full Court further accepted submissions made on behalf of the independent children's lawyer that the Federal Magistrate ought to have conducted an analysis of the risk of abuse so as to determine the safeguards

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26 Finn, Boland and Ryan JJ.
27 (2007) FLC 93-329 at 81, 673.
28 Above in n 17 and see text at n 17.
29 (2007) FLC 93-329 at 81, 676.

which ought to be put in place and, if such safeguards were on an interim basis, adequate ones. Although he did conduct such an analysis in respect of the father – and found no exposure to such a risk – he had not done so in respect of the mother and her household.

Thirdly, it was further alleged that the Federal Magistrate had failed to assess the risk to the child of separation from the mother. It was submitted on behalf of both the mother and independent counsel for the child that adequate reasons had not been given in regard to the impact of his orders on the child's longstanding care arrangements. In respect of the failure, the Federal Magistrate had not followed the approach which had been suggested in interim matters in the Full Court's earlier decision in *Goode and Goode*[30] on various statutory provisions.[31] As regards those particular submissions, on behalf of the mother, in addition to *Goode* and the statutory provisions which had been inserted into the Family Law Act 1975 in 2006, the Federal Magistrate had failed to take into account the necessity to assess the impact on the child of the sudden cessation of her living arrangements with her mother and the very limited time which she would consequently spend with her mother.

As regards the submissions made on behalf of the independent children's lawyer, the Full Court was of the view[32] that it was important to rehearse the principles set out in *Goode and Goode*[33] regarding the conduct of interim proceedings. These were:

(1) the identification of the parties' competing proposals, the issues in dispute at the interim hearing and any agreed or uncontested facts;

(2) considering the matters in s 60CC of the Family Law Act 1975, which sets out the matters to be taken into account by the Court in deciding the children's best interests, and, where possible,[34] to make findings about them;

(3) deciding whether the presumption contained in s 61DA of the Family Law Act 1975 that equal shared responsibility is in the best interests of the child applies, or does not apply because there are reasonable grounds to believe that there has been abuse of the child or family violence, or, in an interim matter, the Court does not consider it appropriate to apply the presumption;

(4) if the presumption does apply, deciding whether it is rebutted because the application of it would not be in the child's best interests;

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30 (2006) FLC 93-286.
31 Family Law Act 1975, ss 60B, 60CA, 60CC and 61DA.
32 (2006) FLC 93-329 at 81, 676.
33 (2006) FLC 93-286 at 80, 898.
34 The Court noted that, in interim proceedings, there may be little uncontested evidence to enable more than a limited consideration of these matters to take place.

(5) if the presumption does apply and is not rebutted, then considering making an order that the child spend equal time with each parent unless it is contrary to the child's best interests as a result of an examination of the factors set out in s 60CC or is impracticable;

(6) if equal time is not to be found to be in the child's best interests, then considering making an order that the child spend 'substantial and significant' time[35] with each parent, unless that is contrary to the child's best interests as found by a consideration of the issues contained in s 60CC, or is impracticable;

(7) if neither equal nor substantial or significant time is found to be in the child's best interests, then making such orders, in the Court's discretion, or as in the child's best interests, having regard to the provisions of s 60CC; and

(8) even if the presumption is not applied or is rebutted, then the Court should make such an order as is in the child's best interests, as a result of considering the factors in s 60CC.

However, even then, the Court may need to consider equal time or substantial or significant time, particularly if one of the parties has sought it or, even if not, if the Court considers that, after affording procedural fairness to the parties, such a course is in the best interests of the child.

In *Vasser and Taylor-Black*,[36] the Full Court remarked that, had the Federal Magistrate followed the steps set out in *Goode*, he might not have fallen into error. He did not do so, and, hence, his failure constituted an appealable error. In addition, the Full Court saw merit[37] in a submission made on behalf of the mother that the Federal Magistrate had failed to take appropriate account of the timing of the mother's reporting of the child's disclosures to the relevant child welfare authority and, likewise, in relation to the mother's solicitor's delay in filing an urgent application.

As with *Potter*, the decision in *Vasser and Taylor-Black* demonstrates, as it ought, the need for courts to carry out appropriate analysis and inquiry. If that is not done at first instance, then an appealable error is likely to be found to have occurred. This is, surely, as it ought to be.

Two further issues which have, similarly, become a part of Australian child law arose in 2007. First, in *M and S*,[38] Dessau J was required to deal with the continuing issue of parental relocation. In that case, there was an application by the mother of an 8-year-old girl to relocate for 3 years to the United Kingdom. She was seeking to join her present husband who had accepted a

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35 See Family Law Act 1975, s 65DAA(3).
36 (2007) FLC 93-329 at 81, 677.
37 Ibid at 81, 677.
38 (2007) FLC 93-313.

lucrative position there. If she were successful in relocating, the mother proposed that the child spend time with her father for two periods of 3 weeks each year.

The mother lived in Melbourne and the father in Canberra. The child was living with her mother and spent time with the father for 2 weekends during school term and half of the school holidays. The father opposed the mother's application to relocate and also sought to increase his time with the child to 3 weekends per school term. In so doing, he argued that a meaningful relationship with his daughter would not be possible were she overseas and he also claimed that the mother did not encourage his relationship with the child. The mother denied any such unwillingness. It was, though, agreed that, whether the child lived in Melbourne or in the United Kingdom, the concepts neither of equal nor of substantial and significant time was practicable and, hence, the issue had to be determined in accordance with the child's best interests. In the event, Dessau J held that the mother be permitted to relocate to the United Kingdom with the child for 3 years.

Having found that the issue was to be determined in the child's best interests the major legislative source was, hence, s 60CC. However, the judge, first, commented that:[39]

> 'Although there is nothing in the new legislation explicitly altering the previous approach to relocation whereby the court was obliged to consider the child's best interests as the paramount consideration, the amended Act does provide a context, through its objects, principles and particular considerations that is substantially different from the context in previous legislation.'

Within that context, Dessau J went on to state[40] that the approach set out in *Goode*[41] provided an appropriate guide. However, at the same time, Dessau J emphasised that 'the legislature has not diminished the best interests test as integral to any parenting issues, including the difficult issue of relocation'.

On the question, therefore, of best interests, the judge, first, turned her attention to the primary considerations as they were to be found in s 60CC of the amended Act.[42] The first she examined[43] was the benefit of the child's having a meaningful relationship with both of the child's parents. The judge pointed out that the likely impact of the relationship between the child and her father was integral to the decision: it was important for her overall well-being and healthy development that she be able to enjoy their relationship, to

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39 Ibid at 81, 385.
40 Ibid at 81, 386.
41 Above text at n 33.
42 Family Law Act 1975, s 60CC(2).
43 (2007) FLC 93-313 at 81, 387.

experience his input into her upbringing, and, hence, to develop her own sense of identity through him and the paternal family.[44]

After that, the judge considered, even though the matter of the child's relationship with the natural father would be further discussed from various standpoints, it was necessary to examine the additional relevant factors contained in s 60CC. The first of these to be considered was s 60CC(3)(a), which specified the views expressed by the child and any factors (such as the child's maturity or level of understanding) which the court thought were relevant to the weight it should give to those views. Dessau J noted[45] that, although the child had broadly stated that she wished to go to the United Kingdom, her views appeared to reflect a conflict.

The judge then turned her attention to the nature of the child's relationship with each of the parents and any other persons, including grandparents or other relatives. In addition to her natural parents, Dessau J commented[46] that the child enjoyed the close, extended family of her father and her stepfather and his children. More particularly, the judge then examined the question of the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent, which she considered to be an especially important matter. It was also a matter which was a cause of dissension between the parents: the father considered that the mother had never truly appreciated his importance in the child's care.[47] The mother denied those claims and, in turn, agreed that the father had never accepted her remarriage. In sum, the judge considered the parties were now polarised 'each with their myopic perspectives that cloud their capacity to fully appreciate the other's position'. After having considered the whole context of the various relationships, Dessau J concluded[48] that the father had exaggerated and overdramatised his claims, whereas, overall the mother's conduct left her confident that she was willing to encourage the relationship between the child and her father. Likewise, the judge was unable to see[49] any likely significant changes in the various relationships involved in the case.

As regards the practical difficulties and expense of conducting the relationship and whether it would substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis, serious problems relating to the child's travelling to spend time with her father existed. However, the judge commented[50] that, as matters stood presently, the child was

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44 It was agreed that the need to protect the child from physical and psychological harm and from being subjected to or exposed to abuse, neglect or family violence was not an issue in the present case.

45 (2007) FLC 93-313 at 81, 388.

46 Ibid at 81, 389.

47 The father claimed the mother had made contact difficult, had not facilitated telephone and e-mail contact and had not been flexible in permitting him to spend time with her over and above the specified court orders.

48 (2007) FLC 93-313 at 81, 392.

49 Ibid at 81, 393.

50 Ibid at 81, 394.

used to travelling between locations. However, she was 'not suggesting there is a direct comparison between that travel and longer overseas travel, or monthly visits'.

The judge considered the other factors to be found in s 60CC(3), though not in any significant detail, as the matters which they involved had been largely appropriately considered in relation to those earlier described. Dessau J did, however, state[51] that it was appropriate for her to consider various risks. First, it might be a reasonable risk to suggest that the mother and her new husband's relationship might be impeded were they to live in different countries, as the husband may face, 'the frustration of the financial impost of a child who is not his biological child, without being able to earn a maximum income now, and in the future back in Australia'. Further, there was the risk whether the family would return to Australia if permitted to spend time overseas. However, she thought that the evidence supported the view that they would: they had consistently expressed their wish to do so, so that the child could complete her schooling there and the mother had always, in the past, complied with court orders. Hence, the judge was of the view[52] that the family would return.

In the end, Dessau J concluded that, having weighed the risks, there was a lower risk of harm to the child from opening this opportunity to her mother, than to close it. As regards the mother, the judge said that if 'she cannot relocate, the mother is put in a terrible position of torn conflict and loyalty and her secure marriage relationship potentially imperilled by stress. It is a relationship in which [the child] is supported and nurtured and able to flourish'.

By way of comment, it may be that *M and S* will not be much welcomed by many who supported and urged the 2006 legislation. Journalistically and anecdotally, much of the pressure for these amendments came from groups of dissatisfied fathers who had long and loudly expressed the view that the Act, especially the amendments made to it in 1995, were biased in favour of women. After *M and S* was decided[53] the, then, Federal Attorney General evinced an intention of further amending the Act so as to deal with the issue of relocation.

Other matters which are specified in s 60CC(3) relate to the lifestyle, culture and traditions of the child as well as the child's right, if of Aboriginal or Torres Strait Islander culture, to enjoy that culture with other people who share that culture. Although that matter has long been regarded as relevant to Australian family law matters, it was examined in 2007 by the Full Court of the Family Court of Australia in *M and L (Aboriginal Culture)*[54] which involved an appeal against parenting orders made by a Federal Magistrate. These orders provided that the two children live with the father and his family in the north-eastern region of the Northern Territory and have the opportunity to spend as much time as possible with their mother and her family on the outskirts of a small

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51 Ibid at 81, 396.
52 Ibid at 81, 397.
53 The Australian Federal Government changed, after almost 12 years, in November 2007.
54 (2007) FLC 93-320.

town located to the east of Darwin. The mother submitted eight grounds of appeal including the alleged failure of the Magistrate to give sufficient weight to the mother's cultural background and history. The other factors involved in the appeal were issues such as the Magistrate's failure to give sufficient weight to the children's primary attachment being to the mother; that insufficient weight had been given to the fact that the father had had little involvement in the lives of the children, particularly since the parents' separation; that there had been a like failure to consider the effects of the father's violence and alcohol consumption on the children; also that insufficient weight had been given to the fact that the mother had been the children's primary carer since their birth. The Magistrate had also failed to consider the relationship between the children and a sibling who was soon to be born. Finally, the Magistrate had been in error in finding that the mother had left the children with other people regularly for extended periods of time. The Full Court[55] allowed the appeal by a majority.

In the majority, Kay J, first, noted that:[56]

> '. . . the prospect of the children being able to be frequently exposed to company and culture of the absent parent is made all the less likely by the tyranny of distance and the significant lack of resources in either household . . . [the Court] needs to choose in which parent's care the best interests of the children lie. It must do so on the available evidence.'

On that issue, Kay J stated that no evidence had been properly provided as to the mother's care being inadequate. Conversely, there was ample evidence of the father's violence and alcohol abuse. Kay J suggested that those matters appeared to have been put aside and matters aimed at maximising the children's opportunity to become immersed in their patrilineal culture had come to dominate the matter. It should be said, as the judge pointed out,[57] that both parents were of indigenous background. After considering the evidence, Kay J concluded[58] that the first instance finding was unsupportable, in essence, for those reasons.

The other judge in the majority, Strickland J, commented[59] that the Federal Magistrate had significantly relied on the evidence and recommendations of a Family Consultant who had compared the alternative communities in which the children might live on an assumption that, in both communities, the children would be brought up in 'a collectivist manner'. Strickland J, having examined the evidence and the Magistrate's conclusions, was of the opinion[60] that it was wrong to evade the realisation that, because of the nature of the community in which the mother lived, the children would largely be cared for by her and not in any wider community. Hence, it was not possible for the

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55 Kay, Warnick and Strickland JJ.
56 (2007) FLC 93-320 at 81, 503.
57 Ibid at 81, 506.
58 Ibid at 81, 520.
59 Ibid at 81, 521.
60 Ibid at 81, 522.

Federal Magistrate, as he had done, to evade the issues relating to the primacy of the mother's care and the father's behaviour. Strickland J was also critical of the Magistrate for having used inadmissible evidence against the wife in respect of the claim that she left the children in others' care for long periods.

In dissent, Warnick J, though, did consider[61] that the Federal Magistrate had failed to give proper weight to the matter raised in the appeal but was not prepared to find that he had wrongly dealt with the evidence available to him or that he had been unduly influenced by the evidence of the Family Consultant.

In the event, the parents' competing applications were remitted for rehearing. All in all, *M and L* is not an easy case to evaluate as so much depended, in all of the judgments, on an evaluation of the evidence of particular circumstances. In the views of the majority, the issues pertinent to the children's cultural identity were treated as being subordinate to other matters relating to aspects of their parenting. This may be because of the structure of the 2006 amendments to the Act, or because of the graphic nature of those particular aspects.

The effect of those 2006 amendments was considered by the Full Court of the Family Court of Australia in *Vanderhum and Doriemuns*[62] which concerned an appeal by the father against parenting orders whereby the two children, aged 5 and 3 years, were to live with the mother and spend time with their father. At the hearing, which had been heard in late 2005 and early 2006, the father sought a joint care arrangement. One of the children had significant health problems and the father, owing to a physical impairment, required help with parenting. There was also continuing conflict between the parents, the source of which was found by the trial judge to be caused by the father's attitude to, and behaviour towards, the mother. It was argued by the father that the trial judge was in error in failing to take into account the changes to the Act foreshadowed in the 2006 amendments. The Full Court[63] dismissed the father's appeal.

The Full Court noted[64] that, did Part VII of the Family Law Act 1975, as amended in 2006, apply to the instant proceedings, then it would apply to an exercise of discretion by the Full Court on a rehearing, in the event of the appeal succeeding. However, they were not persuaded that Part VII in its present form governed the appeal. As the Court emphasised, 'the common law has clearly and consistently regarded the retrospective operation of statutory provisions as exceptional, as have the principles of statutory construction'. Accordingly, that ground of appeal failed as, really, it was bound to do. Further, the Court found[65] that the 2006 amendments to Part VII of the Act did not, nor were intended to, impact on Part X or to the applicable law governing review of decisions made prior to the commencement of those

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61 Ibid at 81, 519.
62 (2007) FLC 93-23.
63 Coleman, Warnick and Thackray JJ.
64 (2007) FLC 93-234 at 81, 610.
65 Ibid at 81, 610.

provisions. Finally, the Court found[66] that the judge at first instance had made no error in the application of the law as it existed at the time of the hearing which was prior to the commencement of the 2006 amendments. As there was no error in the appellate sense,[67] there was no basis for the Full Court to interfere. All of that is, of course, as it should be, though it is rather disturbing that the issue had to be raised at an appellate level at all. What it might, disturbingly, demonstrate is the effect of the governmental publicity which attached to the amendment in question.

In practical terms, parenting orders are all very well, if they are observed, but contraventions are far from uncommon and the judicial response under the 2006 legislation is, given its nature, of particular interest. The matter was first considered by the Full Court in *Irvin and Carr*[68] which involved an appeal by a mother against variation of parenting orders made by a Federal Magistrate following a contravention hearing. The Magistrate had ordered that the child live with the mother and spend time with the father each alternate weekend, overnight each alternate week and for half of the school holidays. The parties both lived in a particular area of Queensland, but, in fact, the mother had bought a house in New South Wales with the intention of moving there but had not disclosed the fact. At the contravention hearing, the mother was placed on a bond and ordered to relocate back to the original location in Queensland. Otherwise, the child would live with the father and spend time with the mother in terms of the original orders. The mother failed to relocate. On appeal, it was argued by the mother that she had been denied procedural fairness at the contravention hearing owing to the father's late service of his application on her. Secondly, the Magistrate was in error that the child live with the father and, thirdly, he had made orders which were outside both parties' parenting proposals. The Full Court[69] dismissed the appeal.

As regards the first ground of appeal, the Court was quick to comment[70] if the wife or her solicitor 'had not had sufficient notice of the father's application or time to consider the father's material, an adjournment should have been sought. It is clear from the transcript of the hearing that no adjournment was sought; indeed, the transcript reveals that no complaint was made'. In those circumstances, the Court considered, it was not open to the mother to raise the issue of procedural fairness. As regards the second ground, the Court noted[71] that the decision was fairly balanced, though a reading of the Magistrate's very thorough reasons revealed that the child's interests would be well served by living with the father. As regards the Federal Magistrate's approach in dealing with the mother's contravention, the Full Court was of the view[72] that that approach was entirely appropriate.

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66 Ibid at 81, 600 ff.
67 Ibid at 81, 607.
68 (2007) FLC 93-322.
69 Finn, Warnick and Boland JJ.
70 (2007) FLC 93-322 at 81, 570.
71 Ibid at 81, 571.
72 Ibid at 81, 572.

During the course of *Irvin and Carr*, the Court made reference[73] to a decision of Warnick J sitting as a single judge in a similar matter. That case was *Sandler and Kerrington*[74] which concerned another appeal by a mother against an order of a Federal Magistrate following a contravention hearing. A parenting order had been made, some 9 months prior to the contravention order, to the effect that the child, who was aged 4 years, should live with his mother and spend time with his father. The Magistrate purported to alter the parenting order pursuant to s 70NBA of the Family Law Act 1975 on an interim basis, placing the child in the father's care. The mother appealed on the grounds, first, that the Magistrate was in error in failing to afford her procedural fairness in relation to the service of the contravention documents. Secondly, the Magistrate had failed to consider the child's best interests as well as the reasons given by a judge who had determined the primary matter.

Warnick J dismissed the appeal and, in so doing, considered the operation of s 70NBA of the Act. Section 70NBA, which deals with the court's power to vary parenting orders, should, the judge thought,[75] be approached no differently from any other application in respect of a parenting order. That is, it had to be considered by reference to ss 60CA,[76] 60CC,[77] 61DA[78] and 64B[79] as well as the earlier decision of the Full Court in *Rice v Asplund*[80] which emphasised the need for courts to evaluate carefully the proposals made by each parent. Further, Warnick J was of the view[81] that, notwithstanding the fact that the Federal Magistrate had acted unjustly towards the mother in relation to procedures (albeit in a relatively minor way) and had failed to conduct the inquiry in the appropriate manner, it was not in the child's best interests to be subject to further distress by the father, pending further proceedings.

In connection with variation of orders, the matter of persistent litigation has, not altogether surprisingly, occurred. In *Watson and Morton*,[82] the father had appealed against orders that he be restrained, for a period of 3 years, from bringing any further application for parenting orders. He also appealed against the decision of the trial judge refusing to grant leave to the father for him to bring further applications for parenting orders. An order under s 118 of the Family Law Act 1975 which seeks to restrict proceedings which are thought to be frivolous or vexatious had been made against him in October 2003. The Full Court of the Family Court of Australia[83] allowed the father's appeal in part.

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73 Ibid at 81, 571.
74 (2007) FLC 93-323.
75 Ibid at 81, 587
76 That the child's interests were to be the paramount consideration in the making of a parenting order.
77 How courts determine what is in children's best interests.
78 The presumption of equal shared parental responsibility when making parenting orders.
79 The meaning of parenting orders and related terms.
80 (1979) FLC 90-725.
81 (2007) FLC 93-323 at 81, 588-9.
82 (2007) FLC 93-331.
83 Coleman, May and Thackray JJ.

As regards the father, the Court noted[84] initially that there had never been any doubt, at any stage, that the applicant was entirely sincere in his wish to see the children. At the same time, it appeared[85] that he had evinced an intention to continue making applications to the Court and it was not clear on what power the trial judge had relied in restraining the applicant from making *any*[86] approach to the Court. However, it was also clear, the Court considered,[87] that, as there had been an apparent change in the applicant's circumstances, as was required, the trial judge's initial discretion had not miscarried. However, the order made which restrained the father from bringing any further application for parenting orders for 3 years was beyond the powers conferred on the Court by s 118,[88] which only empowered the Court to restrain a person from instituting proceedings without the Court's leave. More generally, the Full Court stated[89] that there was no inherent power to restrain a person from commencing new proceedings.[90] Further, the Full Court emphatically concluded[91] that unimpeded access to the courts is a fundamental right, which can only be abrogated or curtailed by a statutory provision.[92]

What effect *Watson and Morton* will have is difficult to predict: immediately, one might think that it will make the position of habitual litigants/applicants easier and, thus, take up the time of already busy courts even more. This possibility is yet more troubling given a prediction that the 2006 amendments may lead to an increase in litigation over children in any event. On the other hand, it may just as equally be that the case should properly be restricted to its own facts.

IV FINANCE AND PROPERTY

Just as allegations relating to the risks attaching to the possibility of child sexual abuse are an entrenched part of modern family law, so are acrimonious disputes about finance and property, including some at basal level. So it was in 2007. Thus, in *Harrington and Harrington*,[93] there was an appeal by the wife against an order for property settlement which had the effect of dividing the property pool 47% to the husband and 53% to the wife. During the course of a long marriage, the wife had received various inheritances from an aunt, her mother and the parties' eldest child. The wife argued, first, that the trial judge was in error by including the wife's paid legal costs in the assets pool. Secondly,

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84 (2007) FLC 93-331 at 81, 696.
85 Ibid at 81, 699.
86 The Full Court emphasised the word 'any'.
87 (2007) FLC 93-331 at 81, 627.
88 See also r 11.04 of the Family Law Rules 2004.
89 (2007) FLC 93-331 at 81, 699.
90 See *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311 at 314 per Beswick CJ and McTinnon J.
91 (2007) FLC 93-331 at 81, 700.
92 See *Re Attorney General (Cth); Ex parte Skyning* (1996) 70 ALJR 321 at 323 per Kirby J; also *Coco v The Queen* (1994) 179 CLR 42.
93 (2007) FLC 93-317.

the trial judge had erred in assuming that, in the absence of evidence, the husband had made direct and indirect contributions to the eldest child's support and to his ability and opportunity to accumulate assets. Thirdly, the assessment of the husband's contributions at 60% was manifestly excessive and, fourthly, the s 75(2) adjustment of 7% in favour of the husband was manifestly excessive.

The Full Court[94] dismissed the appeal considering, first, that there were good reasons for the inclusion of the wife's paid legal fees, even though authority to the contrary[95] existed. As regards the second ground, although the trial judge had made an assumption in the absence of evidence, no appealable error had occurred, because the judge had not relied on the assumption, but had made a finding by inference rather than in the absence of evidence.[96]

In respect of the third ground, the Full Court commented[97] that where, as in this case, the trial judge had recorded all the relevant contributions, there was no reason to consider that the trial judge had fallen into error with regard to the weight to be given to one aspect of contribution. That aspect related to the husband's initial contribution to the matrimonial home and the Full Court stated that 'in terms of recognising the wife's contributions in those improvements and maintenance, it is important to acknowledge the findings about the wife's capacity to preserve the inheritance she received and the growth in volume of those investments, because the husband met other expenses'.

Finally, as regards the effect of s 75(2), the Full Court was of the opinion[98] that it would be unduly particular to say that the trial judge had failed to consider the impact of the order on the wife's position.

Section 79, which is the major provision relating to property distribution under the Family Law Act 1975, is predicated entirely on contributions. Matters of need, which are to be found in s 75, are essentially a secondary consideration.[99] Hence, *Harrington* is a case which is usefully illustrative regarding the central position of contribution as a basis for distribution of property on dissolution of marriage.

Another case which is usefully illustrative of a central problem in Australian property law is *Gollings and Scott*[100] which involved an appeal by the husband against property settlement (and spousal maintenance)[101] orders. The property orders required the husband to transfer to the wife his interest in the

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94 Warnick, Boland and Stevenson JJ.
95 See *Chern and Hopkins* (2004) FLC 93-204.
96 (2007) FLC 93-317 at 81, 469.
97 Ibid at 81, 472.
98 Ibid at 81, 474.
99 For comment, see F Bates 'Discretion, Contribution and Needs – Family Property in Australia' [2005] *International Family Law* 218.
100 (2007) FLC 93-319.
101 For comment on spousal maintenance, see below text at n 115.

matrimonial home and discharge the mortgage over it. On appeal, the husband claimed that the trial judge had erred in determining the size of the asset pool available for distribution. Therefore, the initial order meant that the wife received, in effect, more than 100% of the pool. The husband argued that such an order was beyond the power of the Court, or, if within it, was unjust. The husband also submitted that alterations to the pool of assets should be made.[102] The Full Court[103] allowed the husband's appeal.

The Court commented[104] that, once they had adjusted the pool to take account of the various matters which had been argued before them, it became necessary to revisit the orders made by the trial judge. In so doing, the Court was, first, required to give effect to the general principle that orders ought not to exceed the available pool of assets; secondly, to determine what would be just and equitable in all the circumstances. The Court particularly noted that they were not required to undertake the task of assessing the relative value of the parties' contributions as the parties had agreed that their contributions prior to the date of the hearing of first instance were equal. Hence, the Full Court sought to concentrate on the appropriate adjustment to be made to the wife by reason of s 75(2) of the Act.

In so doing, the Court considered,[105] having regard to those factors, that a very significant adjustment should be made in the wife's favour. This was because the husband's earning capacity was 'overwhelmingly larger than that of the wife'. The Court also had regard to the wife's health and her responsibility for the care of the children as well as the benefit to the husband of his occupation of his second wife's property.[106] In the event, all of that raised the wife's entitlement to approximately 98% of the asset pool.

In addition, the Court took the view that there was nothing in the evidence to suggest that the husband's bearing the tax liability in relation to money ultimately utilised by the wife and children was unfair. Finally, an order adjusting property interests under s 79 of the Family Law Act 1975 could not, normally, exceed the totality of the net assets and/or the superannuation entitlements of the parties. Although some orders had been made, in peculiar circumstances,[107] they should be regarded as exceptions to the rule.

Just as disputes as to the asset pool are an inevitable part of the property scene, so are matters relating to non-disclosure of assets. In *Gould and Gould*,[108] the husband had appealed against orders at first instance where the judge had

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[102] These alterations included a deduction in relation to his interest in his new wife's property, a reduction in his superannuation entitlements and an increase in the liabilities to allow for his tax liability paid post-separation.

[103] Finn, Kay and Boland JJ.

[104] (2007) FLC 93-319 at 81, 493.

[105] Ibid at 81, 494.

[106] Account was also taken of the husband's liability to pay spousal maintenance and child support to the wife.

[107] See *Milankov and Milankov* (2002) FLC 93-095.

[108] (2007) FLC 93-333.

divided the net assets of the parties equally, after finding that the parties had made equal contributions to the assets and that he should make no adjustments by reason of s 75(2) of the Act. The trial judge found that the husband had not been open and frank as to his personal financial affairs and, applying established principles,[109] was not unduly cautious about making findings in favour of the wife in such circumstances.

The trial judge had accepted the net asset pool, as had been proposed by the wife, but also accepted that the husband had made the greater financial contribution, but also took into account the husband's non-disclosure in his ultimate determination that the parties' contributions were equal. The judge also decided to make no adjustment on account of s 75(2) factors, but additionally said that, had he found the husband's financial contribution to be greater than that of the wife, he would have made an appropriate adjustment under s 75(2) so that the parties' overall entitlements were equal. The Full Court[110] allowed the appeal.

On the issue of non-disclosure, the Court found[111] there to be considerable merit in the husband's grounds for appeal. However, the Court did state:[112]

> 'Whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute.'

However, the Court continued[113] by saying that it must be established that the non-disclosure was related in some way to the parties' contributions. In the instant case, no such link or relationship could be established between the non-disclosure and the parties' contributions. Hence, the fact that the trial judge had taken into account an irrelevant factor constituted an appealable error. In the view of the Court, the appropriate approach would have been to increase the asset pool to take the non-disclosure into account or, alternatively or additionally, some adjustment in favour of the wife on account of it by means of s 75(2).[114]

The continuing relevance of spousal maintenance is illustrated by *Brown and Brown*[115] which concerned an appeal by the husband against an order for lump sum maintenance.[116] He also sought an extension of time to appeal an order which restrained him from leaving Australia and leave to appeal further orders. The trial judge had ordered the husband to pay a lump sum maintenance of $3,750,000 to the wife. Two weeks after having made that order, the judge

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109 See *Weir and Weir* (1993) FLC 92-238; *Kannis and Kannis* (2003) FLC 93-135.
110 Bryant CJ, Finn and Boland JJ.
111 (2007) FLC 93-333 at 81, 711.
112 Ibid at 81, 715.
113 Ibid at 81, 716.
114 The Court also found that the trial judge was in error in failing to take account of the parties' contributions during a period of 6 years when he had found that they were separated under one roof.
115 (2007) FLC 93-116.
116 As well as against an order for child maintenance.

restrained the husband from leaving Australia and from obtaining a passport. On appeal, the husband argued that the trial judge had not given adequate reasons for his decision to award a lump sum rather than periodic maintenance, nor for his assessment of the lump sum amount. It was also argued that an irrelevant factor had been taken into account in that assessment. The Full Court[117] allowed the appeal in part, but dismissed the associated application.

First, the Full Court was of the view[118] that the trial judge's reasons for ordering a lump sum payment were clear and mainly related to a history of unfulfilled promises to the wife and defaults of varying kinds. At the same time, though, the Court considered that:[119]

> 'In contrast, in the calculation of a specific sum, the opportunity was available to disclose the weight given to relevant factors in a quantitative manner by the attribution of a monetary amount. A failure to do so is likely to make demonstration of the nexus between the award and "adequacy" or "appropriate in the circumstances" more difficult to identity.'

This meant that, in the end, the Full Court were unable to ascertain why the trial judge had arrived at the figure of $3,750,000 and, hence, it regarded his reasons as inadequate.

However, the Full Court additionally took the view[120] that a capitalisation of the wife's net annual needs for a term of years, selected with regard to joint life expectancy[121] and the exigencies of life, was a relatively straightforward exercise. In the absence of such an exercise, it was not known for how long the trial judge thought it was for the husband to maintain the wife, albeit by one lump sum payment.[122] Finally, the trial judge had placed the injunctions in respect of travel on the husband in order to enforce the lump sum order in favour of the wife. The Full Court found[123] no difficulty with that condition, which was in the nature of enforcement of a court order being so placed.

Thus, the utility of, at least, orders for lump sum spousal maintenance is demonstrated particularly in cases of couples who were, admittedly, very wealthy. However, *Brown* should not be seen as representing any kind of general renaissance of spousal maintenance in the whole context of modern Australian family law.

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117 Kay, Warnick and Boland JJ.
118 (2007) FLC 93-116 at 81, 434.
119 Ibid at 81, 446.
120 Ibid at 81, 448.
121 The Full Court, at 81, 451, took particular note of the husband's health conditions, resulting from a long-term smoking habit.
122 Ibid at 81, 455.
123 Ibid at 81, 459.

V PRACTICE AND PROCESS

Given the recent activity in both legislative and regulatory areas, some interesting developments in the areas of practice and process are properly to be expected and such was the case in 2007.

First, the High Court of Australia considered the relationship between contempt of court and legal professional privilege in *Mead v Mead*.[124] In that case, there was an appeal by the husband to the High Court from a finding of the Full Court of the Family Court of Australia. In the proceedings before the Full Court, the wife had appealed against an order that she serve a term of imprisonment for contempt of court. The majority of the Full Court had found that the trial judge was in error in finding the wife guilty through relying on inferences drawn from the wife's failure to offer an alternative explanation to the husband's allegation of a deliberate breach of injunctive orders which operated so as to prevent both parties from dealing with matrimonial property.

The husband sought, and was granted, special leave to appeal to the High Court of Australia. On appeal, the husband submitted that the Full Court's orders were affected by an error of law. The High Court allowed that appeal. Gleeson CJ[125] noted[126] that the central issue was that the majority in the Full Court had taken the view that, because communications between the present respondent and her solicitor were the subject of legal professional privilege, it was not open to the trial judge to find that the respondent knew the terms and meanings of an earlier order in circumstances where the evidence did not show that she was in court when that order had been made or that she had been served with a sealed copy of it.

'Since', the Chief Justice stated, 'the most likely source of the respondent's knowledge of the order was her solicitor, the majority appeared to think that drawing an inference that she knew of the order would in some way be inconsistent with legal professional privilege'. The Chief Justice was emphatic in his opinion that no such inconsistency occurred.

The issue of legal professional privilege had not arisen in the proceedings in the present issue at first instance. Neither the respondent nor her solicitor had given evidence, nor had there been any attempt to adduce evidence regarding communications between the respondent and her solicitor. 'The rule', stated Gleeson CJ, 'relating to legal professional privilege does not prevent the drawing, from events and circumstances, of inferences about the knowledge of a party, even if the probable source of such knowledge is a privileged communication'. Generally, he went on, it is a rule which precludes the adducing of evidence in certain circumstances, but it had no bearing on the present case. Specific to the case, the Chief Justice continued, even if the

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124 (2007) FLC 93-327.
125 With whom Hayne, Heydon, Crennan and Callinan JJ agreed.
126 (2007) FLC 93-327 at 81, 641.

circumstances supported, or indeed compelled, an inference that the respondent knew and understood the original order, in those circumstances, the consideration that neither she nor her solicitor could have been obliged to reveal the communications that passed between them did not stand in the way of acting on the basis of such an inference. As regards the content of the original orders, which were not difficult to comprehend, it appeared that the parties to those proceedings had very extensive property interests and the order was a general freezing order which prevented the parties from alienating any interests until further order.[127]

In the end, the Chief Justice concluded[128] that, because the majority in the Full Court had wrongly concluded that the law relating to legal professional privilege was an impediment to the trial judge drawing the conclusions which he did, the parties had not had the opportunity to have had a proper consideration of the case. Accordingly, the matter was remitted to a differently constituted Full Court for hearing and determination in accordance with the High Court's reasons.

The matter of legal professional privilege, in not wholly dissimilar circumstances, arose in the Full Court decision in *Stamp and Stamp*.[129] There, there was an application by the husband for leave to appeal and, if successful, to appeal an interim order refusing him leave to inspect the file of the wife's former solicitor provided under subpoena. The parties had entered into consent orders for property settlement in late 2003. The following year, she instructed another solicitor and made an application to set aside the consent orders,[130] based, inter alia, on the wife's own mental stability.

The husband caused a subpoena to be issued to the wife's former solicitor to produce the file. Leave was granted by a Registrar to all parties to inspect the file, but that order was stayed to permit the wife to file a review of the Registrar's decision. The review came before the trial judge who concluded that inspection of the file was not imperative for the husband to oppose the wife's application and also that the wife had not waived legal professional privilege.

The Full Court of the Family Court of Australia[131] granted, by a majority, leave to the husband to appeal and allowed his appeal. First, May and Boland JJ, in the majority, were of the view[132] that the Evidence Act 1995 did not apply, as the application to inspect was an interlocutory one. Hence, reference was to be made to the common law.[133] In that context, the most

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127 There were further proceedings relating to variation of those orders and there was an occasion where the respondent inspected the file.
128 (2007) FLC 93-327 at 81, 641.
129 (2007) FLC 93-314.
130 Family Law Act 1975, s 79A(1)(a).
131 Finn, May and Boland JJ.
132 (2007) FLC 93-314 at 81, 403.
133 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 229 ALR 304.

important case in relation to waiver was *Mann v Casnell*.[134] After considering that case, the majority stated[135] that there was 'a move away from considerations of general fairness. The focus is on the inconsistency of an act, in this case the wife providing particulars of her claim, while maintaining the confidentiality of the communications between herself and her solicitors'.

Secondly, it appeared to May and Boland JJ[136] that the wife was suggesting that a head injury which she had suffered in 1996 had resulted in a medical disability which had affected her capacity to provide proper instructions to the solicitors.[137] 'If there was any disability', the judges said, 'then there must be an issue about the extent to which it affected her capacity to provide instructions to her solicitors and how it affected her proper settlement of the property dispute'. The wife had raised that issue, which, they considered, was inconsistent with the usual right to claim legal professional privilege. Hence, the wife must be taken to have waived her claim. Finn J dissented on the grounds[138] that the effect of the wife's incapacity was a matter for medical evidence. Hence, the claim to inspect the file was premature and the trial judge had been correct to refuse it.

The position of legal practitioners in property matters was again considered by the Full Court in *Bransdon and Davis and Gilbert*.[139] This appeal arose out of orders made by a trial judge in respect of a property settlement made under s 79 of the Family Law Act 1975 and which generated an appeal by the wife's parents and a cross-appeal by the wife. At first instance, it had been found, in the husband's favour, that land registered in the wife's parents' name was held subject to an equitable charge in favour of the husband and wife. That finding resulted in orders for the payment of a cash sum, equivalent to the value of that charge to the husband, by the wife's parents by way of property settlement. The case argued by the wife and the wife's parents was that the husband and wife held no interest in the property and that all financial contributions had been made by way of rental payments by the husband and wife to the wife's parents.

The wife and her parents were represented by the same solicitors and counsel at the trial and, on its first day, counsel had informed the Court that he had received conflicting instructions from both the wife's parents and the wife, but was not in a position of conflict. On the trial's third day, the husband gave evidence that was inconsistent with evidence which had been given by the wife on the previous day. Counsel for the wife and the wife's parents withdrew from the matter. Based on the submissions of counsel for the wife and wife's parents after the withdrawal, the trial continued with the evidence of the wife's mother,

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134 (1999) 201 CLR 1.
135 (2007) FLC 93-314 at 81, 404.
136 Ibid at 81, 405.
137 There was expected to be medical evidence about any such disability, possibly from the workers' compensation records.
138 (2007) FLC 93-314 at 81, 400.
139 (2007) FLC 93-328.

who was the only remaining witness. The wife and wife's parents were then given an opportunity to file written submissions through new and separate lawyers.

The wife's parents appealed on numerous grounds, but their appeal was dismissed by the Full Court.[140] In so doing, they stated,[141] first, that the Court should only restrain the appearance of a legal representative in a clear case where the practitioner is in a position where he or she is fixed with an interest which conflicts with his or her duty to the Court and that interest is of such a nature that the practitioner might fail in the overriding duty to the Court. The present, the Full Court considered,[142] was not such a case because there was nothing before the Court which was such that the lawyer could not represent the wife's parents' interests as well as the wife. Further, the matter had been properly raised by both the Court and other counsel who were satisfied that no conflict of interest situation had arisen. This was the more so when it was clear that the wife and her parents were seeking identical forms of relief. Indeed, the Full Court noted that it would be a rare case where a trial judge would not rely on counsel's assurance where an issue of conflict of interest was raised.

Secondly, there was no prejudice on the grounds of procedural fairness which affected the wife or the wife's parents by the trial judge either continuing the trial immediately after the withdrawal of counsel or after the written submissions had been received. It had been argued, as the Full Court noted,[143] that, when counsel had withdrawn, the trial judge would have stood down the matter so as to enable the wife's parents to seek legal advice before proceeding. The Court pointed out that the only evidence to be called after the withdrawal was uncontroversial. The wife and her parents had been afforded an opportunity to obtain legal advice.

Bransdon is interesting as it contains a detailed discussion of prior authority on the question of conflict of interest and the application of those authorities to an intriguing factual situation.

A further issue which has arisen in recent times in Australian family law[144] is that of judicial bias. In the Full Court's decision in *Fennessy and Sanchez*,[145] a father had appealed against the refusal of a trial judge to disqualify himself from the further hearings of substantive parenting proceedings which had been effectively concluded, apart from the father's final submissions and an appeal against orders made in relation to the judge's dismissal of an oral interim application to spend time with the child. At first instance, the father had argued that non-compliance with the directions for the filing of written submissions by

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140 Faulks DCJ, Coleman and Boland JJ.
141 (2007) FLC 93-328 at 81, 656. See, particularly, *Gianarelli v Wraith* (1988) 165 CLR 543.
142 (2007) FLC 93-328 at 81, 659.
143 Ibid at 81, 663.
144 See F Bates 'Judicial Bias in the Family Court of Australia' (1997) 16 *Civil Justice Quarterly* 337.
145 (2007) FLC 93-330.

the independent children's lawyer and by the mother's solicitors, and the consequent delay, amounted to a denial of natural justice. He also claimed that the trial judge was unable to bring a balanced and unbiased approach to the ultimate decision in the matter because he had not allowed the father's interim application to spend time with the child and because he had made other interim and procedural decisions during the course of the trial which indicated bias. The father also sought to argue that the trial judge was in error in not having regard to the principles relating to interim parenting applications which had been set out in *Goode and Goode*.[146]

By the time of the appeal, the hearing had been heard over a period of more than 9 months. Judgment had not been delivered, pending written submissions from the parties. There had also been an earlier interim application by the father to spend time with the child and that the trial judge disqualify himself. Both applications had been dismissed by the trial judge and his view had been upheld by the Full Court.

Once again, the Full Court[147] dismissed the father's appeal. First, as regards the refusal of the application for an interim parenting order, the Full Court was of the view[148] that, given all of the surrounding circumstances, the trial judge's decision was within the limits of his discretion. This was the more so, when it was apparent that the judge's reasoning process was not in doubt and the reasons which he had given for so doing were readily apparent. As regards the judge's approach to the *Goode* decision, the Full Court did not regard it as an appealable error. It was further apparent that, had he approached the matter in the way which had been suggested in that case, the trial judge's conclusions would have been no different.

Secondly, on the issue of delays, the Full Court held[149] that the trial judge was correct in refusing to disqualify himself on that ground because he had not caused or acquiesced in the delayed finalisation of the proceedings or acted in any way as could reasonably give rise to an apprehension of bias. Likewise, the trial judge was correct in refusing to disqualify himself on other grounds which included allegations of prejudice, lack of impartiality, contempt of his own orders, corruption of court process, denying the best interest of the child and a denial of natural justice to the father.

It is interesting to read *Fennessy and Sanchez* together with *Watson and Morton*[150] to see some of the problems faced, seemingly frequently, by judges in the Family Court of Australia.

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146 (2006) FLC 93-286, see above text at n 30.
147 Coleman, Boland and Stevenson JJ.
148 (2007) FLC 93-330 at 81, 687.
149 Ibid at 81, 692.
150 (2007) FLC 93-331. Above text at n 82. The two cases are juxtaposed in the reports used by the writer.

The use of the anti-suit injunction is relatively rare in Australian family law matters and still more rare in cases not involving an element from outside Australia. However, one such case was the Full Court's decision in *Lederer and Hunt*,[151] which involved an application for leave and an appeal from an order which restrained the appellants (who were Paul Lederer and Primo Meats Pty Ltd and eight other companies) from taking steps in the New South Wales Supreme Court pending the final determination of Family Court proceedings.

The various companies had been found to have been under the control of the husband (Paul Lederer) and his uncle until the latter's death in 2004. In the Supreme Court proceedings, the various companies sought to register the husband as the successor to his uncle in respect of his ordinary and management shares. The wife disputed the disposition in relation to Primo Meats and claimed that the dispute was at the centre of the family law proceedings. It was submitted, inter alia, by the appellants that, first, the trial judge was in error in not approaching the matter as dictated by the High Court of Australia in *CSR Ltd v Cigna Insurance Australia Ltd*.[152] Secondly, the trial judge had not considered matters of comity between the Family Court and the Supreme Court and had failed to take into account that the wife had not applied for a stay in respect of the Supreme Court proceedings. Thirdly, the Family Court was a clearly inappropriate forum in respect of the companies, except for Primo Meats. The Full Court of the Family Court of Australia[153] dismissed the appeal.

First, the Full Court noted[154] that the trial judge had granted the anti-suit injunction on the two jurisdictions which had been identified in the *CSR* case: that is, pursuant to the power to protect courts' own proceedings and processes and also pursuant to the equitable jurisdiction to restrain unconscionable conduct.

Secondly, as regards comity between courts, the Full Court was of the view[155] that, according to *CSR* and other authorities,[156] not only was there no general rule that an anti-suit injunction would not be granted unless the applicant had sought a stay in the foreign jurisdiction, but, further, that any such rule would serve no purpose where the injunction was sought to protect the integrity of the particular court's proceedings or processes.

Thirdly, since one of the purposes for which the anti-suit injunction was being sought was the protection of the Family Court's processes, no question of the appropriateness of the forum arose, and, hence, the stay. Indeed, even if the trial judge's order could have been impugned as an exercise of the equitable

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151 (2007) FLC 93-311.
152 (1997) 189 CLR 345.
153 Bryant CJ, Finn and Boland JJ.
154 (2007) FLC 93-311 at 81, 350.
155 Ibid at 81, 351.
156 See the decision of the United States Supreme Court in *Hilton v Guyot* 159 US 113 (1895).

jurisdiction,[157] it was not established that there was any error in the exercise of the inherent jurisdiction to protect the processes of the Family Court. The fact that the trial judge had not referred to the issue of the need for caution in relation to comity did not affect the orders which he made. Finally, leaving aside the issue of comity, it could not properly be said[158] that the Family Court was a clearly inappropriate forum in relation to any of the companies, given the trial judge's finding that each of the companies was, prior to the uncle's death, owned and controlled in part by the husband.

Lederer and Hunt is an interesting case on the area of family law and anti-suit injunctions. It contains a valuable explication of the principles in the *CSR* decision and provides an interesting instance of their application.

The matter of application for a stay arose in *Lederer*, and it also arose before the Full Court of the Family Court once again in *Waite and Waite Hollins*,[159] which concerned an appeal by the father against a refusal by the trial judge to stay the operation of parenting orders, which had permitted the children to live with their mother in Switzerland. Prior to the conclusion of the parenting hearing in 2001, the mother has used false passports in taking the children to abide with her in Switzerland. The father then appealed to the Swiss authorities to have the children returned to Australia pursuant to the Hague Convention on Civil Aspects of International Child Abduction. In late 2003, the mother was located and, in January 2004, the children were placed in foster care in Switzerland. In 2005, the children returned to Australia and were placed in the care of the Western Australian State welfare authorities. A further hearing took place in early 2006, where the trial judge concluded that the children should be returned to Switzerland. The father appealed against those orders and sought a stay of time to prevent the children from leaving Australia, pending the determination of the appeal. That application was refused.

The bases of the father's appeal were, first, that the trial judge's decision to refuse the application was contrary to the law, as represented by *EJK v TSL (No 2)*.[160] Secondly, in the light of the findings which had been made regarding the mother's initial and unlawful removal of the children from Australia, the trial judge was in error in allowing the children to return to the mother's care in Switzerland. Thirdly, that the trial judge had erred in permitting the children to reside with the mother pending the outcome of the father's appeal. The Full Court of the Family Court of Australia[161] dismissed the appeal.

First, the Court were of the view[162] that *EJK v TSL (No 2)*, whatever it might have decided, was distinguishable from the instant case and, in any event, had been decided after the stay application had been heard and the trial judge had

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157 (2007) FLC 93-311 at 81, 352.
158 Ibid at 81, 354.
159 (2007) FLC 93-325.
160 [2006] Fam CA 806.
161 Bryant CJ, Kay and Thackray JJ.
162 (2007) FLC 93-325 at 81, 615.

not been referred to it. Secondly, the Full Court found that there was no apparent error in the trial judge's finding that the best interests of the children would be served by their return to the mother in Switzerland. In particular, in the Court's own words, 'it would not be in the best interests of the children to delay their departure given their awareness of the scheduled flight and that they had set about saying their goodbyes'. Finally, the Full Court found that the trial judge had correctly identified and applied the appropriate test in her decision not to grant the father's stay application.

Waite and Waite Hollins is an interesting decision in that it draws attention to the relevance of children's best interests in relation to procedural aspects of Hague Convention cases.[163] In reaching its decision, the Full Court noted[164] that the 'unusual circumstances' of the case made it clear that the children's welfare dictated an expeditious return to Switzerland as could be organised. The next point they made[165] related to the 2006 amendments which they stated could 'have led to a further trial . . . with the children remaining out of physical contact with their mother [which] could not be seen to be in any way advancing their welfare and indeed could be said to be harmful to them'.

In the end, the Full Court commented that the trial judge had been obliged to weigh up the father's rights of appeal and continuing physical contact with the children as against what appeared to be an order in the best interests of the children. Once those scales tipped heavily in favour of the latter, the possible loss of a meaningful appeal had to give way.

VI CONCLUSIONS

Although 2007 has produced some interesting developments in Australian family law, developments have been along the lines which might legitimately have been predicted. It may well be that both courts and potential parties are acting cautiously in relation to the 2006 legislation, which, it should be said, has not been uniformly welcomed. At the same time, courts are required to deal with perennial issues such as the standard of proof in relation to allegations of child sexual abuse and in the area of property distribution generally. Prediction is, in both personal and institutional terms, a problematic task. Hence, this writer is more than somewhat unwilling to attempt to predict what the future will bring.

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[163] Ibid at 81, 616. The earlier case involved a country, South Korea, which was not a party to the Hague Convention.
[164] Ibid at 81, 617.
[165] Ibid at 81, 617.

The Bahamas

THE BAHAMAS CHILD PROTECTION ACT: A STEP IN THE RIGHT DIRECTION

*Hazel Thompson-Ahye**

Résumé

La tension entre le droit étatique et le droit coutumier dans les États des Îles du Pacifique s'exprime clairement dans le domaine du droit familial, particulièrement dans le contentieux du droit de garde. Dans bien des cas, ces conflits sont réglés au sein même de la communauté, sans référence au droit formel. Par contre, lorsqu'une partie saisit un tribunal officiel, la législation et le droit commun s'appliquent. Dans ce contexte, les valeurs qui sous-tendent le droit étatique et le droit coutumier sont souvent irréconciliables. Après un exposé sommaire sur le droit et sur les juridictions compétentes en matière de droit de garde, tant étatique que coutumier, ce texte fera état de certaines décisions jurisprudentielles pour illustrer les conflits qui peuvent exister entre les deux systèmes. L'exposé se concentre sur la situation des îles Fiji, Samoa, Solomon, Tonga et Vanuatu, mais il fait également référence à la situation qui prévaut dans quelques plus petites îles de la région, comme Kiribati, Nauru et Tuvalu.

Le Commonwealth des Bahamas ('Les Bahamas') a ratifié la Convention relative aux droits de l'enfant en 1991. En vertu de l'article 4 de la Convention, Les Bahamas ont dès lors fait face, comme tous les États ayant ratifié la Convention, à l'obligation de «prendre toutes les mesures législatives, administratives et autres qui sont nécessaires pour mettre en oeuvre les droits reconnus» par la Convention.

La loi des Bahamas sur la Protection de l'enfant de 2007 constitue une réponse du gouvernement à cette obligation. En dépit des obstacles énormes, les Bahamas ont, par l'adoption de cette loi, accompli un pas de géant dans le chemin vers le respect complet de leurs obligations aux termes de la Convention, notamment en introduisant quelques dispositions nouvelles et en modifiant ou en abolissant certains volets archaïques de la législation. Même si cette loi est loin de la perfection, elle n'en constitue pas moins un effort louable qui mérite d'être salué.

I INTRODUCTION

The Commonwealth of the Bahamas ('the Bahamas') ratified the Convention on the Rights of the Child (CRC) in 1991. Under Art 4 of the CRC, the Bahamas, like other ratifying States Parties, was thereafter obliged to

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'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized' in the CRC. With respect to economic, cultural and social rights, Art 4 requires States Parties to undertake such measures 'to the maximum extent of their available resources and, where needed within the framework of international co-operation'.

The Child Protection Act (CPA) 2007 of the Bahamas is an attempt by the government to comply with Art 4 of the CRC. The Bill for the CPA clearly stated its intention thus:[1]

> 'The legislation seeks to enable The Bahamas to fulfil certain obligations The Bahamas have assumed under the Convention on the Rights of the Child which it has ratified.'

This chapter discusses the extent to which the CPA achieves its stated purpose.

II SOME FEATURES OF THE CPA

(a) A consolidating statute

The CPA is a consolidating statute. It repeals a number of existing laws which pertain to children and families, re-enacts some of the repealed provisions bringing them under one umbrella and in the process, updates many other existing laws. The repealed legislation, as set out in the Sixth Schedule are: the Children and Young Persons Act,[2] the Maintenance of Emigrants Act,[3] the Guardianship and Custody of Maintenance Act,[4] the Affiliations Proceedings Act,[5] and the Infants' Relief Act.[6] The revised legislation are the Matrimonial Causes (Summary Jurisdiction) Act, the Penal Code and the Adoption of Children Act to bring them in line with provisions in the CPA.

(b) Implementation plan

The CPA provides for its commencement 'on a date to be appointed by the Minister by notice published in the Gazette and different dates may be appointed by such a notice for the coming into force of particular sections or Parts of this Act'.[7] Thus, it points to an intention to employ an implementation schedule. This is a useful device, in circumstances where some provisions in the legislation do not require as high levels of expenditure or elaborate

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1 See Objects and Reasons of the Bill for the Child Protection Act.
2 Ch 97 of the 2000 Revised Laws of the Bahamas.
3 Ch 128, ibid.
4 Ch 132, ibid.
5 Ch 133, ibid.
6 Ch 134, ibid.
7 Section 1(2) of the CPA.

preparedness as others. The implementation plan ensures that the entire CPA is not delayed because some of its sections require a higher outlay on personnel and infrastructure than others.

(c) Implementation body

Under the CPA, the implementation of the CRC has not been left to chance. The National Committee for Families and Children ('the Committee') has been charged with the responsibility for:

(a) promoting, monitoring and evaluating the implementation of the CRC and ensuring that the government meets its national and international obligations as a party to the CRC;

(b) promoting, monitoring and evaluating implementation of the goals reached at the world summits on the CRC;

(c) promoting public awareness on national legislation affecting families and children, and facilitating effective and efficient planning and coordination of efforts among and between NGOs, service clubs, churches and other organisations involved in the provision of services for families and children;

(d) ensuring that various institutions, communities and homes in the Bahamas understand and apply the standards of protection and care set out in the CPA, regulations made hereunder and in the CRC, within their institutional, community or family setting;

(e) recommending and advocating to, and at different levels and institutions of the Bahamian society policies for:

    (i) the care, protection and maintenance of families and children in the Bahamas;
    (ii) the contribution of resources from the international community and the local private sector.[8]

These are very serious and far-reaching responsibilities which, if properly carried out, would certainly ensure the proper implementation of the CRC in the Bahamas. The Ministry[9] is given oversight of the work of the Committee and has undertaken 'to take such action as is considered necessary' to implement the recommendation of the Committee.[10]

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[8] Section 97(a)–(e).

[9] See s 2, the definition section, in which 'Minister' is defined as: 'The Minister for the time being responsible for social services.' The 'Ministry' must, therefore, refer to the one responsible for those functions.

[10] Section 98.

(d) Rights recognised under the CPA

Under the CPA, the child is recognised as having the right to exercise, in addition to all the rights stated in the CPA, 'all the rights set out in the United Nations Convention on the Rights of the Child subject to any reservations that apply to the Bahamas and with appropriate modifications to suit the circumstances that exist in the Bahamas with due regards to its laws'.[11] This is a clear indication that the CPA will not achieve full compliance with the CRC, and will not honour the Belize Commitment to Action for the Rights of The Child, signed by the Bahamas at the Caribbean Conference on the Rights of the Child in Belize City in 1996. Under the Belize Commitment, the Bahamas, like other governments in the Caribbean, undertook to 'REVIEW AND REVISE the relevant laws, policies and programmes to FULLY comply with the LETTER and THE SPIRIT of the Convention on the Rights of the Child'.[12]

III COMPLIANCE WITH THE CRC

(a) Definition of a child: Article 1

The CRC defines a child as 'every human being under the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.[13] The applicable law, which lays down the age of majority in the Bahamas is the Minors Act, which sets the age of majority at 18 years.[14] The CPA accords with the Minors Act and the CRC, as it defines 'child' as: 'unless provided otherwise in this Act, a person below the age of eighteen years'.[15] The CPA, therefore, applies to all children under 18, whether in need of care and protection and/or who are 'alleged as, accused of or recognized as having infringed the penal law'.

In Part XII of the CPA, which deals with Juvenile Courts, the concept of 'child' is fragmented into three different categories, according to age, to facilitate differences in the law's treatment of each separate category. The first category is 'child' who is defined as 'a person under the age of fourteen years', the second, 'juvenile' who is 'a person who has attained the age of ten and is under eighteen years', and the third, 'young person' who is 'a person who has attained the age of fourteen and is under the age of eighteen years'.[16]

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11 Section 4 of the CPA.

12 Part 1: 'The Commitment: The Belize Commitment to Action for the Rights of the Child' in *The Report of the Caribbean Conference on the Rights of the Child: Meeting the Post Ratification Challenge*, Belize City, Belize, 7–10 October 1996 (emphasis in original).

13 Article 1 of the CRC.

14 Section 2 of the Minors Act; Ch 6 of the Statute Laws of the Bahamas.

15 Section 2 of the CPA.

16 Section 116 of the CPA.

The definition of 'juvenile' indicates that juvenile justice principles, practices and procedures would be available to children aged 10 years, the age of criminal responsibility, up to 18 years, the internationally recognised and recommended upper age limit for juvenile justice.

(b) Compliance with the umbrella principles of the CRC

The umbrella principles of the CRC are to be found in:

(i) Article 2 – non-discrimination;

(ii) Article 3 – best interests of the child;

(iii) Article 6 – right to life and maximum possible survival and development; and

(iv) Article 12 – respect for the child's views.

(i) Non-discrimination: Article 2

Article 2 of the CRC enjoins States Parties to:[17]

> ' . . . respect and ensure the rights set forth (in the CRC) to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

Curiously, the CPA places upon 'any person having the charge, care or custody of a child', a 'duty' 'to use his best efforts to protect the child from discrimination'.[18] This is at variance with the CRC which places upon States the duty to protect the child from discrimination.

Discrimination in rights to citizenship

Upon ratification of the CRC, the Bahamas entered a reservation with respect to its right 'not to apply the provisions of Art 2 insofar as those provisions relate to the conferment of citizenship upon a child, having regard to the Provisions of the Constitution of the Commonwealth of the Bahamas'.

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[17] Article 2(2) of the CRC.
[18] Section 5(2) of the CPA.

Persons born within the jurisdiction

As discussed in the 2005 Survey,[19] the Bahamas Constitution provides that a person born in the Bahamas becomes a citizen if at the date of his birth either of his parents was a citizen of the Bahamas.[20] A person born in the Bahamas, neither of whose parents is a citizen of the Bahamas, is entitled to be registered as a citizen 'upon his making application on his attaining the age of eighteen years or within twelve months thereafter'.[21]

Persons born within wedlock outside the jurisdiction

A person born in wedlock outside of the Bahamas, whose father is a citizen of the Bahamas, is given automatic citizenship at the date of his birth.[22] If it is only the mother of the person born within wedlock outside the jurisdiction who is Bahamian, that person does not have immediate right to Bahamian citizenship. Such a person must make application for citizenship on attaining age 18. The child of a Bahamian mother born in wedlock outside the jurisdiction is thus discriminated against, during his or her minority, and is denied the enjoyment of all the rights and privileges of Bahamian citizenship, including the right to hold a Bahamian passport and to qualify for discounted tuition rates at the College of the Bahamas.

Persons born out of wedlock outside the jurisdiction

The Constitution further provides that 'any reference to the father of a person born out of wedlock is to be construed as a reference to the mother of that person'.[23] Accordingly, a child born out of wedlock outside the jurisdiction to a Bahamian mother has an automatic right to Bahamian citizenship. Thus, the Constitution is at odds with Art 2 of the CRC, as it allows discrimination against children because of their parent's sex and because of their birth status.

The Bahamas passed the Status of Children Act in 2002, indicating in its long title, that the purpose was 'to reform the law relating to children by providing for their equal status'. That Act further stated that 'the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other'.[24] The lofty ambitions of the Act were then diminished by the provision that the Act 'does not affect or limit in any way any rule of law relating to citizenship of any person'.[25]

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19 H Thompson-Ahye 'A View of Some Aspects of Family Law in the Commonwealth of the Bahamas' in A Bainham (ed) *The International Survey of Family Law 2005 Edition* (Jordan Publishing Ltd, 2005).

20 Article 6 of the Constitution of the Commonwealth of the Bahamas.

21 Article 7, ibid.

22 Article 8, ibid.

23 Article 14, ibid.

24 Section 3(1) of the Status of Children Act.

25 Section 3(3)(b), ibid.

Having regard to the aforementioned discriminatory provisions in the Constitution, which can only be changed by a referendum, the Bahamas Government entered the reservation to the CRC. There are no other reservations, yet other areas of discrimination persist in the law.

Time limitation for establishing paternity

Under the pre-CPA law, the mother of a child born out of wedlock must apply for an affiliation order to determine paternity and, thereafter, maintenance of a child born out of wedlock within 3 years of the child's birth or, at any time thereafter, on proof that the father had within 3 years of the birth maintained the child or within 12 months of the putative father's return to the Bahamas, upon proof that he ceased to reside in the Bahamas within 3 years after the child's birth.[26] This time limitation constitutes an area of discrimination as the mother of a child born within wedlock is not similarly circumscribed as she can bring an application at anytime during the child's minority. This discrimination will be abolished when the CPA is implemented, as it provides that 'a single woman delivered of a child' may 'at any time . . . before the child attains the age of eighteen years or sooner marries'[27] apply for maintenance.

Although, under the Status of Children Act, applications for determination of paternity can be brought in the Supreme Court at any time, even, in most cases, after the death of the parties, these cases are more costly as the applicant generally has to hire a lawyer for the purpose.

Wilful neglect to maintain

Another area of discrimination is the choice of forum for applications for wilful neglect to maintain. The mother of a child born within wedlock has a choice of forum in which to bring her application. She can apply either in the magistrates' courts under the Matrimonial Causes (Summary Jurisdiction) Act,[28] or in the Supreme Court under the Matrimonial Causes Act.[29] The mother of a child born out of wedlock can approach only the magistrates' courts for relief. Some women are reluctant to approach the magistrates' courts because the physical conditions there, generally, leave much to be desired.

(ii) Best interests of the child: Article 3

The term 'the welfare of the child', which is widely regarded as being synonymous with the best interests principle, is stated in the CPA to be a guiding principle and 'the paramount consideration' 'whenever a determination has to be made with respect to (a) the upbringing of a child or the administration of a child's property or the application of any income arising from it, and [in] all matters relating to a child, whether before a court of law or

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[26] Sections 1–7 of the Affiliation Proceedings Act; Ch 133 of the Statute Law of the Bahamas.
[27] Section 42 of the CPA.
[28] Section 3(h) of the Matrimonial Causes (Summary Jurisdiction) Act, Ch 126.
[29] Section 31 of the Matrimonial Causes Act, Ch 125.

before any other person'.[30] The best interests principle resonates throughout the CPA. It is one of the stated criteria to be used in the determination of several matters, such as: the question of deprivation of the right to custody of the mother of a child born out of wedlock;[31] the award of custody to the father of such child;[32] the variation of an order for custody in circumstances where the person having custody has been found to have misapplied money paid for the maintenance of the child;[33] consideration of the matter of contact with parents of a child under a care order;[34] questions involving the safety or physical harm to the child; supervised access to the child where an exclusion order exists;[35] contact by the parent of a child under emergency protection;[36] and return to placement of a child who has escaped from a home or foster care.[37] It is also the impetus for developing age-appropriate considerations in the formulation of juvenile justice principles.

(iii) Right to life, survival and development: Article 6

The child's right to life, survival and development is primary among all the rights of the child. If the child is deprived of life and is not allowed to survive and develop, there would be no child to shield from discrimination, whose best interests need to be protected and views should be heard.

As a general rule, a child thrives best in an environment where he is cared for by both parents. The CRC recognises and supports the invaluable role played by parents in the life, survival and development of the child. It recognises the fact that, at times, for the child's survival and development, it might be necessary to separate the child from the parents, or parents might need to be assisted or compelled to perform their parenting role responsibly. It requires that the child be protected from harm and exploitation of all kinds and mandates that the State and its agencies play their roles so the child will achieve the maximum possible survival and development.

The CPA, in many ways, demonstrates that it is mindful of the State's rights, responsibilities and obligations to the child. The CPA takes a realistic view of the child's right to life, survival and development and includes provisions which evince awareness that the child's own action may endanger the child's life, threaten his survival and hamper his healthy development. In recognition of this, the CPA includes provisions which seek to foster the preservation of life and the survival and development of child offenders. Thus, it enacts provisions to prevent juvenile delinquency, to facilitate diversion of child offenders, and to

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30 Section 3(1) and (2).
31 Section 21(3)(d).
32 Section 21(4).
33 Section 61(1).
34 Section 74(2).
35 Section 128(1).
36 Section 80(5).
37 Section 93(3).

place restrictions on punishment, such as capital punishment and life imprisonment without possibility of parole.

Parental rights and responsibilities: Articles 5 and 18

The CPA provides that a child 'is entitled to live with his parents or guardian',[38] that every parent has 'parental responsibility for his or her child'. This can lead to an assumption that the CPA is wholly child-centred and has abandoned the concept of parental rights, until one encounters provisions such as: 'the mother or father of a child shall be guardian and have a right of access to the child', which support parental rights over child rights.

A prerequisite to the exercise of parental rights and responsibilities, such as custody, access or maintenance, or the right of appointment of a testamentary guardian is the legal recognition of parentage. Parenthood is established by automatic operation of law or by decision of the courts.

In the case of married persons, the question of who is the father of the child is usually a simple matter of presumption of paternity. When the parents are unmarried, paternity is presumed when the putative father signs the birth register together with the mother, acknowledges by sworn affidavit that he is the father, or falls within the other presumptions enumerated in legislation.[39]

As mentioned before, the laws of the Bahamas make provision for the establishment of paternity in the magistrates' courts in affiliation proceedings,[40] or in the Supreme Court under the Status of Children Act.[41] Under the CPA, the applicant for a finding of paternity in the magistrates' court must be a single woman.[42] If, therefore, a man wishes to admit to paternity to a child born out of wedlock and play his role as father to such child and the mother refuses to have him accompany her to register the child, or is unwilling to bring proceedings for him to be adjudged the father of a child born out of wedlock by proceedings in the magistrates' courts, he cannot himself file a complaint. If the mother does not wish him to exercise the privileges, rights, or responsibilities of fatherhood, the law allows her to do so, unless he has the means to embark on the expensive proceedings of seeking a declaration of paternity from the Supreme Court under the Status of Children Act. The CPA should provide for a father to approach the lower courts to determine his paternity of a child and for subsequent relief in cases where the mother wishes to exclude him from involvement in the child's life. The necessity for such a law is particularly acute in the Bahamas where it is reputed that 70% of children are born out of wedlock.

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38 Section 5(1).
39 Section 7 of the Status of Children Act; Ch 130 of the Statute Laws of the Bahamas.
40 Affiliation Proceedings Act; Ch 133 of the Statute Laws of the Bahamas.
41 Chapter 130 of the Statute Laws of the Bahamas.
42 Section 42 of the CPA.

The CPA is silent on the issue of determination of parenthood in cases of assisted reproduction. The issues of who is the mother of the child and who is the father are fast becoming contentious, occupying the court in various jurisdictions. In vitro fertilisation is available in the Caribbean in a few jurisdictions and Bahamians have always enjoyed easy access to the United States where the procedure can be obtained. Thus, the CPA should include provisions to govern the variety of circumstances in assisted reproduction which may cause conflict.

The CPA does not consistently demonstrate commitment to the principle of joint parental rights and obligations. Under the CPA, the mother of a child born out of wedlock has automatic rights to guardianship, custody of and access to the child. She cannot be deprived of custody unless found to be unfit and a social service officer has confirmed by written report that such an order depriving her of custody is in the best interests of the child.[43] The father of a child born out of wedlock can make an application for an order for custody of his child only in proceedings for a maintenance order or in other proceedings.[44] He can only appoint by deed or will a guardian of his child after his death, if he had custody of the child.[45]

Further, the CPA provides that, if it deems just, the court may disregard parental rights arising out of parental responsibility. The court is mandated, when considering matters of custody and access, to have regard to past contribution to the care, maintenance and upbringing of the child.[46] This seems to be inviting the court to predicate decisions of guardianship, custody and access on matters such as the parent's past contribution to the child's maintenance. The inherent danger in this approach is that the fundamental principle of the best interests of the child, as provided for in both ss 3 and 29 of the CPA, might be relegated to inferior status, while a punitive approach to a seeming dereliction of duty guides the decision making. Another danger is that the well-settled principle of access being the right of the child, rather than the parent's, might be overlooked in the process of the court's compliance with the CPA. No such fetter should be placed on the exercise of the court's discretion.

Another difficulty with the CPA is that it actually states and places the responsibility 'on every man to maintain his own children and any child which his wife may have living with her at the time of marriage to him so long as the children cannot maintain themselves'.[47] It further states that a woman is obligated to maintain her children if the husband fails to perform his obligations, and that widows and unmarried mothers must maintain their own children.[48] By these provisions, the CPA fails to recognise joint responsibilities of parents to maintain their children whether born within wedlock or not and

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43 Section 21, ibid.
44 Ibid.
45 Section 15, ibid.
46 Section 14(2).
47 Section 33 of the CPA.
48 Section 34, ibid.

fosters discrimination by gender stereotyping and marital status. These provisions should be revisited, since they can operate to the detriment of children, who must be maintained by both parents when they are both able to fulfil their obligations to the children for whom they are responsible.

Right to health: Article 24

Recognition of the child's right to health is embodied in the CPA in a general sense, by virtue of the CPA's incorporation of all the rights in the CRC,[49] which includes the right to health and is also specifically interspersed among many provisions of the CPA. It is the motivation for the provision regulating child labour which states that '[no] child shall be employed or engaged in any activity that may be detrimental to his health'.[50] The child's health is the concern that prompts the requirement for early intervention and treatment of children with disabilities as these can escalate into more serious health problems.[51] It is the rationale for imposing fines and imprisonment on persons who have the custody, charge or care of children who are convicted of acts of cruelty, neglect or abandonment or exposure of children in a 'manner likely to cause . . . injury to health'.[52] It is the rationale for giving, selling or causing to be given or sold to a child any intoxicating liquor or tobacco being deemed 'ill-treatment of the child in manner likely to cause injury to the child's health'[53] and is the point of reference for a child being deemed 'in need of care and protection'.

Under the CPA, a child is deemed 'in need of care and protection' if the child 'is being cared for in circumstances in which the child's physical or mental health or emotional state is being seriously impaired, or there is serious risk that it will be seriously impaired'.[54]

The CPA evidences the State's concern for the child's health when it charges the Minster with the responsibility to make regulations 'prescribing the medical arrangements to be made for protecting the health and well-being of children in approved homes'.[55] The CPA provides for court orders requiring a person convicted of offences in respect of a child under the Penal Code or the Sexual Offences or Domestic Violence Act to submit to 'a medical examination and testing for the purpose of ascertaining whether such person is a carrier of a communicable disease, if satisfied that such examination and testing is in the best interests of the child'.[56]

The need to protect the child's health guided the inclusion of an order in the CPA, where offences have been committed endangering a juvenile's safety or

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[49] Section 4(c) and Art 24 of the CRC.
[50] Section 7(1).
[51] Section 8(1)(a).
[52] Section 62(1).
[53] Section 62(3).
[54] Section 82(3)(b).
[55] Section 95(a).
[56] Section 103.

occasioning bodily injury, requiring the parent or guardian of the juvenile to enter into a recognisance to exercise proper care and guardianship. It prompted the framing of orders to commit the juvenile to the care of a fit person, to make care or supervision orders and exclusion orders against a parent and orders for supervised contact or prohibition of contact. The court can also make orders for counselling, and if necessary, for medical and psychiatric evaluation and treatment of supervised persons.[57]

Right to an adequate standard of living and maintenance: Article 27

The CRC requires States Parties to 'recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development'.[58] It requires 'parents or persons responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development'.[59] The CRC further mandates States to 'take all appropriate measures to secure the recovery of maintenance for the child from parents and others responsible for the child'.[60]

The CPA enacts a comprehensive range of provisions to address this right of the child.

In providing for application to be made by a single woman for maintenance of her child 'at any time before the child attains the age of eighteen years or sooner marries',[61] the CPA effects a most welcome change in the law which removes the long-prevailing discrimination in the laws dealing with maintenance between children born in wedlock as against those born out of wedlock, which exists in most Caribbean jurisdictions as a legacy of our colonial laws. The CPA recognises a presumption of the right to maintenance in children below the age of 16,[62] which may be deemed to continue to the age of 18, unless varied or cancelled by the court,[63] and which may continue to the age of 21 or even further, if the child is continuing in full-time education or is disabled.[64]

An order may also be made and enforced against the estate of deceased parents[65] and also against a parent whose child is in the care of the State.[66] The

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57 Sections 4 and 5 of First Schedule.
58 Article 27.
59 Article 27.
60 Ibid.
61 Section 42.
62 Section 36.
63 Section 40.
64 Section 57.
65 Section 58(3).
66 Sections 94 and 95.

CPA provides for the complaint to enforce a maintenance order to be brought, not only by the applicant, but also by the child or even the social welfare agency that is providing for the child.[67]

Under the CPA, the court can prohibit from leaving the jurisdiction one, who being liable to do so, 'has not made adequate provision for the payment of any sums ordered to be paid during his absence'.[68] The CPA provides for collection of maintenance by a collecting officer of the court, for the enforcement of the order by distress or other means.[69] Where distress fails, the punishment for wilful default for non-payment is imprisonment up to 3 months.[70] A person who misapplies money paid for maintenance of a child is liable on conviction to a fine or imprisonment for 2 years and may lose custody of the child.[71]

The CPA allows an order for custody or maintenance to be made 'notwithstanding that the parents of the child are then residing together'.[72] The CPA, however, leaves untouched, existing laws for collection of maintenance abroad, which are limited in scope and should be reviewed.

Right to education, freedom from economic exploitation: Articles 28 and 32

The CRC outlines the child's right to education and sets out the aims of education.[73] The CPA recognises the child's right to education by including the 'educational needs of the child' as a factor to be taken into account in any determination of the upbringing of a child or the administration of a child's property or the application of any income arising from it'. By incorporating the CRC,[74] the CPA includes the child's right to education.

The CPA imposes a duty on the custodial parent of the child to 'ensure that the child is enrolled and attends school'.[75] This duty extends to foster parents and persons in charge of residential homes.[76] By prohibiting a child from 'being employed or engaged in any activity that may be detrimental to his education', by setting a minimum age of 16 years for child labour, albeit with certain exceptions, and by prohibiting the child's being engaged in night work or in an industrial undertaking from specified times during school days and non-school days,[77] the CPA pays cognisance to the necessity to support the child's right to education.

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67 Section 37(1), (2) and (3).
68 Section 43.
69 Section 47.
70 Section 55.
71 Section 61.
72 Section 22(4).
73 Articles 28 and 29 of the CRC.
74 Section 3(1)–(3) of the CPA.
75 Section 5(2)(b).
76 Section 74(3).
77 Section 7(1)–(4).

It is disappointing that the CPA evinces no intention to 'take all appropriate measures to ensure school discipline is administered in a manner consistent with the child's human dignity and in conformity with the CRC'.[78]

Right to leisure, recreation and cultural activities: Article 31

The child's right to leisure, recreation and cultural activities and to participate in sports and artistic activities is spelt out in the CPA.[79] This is difficult to reconcile with the CPA provision allowing children over 16 years to be engaged in night work or in an industrial undertaking during the week up to 8 pm on any school day.[80] The spectacle of children, even younger than 16 years, working in food stores as late as 9 pm on school days is worrying.

Right to protection from abuse, sexual exploitation, trafficking and to rehabilitation: Articles 33, 34, 35 and 39

Protection of the child from abuse and sexual exploitation has been to some extent addressed in the earlier discussions on the best interests of the child and in the child's right to health. The CPA seeks to protect the child by requiring mandatory reporting of child abuse by 'a person who performs professional or official duties with respect to a child who, in the course of professional or official duties has reasonable grounds to suspect that a child is suffering or has suffered significant harm'.[81] The list of persons, although stated to be not all-inclusive, appears very exhaustive. Not only are various types of health care personnel included, but also teaching personnel, social workers, recreational, youth workers, police and probation officers. A welcome addition is the 'member of the clergy', who, outside of the special circumstances of the confidential confessional, may receive direct information of, or may suspect, child abuse. The position of the mediator who learns of abuse in the course of mediation is not specifically alluded to. Since, however, the CPA is clear that the provisions for reporting 'apply whether or not the information is confidential or privileged',[82] the mediator's promise of confidentiality would have to take second place to the need to protect the child. This should be a matter made clear in the ground rules at the start of the mediation and should also feature in the mediator's code of ethics.

The privilege attached to communication between attorney and client is unaffected by this law.[83]

The CPA gives guidelines for the circumstances and procedure for a child who is ill-treated or neglected, who falls into bad associations, is exposed to moral

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78 Article 28.2 of the CRC.
79 Section 4(a).
80 Section 7(3) and (4).
81 Section 63.
82 Ibid.
83 Section 63(3).

danger or otherwise in need of care and protection to be taken into care.[84] It makes provision for a child in need of care to be placed with a foster parent[85] or in an approved children's home,[86] a juvenile correction centre, a treatment centre or with a fit person.[87] This is in keeping with the requirement under the CRC for the child 'in whose best interests cannot be allowed to remain in that (family environment), to be entitled to special protection and assistance provided by the State'.[88] However, the nature of the 'special protection and assistance' must be regarded in light of the requirement in the CRC to make available 'alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and to the offence'. Institutionalisation for status offences is not acceptable.

The care order is made as a measure of last resort for a maximum of 3 years or until the child reaches 18 and must be reviewed every 90 days.[89] It thus makes provision for periodic review of placement, a feature that is absent from much child protection legislation, though required by the CRC.[90] Swift return to a family environment that has been rendered safe by counselling or other means facilitates reintegration.

The CPA provides for a search and production order authorising a police officer to enter any premises to search for and remove to a place of safety any child whom the social services officer has reasonable cause to believe is suffering or is likely to suffer significant harm or is need of care and protection.[91] The order provides for a social worker, police officer or other authorised person to place such a child under emergency protection in a place of safety or prevent the child's removal from some place where the child is being accommodated.[92]

The CPA establishes a Children's Registry to receive reports concerning children against whom offences are, or are suspected to have been, committed and who are taken into care, as well as children who commit offences, and sets up a Children's Register for recording these reports.[93]

While not specifically addressing exploitation, drug abuse, pornography, trafficking in children, and rehabilitative care, the CPA lays the groundwork for such matters by empowering the Minister to make regulations to deal with matters such as 'child pornography' and 'providing for the prevention of the

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84 Sections 71–82.
85 Sections 71 and 87.
86 Sections 71 and 88.
87 Section 71.
88 Article 20(1) of the CRC.
89 Section 73.
90 Article 25 of the CRC.
91 Section 79.
92 Section 80.
93 Section 106.

use of illicit drugs and also for the rehabilitation of children'.[94] It is to be noted that the Child Rights Committee in its Concluding Observations on the Bahamas initial report recommended that the State Party ratify the Optional Protocol to the CRC 'on the sale of children, child prostitution and child pornography'.[95]

By failing to explicitly or impliedly abolish corporal punishment in schools as a disciplinary measure, the Bahamas missed the opportunity to join the ever-growing number of countries that have enacted legislation in compliance with the CRC in this regard.

(iv) Respect for the child's views: Article 12

In accordance with the State's obligation under the CRC, the CPA makes provision for the child's views to be ascertained in several instances. The provision is stated in general terms, that:[96]

> '[w]henever a determination has to be made with respect to –
>
> (a) the upbringing of a child; or
> (b) the administration of a child's property or the application of any income arising from it . . . the court or any other person shall have regard in particular to the ascertainable wishes and feelings of the child concerned in light of his or her age and understanding;'

Also, in specific instances, such as in a determination of the religion in which the child should be brought up.[97]

The CPA makes specific provision for a child considered to be of 'sufficient age and understanding' to be interviewed in the course of the preparation of a social enquiry report prior to a determination of proceedings for a supervision order or a care order,[98] or for termination of a care order[99] and when considering the matter of a child who has run away from a placement in an institution or from foster care.[100]

The CPA also makes provision for the court to summon the child concerned to attend any proceedings of the court convened to consider an application in respect of that child.[101] It is hoped that attention would be paid to this provision when proceedings are instituted before a magistrates' court for an order for medical examination of a child's physical or mental condition. The CPA authorises an officer of the Social Services Department or a senior police

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94 Section 152.
95 See para 62 of CRC/C/15/Add.253 (2005).
96 Section 3(3)(a).
97 Section 28(2).
98 Section 65(1)–(4).
99 Section 75(3).
100 Section 93(3).
101 Section 99(1).

officer, with reasonable cause, to apply for the order to determine whether the child has been abused or when a report is required of the child's physical or mental condition.[102]

In accordance with the CRC, and the Guidelines for Action on Children in the Juvenile Justice System, in particular, in relation to the need to give assistance to child witnesses in the judicial and administrative process, the CPA provides for evidence of a child witness to be taken although the child 'does not in the opinion of the court understand the nature of an oath', provided the 'child understands that it is his duty to speak the truth and has sufficient understanding to justify his evidence being heard'.[103] Similar provisions have been enacted in respect of a child victim of tender years.[104] Further, in circumstances where a child victim is medically certified as being unable to attend court, or is 'being kept away by threats or fear of bodily harm', the CPA provides for the child's evidence to be taken by 'an approved recording device'.[105]

In juvenile court proceedings, a child offender is given the opportunity to be heard on the place of trial for indictable offences,[106] is given the opportunity to challenge witnesses,[107] and to make a defence to a charge either through himself, his parents or guardian, or by utilising the services of the Minor's Advocate.[108]

IV THE CPA AND JUVENILE JUSTICE

(a) Compliance with the CRC and international standards and norms in juvenile justice

The necessity for juvenile justice legislation to reflect the international standards outlined in the CRC and other instruments was recommended by the United Nations Child Rights Committee in its Concluding Observations on the Bahamas' initial report.[109] The government was thereby charged with the responsibility of having the CPA conform to the principles set down in the CRC, in particular, Arts, 37, 39 and 40, as well as reflect the international standards and norms in juvenile justice standards in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'), the United Nations Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines'), the United Nations Rules for the

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[102] Section 86.
[103] Section 100(1) and (2).
[104] Section 102(1)(a).
[105] Section 101(1)(a) and (b).
[106] Section 120(4).
[107] Section 122(1).
[108] Section 112(2)(b).
[109] CRC/C/15/Add.253 (2005).

Protection of Juveniles Deprived of their Liberty ('the Havana Rules'), as well as the Vienna Guidelines for Action on Children in the Criminal Justice System ('the Vienna Guidelines').

Juvenile justice laws must comply not only with these specific Articles of the CRC and the other international standards and norms in juvenile justice, but also with other related Articles of the CRC, especially the umbrella principles. Accordingly, the principles of non-discrimination, best interests of the child, the child's right to life, survival and development and the child's right to be heard must feature in the development of special laws, policies and practices in the area of juvenile justice. These juvenile justice laws must protect all children below 18 and should specify an age of criminal responsibility. The CPA evidences the efforts by the legislature to achieve compliance with its child rights obligations.

The CPA complies with the CRC requirement for 'the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law',[110] or who are child victims, by enacting juvenile justice laws, a juvenile court, detention centres for juveniles and creates offences to guard against the infringement of the rights of child offenders and victims.[111]

(i) Age of criminal responsibility

The CPA sets the age of criminal responsibility at 10.[112] Though, not in keeping with the recommendation of age 12 made in both the Caribbean 2000 Consensus on Juvenile Justice[113] and the General Comment No 10 (2007) Children's Rights in Juvenile Justice issued by the UN Committee on the Rights of the Child,[114] it is an advance on the very unsatisfactory previously existing age of 7 years.

The CPA conforms to the letter of the CRC, since it has fulfilled the requirement to establish a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law'.[115] Whether it has complied with the spirit of the CRC can best be judged by considering the Beijing Rules which urge that the age should 'not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity'.[116] The CPA's compliance is thus, questionable, in light of the foregoing signposts for regional and international standards. The negative consequences on the child's development from too early contact with the

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110 Article 40(3) of the CRC.
111 See ss 109–148.
112 Section 109.
113 See H Thompson-Ahye, *Hazel Report on the Regional Symposium on Juvenile Justice in the Caribbean* (UNICEF Caribbean Area Office, Barbados) p 20.
114 CRC/C/GC/10, 9 February 2007.
115 Article 40.3(a) of the CRC.
116 Rule 4.1 of the Beijing Rules.

juvenile justice system have been widely documented. It is hoped that the Bahamas would reconsider and revise upwards this particular provision.

(ii) Separation from adults: Article 37

The requirement of separation of children from adults as required by the CRC and Havana Rules[117] is clearly spelt out in the CPA which prohibits the association with adults (save an adult relative charged with an offence not involving the child) of a child offender or victim at a police station, or while being conveyed to or from court, correction centre or place of safety or while waiting in court.[118] The CPA also prohibits a juvenile who is ordered to be detained in an adult correctional centre, or is ordered to be transferred from a juvenile detention centre to an adult correctional centre from associating with adult prisoners.[119]

(iii) Provision of legal or other assistance, provisions for bail

The CPA requires contact to be made with the juvenile's parents, the Director and office of the Minor's Advocate on arrest of the juvenile. The juvenile's parent or guardian is required to attend court where practicable and legal representation or other appropriate assistance must be provided where the juvenile so desires or needs such assistance.[120] In some cases, it may not be appropriate for the juvenile's parents or guardian to attend court, as when there is hostility between the parent and the child,[121] or when the parent is mentally challenged.[122] For such reasons, it would be better if the legislation were to provide for 'an appropriate adult', who may or may not be a parent, to attend court to support the child. The provision of legal assistance is commendable as it is extremely difficult for juveniles to negotiate the legal system, which even adults may experience as traumatic.

The CRC, the Beijing Rules and Havana Rules[123] all provide for detention of juveniles to be avoided to the greatest extent possible and limited to exceptional circumstances. Accordingly, save in exceptional cases, bail should as a general rule be granted to juveniles who have been arrested. In accordance with these standards, the CPA provides for bail to be granted save in certain specified circumstances when granting bail may be inadvisable.[124]

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117 Rule 17 of the Havana Rules.
118 Section 111.
119 Section 126(6).
120 Sections 112 and 115 and Arts 37 and 40 of the CRC.
121 *DPP v Blake* [1989] 1 WLR 432.
122 *R v W and Other* [1994] Crim LR 130; *R v Morse and Others* [1991] Crim LR 195.
123 Rule 17 of the Havana Rules, Rule 13 of the Beijing Rules.
124 Section 112 of the CPA.

(iv) Status offences

The Riyadh Guidelines advise that:[125]

> '[i]n order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.'

The Guidelines here refer to status offences, such as truancy, disobedience, being beyond control for which juveniles are frequently brought before the court and are institutionalised. The Beijing Rules also advocate that juvenile justice principles be applied in the case of status offences.[126]

The CPA approaches the issue from a helping, rather than a punitive angle as it places a duty upon 'a parent or guardian of a child who determines that he is unable to control the child' to 'seek assistance of an officer or any authorized officer for the purpose of establishing parental control'.[127] Truancy, staying out late at night and being abusive to parents or teachers are deemed evidence of lack of parental control by the CPA.

It is only in a case where the magistrate deems it expedient to so deal with the child that a supervision or care order is made on the application of a social welfare officer.[128] It would seem that it is no longer possible for a parent to haul a child before the court complaining that the child is beyond control. The CPA encourages every effort be made to divert the child from court.

(v) Diversion

The principle of diversion speaks to two types of intervention; the first involves early intervention in the life of children who are deemed 'at risk' to steer them away from the path of criminality, while the other refers to measures aimed at preventing juveniles, accused of committing offences, from being charged with criminal offences and coming under the court's jurisdiction. The CPA is in accordance with the requirements of the CRC,[129] the Beijing Rules[130] and the Riyadh Guidelines,[131] which all advocate diversion.

Intervention in the case of a child at risk may arise in different circumstances under the CPA.

The issue of status offences was referred to above.

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[125] Guideline 56.
[126] Rule 3(1).
[127] Section 64(1).
[128] Section 64(3).
[129] Article 40(3)(b) of the CRC.
[130] Rule 11.1.
[131] Riyadh Guidelines 5 and 58.

Before the supervision order or care order is granted to the officer from Social Services, a social enquiry report must be given to the court. The magistrate is required to give reasons if he decides not to accept the recommendations made in the report. A supervision order, which is initially made for one year but may be extended, requires that the child be supervised while remaining in the home. The supervisor must befriend the child, advise the parents and make plans for the child's future, in consultation with the parents and the child.[132]

When a care order is made, the child is removed from the home and placed in foster care, or in an approved children's home, juvenile correction centre or treatment centre or with a fit person. A care order is a measure of last resort when all other methods have failed and the danger to the child requires that the child be removed without delay. During the continuance of the care order, the Social Services Department provides counselling to the child and the family gets assistance from the community to resolve the problems which gave rise to the care order being made.[133]

The court may in the course of proceedings for a supervision or care order, including interim orders, make an exclusion order forbidding a person from contact with a child or with the persons looking after the child.[134] This is an excellent provision to protect the child.

Intervention in the circumstances of judicial proceedings is rather restricted. Diversion is available only to juveniles below 14 years and only when they admit to relatively minor offences not involving assault on a teacher or violence to any person or use of a weapon or property offences under $50.[135] Such an approach restricts the discretion of juvenile justice personnel who are required to act appropriately and with proportionality having regard to both the offender and the offence.

(b) Juvenile court procedure

(i) Due process

The CPA not only establishes the institution of the juvenile court for dealing with juvenile offenders, but also sets out the procedure for juvenile court hearings which takes into account the due process rights of the child as set out in the CRC.[136] Thus, the child's parent or guardian is warned to attend court,[137] the juvenile is given notice and particulars of the charge and the date of hearing,[138] the charge is explained to the juvenile by the court[139] and advice

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[132] Sections 64–72 of the CPA.
[133] Section 71.
[134] Section 77.
[135] Section 112(3) of the CPA.
[136] Articles 37 and 40.
[137] Section 114(1)–(4).
[138] Section 115(1).
[139] Section 115(2).

given on procuring legal representation through the Minor's Advocate.[140] In cases where the child declines representation, the child must be given assistance by the court to make his defence.[141]

The CPA also outlines the composition of the juvenile court, its jurisdiction and powers and the time and places for hearing juvenile matters.[142]

(ii) Disposition of juvenile cases

In accordance with its mandate that a 'variety of dispositions . . . be made available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence',[143] the CPA, in addition to the usual methods of dismissal of the charge, probation, fines, damages and costs, fit persons orders, detention and community service orders, parents entering into recognisance for good behaviour of the offender, also provides for counselling of both parents and children and committal to a treatment centre.[144]

(c) Restrictions on punishment: Article 37

The CRC, the Beijing Rules, Riyadh Guidelines and the Havana Rules all place restrictions on punishment of juveniles.[145] Common to all of these instruments is the principle that detention of juveniles shall be a measure of last resort and for the shortest appropriate period of time. The prohibitions against capital punishment as a sentence for offences committed by juveniles and the imposition of life imprisonment without possibility of release, which are clearly spelt out in the CRC, are closely followed in the CPA.[146]

The CPA conforms to the principle of imprisonment as a last resort,[147] but offers no shield against imposition of cruel, inhuman or degrading treatment or punishment or the possibility of imprisonment of juveniles as young as 14 years, who may be sentenced to detention or transferred to an adult correctional centre,[148] though precluded from associating with adults.[149]

(d) Periodic review of detention

In keeping with the requirement that detention should be for the minimum appropriate period, the CPA is replete with instances where periodic review is

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[140] Section 115.
[141] Section 115(3).
[142] Sections 116–124.
[143] See Article 40.4 of the CRC and Rule 18 of the Beijing Rules.
[144] Section 125.
[145] Article 37 of the CRC; Riyadh Guidelines 46; Rule 17 of the Havana Rules.
[146] Section 126.
[147] Section 126(5).
[148] Section 127.
[149] Section 126(2).

undertaken by juvenile justice personnel. Thus, it provides for review of a care order every 90 days,[150] and for a review of sentences of imprisonment by a judge every 3 years.[151]

V CONCLUSION

There is no denying the fact that the Commonwealth of the Bahamas, despite formidable obstacles in its path, has made some giant strides on its way to full compliance with its obligations under the CRC by its enactment of the CPA. While, the CPA is by no means perfect, it is an earnest effort and the Bahamas should be commended for it. It is hoped that the Bahamas will continue to strive to achieve the lofty and laudable goal of granting to all children within its purview their civil, political, economic, social and cultural rights. It is a promise that was made to the State's children in 1991, a sacred promise that must be kept without reservation.

[150] Section 73(3).
[151] Section 127(4).

Brazil

LIFE, DIGNITY AND HUMAN RIGHTS: STEM CELL RESEARCH, THE LAW AND A RECENT COURT RULING IN BRAZIL

Luiz Edson Fachin[*]

Résumé

Ce document décrit la première loi autorisant l'utilisation au Brésil de cellules souches embryonnaires pour des raisons thérapeutiques et de recherche, et la façon dont sa constitutionalité a été contestée sur le fondement d'une atteinte à la dignité de la vie humaine. Deux aspects sont explorés. En premier lieu, cette étude analyse l'adoption de la loi ainsi que la décision juridictionnelle confirmant l'autorisation légale de procéder à la recherche scientifique. Dans un second temps, elle présente la controverse actuelle entre les partisans et les opposants à la recherche, en tout ou partie, qui se concentrent sur la dignité humaine, avec une analyse détaillée de ce principe dans le système juridique brésilien. Pour terminer, le contexte dans lequel la Cour Suprême fédérale (la Cour constitutionnelle du Brésil) est intervenue est présenté, et de plus amples informations sur le vote des juges et sur la loi examinée sont jointes en annexe.

I INTRODUCTION

Human life and science are not merely words with a meaning for academic debate in countries like Brazil. Strictly speaking, they deal with one of the most complex issues of our times, giving grounds to passionate discussions on scientific development and freedom of research, as well as on the concrete conditions of society itself.

What has been experienced in Brazil does not seem to be an exception, with due heed taken of the historical and cultural differences in relation to other

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countries. On the one hand, we see the rise of such arguments as the defence of the secular State, the autonomy of science as the basis for bioethics, and reproduction rights. On the other hand, we face a myriad of arguments on, inter alia, the existence of human life prior to birth, the therapeutic use of embryonic stem cells, and the existence of human life in the embryo.

The aim of this study is to inform and examine a summary of the recent paths followed by such matters in Brazil, both in the enactment of legal provisions and also in the definition given by the judiciary through the Federal Supreme Court in a recent ruling on the conformity of the law to the Constitution. This chapter will present the laws on embryonic stem cells, the arguments favouring and opposing the constitutional nature of the legal rule authorising such scientific research, and the decision reached by the Brazilian Constitutional Court, which opened the doors to this new scientific horizon by a majority vote (in a voting decided by six to five votes).

As the explanations unfold, it will be noted that the same principle – that of the dignity of the human person – appears in both sides of the debate, either to deny the legal possibility and the ethics of research on embryonic stem cells, or to contend that it is the freedom of science itself that will provide grounds for therapies to fight the various pathologies that sacrifice the very dignity of life itself.

On one side of the battlefield, we see the claims that regard human dignity as part of the fundamentals of the Republic, as expressly set forth in the Brazilian Constitution (art 1, item III), and even as a fundamental human right (expressly mentioned in the introduction to art 5 of the Constitution) based on the inviolable right to life. On the other side of this battlefield, we see the social and technical function of research, aiming to comply with the needs of government policies that implement the right to health, to physical integrity, and to the very dimension of living with dignity, as well as the freedom of scientific research, under provisions set forth in art 5, item IX, letter 'd' in the Brazilian Constitution.

II LEGAL GROUNDS FOR USING EMBRYONIC STEM CELLS

Let us first examine the legal grounds for the polemics regarding research on embryonic stem cells in Brazil.

On 24 March 2005, President Luiz Inácio Lula da Silva enacted the Law No 1105, which regulated the Federal Constitution, especially concerning 'safety norms and inspection systems for the construction, culture, production, handling, transport, transfer, import, export, storage, research, trading, consumption, release in the environment and discharge of genetically modified organisms and their by-products'. The law came to be known as the Biosafety Law.

Prior to this 2005 law, there was a rule in Brazil banning the genetic engineering of human germinal cells, and the production, storage or handling of human embryos addressed as biological material available were also forbidden. Actually, both the genetic engineering of human germinal cells and the in vivo interventions in human genetic material were treated as felony, subject to sentences of 6 to 20 years in prison.[1]

The wording of art 5 of the new law enacted in 2005 authorises the research on embryonic stem cells, although the actual purpose of the bill submitted originally was to regulate activities dealing with genetically modified organisms. Nevertheless, a topic was added to the main bill to include the production, storage or handling of human embryos, even though this matter, strictly speaking, bears little or no connection to the issue of GMOs (genetically modified organisms). After a lot of discussions, public hearings and controversies, the Legislative Power approved the bill on 4 March 2005, with 352 in favour of and 60 votes against the measure.

The new law then authorised the research and defined the embryonic stem cells as 'embryonic cells that have the ability to differentiate into cells of any body tissues'. Within the universal scope encompassed by the new law (including, but not limited to, biotechnology, genetically modified organisms, biosafety, and the precautionary principle), art 5 provided solely for the following permission:

> 'It is permitted, for research and therapeutic purposes, to use human embryonic stem cells produced by in vitro fertilization and not employed in the procedure, subject to the following conditions: first – that the embryos are unviable; or, second – that the embryos have been frozen for no less than three years prior to the date of publication of this Law (i e 28 March 2005), or, if already frozen at the date of publication of this Law, after a three-year lapse from the freezing date.'

The consent of parents and the approval by research ethics committees were defined by law as necessary prior conditions in the case of research or therapy carried out by research institutions and health service providers.

From then on, there has been a legal rule that allows for scientific research on embryonic stem cells in Brazil.

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[1] Such was the wording of arts 8 and 13 of Law 8974 of 5 January 1995, revoked by the new legislation (Law 11105/2005). During the period between these two laws, Executive Order No 2191-9 was issued on 23 August 2001, creating the Brazilian National Biosafety Technical Commission (CTNBio), a multidisciplinary body with collegiate powers, established for consulting purposes in the area of preparation, updating and implementation of the national policy on biosafety regarding genetically modified organisms, as well as human health protection.

III THE LAW IS CHALLENGED BY AN ALLEGATION OF UNCONSTITUTIONALITY

Less than 2 months after the law had come into force, the Federal Prosecutor General of Brazil challenged the wording of art 5 in the new law as unconstitutional before the Federal Supreme Court by means of a Direct Action of Unconstitutionality (under docket number 3510). The technical grounds for objecting to the research were, in brief, the following:

(1) human life develops with, and as of, fertilisation;

(2) the embryo is destroyed by the use of embryonic stem cells;

(3) current experiments show that adult stem cells may be used in an effective and safe manner; and

(4) there are no records of results from embryonic stem cells.

The petition for banning research on embryonic stem cells was based on the constitutional principle of the inviolable right to life, and on the protection granted by the Brazilian Civil Code to the rights of the unborn child since conception. During the legal debate there was also a mention of art 4 of the American Convention on Human Rights – 'Pact of San Jose, Costa Rica', of which Brazil is a signatory and which protects the right to life from the moment of conception, including the allegation that such protection already existed in the Roman Law, since the rights of the fetus were guaranteed, as seen in the 'Digesto' of the Justinian Code,[2] from the moment of conception.

The action was filed and assigned for proceedings by the Federal Supreme Court on 31 May 2005. After several court procedures, a public hearing was scheduled within the Constitutional Court 2 years later, to hear persons endowed with known expertise and authority in the field, as well as entities of the civil society. This hearing was set forth by the Brazilian Constitution for the Parliament, and was adopted by analogy by the Supreme Court.

Various entities and bodies of the Brazilian society participated in the debate and in the court procedures, such as the Brazilian Confederation of (Catholic) Bishops, the Institute of Bioethics, Human Rights and Gender, Brazil's Pro-Life Movement, besides obviously the General Attorney of Brazil, defending the confirmation of the law enacted by the President of the Republic.

The court session started on 5 March 2008 and ended on 29 May 2008, dismissing the direct action of unconstitutionality by a majority of voices. The

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[2] Digesta (D 1.5.7.): 'Nasciturus pro iam nato habetur, quotiens de eius commodis agitur' (An unborn child, if subsequently born alive, is considered as already in existence whenever it is to its own advantage).

voices against the permission for research were those of the Chief Justice (installed in office during the judgment) and of four other justices. The Reporting Justice and five other justices voted in favour of the permission. The result was achieved by simple majority, ie with six justices in favour and five justices against.

IV HUMAN DIGNITY AS A LEGAL VALUE AMID THE DEBATE

The dignity of the human person pervaded all moments of the debate, and this theme is undoubtedly the cornerstone of the whole legal system. As an example, when voting in favour of declaring the law unconstitutional as worded, Justice Gilmar Mendes (installed as Chief Justice to replace Justice Ellen Gracie) based his vote right from the beginning on the ethical, legal and moral issues of life and human dignity. To that extent, he further argued about the issues of abortion and euthanasia, stressing the role of the Constitutional Courts as 'houses of the people'.

He stated, in brief, that 'there is a vital element worthy of legal protection' even during the pre-birth stage, and that the Brazilian law was deficient 'in the regulation of research and, therefore, not compatible with the principle of proportionality in terms of prohibition of an insufficient protection'. Consequently, following such lines, the effective protection of human rights, of fundamental rights, and also of the so-called personhood rights would demand an integral and unified protection of such rights, with a focus on the dignity of the human person as the central point of the axiological radiation of human values.

In view of the contemporary concept of human dignity and the relationship between the Constitution and civil law, it could be affirmed that the personhood rights are actually fundamental rights.

Regarding this theme, both sides, attacking or defending the law that authorises the research, ie either seeking to declare it as unconstitutional or to uphold it as constitutional, ended up resorting to the same principle.

On the one hand, the parties defending the idea of declaring the law unconstitutional and opposing the research tried to contend at the Supreme Court, albeit in vain, that from a legal point of view the right to life, as declared by art 5 of the Brazilian Constitution, is inviolable from conception, and that this would further be warranted by art 4 of the new Brazilian Civil Code in force as of 2003, which protects the rights of the unborn child from conception. They further alleged that, from a scientific point of view, there would be a possibility of rejection, giving rise to teratomas (embryonic tumors), of loss of control of embryonic cells, and that the treatment of genetic diseases could be made with adult stem cells. It was further argued that to open this door to research would mean the transforming of human beings into experimental

guinea pigs. They stated that the law at least lacked a provision for the creation of a properly regulated Central Ethics Committee.

On the other hand, the parties defending the constitutional nature of the law contended that a distinction should be made between an embryo and an unborn child: whereas the Civil Code rule protects a potential being in development inside the maternal womb (ie the unborn child), the embryo is neither a person nor an unborn child, since it is not yet implanted in the mother's uterus and its birth is uncertain. It was further contended that the law did not authorise the research unless the embryos represented surplus embryos from in vitro fertilisation procedures, inviable or frozen for over 3 years. In addition, the law prohibited human cloning, both therapeutic and reproductive, further banning any embryo trading. As an example of this approach, we present the vote given by Justice Cármen Lúcia Antunes Rocha.

Under the argument of the secular State based on the Brazilian Constitution, the Justice affirmed that 'the respect for the principle of dignity of the human person is ascertained by the constitutional ethics now in force'. She argued that it was a matter of living with dignity and that 'there is no violation of the right to life when research are permitted'. In her words: 'In order to germinate, the grain has to die.' Between 'human matter waste' and the use for research, the Supreme Court Justice chose not to discharge the material, since the lack of research means the certitude of no results in science.

In view of the debate on such a principle, and bearing in mind that the related circumstances must not be different – considering other countries with similar legal traditions and an analogous context as regards historical, cultural and economic features – we shall now describe the legal value of the principle within the framework of the Brazilian legal system.

(a) Personhood and fundamental rights

Not all of the fundamental rights are personhood rights. Personhood rights, according to Rabindranath Capelo de Souza, derive from the combination of psychosomatic and environmental facets that compose human personhood.[3] The right to due process of law, for instance, is a fundamental right, but not a personhood right. It is possible to state, along these lines, that the legal construction of personhood rights is a subset of the wider universe of fundamental rights and, as such, applicable both to relationships involving the State and to those between individuals.[4]

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[3] Rabindranath Capelo de Souza *O direito geral de personalidade* (General Law of Personality) (Coimbra, 1995).

[4] J J Gomes Canotilho *Curso de direito constitucional* (The Course of Constitutional Law) (São Paulo, Saraiva, 21st edn, 2000) p 372.

Furthermore, in the likelihood of direct and immediate enforcement of fundamental rights in the relationship between private individuals,[5] there is no question whatsoever of the absolute restriction that results from the split between public law and private law. In other words, not only personhood rights but also all the other fundamental rights are applicable to the relationships between private individuals.

It could not be otherwise. To impose an absolute restriction on the application of the principle of the dignity of the human person – endowed with constitutional status – according to personhood right restrictions defined by ordinary laws would imply contempt for the Constitution itself and an intolerable violation of the very dignity of human persons.

It must then be reaffirmed that, regardless of the existence or lack of provision for personhood rights other than in the Constitution itself, the dignity of the human person in the relationship between private individuals is protected by direct or indirect enforcement of the fundamental rights, and that this is a larger universe encompassing even personhood rights themselves.[6]

(b) Fundamental rights and justice

The focus on the perception of fundamental human rights must be made through the lenses of the dignity of the human person, as a necessary goal within the core of materially fundamental rights.[7]

Along this line of thinking, for Professor Cármen Lúcia Antunes Rocha,[8] Justice of the Federal Supreme Court of Brazil, who voted in favour of the research in the judgment on the allegation of unconstitutionality, 'dignity is a basic assumption for the idea of human justice, and the entitlement to dignity should require no further effort to deserve it, as it is inherent to life and, as

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5 Without obviously excluding any related or consequential enforcement. In this sense, see Juan Maria Bilbao Ubillos 'En que medida vinculan a los particulares los derechos fundamentales?' in Ingo Wolfgang Sarlet (ed) *Constituição, direitos fundamentais e direito privado* (The Constitution, fundamental rights and private law) (Porto Alegre, Livraria do Advogado, 2006) pp 301–340.

6 M C B Moraes 'Recusa à realização do exame de DNA na investigação de paternidade e direitos da personalidade' (Refusal to consent to DNA paternity testing and personhood rights) in Vicente Barreto *A nova família* (The new family) (Rio de Janeiro, Renovar, 1994) p 174. Professor Maria Celina Bodin de Moraes states: 'In contrast to the strict identification and severing of personhood rights we have the notion of a human person and thus of his/her personhood – considered as a unitary value, consequently giving rise to the acknowledgement by the legal system of a general protection clause that will definitely encompass the full protection of personhood, in all of its manifold manifestations, having the dignity of the human person as its confluence point, placed at the apex of the Federal Constitution of 1988.'

7 On this matter, see Ingo Wolfgang Sarlet *A eficácia dos direitos fundamentais* (The effectiveness of fundamental rights) (Porto Alegre, Livraria do Advogado, 1998) p 98.

8 C L A Rocha *O princípio da dignidade da pessoa humana e a exclusão social* (The principle of dignity of the human person and social exclusion) Speech at the XVII Conference of the Brazilian Bar Association – OAB, 29 August to 2 September 1999.

such, a right that precedes the State'. The dignity of the human person is thus assured as a constitutional 'super-principle'.

It is imperative that the State be committed to the dignity of the human person.

The theme concerns the guarantees of the Democratic State under the Rule of Law and the dignity of the human person, concretely conceived,[9] as stated by art 1 of the 1988 Federal Constitution.

It should be noted that the technical and scientific development has not been able, in such countries as Brazil, to promote the inclusion of everyone in the modern society. On the contrary, a kind of social Darwinism is eliminating approximately 70% of the population in Brazil from such a goal. They are excluded from both consumption and basic access to the Social State range of benefits. The technological wave has been much more associated with the logic of the market and the globalisation processes than with the promotion of human dignity. The conversion of living beings into genetic resources generates such perplexity.

(c) How have we reached this point?

The topics herein presented are connected with the new economics in the information field. If culture and nature are commodities in the new digital world, filled with databases, a dignified life must not simply exclude research and scientific progress.

The dignity of the human person is imperative from an ethical and existential point of view, and it is also, unequivocally, a constitutional principle and rule[10]

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[9] There are indeed scholars, and not just a few of them, who reject the idea of the dignity of the human person as an evident value, accepted by the legal system for having concrete applicability. On the contrary, some legal scholars ascertain that the concept of dignity of the human person would be too abstract. By refusing this view – distant from a transforming praxis – the current philosophy of law brings an authoritative argument to provide grounds for the concrete and self-applicable nature of the dignity of the human person. This is the recently disseminated paradigm of the concrete life of each subject. Under such a perspective, life is no longer the first and most fundamental right to be protected by the legal system, and it rather becomes an essential condition for permitting the other rights. The concept of supremacy of human life is thus developed, and human life must necessarily be endowed with dignity in order to be understood as life. This paradigm insists that life (existence) be thought of under a concrete aspect, i e the point of departure for such a model is life with concrete content, since life is, by principle, also biological. Therefore, it can be ascertained that life will never be reduced to a mere abstraction, considering its concrete physical and biological substratum. Under this perspective, the new philosophical paradigm thus demonstrates the concrete foundations for the dignity of the human person, burying the critics of its supposed abstract and intangible features. See H Maturana and F Varela *A árvore do conhecimento: as bases biológicas da compreensão humana* (The tree of knowledge: biological bases for human understanding) (São Paulo, Palas Athena, 2001).

[10] On the double dimension of principles and rules inherent in the fundamental legal norms, see Robert Alexy *Teoria de los derechos fundamentales* (The theory of fundamental rights) (Madrid, Centro de Estudios Políticos y Constitucionales, 2002).

perceived by the Brazilian legal system as the fundamentals of the Republic, pervading the whole rationality of the national legal system by its normative enforcement.

It regards, in theory, the acknowledgement by law of a dimension inherent to every human person that precedes – as a logical and ethical principle – the legal system itself. In fact, the juridical system as desired in a theoretical plan by the abstract human creation contains in itself some 'metajuridical' elements that are conditions for the possibility of law itself.

Nonetheless, the principle of the dignity of the human person must address the protection of the concrete person, without reducing it to a 'virtual subject'[11] considered in an abstract manner, reputed as a mere element of the juridical relationship or centre of assessment.[12] Under such concept, dignity is taken as an attribute referring to the human being when concretely considered. Another extremely relevant element is also inferred when reviewing the principle at issue: the dignity of the human person is an imperative that derives from an ethics of alterity.

This is, perhaps, how we got this far: we have forgotten that the dignity of the human person may be conceived under the double dimension of principle and value.[13] Its axiological dimension allows us to state that there is a prima facie prevalence of the dignity value that determines the accomplishment of rules, even though a formal a priori prevalence of the principle is not stated.

Paulo da Mota Pinto, a highly distinguished professor from Coimbra and a former member of the Constitutional Court of Portugal, notes the supremacy of the dignity of the human person as a value when ascertaining that 'a true axiological imperative for any legal system derives from the assurance of human dignity, namely the acknowledgement of legal personhood for all

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[11] According to Jussara Meirelles, 'on the one hand, we have what we would call a codified person or a virtual subject; on the other hand, we have the real subject, the really human person, seen under the prism of its own nature and dignity, the "real people" person': 'O ser e o ter na codificação civil brasileira: do sujeito virtual à clausura patrimonial' (To be and to hold under the Brazilian Civil Code: from the virtual subject to the prison of assets) in Luiz Edson Fachin (ed) *Repensando fundamentos do direito civil brasileiro contemporâneo* (Rethinking the foundations and contemporary Brazilian civil law) Rio de Janeiro, Renovar, 1998) p 91.

[12] Ingo Wolfgang Sarlet *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988* (Dignity of the human person and fundamental rights in the 1988 Federal Constitution) (Porto Alegre, Livraria do Advogado, 2001) p 60. Along those lines, Sarlet designates the dignity of the human person as 'an intrinsic and distinctive quality of each human being that entitles him/her to the same respect and consideration from the State and from the community, implying in this sense a set of fundamental rights and duties that secure the person from any and all acts of degrading and inhuman nature, and assure a minimum of existential conditions for a healthy life, in addition to providing for and fostering his/her active and co-responsible participation in the destinies of his/her own existence and in the life in communion with other human beings'.

[13] According to Alexy, the actual accomplishment of a principle is also the accomplishment of a value. In addition, both principles and values are subject to assessment, even though principles remain in the deontological domain and values in the axiological domain (above n 10).

human beings, followed by a provision of legal means (especially subjective rights) aimed at defending the refractions that are essential to the human personhood, as well as the need for protection of such rights by the State'.[14] A notion that arises from this statement is that of the dignity of the human person as a general protection of personhood, with implications for the protection of the moral, physical and psychological integrity of the human person. The inclusion of the dignity of the human person principle in the Constitution is not – and should not – be taken as mere rhetoric on the part of the constitutional legislator: it is a constitutional rule and, as such, a binding rule.

There is no doubt that, as the dignity of the human person is a value that precedes the right and commands it – being further a principle taken to a level of fundamentals of the Republic – it ends up as a supreme value of the legal system. Consequently, it becomes a fundamental vector in the actual operation of legal precepts, both regarding public law and private law.

As the principle of the dignity of the human person is an unavoidable ethical and legal component to which the whole law is subordinated, without any doubt we must re-examine the precepts also under civil law, with a view to preserving and promoting the dignity of the human person. The relationship between private individuals – including and mainly regarding the exercise of any technical, scientific or economic activity – is conditioned upon the assumption of respect for the other person, taken as a concrete subject and endowed with dignity.

Thus, the respect for the dignity of the human person is undoubtedly a necessary condition for the relationship between private individuals.[15] However, dignity refers to a concrete person and, rather than being taken as an atomised and abstract individual, the person is considered in a dimension of intersubjectivity.

(d) On our origins

In order to well position the debate within the Brazilian Supreme Court, we must now readdress one of the essential elements of this theme. It regards Kant's notion of moral autonomy, based upon the autonomy of will commanded by pure practical reason, leading to a formula based upon the idea that the human being must always be treated not only as a means but also as an end.[16] Even when treated as a means it must simultaneously have an end in itself.

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[14] See Sarlet, above n 12, p 88.

[15] Sarlet, above n 12, p 46. The affirmation by Sarlet is quite accurate: 'The dignity of the human person means both a limit and a duty for the government powers and, as we see it, for the whole community in general, touching each and every person, and said duplicity further points to a dimension that simultaneously defends and rewards dignity.'

[16] Immanuel Kant *Fundamentos da metafisica dos costumes* (Foundations of the metaphysics of morals) (Rio de Janeiro, Ediouro).

This widely known concept may be deemed as a core expression of the idea of the dignity of the human person in modern thought. For Kant, it is the feasibility condition of the categorical imperative, whereby one must act only according to the maxim by which the act may rationally become a universal law.[17]

To treat the rational being as an end is a prior condition for a feasible affirmation of the universal possibility of commanding the individual's autonomy by practical reason. It should be immediately noted that Kant's moral theory is, in this aspect, close to what would later be deemed an ethics of alterity – even if the foundations, as well as the very manner of facing the coexistential dimension of humanity, may differ. Consequently, an act that entails denial of the condition of an end in itself, either to the very person or to others, is not moral. According to Kant, everything set as an end has either a price or a dignity. Whatever cannot be measured against other values and cannot have its price established has a dignity. In accordance with this thought, the human person has dignity.[18]

In opposition to the Greek philosophy heritage, modern reason ended up almost exclusively reduced to an instrumental reason, leading all knowledge to a scientific bias. The belief in the possibility to forecast and control all events reduces knowledge to a notion of science that creates an abstraction between subject and object as separate entities with an unavoidable split between them.[19] Instrumental reason is linear, limiting itself to drawing a direct relationship between means and ends. The market is ruled by such straight-line rationality and science likewise responds to this order of ideas and praxis.

Therefore, an adequate challenge derived from the mutual symbiosis between market and scientific development is one of the easily assessable marks in the history of the market society development.

The pretentious claim to control and forecast, as supposedly assured by instrumental reason, represents the compass of the regulatory pillar of modern times, spreading to all fields of knowledge – including law. The concrete human being becomes a means for such stability, to the extent that the human being is not deemed the ultimate end: the end appears within the abstraction of the formal datum named 'legal security'. It is obviously undeniable that legal security carries a relevant value, even as a tool for the protection of personal dignity. The problem resides in the inversion of values that converts security into a supreme principle, a corollary of the gap between *real* and *abstract* created by the pattern of the law based on the division in modern reason.

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17 Immanuel Kant *Crítica da razão prática* (The critique of practical reason) (São Paulo, Martins Fontes, 2001).

18 Kant, above n 16.

19 A split which is rejected by Kant.

(e) The repersonalisation

The dignity of the human person taken in its concrete dimensions – and not as an abstract being hovering over a metaphysical location – finds its venue in civil law under the so-called 'repersonalisation'.[20] In fact, it is possible to state that the centrality of the person under eighteenth-century civil law is not identified other than within the scope of the words fomenting the Liberal Utopia, the leitmotiv of modern private law development, in accordance with the above explanation. Nevertheless, it has already been demonstrated how the words and reasoning centered on a purely formal element finally culminated in a rationality that made the dignity of the person be overruled by patrimonialism and conceptualism.

To 'repersonalise' the civil law then means, in the teachings of Tepedino,[21] to place the human person at the core of the preoccupations of the law. In a way, it means to readdress the idea that the human being is endowed with dignity and represents an end in itself. Nevertheless, the fundamentals here differ from what is contained in the ideas defended by Kant. From the dialectics that deny the Kantian abstraction, we see the rise of a synthesis mandating the protection of the person by its condition of concreteness, a subject of necessities. It really concerns protecting the human person in its coexistential dimension, with its network of relationships that composes society itself. It is impossible to conceive the individual without the other, wherefore the protection of human dignity is always inter-individual, based on an ethics of alterity, and never individualistic.[22] The personhood rights of an individual are not based on abstract data of legal personality, but rather on personhood as something inherent to the concrete subject. As explained above and as inferred from the words of Capello de Souza, it is a compound of psychosomatic and relationship facets, ie it comprises the physical and psychological elements, in conjunction with the relationship between those elements and the environment – and, above all, with other subjects.

This leads to the conclusion that if personhood rights are not 'granted' by positive law, it then becomes unnecessary to typify each and every right so as to insert it within the 'World of Law'. The contemporary view of the system of law and of the normative construction methods shows that there are insufficient grounds to sustain the enforcement of law through subsumption under rigid patterns of juridical relationships, clinging to ready-made answers and without the need for definition of the issue in each concrete case. The

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[20] Orlando de Carvalho *A teoria geral da relação jurídica* (A general theory of legal relations) (Coimbra, Centelha, 1981).

[21] Gustavo Tepedino *Temas de direito civil* (Themes of Civil Law) (Rio de Janeiro, Renovar, 2004).

[22] We must mention the significant reflection by Maria Celina Bodin de Moraes, who bound the dignity of the human person both to freedom and solidarity: 'O conceito de dignidade humana: substrato axiológico e conteúdo normativo' in Ingo Wolfgang Sarlet (ed) *Constituição, direitos fundamentais e direito privado* (The Constitution, fundamental rights and private law) (Porto Alegre, Livraria do Advogado, 2nd edn, 2006) pp 107–150.

personhood that is to be protected by law is thus not merely an object created by the rule. A distinction must thus be made between personhood as a concrete datum and personhood as a generic attribute allowing anyone to be a part of the juridical relationship as a subject of the law.[23] The definition of personhood in light of the abstraction that branded eighteenth-century legal positivism and reached the twentieth century, culminating with Kelsen, is nothing more than the normative attribution or the attribution of a function by a normative order. In other words, the 'ascension' to the condition of 'person' would occur when the legal system 'grants' such a condition. This is certainly not the personhood that we are dealing with, the subject matter of the general protection detailed here. This is due to the fact that the dignity of the human person is not something born out of positive law, integrating a dimension that, as explained, precedes law itself. Therefore, protection does not have its roots in the law, and it is unnecessary to list the rights that would be entitled to legal protection. Everything inherent to the personhood of the concrete subject is worthy of legal protection, since it concerns the dignity of the human person.

To direct the central focus of the general protection of personhood to the principle of the person's dignity thus means to base those rights on the same principle that grounds the fundamental rights. We thus see how it was possible for both the defenders and the challengers of the research to resort to the same principle in order to reach completely opposite conclusions. As the principle is based on the Constitution, it is meaningful to explain, albeit briefly, this aspect of the constitutional text.

V THE BRAZILIAN CONSTITUTION AND HUMAN DIGNITY

The 1988 Federal Constitution made civil law relinquish the patrimonialist stand inherited from the nineteenth century, especially from the Napoleonic Code, migrating to a concept under which human development, as well as the dignity of the person when concretely considered, is privileged in the relationship between individuals, aiming at their emancipation.

The Constitution established the dignity of the human person as the basis of the Republic. This approach placed the person at the core of the preoccupations of the legal system in such a manner that the whole system, guided by and based on the Constitution, is directed towards the protection of the person. The constitutional norms (comprising principles and rules) are centred on such a perspective, and they thus confer a systematic unity to the whole legal system.

In opposition to the traditional and dogmatic law, we thus see an inversion of the core concerns of the legal system, whereby the protection of the human person becomes the ultimate end of the law as a tool for the full development of

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[23] Meirelles, above n 11.

the human person. The inversion of the locus of concerns must also take place in civil law. This is a necessary consequence in view of the supremacy of the Constitution within the legal system. For this reason, the whole set of normative standards beneath constitutional level must adjust itself to the constitutional axiological pattern.

Within this framework and in light of the constitutional system, the patrimonial aspect, previously in the centre of the spotlights, is now moved to the background. The real estate guided codification, a mark of the 1916 Civil Code, is no longer supported by the current Constitution.[24] Wealth has been considered as an 'attribute of personhood' by many authors. Two reflections must be taken into consideration under this perspective. First, the personhood mentioned is the abstract personhood, ie the personhood given by the legal system, whereby someone is rendered qualified to be a subject of rights. This is not a concrete person, a person with needs, feelings, desires, abilities, but an abstract category person, not to be confused with the concrete human being. Secondly, the idea that wealth would be an attribute of personhood leads to the idea that personhood and wealth are the same thing.

We thus see a confusion of concepts, binding wealth to the person. However, this abstract person cannot be confused with the concrete human being. Even if we were to admit wealth as an attribute of personhood or personality, we would be speaking of an abstract category, not to be confused with the concrete human being. Wealth cannot thus be confused with the value of the human person, since the human person is not limited to one abstract category.

In this way, to privilege wealth – and contrary to what one could imagine with a shallow view this notion of 'attribute of personhood' to be – means to marginalise the constitutional value of the dignity of the human person. In the 1988 Constitution, the dignity of the human person acquires the status of an organisational cardinal principle within the legal system. Therefore, any positively defined or potential rule that clashes with this principle, in whole or in part, is unconstitutional.

According to such ideas, any assessment of the constitutional or non-constitutional nature of a statute, in view of the repersonalisation mandated since 1988, must take into consideration the superiority of the protection of human dignity over the patrimonial juridical relationship. By implication, this means that a statute – it must be stressed, both a positively ascertained or a proposed statute – will be deemed unconstitutional if it privileges a patrimonial view rather than a concept committed to the protection of the concrete human being.

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[24] On this matter, Meirelles writes: 'Therefore, it is not difficult to conclude that the person described by the Civil Code is not the person who lives, feels and walks in our days. The personal values, the desires, and the intent to have its dignity acknowledged are not reflected in the abstraction of a figure manufactured by the system as a person, as a subject of law', above n 11, p 91.

Nevertheless, according to the Brazilian Constitution, the right to life is not an absolute and fundamental right. Here are some exceptions:

(a) death penalty in the case of declaration of war (art 5 item XLVII of the Constitution);

(b) abortion as a means to save the life of the pregnant woman (a 'necessary abortion') or when the pregnancy results from rape ('humanitarian or therapeutic abortion'), under art 128 items I and II of the Brazilian Penal Code.

Within such a framework, we must see how the Brazilian Constitutional Court examined the tension between right to life, a life with dignity and scientific research.

VI THE ROLE OF THE BRAZILIAN SUPREME COURT IN PERMITTING THE RESEARCH

It is precisely within the setting outlined above that the role of the Brazilian Supreme Court is established in the Brazilian contemporary horizon and, consequently, that the nexus of these considerations is found. When the constitutional focus is centred in the past, there are many concepts that can reduce the defence of the Constitution simply to an instrumental apparatus, with only formal preoccupations. Notwithstanding this and without prejudice to its relevance, another concept can be found in our Constitution, one able to face a new era. From our point of view, the protection of human dignity also implies a proactive stand, reclaiming the duty to enforce rights and not only to maintain them.

Within the scenario of a Social Rule of Law, the higher courts are assured a locus of significant relevance. This is due to the fact that the activities of the higher courts are generally committed to the discussion and determination of controversial points, connected with constitutional matters. In general, they are thus also called constitutional courts, even though they may, without naming it, implement such action. This is the case of the Federal Supreme Court in the Brazilian legal system, as set forth in art 102 of the Federal Constitution. This layout of higher courts as protectors of the Constitution, in spite of the important Roman and Germanic roots of the Brazilian law, is based on the common law experience, more specifically on the example of the United States. The role of defending the Constitution is not limited to the Supreme Court. In an indirect and general manner, each government and social body, including the citizens, is also charged with such a duty. However, judgment-rendering courts or trial courts may lack this duty of direct or immediate protection of the Constitution, even at the level of oversight of diffuse rights to ensure compliance with the Constitution. Nevertheless, all those connected with the law are primarily and above all bound by a duty of dispensing the law while observing the Constitution.

However, it is undeniable that the control has a much more direct feature when exerted by the Supreme Court, which holds a transcendent power in the face of the State.

VII CONCLUSION

Here is the path followed by a controversial law to the Federal Supreme Court. The Court comes to life as an abstract defender of the Constitution, and then becomes a concrete entity, as the historical and cultural features of its decisions are unveiled. Under the Anglo-Saxon tradition this effect is even stronger, and it is in this context that we understand the visceral connection between the constitutional jurisdiction and the democratic principle, without leaving aside the formative and historical process of the reasoning.

In addition to a healthy reflection, the normative texts must also act as a curb on the power of the State. Accordingly, the higher courts – usually known as constitutional court – also hold this function of control among their competencies, and they may be at the apex of the jurisdictional scale or a political body outside the three branches of the classical division of powers. The Brazilian example does not fall outside this rule, and it was further influenced by the German constitutional and jurisdictional anatomy.

After the 1988 Constitution and the consequent establishment of the Higher Court of Justice (Superior Tribunal de Justiça), the Federal Supreme Court (Supremo Tribunal Federal) strengthened its *locus* of constitutional jurisdiction, as the ultimate 'guardian of the Constitution'.

This role was accomplished in the judgment, which is the subject matter of this chapter, when the Federal Supreme Court fulfilled its constitutional mission. The legal examination of the constitutional nature of the law that authorises the research has come to an end in Brazil. However, the debate has not ended. Only the future will show us the possible and final results obtained through scientific progress, and the discussion on life, its beginnings and dignity will never cease.

APPENDIX 1

Summary of the judgment by the Brazilian Federal Supreme Court

Information

The voting by the Brazilian Federal Supreme Court (Supremo Tribunal Federal – STF) on the Direct Action of Inconstitutionality No 3510, filed to seek that art 5 of the Biosafety Law be declared unconstitutional, started on 5 March 2008. The article challenged deals with the use of embryonic stem cells in research. The voting ended on 29 May 2008.

For six justices, ie for the majority of the court, art 5 of the Biosafety Law is not liable to amendment. The majority of votes were given by Justice Carlos Ayres Britto, reporting on the matter, and by Justices Ellen Gracie, Cármen Lúcia Antunes Rocha, Joaquim Barbosa, Marco Aurélio and Celso de Mello.

Vote by the reporting justice

The first vote was given by the justice reporting on the proceedings, Justice Carlos Ayres Britto, denying grounds of unconstitutionality. He based his vote on provisions of the Federal Constitution that guarantee the right to life, health, family planning and scientific research. He also stressed the spirit of brotherhood extolled by the Federal Constitution for society when he defended the use of embryonic stem cells in research seeking the cure for diseases. He used as argument in favour of the use of stem cells in research the fact that human life only starts after birth. For the STF justice, 'human life is a phenomenon that takes place from birth to brain death. The embryo holds a vegetative life that precedes the brain'. The STF justice further tried to make a distinction between a frozen embryo and an embryo formed within the womb and the human person. For the reporting justice, a frozen embryo is unable to become a fetus or a human being, because it could not develop without being implanted in a feminine body. He voted in favour of the research.

The vote by the Chief Justice then in office

At the same time, Justice Ellen Gracie, then acting as Chief Justice of the STF, advanced her vote and explained that she would follow the vote of the reporting Justice Carlos Ayres Britto. The Chief Justice fully agreed with the reporting justice and voted accordingly. For her, the Biosafety Law shows no vice of unconstitutionality:

> 'Neither the guarantee of dignity of the human person, nor the guarantee of inviolability of life can be ascribed to a pre-embryo since, as I believe, a pre-embryo not yet lodged in its natural nest of development, the uterus, cannot be classified as a person.'

She noted that the Brazilian legal system assigns the quality of person to a child born alive.

> 'On the other hand, a pre-embryo does not conform to the condition of an unborn child, since an unborn child, as the name already clarifies, presupposes the possibility or the likelihood of birth, and that does not happen with embryos that are proved unviable or set to be discarded.'

She stated:

> 'I see no vice of unconstitutionality. In my belief, a pre-embryo not yet received by the uterus cannot be classified as a person.'

She voted in favour of the research.

Pronouncement by the Federal Prosecutor General

The new Federal Prosecutor General, Antônio Fernando Barros e Silva de Souza, and the attorney for Brazil's National Confederation of (Catholic) Bishops (CNBB) also expressed their views, both arguing that the law was unconstitutional. For them, the Constitution guarantees the right to life, and the embryo would already be a living being. Souza argued that:

> 'There is sound scientific conviction that human life starts with fertilization, and article 5 of the Constitution guarantees the inviolability of human life.'

Adjournment

Following the vote of the reporting justice, Justice Carlos Alberto Menezes Direito requested a detailed examination in the matter of the Action for Inconstitutionality of the law, adjourning the judgment session.

The judgment session is resumed

The voting session resumed on 29 May 2008, and justice Carlos Alberto Menezes Direito voted for the 'partial unconstitutionality' of art 5 of the law. The justice contended that the article required changes, so as to determine that no research would be allowed on the embryonic stem cells unless the cells were removed from the embryo without destroying it. He stated:

> 'From the moment of fertilization, more precisely from the moment the sperm nucleus and the ovum nucleus are united, the embryo is already an individual, a representative of the human species, with the same genetic material of a fetus, a child, a grown-up, an old person.'

For Justice Menezes Direito 'the embryonic stem cells are indeed a human life, and any destination that is different from human reproduction violates the right to life'. He voted against the research.

Vote by Justice Cármen Lúcia Antunes Rocha

Justice Cármen Lúcia then offered her vote in favour of the research on embryonic stem cells. According to the justice:

> 'Their use is a form of knowledge for life. This is the nature of the scientific research on embryonic stem cells, which seeks to extend life, and not to affront it. In addition to the fact that the research does not violate the right to life, it becomes a part of human existence because it would not be life.'

She mentioned scientific studies indicating that research on embryonic stem cells capable of differentiating into any human tissue cannot be replaced by other lines of research, such as those using adult stem cells, and that the discarding of cells not yet implanted in the uterus generates only a 'genetic waste disposal'. She voted in favour of the research.

Vote by Justice Ricardo Lewandowski

In general lines, Justice Ricardo Lewandowski voted for the imposition of restrictions on stem cell research, partially granted the action, and requested that the article be amended, so that research would not be allowed unless it used non-viable embryos, without any possibility of spontaneous division. His stand was opposed to research.

Vote by Justice Eros Grau

Justice Eros Grau proposed amendments to the Biosafety Law, to include restrictions on research. The purpose of the justice was to assure that the stem cells used in the research be solely those obtained from ova without a spontaneous division, that all research on embryonic stem cells be subject to a prior authorisation by the Ministry of Health, and that the ova used be solely those from in vitro fertilisation, exclusively for human reproduction. In the general count of votes, he opposed the research, following the stand of Justices Menezes de Direito and Ricardo Lewandowski.

Vote by Justice Joaquim Barbosa

Justice Joaquim Barbosa fully agreed with the reporting justice and voted accordingly. For him, to ban research on embryonic cells, in terms of the law, would mean 'to close the eyes to scientific progress and to the benefits likely to derive therefrom'. He voted in favour of the research.

Vote by Justice César Peluso

For Justice César Peluso the research does not affront the right to life because the frozen embryos are not equivalent to persons. However, he emphasised the importance of strictly overseeing and inspecting the research, pointing to the need for the proper legal tools for that purpose.

Vote by Justice Marco Aurélio Mello

Justice Marco Aurélio Mello voted in favour of scientific research on embryonic stem cells in Brazil. He affirmed:

> 'There is no issue here of questioning whether a pregnant woman should remain physically connected, but rather to determine the destiny of fertilized ova that would certainly be destroyed, and whether they can and should be used in an attempt to seek the progress of mankind.'

He fully agreed with the reporting justice and voted accordingly. He considered the wording of art 5 of the Biosafety Law, challenged by the Direction Action of Inconstitutionality, 'consistent with the Federal Constitution, most notably with articles 1 and 5 thereof, and with the principle of reasonability'. Article 1, item III, of the Constitution sets forth the fundamental right to dignity of the human person, and the introduction to art 5 foresees the inviolable right to life.

He also cautioned against the risk of having the STF assume the role of legislator, by imposing restrictions on a law that, according to him, had been adopted with the support of 96% of the senators and 85% of the federal deputies, which would indicate its 'reasonability'. The justice then remarked that all indicating posts of the supposed commencement of life were mere opinions, and he presented a list of always discordant concepts throughout history, from ancient to modern times. For him, 'the commencement of life does not presuppose just the fertilization, but also the viability of pregnancy, of the human gestation'. He even remarked that 'to say that the Constitution protects the intrauterine life is already prone to discussion, when considering [that the Constitution permits] the therapeutic abortion or the abortion of a child born out of rape'. And he concluded by saying that 'the legal cause of action depends upon a live birth' and that to throw away the embryos discarded from human reproduction would be a selfish gesture and deep blindness, since they could be used to cure diseases.

Vote by Justice Celso de Mello

Justice Celso de Mello also voted in favour of the research, contending that the law approved by the Congress awards the inviable, discarded embryos 'a nobler destination'. 'All those embryos have one single destination: they are doomed to disposal as sanitary waste. Therefore, a nobler destination is assigned', he affirmed. Regarding the affirmations that the law would contradict the right to life, he asserted: 'An ovum or an embryo that cannot be implanted in a uterus does not have the potential to become a human being.' The justice voted in accordance with the reporting justice, ie the action should be dismissed. According to him, the State cannot be influenced by religion:

> 'The enlightened vote tendered by the eminent Justice Carlos Britto will allow those millions of Brazilians who are now suffering and left at the margins of life to actually exercise a basic and inalienable right, namely the right to seek happiness and also the right to live with dignity, a right of which nobody, absolutely nobody, should be deprived of.'

Vote by Justice Gilmar Mendes, the new Chief Justice

The last vote was tendered by Justice Gilmar Mendes (already installed in office as the new Chief Justice of the Federal Supreme Court). He expressed reservations about the legislation, deeming that the Brazilian norm has deficiencies. Justice Mendes asserted that it is 'perplexing' to realise that this matter is ruled in Brazil by one single article of a statute. He further stated that the law fails to assign a central body to oversee the research, under the Ministry of Health. His stand was aligned with the votes opposing the research.

Final voting results

The debates on the use of stem cells were then completed, and the subject matter of the debates was voted on by 11 justices. Six of them dismissed the

petition in the action of unconstitutionality of art 5 of the Biosafety Law, on the use of embryonic stem cells in research.

By a slight simple majority, in May 2008, the Brazilian Supreme Court ruled as follows: research on embryonic stem cells does not violate the right to life, nor the dignity of the human person.

APPENDIX 2

Law 11105 of 24 March 2005

Below is a part of the legal statute that regulates items II, IV and V of art 225, para 1, of the Brazilian Federal Constitution, sets forth safety norms and oversight systems for activities involving genetically modified organisms and their by-products, creates the National Biosafety Council (Conselho Nacional de Biossegurança – CNBS), restructures the National Biosafety Technical Commission (Comissão Técnica Nacional de Biossegurança – CTNBio), sets forth provisions on the National Biosafety Policy (Política Nacional de Biossegurança – PNB), revokes Law 8974 of 5 January 1995 and the Executive Order 2191-9 of 23 August 2001, revokes arts 5, 6, 7, 8, 9, 10 and 16 of Law 10814 of 15 December 2003, and includes other general provisions.

'**THE PRESIDENT OF THE REPUBLIC:** Let it be known that the National Congress decrees and I sanction the following Law:

CHAPTER I

PRELIMINARY AND GENERAL PROVISIONS

Article 1 – This Law establishes safety norms and oversight systems for the construction, culture, production, handling, transport, transfer, import, export, storage, research, trading, consumption, release in the environment and discharge of genetically modified organisms and their by-products, under the guidelines of incentive to the scientific progress in the area of biosafety and biotechnology, protection of life and protection of human, animal and plant health, and compliance with the principle of precaution for the protection of the environment.

. . .

Article 5 – It is permitted for research and therapeutic purposes to use human embryonic stem cells produced by in vitro fertilization and not employed in the procedure, subject to the following conditions:

I – that the embryos are unviable; or

II – that the embryos have been frozen for no less than 3 (three) years prior to the date of publication of this Law or, if already frozen at the date of publication of this Law, after a three-year lapse from the freezing date.

Paragraph One. The consent of parents will be required in all cases.

Paragraph Two. Research institutions and health service providers carrying out research or therapy on or with human embryonic stem cells must submit their plans to the respective research ethics committees for approval.

. . .

Article 41 – This law comes into force on the date of its publication.

. . .

Brasília, 24 March 2005; 184th year of the Independence and 117th year of the Republic.

LUIZ INÁCIO LULA DA SILVA, President of Brazil.'

Canada

REFORM NOT REVOLUTION

*Martha Bailey**

Résumé

Au cours des récentes décennies, le droit familial canadien a connu des réformes en profondeur. Celles-ci ont été provoquées notamment par une succession de contestations constitutionnelles en matière de discrimination basée sur le sexe, l'orientation sexuelle ou le statut matrimonial. Le Canada semble désormais dans une période de réforme relativement calme mais constante qui se base sur les principes d'action suivants: 1) étendre le traitement égal des couples de même sexe; 2) garantir la primauté de l'intérêt de l'enfant sur celui des parents; 3) assurer l'égalité entre hommes et femmes. Ces principes sont également à la base de récentes décisions jurisprudentielles qui viennent préciser les contours du droit familial contemporain.

I INTRODUCTION

The equality rights guaranteed by Canada's Charter of Rights and Freedoms ('the Charter') came into effect only in 1985.[1] The equality jurisdiction that has evolved from that date has to a large measure involved and significantly affected family law. In 1995, the Supreme Court of Canada ruled in *Miron v Trudel* that marital status is an analogous ground under s 15 of the Charter.[2] Although in 2002 the Supreme Court ruled that excluding unmarried opposite-sex couples from the provincial marital property scheme did not violate the constitutional guarantee of equality,[3] it would be fair to say that *Miron v Trudel* supported the shift towards extending the incidents of marriage to unmarried couples. In another landmark equality ruling of 1995, the Supreme Court of Canada ruled that sexual orientation is an analogous ground of discrimination under s 15.[4] Four years later it made clear that this ruling extended to private family law regimes, when it ruled that the extended definition of 'spouse' in Ontario's support statute violated s 15 because it

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1 Canadian Charter of Rights and Freedoms, enacted as Sch B to the Canada Act 1982 (UK) 1982, c 11.

2 *Miron v Trudel* [1995] 2 SCR 418.

3 *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325.

4 *Egan v Canada* [1995] 2 SCR 513.

included unmarried opposite-sex couples but excluded same-sex couples.[5] The 1995 and 1999 decisions ushered in a decade of remarkable expansion of marital rights and obligations for same-sex couples.

In part because old laws were struck down for violation of the constitutional guarantee of equality, and in part because of increasing political will to introduce reforms, over the past few decades Canada has experienced dramatic changes in family law. Most of the incidents of marriage have been extended to unmarried couples. The exception to this general trend is the civil law province of Quebec, but that province's distinctive approach to unmarried cohabitation is now under challenge. Civil marriage has been opened up to same-sex couples. The few remaining areas of discrimination in respect of same-sex couples are now being tidied up. Even apart from the areas addressed in the major *Charter* cases, there has been increased sensitivity to fairness concerns. Child support guidelines have reduced judicial discretion and increased certainty and fairness, and the newer spousal support guidelines are beginning to have the same effect. The issue of domestic violence is now far better understood and more routinely addressed in family law policy than in the past. After the last few decades of sweeping changes, Canada seems now to be in a period of steady reform in accordance with now uncontested principles of:

(1) extending equal treatment to same-sex couples;

(2) giving primacy to the rights and interests of children over those of parents; and

(3) ensuring gender equality.

This chapter reviews recent reforms in relation to these three principles.

II SAME-SEX RELATIONSHIPS

The federal government passed the Civil Marriage Act in 2005, which opened up civil marriage to same-sex couples throughout Canada.[6] The resolution of the same-sex marriage issue was the background against which Canadian courts dealt with various residual issues relating to recognition of same-sex relationships.

(a) Retroactive remedies for discrimination in public benefits

Canada (Attorney General) v Hislop raised the general issue of the extent to which Parliament is constitutionally required to remedy past discrimination on the basis of sexual orientation. *Hislop* was a class action challenging the

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5 *M v H* [1999] 2 SCR 3.

6 Civil Marriage Act, SC 2005, c 33, online at: http://laws.justice.gc.ca/en/showtdm/cs/C-31.5.

constitutionality of Canada's pension scheme in relation to same-sex couples.[7] The Canada Pension Plan (CPP)[8] had been amended in 2000 to include same-sex couples, but the claimants argued that the amendments did not go far enough and that it continued to discriminate on the basis of sexual orientation in violation of s 15(1) of the Charter.[9] The amendments extended survivor benefits to same-sex partners, but eligibility was limited to same-sex partners whose 'spouse' died on or after 1 January 1998. Benefits were not retroactive to 17 April 1985, when s 15(1) of the Charter came into force, or the date of death of the 'spouse', whichever occurred later. As well, the CPP precluded monthly pension payments to same-sex survivors for any month before July 2000, when the amendments came into force. Finally, the CPP includes a general provision (unaffected by the 2000 amendments), which limits the right of estates of survivors from obtaining benefits if the application for the benefits is not made within 12 months after the death of the survivor. The claimants argued that they should be exempted from this general provision, because prior to the amendments to the CPP they would have no eligibility to apply for benefits.

On the issue of whether same-sex survivors whose partners died between 17 April 1985 and 1 January 1998 were entitled to a CPP survivor's pension, the Supreme Court ruled that denial of pensions was a violation of s 15(1) of the Charter and that the violation was not justified under s 1.[10] The Court also ruled that the provision that provided that monthly payments were payable only from July 2000 or later was unconstitutional. This provision discriminated between opposite-sex survivors, who could claim retroactive arrears for up to 12 months and same-sex survivors who could not. The Court ruled that same-sex survivors who were eligible for payments in July 2000, when the CPP amendments came into force should be able to claim retroactively back to August 1999. The Court declined to grant a 'constitutional exemption' from the general provision in the CPP which limits the right of estates of survivors from obtaining benefits if the application for the benefits is not made within 12 months after the death of the survivor. In reaching this conclusion, the Court gave the rationale for limiting remedies for past discrimination:[11]

> 'Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that *Charter* remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class's claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former CPP. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of

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7 *Canada (Attorney General) v Hislop* 2007 SCC 10 ('*Hislop*'), online at: http://scc.lexum.umontreal.ca/en/2007/2007scc10/2007scc10.html.

8 Canada Pension Plan, RS, 1985, c C-8, online at: http://laws.justice.gc.ca/en/C-8/index.html.

9 Canadian Charter of Rights and Freedoms, Sch B to the Canada Act 1982 (UK) 1982, c 11.

10 Section 1 of the Charter provides: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

11 *Hislop*, above n 7, para 117.

> constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.'

The result of this landmark action – the first successful class action *Charter* challenge – was to acknowledge the continuing discrimination inherent in the amended CPP but to set a firm limit on the right to retroactive remedies.

(b) Filiation

The Supreme Court of Canada also dealt with a case involving the determination of parentage where the mother (A) was in a same-sex relationship.[12] A and her same-sex partner (C) were in a long-term committed relationship. They decided that one of them would have a child, but agreed that both of them, not just the biological mother, should be the child's mothers. The father (B) wished to be recognised as the father of the child. A, B and C all wanted the child to have three legal parents. At the time, the normal course would have been for the mother and the father, if known, to be registered as the legal parents. Registration as a legal parent is not determinative of all questions relating to rights and responsibilities in relation to a child – for example, someone who is not registered as the father of a child may be found to be a parent within the meaning of the statutory scheme for child support. However, registration as a legal parent is significant because it carries with it all the incidents of parenthood.

After the child was born, A, the biological mother's partner, with the consent of C, the biological mother, and B, the biological father, applied under Ontario's Children's Law Reform Act (CLRA)[13] for a declaration that she was a parent within the meaning of the CLRA. It is important to point out that this was not an application for adoption or for custody, which issues as they arise in the context of same-sex relationships have already been addressed. Rather it was a declaration of legal parentage that was sought. The court of first instance dismissed the application on the grounds that it had no jurisdiction to do so under the CLRA and no parens patriae jurisdiction to make such a declaration. A appealed to the Court of Appeal for Ontario, which reversed the lower court and granted the declaration pursuant to its parens patriae jurisdiction.[14] The Court of Appeal for Ontario examined the CLRA, noting that it was progressive legislation in its day because it eliminated distinctions between

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[12] *Alliance for Marriage and Family v AA* [2007] 3 SCR 124, online at: http://scc.lexum.umontreal.ca/en/2007/2007scc40/2007scc40.html.

[13] Children's Law Reform Act, RSO 1990, c C.12. The application was brought under s 4(1) of the Act, which provides: 'Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.'

[14] *AA v BB* 2007 ONCA 2, online at: www.ontariocourts.on.ca/decisions/2007/january/2007ONCA0002.htm.

'legitimate' and 'illegitimate' children, but that it contemplates only one mother and one father. At the time when it was enacted:[15]

> 'The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme. The Act does not deal with, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer.'

Because of the limits in the statutory scheme, the Court of Appeal for Ontario turned to its inherent parens patriae jurisdiction. The Court of Appeal for Ontario found that the parens patriae jurisdiction may be applied not only to rescue children in danger but also to address legislative gaps. This was not a case involving danger to the child, but the Court of Appeal determined that it was contrary to the best interests of the child to be deprived of the legal recognition of the parentage of one of his mothers. Their only way to do this under the existing legislative scheme was for A and C to adopt the child, but the effect of such a 'step-parent' adoption would be to deprive the biological father of parentage,[16] and this too would be contrary to the best interests of the child. Therefore, the Court of Appeal applied its parens patriae jurisdiction to bridge the gap left by the CLRA and to grant the declaration. In the result, the child had three legal parents.

None of the three parents sought to challenge the ruling of the Court of Appeal for Ontario. Nor did the Attorney General of Ontario try to do so. However, the Alliance for Marriage and Family, a coalition of five groups that supports traditional forms of marriage and family, tried to do so. The Alliance had been given leave to intervene in the hearing before the Court of Appeal for Ontario, where it argued unsuccessfully against A's appeal. But when it attempted to have the decision overturned at the Supreme Court of Canada, a brief judgment was issued stating that the organisation had no standing and dismissed its application.

(c) Step-parents seeking custody and access orders

DWH v DJR was another case involving a same-sex couple who were in a long-term committed relationship and who wanted to have a child.[17] In this case the couple was male. A female friend agreed to have a child to be raised by the male couple, using assisted conception with the sperm donated by one member of the male couple. As in the *AA v BB*, the other biological parent remained involved in the child's life, so the child effectively had three parents. In *DWH v DJR*, however, the child had only two legally registered parents, the biological mother and father. When the child was 3 years old, the couple separated, and the biological father would not permit his former partner to see the child. The biological mother supported the biological father in this refusal.

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15 Ibid, para 21.
16 See Ontario's Child and Family Services Act, RSO 1990, c C.11, s 158(2)(b).
17 *DWH v DJR* 2007 ABCA 57.

The issue for the court was whether contact should be ordered, despite the opposition of the two biological parents.

The Alberta Court of Appeal first addressed the issue of whether the applicant had to seek leave of the court to apply for contact. Under Alberta's Family Law Act, a person seeking contact with a child must first obtain leave of the court unless the applicant is a parent of the child or stands in place of a parent.[18] Under s 48 of the Act, a person is deemed to stand in the place of a parent if that person '(a) is the spouse of the mother or father of the child or is or was in a relationship of interdependence of some permanence with the mother or father of the child, and (b) has demonstrated a settled intention to treat the child as the person's own child'. There was no doubt that the applicant was the spouse of the child's biological father and that he had demonstrated the requisite settled intention to treat the child as his own. Thus, the applicant was able to proceed without first obtaining leave of the court.

The Alberta Court of Appeal then considered the merits of the application for contact, having regard to s 35(5) of the Act, which requires the court to satisfy itself that: '(a) contact between the child and the applicant is in the best interests of the child, (b) the child's physical, psychological or emotional health may be jeopardized if contact between the child and the applicant is denied, and (c) the guardians' denial of contact between the child and the applicant is unreasonable'. In this case, the applicant had helped plan the child's conception, was actively involved with the child, attended to the child's needs since her birth, and there was a relationship of interdependence between the applicant and the child for most of the child's life. The Alberta Court of Appeal was satisfied that the applicant had 'been directly involved in her parenting since birth' and that there was 'the potential for emotional harm occasioned by the sudden withdrawal of parental attention and support'.[19] Furthermore, the denial of contact was not reasonable:[20]

> 'That the appellant is HIV positive, has allegedly made poor choices in his love life, was for a short time irrational and emotional following the parties' separation, is an inadequate foundation upon which to refuse the contact order in the circumstances of this case.'

In the result, the applicant was granted reasonable contact.

This decision is not surprising, given Canada's longstanding emphasis on the best interests of the child in custody and access proceedings, legal recognition of same-sex relationships, and prohibition of discrimination on the basis of sexual orientation. However, this decision is important because it highlights the challenges that a non-biological parent can face upon separation if continuing contact is opposed by the child's biological parents. The pre-emptive strategy adopted in *AA v BB* of obtaining a declaration of parentage while the family is

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[18] Family Law Act, SA 2003, s F-45, s 35.
[19] *DWH v DJR* 2007 ABCA 57, paras 18 and 19.
[20] Ibid, para 19.

intact eliminates the risks that are inherent in the status of step-parent. These risks have historically been greater where the step-parent is a former same-sex partner. That *DWH v DJR* emanated from Alberta, which has been the most vocally conservative of Canada's provinces in regard to recognition of same-sex relationships, signals an end to the era of legal discrimination.

III PROTECTING THE RIGHTS AND INTERESTS OF CHILDREN

As recognised in the *DWH v DJR* case discussed above, Canadian law concerning children is based on the fundamental principle of the best interests of the child. Recent cases emphasise that this fundamental principle has not been displaced by the adoption of new forms of family formation.

(a) Contracting out of parental rights and obligations

Jane Doe v Alberta involved a biological mother who conceived a child through assisted insemination with the sperm of an anonymous donor.[21] Throughout her pregnancy and at the time that she gave birth, the mother was cohabiting with John Doe, who did not wish to be the biological father of the child or to stand in the place of a parent or to act as the child's guardian or to support the child. Jane and John Doe applied to the court for a declaration that they had the right to enter into a written agreement that John Doe would have no parental rights or obligations with respect to the child and that the agreement would bind them and any third parties such as government authorities.

In considering whether an agreement exempting John Doe from parental rights and responsibilities would be legally enforceable, the Alberta Court of Appeal first considered whether he would qualify as a parent under Alberta's *Family Law Act*.[22] The Act includes a provision relating to children born as a result of assisted conception, providing in s 13(2) that:

> 'A male person is the father of the resulting child if at the time of an assisted conception he was the spouse of or in a relationship of interdependence of some permanence with the female person and (a) his sperm was used in the assisted conception, even if it was mixed with the sperm of another male person, or (b) his sperm was not used in the assisted conception, but he consented in advance of the conception to being a parent of the resulting child.'

This provision did not apply to John Doe, because his sperm was not used in the assisted conception and he did not consent in advance to being the parent of the resulting child.

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[21] *Doe v Alberta* 2007 ABCA 50, application for leave to appeal to the Supreme Court of Canada dismissed: [2007] SCCA no 211.

[22] Family Law Act, SA 2003, s F-45, s 13(2).

The Alberta Court of Appeal then turned to the extended definition of 'parent' for the purpose of child support. This definition includes a person standing in the place of a parent. A person stands in the place of a parent if the person '(a) is the spouse of the mother or father of the child or is or was in a relationship of interdependence of some permanence with the mother or father of the child, and (b) has demonstrated a settled intention to treat the child as the person's own child'.[23] In accordance with precedent, the Alberta Court of Appeal took a contextual and holistic approach to determining whether John Doe met this definition. It held that a person's actual intention is relevant but not determinative. The Court reasoned that the focus should be not on the intention of the putative parent but on the relationship of the parties. The Court doubted whether John Doe could insulate himself from developing a relationship with the child:[24]

> 'The "settled intention" to remain in a close, albeit unmarried, relationship thrust John Doe, from a practical and realistic point of view, into the role of parent to this child. Can it seriously be contended that he will ignore the child when it cries? When it needs to be fed? When it stumbles? When the soother needs to be replaced? When the diaper needs to be changed? . . . [A] relationship of interdependence with the mother of the child in the same household, of itself, will likely create a relationship of interdependence of some permanence *vis-à-vis* the child. John Does's subjective intent not to assume a parental role will inevitably yield to the needs (and not merely physical needs) of the child in the same household.'

The assessment of whether John Doe is a parent for the purpose of child support will have to be assessed on the basis of the circumstances existing when and if the issue arises and cannot be determined in advance just after the birth of the child. John Doe cannot shield himself from the possibility of future liability by means of a contract.

Although parties are entitled, and even encouraged, to resolve disputes by agreement, Canadian courts have long held that support is the right of the child and that parents cannot bargain away the rights of the child. In accordance with this principle, the Alberta Court of Appeal stated that 'no agreement between the parents can oust the jurisdiction of the court to pronounce upon parental rights and obligations and to depart from written agreements about child support'.[25] The Court noted disapprovingly that the child's interests were not represented in court even though the child's rights and interests would be affected by the declaration sought. The decision is consistent with the longstanding practice in Canada of giving priority to the rights and interests of the child where these are in conflict with the claims of the parents.

In support of his claim, John Doe invoked s 7 of the Charter, which provides that:

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[23] Family Law Act, s 48(1).
[24] *Doe v Alberta*, above n 21, paras 22 and 23.
[25] Ibid, para 26.

> 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

John Doe argued that his right to liberty would be infringed if he were denied the choice of whether or not to become a parent. The Court gave short shrift to this argument. It stated that the legislative scheme did not impinge on Doe's freedom to order his life as he saw fit. He freely decided to enter into a relationship of some permanence with the mother of a newborn child. Support obligations flow from his free choices – if he wanted to avoid those obligations he could refrain from entering into the relationship. The *Doe* case emphasises that parties cannot simply 'opt out' of a parental relationship.

(b) Getting tough on child support debtors

Over the last couple of decades, legislators have reformed the laws relating to child support significantly. Child support guidelines have made levels of child support more predictable and fair.[26] Governments have assumed responsibility for collecting child support, so custodial parents are largely relieved of the obligation of enforcing awards. Governments have been empowered to share information in order to track down support debtors. And they may suspend driver's licences and other government permits.[27] Despite the improvements in the enforcement system, the problem of default remains.[28] Whether imprisonment is available as a sanction for child support default was addressed by the Supreme Court of Canada in *Dickie v Dickie.*[29]

The father was ordered to pay child support in 2001. The following year he relocated to the Bahamas. The mother was unable to enforce the child support orders because the Bahamas is not a reciprocating jurisdiction under Ontario's Interjurisdictional Support Order Act.[30] At the Court of Appeal for Ontario, Laskin JA commented that 'the inference that Dr Dickie moved to the Bahamas to frustrate Kitely J's orders, and to avoid his obligation to support his children and former wife, is overwhelming'.[31] There was evidence that the father lived in luxury in the Bahamas, while the mother and the children struggled to make ends meet.

In December 2002, the father was ordered to provide an irrevocable letter of credit in the amount of $150,000 to secure his child and spousal support obligations and to provide security for costs in the amount of $100,000, to be

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[26] The federal child support guidelines are available online at: www.justice.gc.ca/eng/pi/sup-pen/grl/glp.html.

[27] See, eg, Ontario's Family Responsibility and Support Arrears Enforcement Act, 1996, SO 1996, c 31.

[28] Statistics Canada, *Child and Spousal Support: Maintenance Enforcement Survey Statistics*, 2006/2007, Catalogue No 85-228X (Canadian Centre for Justice Statistics).

[29] *Dickie v Dickie*, 2007 SCC 8, online at: http://scc.lexum.umontreal.ca/en/2007/2007scc8/2007scc8.html.

[30] Interjurisdictional Support Order Act, SO 2002, c 13.

[31] *Dickie v Dickie* (2006) 79 OR (3rd) 1 (CA), para 75.

held in an account by the mother's lawyers until further order. The father failed to comply with these orders, but he did not appeal or try to vary the orders. Contempt proceedings were then brought against him for failure to comply with the order to provide security. In 2004 the father was found to be in contempt of court. For unknown reasons, the father had not remained in the Bahamas but had come to Ontario for the hearing. The court ordered that he be jailed for 45 days and that he pay $16,000 in costs. After serving the 45-day sentence, the father appealed the contempt order. He still had not complied with any of the orders against him.

On appeal, the father argued that a contempt order was not available because the order against him to provide security was an order for 'the payment of money'. Ontario's law prohibits use of the contempt power for failure to comply with an order for 'the payment of money'.[32] He also argued that he had been denied procedural fairness. The Court of Appeal for Ontario allowed the father's appeal, but Laskin JA issued a strong dissent. Laskin JA would have adjourned the father's appeal until Dr Dickie had taken steps to comply with the court orders below. Assuming that it was correct to hear the appeal, Laskin JA would have dismissed it on the basis that the order to provide security was not an order for the 'payment of money' and that the father was afforded procedural fairness. The mother appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal. The Court stated that the Court of Appeal for Ontario had the authority to refuse to hear the father's appeal until the father complied with the outstanding orders against him. Because the lower court had heard the appeal, the question of whether it could have declined to do so was now moot. The Court went on to allow the mother's appeal, adopting the reasoning of Laskin JA in the court below. The Court awarded costs to the mother on a 'substantial indemnity basis', an indication of its disapprobation of the conduct of the father.

The Women's Legal Education and Action Fund (LEAF) had intervened at the Supreme Court of Canada to argue in favour of the appeal, and counted the result in *Dickie* as a victory for women:[33]

> 'The Supreme Court unanimously agreed that men must be held accountable to their family law obligations. The decision is consistent with LEAF's position that men such as Dr. Dickie who continue to willfully disobey family court orders should be found in contempt of court. Ninety-seven percent of parents trying to avoid child support payments are men, and the problem of women and children living in poverty following relationship breakdowns has been recognized by the Supreme Court.

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[32] Rules of Civil Procedure, RRO 1990, Reg 194, Rule 60.11.

[33] Women's Legal Education and Action Fund website, at: www.leaf.ca/legal/briefs/2007-dickie.html.

> The ruling should have a significant impact on the ability of women to resolve the problem of men who abuse the family justice system so as to perpetuate the exercise of power and control over them.'

Whatever impact the decision has on the position of women generally, it was probably a hollow victory for Mrs Dickie. After Dr Dickie returned to the Bahamas he was outside the power of Canadian courts and could remain in contempt of the orders against him without suffering any sanctions. The power to punish support debtors for contempt of security orders will only help women who are within the jurisdiction, and the power to enforce support orders only extends to reciprocating jurisdictions.

(c) Child protection

Another important Supreme Court of Canada decision was *Syl Apps Secure Treatment Centre v BD et al* (*Syl Apps*).[34] The case involved a 14-year-old girl who had written a story in school about her parents physically and sexually abusing her. Subsequently the girl was found to be in need of protection because she was suffering from serious emotional harm which her parents could not or would not alleviate. She was placed under the wardship of the child protection authorities. The wardship order stipulated that: '[a]ttempts will be made during the period of Society Wardship to reintegrate the family where possible'.[35] This sort of provision is often included in non-permanent wardship orders because of the temporary nature of such orders. After the girl made many suicide attempts, she was sent to Syl Apps Secure Treatment Centre. Eleven months after being placed in the treatment centre, she was made a permanent ward of the Crown.

In this action, the plaintiffs were the girl's parents, grandmother and three siblings. Their claim was that the defendants, the treatment centre and a social worker employed by the treatment centre were negligent in treating the child as if the parents had physically and sexually abused her. The plaintiffs alleged that this negligence caused a permanent split between the girl and her family, thereby depriving the family of a relationship with the girl.

In a unanimous decision, the Supreme Court of Canada ruled that there is no legal duty of care owed by a treatment centre or its social workers to the family of a child in their care. The claim was therefore struck out as disclosing no reasonable cause of action. The Court determined that there was not a relationship of sufficient proximity between the family and the defendants, such that it would be fair to impose a duty of care.

The plaintiffs had argued that the references to 'family' in the relevant child protection statute established the requisite proximity. The Court relied on its

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[34] *Syl Apps Secure Treatment Centre v BD et al*, 2007 SCC 38, online at: http://scc.lexum.umontreal.ca/en/2007/2007scc38/2007scc38.html.

[35] Ibid, para 57.

own previous rulings that references in child welfare legislation to the 'integrity of the family unit' are not intended to strengthen parental rights but are intended to foster the best interests of children. The Court reasoned that protection of a child's best interests and the statutory duties that flow from this protection would be in conflict with recognising a duty of care to the child's family:[36]

> 'To impose a duty of care towards the child's family on a treatment centre and its social workers in this context creates a potential conflict with their ability effectively to discharge their statutory duties . . . If a corresponding duty is also imposed with respect to the parents, service providers will be torn between the child's interests on the one hand, and parental expectations which may be unrealistic, unreasonable or unrealizable on the other. This tension creates the potential for a chilling effect on social workers, who may hesitate to act in pursuit of the child's best interests for fear that their approach could attract criticism – and litigation – from the family. They should not have to weigh what is best for the child on the scale with what would make the family happiest, finding themselves choosing between aggressive protection of the child and a lawsuit from the family.'

The Court's ruling that the rights and interests of the child take precedence over the claims of the parents is consistent its long-standing approach to such conflicts. The *Syl Apps* decision was no doubt a relief to child protection workers and agencies.

IV GENDER EQUALITY

Canada's family laws are now based on a model of marriage as a partnership of equals and have long been gender neutral in their formulation. Assets are divided equally. Neither parent has an edge in custody disputes. Either party may be eligible for spousal support. However, Canadian courts have recognised the gendered nature of family relations. Often, though certainly not always, women are the primary caregivers of children and more needy than men after separation. Commenting on Canada's gender neutral laws in the context of continuing economic inequality, L'Heureux-Dubé J wrote in *Moge v Moge*:[37]

> 'What the Act requires is a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown for both spouses, regardless of gender. The reality, however, is that in many if not most marriages, the wife still remains the economically disadvantaged partner. There may be times where the reverse is true and the Act is equally able to accommodate this eventuality.'

Although L'Heureux-Dubé J made this observation in 1992, it is still the case that most women are not the financial equals of their partners. And women are

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[36] Ibid, paras 49 and 50.
[37] *Moge v Moge* [1992] 3 SCR 813.

still more likely to be the primary caregivers of children. The large majority of recipients of child or spousal support are women and the large majority of payors are men.[38]

Within this context of gender neutral laws but continuing social inequality of women two important issues relating to gender equality were recently addressed. The Supreme Court of Canada handed down a major decision dealing with 'get abuse', ie the refusal of men to remove barriers to religious remarriage by their ex-wives. And Justice Canada published a final report on spousal support guidelines. These guidelines will primarily benefit women. Although spousal support is sought and awarded only in a minority of cases, it is overwhelmingly women who are the recipients of any such orders.

(a) Get abuse

About 1.1% of Canada's population is Jewish.[39] Within this small community, some women have experienced the problem of get abuse. In *Bruker v Markovitz*, a Supreme Court of Canada decision handed down in 2007, Abella J explained the problem as follows:[40]

> 'A *get* is a Jewish divorce. Only a husband can give one. A wife cannot obtain a get unless her husband agrees to give it. Under Jewish law, he does so by "releasing" his wife from the marriage and authorizing her to remarry. The process takes place before three rabbis in what is known as a beth din, or rabbinical court. The husband must voluntarily give the get and the wife consent to receive it. When he does not, she is without religious recourse, retaining the status of his wife and unable to remarry until he decides, in his absolute discretion, to divorce her. She is known as an agunah or "chained wife". Any children she would have on civil remarriage would be considered "illegitimate" under Jewish law. For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all.'

In 1990 Parliament amended the Divorce Act to deal with the problem of get abuse. Courts were empowered to strike the pleadings of or dismiss any application brought by a person who has refused to remove barriers to religious remarriage by the other spouse. The Divorce Act, as amended, provides:[41]

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[38] Statistics Canada, *Child and Spousal Support: Maintenance Enforcement Survey Statistics*, 2006/2007, Catalogue No 85-228X (Canadian Centre for Justice Statistics).

[39] This figure is from the survey conducted by Statistics Canada in 2001 and reported in 'Canada Still Predominately Catholic and Protestant', online at: www12.statcan.gc.ca/english/census01/products/analytic/companion/rel/canada.cfm.

[40] *Bruker v Markovitz* 2007 SCC 54, paras 3–5.

[41] 1985, c 3 (2nd Supp).

'21.1 (1) In this section, "spouse" has the meaning assigned by subsection 2(1) and includes a former spouse.

(2) In any proceedings under this Act, a spouse (in this section referred to as the "deponent") may serve on the other spouse and file with the court an affidavit indicating

(a) that the other spouse is the spouse of the deponent;
(b) the date and place of the marriage, and the official character of the person who solemnized the marriage;
(c) the nature of any barriers to the remarriage of the deponent within the deponent's religion the removal of which is within the other spouse's control;
(d) where there are any barriers to the remarriage of the other spouse within the other spouse's religion the removal of which is within the deponent's control, that the deponent
    (i) has removed those barriers, and the date and circumstances of that removal, or
    (ii) has signified a willingness to remove those barriers, and the date and circumstances of that signification;
(e) that the deponent has, in writing, requested the other spouse to remove all of the barriers to the remarriage of the deponent within the deponent's religion the removal of which is within the other spouse's control;
(f) the date of the request described in paragraph (e); and
(g) that the other spouse, despite the request described in paragraph (e), has failed to remove all of the barriers referred to in that paragraph.

(3) Where a spouse who has been served with an affidavit under subsection (2) does not

(a) within fifteen days after that affidavit is filed with the court or within such longer period as the court allows, serve on the deponent and file with the court an affidavit indicating that all of the barriers referred to in paragraph (2)(e) have been removed, and
(b) satisfy the court, in any additional manner that the court may require, that all of the barriers referred to in paragraph (2)(e) have been removed,

the court may, subject to any terms that the court considers appropriate,

(c) dismiss any application filed by that spouse under this Act, and
(d) strike out any other pleadings and affidavits filed by that spouse under this Act.

(4) Without limiting the generality of the court's discretion under subsection (3), the court may refuse to exercise its powers under paragraphs (3)(c) and (d) where a spouse who has been served with an affidavit under subsection (2)

(a) within fifteen days after that affidavit is filed with the court or within such longer period as the court allows, serves on the deponent and files with the court an affidavit indicating genuine grounds of a religious or conscientious nature for refusing to remove the barriers referred to in paragraph (2)(e); and

(b) satisfies the court, in any additional manner that the court may require, that the spouse has genuine grounds of a religious or conscientious nature for refusing to remove the barriers referred to in paragraph (2)(e).

(5) For the purposes of this section, an affidavit filed with the court by a spouse must, in order to be valid, indicate the date on which it was served on the other spouse.

(6) This section does not apply where the power to remove the barrier to religious remarriage lies with a religious body or official.'

Some provinces added similar provisions to their legislation dealing with marital property and support in cases not involving divorce.[42] These statutory provisions do not provide a complete solution to the problem and did not help the wife in *Bruker v Markovitz*.

The *Bruker* case involved a Quebec couple. After breakdown of the marriage, the wife commenced divorce proceedings in 1980. The couple settled the corollary issues of custody, child support and spousal support. Their agreement was incorporated into the divorce decree. Included in the terms of the settlement agreement was a provision requiring that parties would attend before the rabbinical court to obtain a get. The husband refused to do so. In 1989, 9 years after the divorce, the wife sued for breach of contract, claiming $500,000 for her inability to remarry and for being prevented from having children who would be considered 'legitimate' under Jewish law.

In 1995, 15 years after the divorce, the husband finally appeared before the rabbinical court and agreed to deliver the get. The wife now had the religious divorce, but she continued her action for breach of contract. In that proceeding, the husband challenged the validity of the agreement on the basis that the religious nature of the agreement rendered it unenforceable under Quebec law. He also invoked his freedom of religion, arguing that enforcement of the agreement would violate his rights. The wife argued that the agreement to attend and obtain a get was consistent with Quebec law and values. She also pointed out that she had given concessions in exchange for the husband's promise to give a get. It would hardly be fair for the husband to have the benefit of the concessions she had made without honouring his part of the bargain. The wife was seeking damages only. She did not seek an order for specific performance of the contract.

At trial, the judge found in favour of the wife and awarded damages of $47,500 – $2,500 for each of the 15 years between the divorce and the get, and $10,000 for the wife's inability to have children considered 'legitimate' under Jewish law. The Court of Appeal allowed the husband's appeal, reasoning that the obligation was religious in nature, and that moral obligations of this kind are not enforceable under Quebec law. The wife then appealed to the Supreme Court of Canada.

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[42] See, eg, Family Law Act, RSO 1990, c F3, s 2.

In a 7-2 decision, the Court allowed the appeal and restored the trial judgment. The majority took the view that simply because a dispute has a religious aspect does not mean that it is necessarily non-justiciable. The Court determined that it was not being asked to decide doctrinal religious issues but simply a civil claim for breach of contract. This was a case where the husband had transformed his moral obligation to give a get into a legally binding obligation. The husband did this by making his promise in a contract which satisfied all the requirements of enforceability of Quebec's law.

The majority's opinion emphasised that enforcing agreements to give gets addresses the problem of gender discrimination that is inherent in barriers to religious remarriage. The Court also reasoned that enforcement of such agreements may alleviate the problem of extracting unfair concessions in a civil divorce. In response to the husband's argument that enforcement would infringe his right to religious freedom, the Court decided that any impairment to the husband's religious freedom was outweighed by the harm to the wife personally and to the public's interest in protecting the fundamental values of equality and autonomous choice in marriage. The husband's claim was also outweighed by the public benefit in enforcing valid and binding contractual obligations.

(b) Spousal Support Guidelines

In 2008, the final version of Canada's *Spousal Support Advisory Guidelines* was released (draft Guidelines have been available since 2005).[43] The purpose of the Guidelines is not to change the law but to increase consistency and certainty in this area. The Guidelines do not have any statutory force. They are informal Guidelines only and operate on an advisory basis. This is in contrast with Canada's Child Support Guidelines, which are mandated by statute. The Spousal Support Guidelines do not attempt to create new norms; rather they purport to reflect existing case-law.

The Spousal Support Guidelines do not deal with entitlement, only with the issues of amount and duration. There are two basic formulas: the 'without child' formula and the 'with child' support formula. The 'with child' formula applies if there are dependent children of the marriage, and a concurrent child support obligation, at the time spousal support is determined. The formulas produce ranges for the amount and duration of support, not just a single number.

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[43] Carol Rogerson and Rollie Thomson *Spousal Support Advisory Guidelines* (Canada, Department of Justice, July 2008), online at: www.justice.gc.ca/eng/pi/pad-rpad/res/spag/index.html.

The 'without child' support formula is based on the gross income difference between the spouses and the length of the marriage. The amount and the duration of support increase incrementally with the length of the marriage. The ranges are calculated as follows:[44]

> 'Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the gross income difference) for each year of marriage (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The maximum range remains fixed for marriages 25 years or longer at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in equalization of the spouses' net incomes – the net income cap.)
>
> Duration ranges from .5 to 1 year for each year of marriage. However, support will be indefinite (duration not specified) if the marriage is 20 years or longer in duration or, if the marriage has lasted 5 years or longer, when the years of marriage and age of the support recipient (at separation) added together total 65 or more.'

The 'with child' formula differs from the 'without child' formula in three ways. First, the 'with child' formula uses the net incomes of the spouses, not their gross incomes. Secondly, this formula divides the pool of combined net incomes between the two spouses, not the gross income difference. Thirdly, the upper and lower percentage limits of net income division in the with child support formula do not change with the length of the marriage. The 'with child' calculation is the more complicated because each party's income must be determined net of taxes and child support obligations. Then the net incomes are added together, and spousal support is the amount that would leave the lower income spouse with 40% to 46% of the combined net incomes. Initial awards are indefinite.

The Guidelines provide for variations and exceptions, adding nuance to the two basic formulas. Many courts across the country have endorsed the Guidelines. The Court of Appeal for Ontario did so in 2008, commenting:[45]

> 'The objective of the Guidelines is to bring certainty and predictability to spousal support awards under the *Divorce Act*. For this purpose, they employ an income-sharing model of support, that if proven viable, will reduce the need to rely on the labour-intensive, and thus expensive, budget-based evidence employed in a typical case. In this way . . . the Guidelines aspire to reduce the expense of litigation of spousal support by promoting resolution for the average case.'

Use of the Guidelines has become standard practice for family lawyers. The entrenchment of the Guidelines may lead to an increase in spousal support claims and awards.

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[44] Ibid, at viii.

[45] *Fisher v Fisher* 2008 ONCA 11, para 94.

V ON THE HORIZON

Although most of Canada has long since extended most of the incidents of marriage to unmarried couples, the country's one civil law jurisdiction, Quebec, has not done so. Now before the courts is a Charter challenge to the exclusion of unmarried couples from the family law.[46] The case involves a couple who cohabited outside of marriage for 10 years and had three children together. The claimant, 'Lola', was only 17 years old when their relationship began and is 15 years younger than the respondent. The case has attracted substantial media attention because of the great wealth involved. According to news reports, Lola is living in luxury and receiving $35,000 a month in support, but she is claiming $50 million, plus $50,000 a month in support. Lola is hardly a needy claimant, but her challenge to Quebec laws has the potential of helping many unmarried women who are in need of support following breakdown of a relationship.

Lola will be trying to persuade the court that excluding unmarried couples from Quebec's family laws violates the Charter guarantee of equality by discriminating on the basis of marital status. It is important to note that Quebec's exclusion of unmarried couples was not based on any sort of bias against unmarried cohabitation. Quebec has the highest rate of unmarried cohabitation in Canada. The exclusion of unmarried couples from the family law scheme was based on respect for autonomy of the parties. The government did not want to impose the incidents of marriage on those who chose not to marry.[47] Whether Quebec's principled approach survives the Charter challenge will be the big story as Lola's case works its way through the courts.

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[46] Sue Montgomery 'Case could redefine common law rights' *The Gazette* (19 January 2009).

[47] Minister of Justice, Serge Ménard, explained to the National Assembly of Quebec why the province did not previously include unmarried couples within its scheme of marital rights and obligations, saying: 'Lorsque le législateur a révisé le droit de la famille, tant en 1980 qu'en 1991, il s'est interrogé sur l'opportunité de prévoir des conséquences civiles aux unions de fait. S'il s'est abstenu de le faire, c'est par respect pour la volonté des conjoints: quand ils ne se marient pas, c'est qu'ils ne veulent pas se soumettre au régime légal du mariage' ('When the legislature revised family law, both in 1980 and 1991, it considered providing for the civil consequences of de facto unions. It failed to do so out of respect for the wishes of the cohabiting parties: if they do not marry, it is because they do not want to come under the legal regime of marriage'). Quebec, Debates of the National Assembly, 18 June 1998. See also Alberta Law Reform Institute, *Towards Reform of the Law Relating to Cohabitation Outside of Marriage*, Report No 53 (Edmonton, June 1989) at 13.

The Czech Republic

CZECH FAMILY LAW: THE RIGHT TIME FOR RE-CODIFICATION

*Zdeńka Králíčková**

Résumé

Chacun sait que le droit de la famille tchécoslovaque avait été façonné selon le modèle soviétique, comme dans les autre pays satellites de l'ex URSS.

Malgré les changements radicaux intervenus dans les pays issus de l'effondrement du bloc soviétique et les pays anciennement sous son influence politique, le législateur tchèque a longuement hésité à réformer. Plutôt qu'à une recodification de rupture, on a procédé à des amendements sectoriels et sans vision globale du *Family Act* (Act n° 94/1963 Coll.). Néanmoins, le droit tchèque a profité de modifications positives, nécessaires dès 1989, et particulièrement dans le domaine des droits de l'homme. Le but de cette contribution est de critiquer l'état actuel du droit de la famille en République tchèque. Les propos suivants tentent, après un rapide résumé des développements législatifs des années 90, de proposer des modifications radicales à l'occasion de la refonte du Code civil. Les directions à prendre en droit de la famille et en droit civil ont été définies par le Ministre de la Justice (Ref. N° 2623/00-L du 29 Janvier 2001). La publication en 2005 de l'avant projet du nouveau Code civil a permis un débat général. Les problèmes de droit de la famille ont été inclus dans la deuxième partie. Durant l'été 2008, une version retravaillée de l'avant projet a été ouverte aux commentaires et à des analyses supplémentaires.

I INTRODUCTION

It is widely known that family law in the former Czechoslovakia was designed according to the Soviet pattern as in other satellites of the Soviet Union.[1]

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1 On problems of the development in the post-communist countries, see materials from the conference held in Prague in 1998, organised by the International Society of Family Law, especially the introductory paper; see J Haderka 'Basic features of the legal regulation of the family law in the post-totalitarian states of Central and Eastern Europe' [in Czech] (1999) 2/3 *Právní praxe* 71–93. For the general view on communist family law, compare M Mladenović, M Janjić-Komar and C Jessel-Holst 'The family in Post-Socialist Countries' *International Encyclopaedia of Comparative Law* Vol IV, Chap 10 (Tübingen, 1998) 3–151. For the Czech reality in detail, see J Haderka 'The Czech Republic – New Problems and Old Worries' in A Bainham (ed) *The International Survey of Family Law 1994* (Martinus Nijhoff Publishers,

Despite radical changes in the countries of the disintegrated Soviet Union[2] and countries of its political influence,[3] the Czech lawmakers have been hesitating from day to day to make changes.[4] Instead of a re-codification based on discontinuity we have to witness partial, non-conceptual and minute amendments to the Family Act (see Act No 94/1963 Coll, hereafter FA). It is possible to agree with the opinion that the undesirable state of frequent legislative changes, especially changes affecting marriage and family, weakens the stability and certainty of the legal order and, as a consequence, it has an impact on the level of law awareness.[5] It is alarming that non-conceptual changes occur even in status matters such as maternity. The development after 1989 resulted in a bleak provisional situation, which was described in the Czech legal literature in connection with the necessity of a re-codification of the Civil Code as 'an open-air museum of the Soviet understanding of the law'.[6]

However, some positive changes in the Czech legal order have already occurred and had to occur immediately after 1989, mainly in the sphere of human rights. Until now, the passing of the Constitution of the Czech Republic (1993) and of the original Czech-Slovak Charter of Fundamental Rights and Freedoms (1991) and especially of a great number of human rights conventions has been of key importance for Czech family law. Regarding this fact, it is therefore necessary to draw attention to Art 10 of the Constitution of the Czech Republic which states that the above-mentioned international conventions which were ratified by the Czech Parliament and which are binding on the Czech Republic are part of the Czech legal order. If an international convention establishes something different from Czech law, the international convention prevails (see the version since 2002).

1996) 181–197, and J Haderka 'A Half-Hearted Family Law Reform of 1998' in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2000) 119–130.

2 Towards this see M Antokolskaia 'New Russian Family Law' [in Czech] (1999) 2/3 *Právní praxe* 141, and O A Khazova 'Family Law in the Former Soviet Union: More Differences or More in Common' in M Antokolskaia (ed) *Convergence and Divergence of Family Law in Europe* (Intersentia, 2007) 97ff.

3 Towards this see V Cepl 'Bottlenecks in the Transformation of Eastern Europe' (2000) 4 *Journal of Law and Policy* 23ff.

4 On the questions of the development and the basis of communist law, including Czechoslovak law, see the work of Rodolfo Sacco *On some issues of the basis of the civil law of the communist countries* [in Czech] (Právník, 1969) 801ff, Czech translation by Otto Kunz. The author argues that of all the civil law legislation valid in communist countries, it is the Czechoslovak and the Soviet Union ones that reflect the most conscious deviation from the Roman law patterns. It might be added that this is exactly what significantly inhibits the process of the transformation of the civil law in the Czech Republic nowadays. On this issue further compare the conclusions of Ján Lazár who argues that the Czechoslovak civil law was markedly totally anomalous and even for the situation before 1989 it represented an inadequate and unsuitable system of the overall arrangement of the property and personal relationships in society, divided into five independent codes. See the essay 'The topical contemplations on the optimal conception of the private law code' [in Slovak] in L Ostrá (ed) *A Homage to A Kanda on his 75th Birthday* [in Czech] (Plzeň, A Čeněk, 2005) 45–56.

5 See J Švestka, L Kopáč, M Knappová and V Knapp 'Towards the topical issue of codification of private family law relations' [in Czech] (2005) 9 *Právní rozhledy* 348.

6 Compare K Eliáš 'The concept of the new Civil Code' [in Czech] (2001) 8 *Právní rádce* 12.

When speaking of individual international conventions relevant to Czech family law and to which the Czech Republic has acceded recently, we have to name especially the United Nations Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention on the Exercise of Children's Rights, the European Convention on the Legal Status of Children Born out of Wedlock, the European Convention on Adoption of Children, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, and the European Convention on Contact Concerning Children etc.

The acceptance of the above-mentioned international conventions has led, among other things, to a new perception of Czech family law, its more cultural interpretation and application, and last but not least, the growing interest of the Constitutional Court in the conformity of Czech family law with European human rights standards.[7] It is also necessary to mention the case-law of the European Court of Human Rights in Strasbourg, in particular Art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[8] These developments are apparent especially with the passing of the so-called Great Amendment to the Family Act (see Act No 91/1998 Coll). This legislative deed, however, was not seen positively by all. Professor Haderka, member of the International Society of Family Law and a frequent contributor to *The International Survey of Family Law* called it 'A Half-Hearted Family Law Reform of 1998'.[9] Nevertheless, after 10 years of the Amendment being in force we may say that it was useful in many respects. For example, it introduced a new view of adoption in the light of the child's rights and also the rights of the potential father.[10]

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7 Compare the judgment of the Constitutional Court No 72/1994 Coll, in the case of the abolition of § 46 of the Act No 94/1963 Coll, on the Family (Family Act), in its original wording. The clause enabled an administrative body ('*národní výbor*') to take away a child from his or her parents. Further, compare the judgment of the Constitutional Court No 476/2004 Coll, in the case of the abolition of § 5 par 1, last clause, § 8 par 4, and § 41 par 2 of the Act No 109/2002 Coll on the exercise of special treatment in an institution or protective education in school institutions and on preventative educational care in school institutions and on the changes of other laws. These clauses enabled the court to put a child not only into an institution but also to a 'contractual family' without further specifying the conditions and the definition of the contractual family.

8 For general information see V Berger *The Judiciary of the European Court of Human Rights* [in Czech] (Praha, IFEC, 2003) 357. On the concrete influence of the Strasbourg judiciary on Czech family law, cf J Haderka 'The case Keegan versus Ireland' [in Czech] (1995) 8 *Právní rozhledy* 311–313.

9 See J F Haderka 'A Half-Hearted Family Law Reform of 1998' in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2000) 119–130.

10 See Z Králíčková 'Adoption in the Czech Republic: Reform in the light of the Child Welfare laws' in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2003) 125–142.

Let us hope that judicial decisions of the European Court of Human Rights will inspire the creators of the re-codified Czech Civil Code, too, especially in finding a balance among biological, social and legal parenthood.[11]

The aim of this contribution is a criticism of the contemporary state of the Czech family law – of the Family Act in its original wording (Act No 94/1963 Coll) and its non-conceptual direct or indirect amendments[12] in the light of the re-codification already prepared of the Civil Code. The following lines attempt, after a brief summary of the legislative development in the 1990s, to suggest major changes within the re-codification of the civil law, being mainly thoughts on the design of Czech family law in the light of human rights and within the European context. The growing respect towards human rights, international conventions, and the harmonisation tendencies in the sphere of traditional institutes of the European continental family law have positively influenced Czech family law and have led to legally and politically optimistic views as regards the perspectives of its future development.[13]

II THE INEVITABILITY OF THE RE-CODIFICATION OF CZECH FAMILY LAW WITHIN THE CIVIL CODE

Attempts at a re-codification of Czech family law can be counted on the fingers of one hand.[14]

In the first half of the 1990s there appeared suggestions of repealing the Family Act (Act No 94/1963 Coll) and to incorporate family law rules into the existing Civil Code (see Act No 40/1964 Coll) as its last part (the tenth one).[15] In connection with that it was stated, among other things, in the literature dealing with the re-codification of private law family relationships that the implantation of family law into the existing Civil Code would only increase its

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[11] See for instance the case *Paulik v Slovakia* [2006] ECHR 10699/05 No 90, 10 October 2006.

[12] The so-called Great Amendment to the Family Act made by Act No 91/1998 Coll was preceded by an amendment in the form of the Act No 234/1992 Coll, which is very limited with respect to its size but is of key importance from the point of view of its content: the possibility of entering a marriage in a church was reinstated into the legal order of the federation (§ 4a–4b of the FA), including its relatively problematic retroactivity (cf § 4c of the FA). Further, see the most recent indirect amendment made by the Act No 383/2005 Coll. As for the Civil Code amendments important for family law, it is necessary to mention the so-called Great Amendment made by the Act No 509/1991 Coll, which significantly touched upon the issue of community property of spouses by enabling so-called modification contracts and by adjusting the common use of a flat by a married couple, when substituting it with the traditional notion of 'tenancy'. By this, however, the amendment did not fully break the rigidity of property rights – as for married couples in general, or as for the dwelling of spouses in particular.

[13] On general issues of the evolution of Czech family law, cf Z Králíčková 'Czech family law: the development, current state, and perspectives' [in Czech] (2003) 5 *Právní obzor* 487–508.

[14] Here I leave aside the activities during the era of Czechoslovakia under the leadership of professors Viktor Knapp and Karol Plank.

[15] For details see the critical words by M Hrušáková 'Several notes on the "family law" amendment to the Civil Code' [in Czech] (1995) 6 *Právní praxe* 338ff, and 'On the draft of the family law amendment to the Civil Code' [in Czech] (1996) 2 *Právní rozhledy* 45ff.

inconsistency caused by the so-called Great Amendment of 1991 (see Act No 509/1991 Coll).[16] As a starting point from the bleak state of the art, the reform of private law family regulation in two separate phases was recommended: first, absolutely necessary changes to the existing family law regulation were to be made in the form of an Amendment to the Family Act, and, later on, a coherent, modern family law regulation was to be created which would then be systematically integrated into the new basic private law regulation, ie the Civil Code.[17] The first attempt at the re-codification of family law, or its inclusion into the old Civil Code, was more or less rejected by the professionals.[18]

According to another conception, family law was to be included in the seventh part of the new Civil Code.[19] Unfortunately, that way was not followed by the lawmakers.[20] Basic inconsistencies of the Family Act thus began to be removed only in 1998 in connection with the acceptance of the controversial already mentioned so-called Great Amendment to the Family Act (Act No 91/1998 Coll).[21] This amendment significantly affected the regulation of divorce, newly regulated parental responsibility, secured the protection of ownership interests of the child, introduced again the institution of guardian, and, as already mentioned above, it modernised the institution of adoption, improved the regulation of alimony, and introduced a new institution of marital property law, which is the community of property of spouses. The acceptance of the Great Amendment to the Family Act was shortly afterwards followed by the passing of the Social-Legal Protection Act (Act No 359/1999 Coll), which, however, had already been amended.[22] By this Act, the institution of foster care, among others, was included into the Family Act and the special Act on Foster Care was repealed (Act No 50/1973 Coll).

We may say that the partial changes of Czech family law mentioned above prepared the ground for a fundamental step – the re-incorporation of family

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16 We may fully agree that the 1964 Civil Code was a piece of legislation that from its very beginning had low legal standards from the point of view of conception, content, and systematic form and that by the amendment in the form of Act No 509/1991 Coll became an inconsistent legal hybrid of two qualitatively different political and economic periods. See J Švestka, L Kopáč, M Knappová, V Knapp 'Towards the topical issue of codification of private family law relations' [in Czech] (2005) 9 Právní rozhledy 345–346.

17 Ibid at 347.

18 On the criticism of the concept compare K Eliáš 'On some basic aspects of the recodification of Czech private law' [in Czech] (1997) 2 *Právník* 105ff, and other works of his cited here.

19 Compare the material on the conception of the new Civil Code: (1996) 5/6 *Právní rádce* 353 nn.

20 The author of the conception was professor František Zoulík.

21 See M Zuklínová 'What is new in the Family Act' [in Czech] (1998) 5 *Právní praxe* 258, and J Haderka 'On the origin and basic problems of the Family Act amendment of 1998' (1998) 5 *Právní praxe* 269–297. Details also in an article by J Haderka 'A Half-Hearted Family Law Reform of 1998' in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2000) 119–130.

22 In connection with this, we should also draw attention to the Act No 218/2003 Coll, on the responsibility of youths for acts violating the law and on youth justice. For this compare P Šámal, H Válková, A Sotolář and M Hrušáková *The law on youth justice* [in Czech] (Praha, C H Beck, 2004).

law institutions into the Civil Code as the basic source of private law. The second separate phase could then be started – the phase of private law family regulation reform recommended in studies on Czech family law with the law designed so that it should come closer to the current legal regulations of European countries.[23] In the spirit of the European tendencies, the work on the re-codification of the Civil Code as the basis of the private law has currently been going on in the Czech Republic. The activities should result in a unified, coherent, systematic, clear, complete, and at the same time necessarily open code.[24] The direction of the development of Czech family law, defined by the subject matter of the Ministry of Justice (Ref No 2623/00-L of 29 January 2001), can be characterised as an effort to create a European continental civil concept of family law. Family law rules were incorporated into the second part of the paragraphed draft version of the re-codified private law code, which, apart from the matters now codified by the Family Act, also includes marital property law based on the principle of full private autonomy between the spouses, further the right to marital and family dwelling and other related property issues,[25] including the private-law rules against domestic violence.[26] The new Civil Code will also regulate, among others, the registered partnership of same-sex couples.[27]

This concept has had, and certainly will have, many adherents but also opponents, be it the issue of returning family law into the Civil Code at all, or its inclusion into the system of the Civil Code,[28] or the content of individual institutions.[29] We can only add one note to the issue: conceptual inclusion (returning) of the family law rules into the Civil Code is correct. It expressly draws upon the status rights of people, or persons in the legal sense of the word

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[23] See J Švestka, L Kopáč, M Knappová and V Knapp 'Towards the topical issue of codification of private family law relations' [in Czech] (2005) 9 *Právní rozhledy* 345–346.

[24] Compare J Švestka, F Zoulík, M Knappová and J Mikeš 'On the development and the contemporary state of re-codification of the Czech civil law' [in Czech] in 'The issues of re-codification of private law' [in Czech] (2003) 2/3 *Acta Universitatis Carolinae, Iuridica* 39.

[25] On the subject matter of the law compare K Eliáš and M Zuklínová *Principles and starting points of the new private law code* [in Czech] (Praha, Linde, 2001). On the significance of the work compare the review by Ivo Telec in (2002) 8 *Právník* 906ff. For a German review see (2004) 4 *Rabels Zeitschrift* 191–221.

[26] On the necessity of establishing not only the penal rules against the domestic violence but also the civil law regulations, see Z Králíčková 'Civil law aspects of domestic violence according to the proposed law' [in Czech] (2003) 8 *Bulletin advokacie* 84ff.

[27] On this issue see M Zuklínová 'Question marks on another (ie non-marital) co-habitation from the point of view of family law' [in Czech] (1999) 6 *Právní rozhledy* 295–299.

[28] On the reservations on the systematic inclusion of the regulation of the private (both personal and proprietary) family legal relationships into the Civil Code, see the study J Švestka, F Zoulík, M Knappová and J Mikeš 'On the development and the contemporary state of re-codification of the Czech civil law' [in Czech] in 'The issues of re-codification of private law' [in Czech] (2003) 2/3 *Acta Universitatis Carolinae, Iuridica* 61. On the defence of the overall conception see the work by M Zuklínová 'The future Civil Code and the Family Law (several thoughts on the proposed law)' [in Czech] in 'The issues of re-codification of private law' (2003) 1/2 *Acta Universitatis Carolinae, Iuridica* 141–154.

[29] On the particular problems of marital property law according to the proposed law, see Z Králíčková 'Reflections on the re-codification of the Czech family law' [in Czech] in *Proceedings Homage to M Knappová* (Praha, ASPI, 2005) 225–243.

in general. This is not changed even by the fact that in family law a significant role is played by mandatory legal rules, as this is a phenomenon characteristic for status rights, without leaving anyone in doubt about the private character of such rights. Also, the high level of its mandatory nature does not make this part of private law public.

An indubitable positive aspect of big codes is their stability.[30] In democratic countries it is not easy to change them ad hoc according to current particular interests. Unfortunately, during the work on the re-codification new problems began to arise that were unfortunately often dealt with in ignorance of the intention of the draft Civil Code and human rights standards on which family law should be based. We could then witness lobbying, defending particular interests and, to a considerable extent, populism, especially before elections.

III NON-CONCEPTUAL DIRECT OR INDIRECT AMENDMENTS TO OLD LAWS AND CONTROVERSIAL ACTS

In connection with the proposed system and quality changes to family law within the framework of the re-codification of the Civil Code it is necessary to mention a legislative initiative that rippled the still waters of Czech family law.

(a) Questioning and weakening the dictum '*mater simper certa est*'

On 6 June 2004, that is after the Czech Republic acceded to the European Union, the controversial Act on the so-called Secret Childbirths was passed on the basis of the proposal of a group of members of Parliament (cf Act No 422/2004 Coll, by which the following Acts are changed: Act No 20/1966 Coll on the care of the health of people with its recent amendments; Act No 301/2000 Coll on the registers, names and surnames and on the change of some related Acts with their amendments, and Act No 48/1997 Coll on public health insurance with its amendments; henceforth, Act No 422/2004 Coll is referred to as 'the cited Act').[31]

As already stated, the new Act is a work of the members of Parliament, and therefore it was not discussed by professionals.[32] From the explanatory note to

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[30] Compare R Zimmermann 'Re-codification of private law in the Czech Republic' [in Czech] (1996) 5 *Evropské a mezinárodní právo* 3: 'From the codification we expect that it will last', and at 7: 'the codification can stand against the storms, if its clauses are sufficiently abstract and flexible and enable the judges and authors of legal texts to influence the necessary adjustments'.

[31] On fierce critical comments, see M Hrušáková and Z Králíčková 'Anonymous and secret motherhood in the Czech Republic – utopia, or reality?' [in Czech] (2005) 2 *Právní rozhledy* 53nn; S Radvanová and M Zuklínová from the Faculty of Law of the Charles University have expressed strong agreement with the conclusions presented in the paper.

[32] On problems connected with Drafts prepared by members of Parliament as one of the causes of the contemporary state of Czech legislation, see the study of F Zoulík 'An essay on our

the Act an effort is apparent to create conditions for diminishing the number of abortions, preventing murders of newborn babies by their mothers, and decreasing the number of cases when mothers abandon their children.[33] On this issue we come across two opposing interests. The interest of the mother often lies in keeping her pregnancy, childbirth and identity secret. The interest of the child is, however, the right to live, to know his or her descent and to live in the care of his or her mother and father. Saving human life is certainly a priority but we must not forget that, apart from the right to live, there are also other fundamental human rights that need to be respected.[34] The present issue cannot be trivialised and regulated briefly and simply by the institution of an 'artificial foundling'. We fully agree with the opinion that the results of an effort to find an original solution at all costs can even be worse than an unprofessional approach.[35]

It is alarming that such a serious interference with status rights that have their basis in private law was made by amendments to the rules of public law, without a consequent analysis of the legal consequences of such a change and also without amendment of the Family Act. The cited Act did not change the Family Act that regulated the establishing of motherhood in the following dictum: 'The mother of the child is the woman who gave birth to it' (see clause § 50a of the FA). The regulation is mandatory and quite explicit: motherhood is based on the objective legal fact – the childbirth.[36]

A significant consequence of the new legal regulation of making it possible on childbirth to keep the identity of the mother secret in the administrative regulations is the interference with the concept of status rights in the Czech Republic, a concept based on the natural legal basis of the Austrian General Civil Code (ABGB, 1811). Some foreign legal regulations following the French Code Civil (CC, 1804) rely on the concept that motherhood is based not only on the fact of giving birth but also on the recognition of motherhood by the woman who has given birth to the child. In such a way, childbirth without

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contemporary legislature' [in Czech] in *In the service of the law. Papers for the 10th anniversary of the foundation of the C H Beck branch in Prague* [in Czech] (Praha, C H Beck, 2003) 1ff.

33 On this issue see J Severová 'Mothers who give up their children' [in Czech] (2000) 1 *Náhradní rodinná péče* 38–41.

34 See M Hermanová 'Legal aspects of the problems with abandoning a child anonymously' [in Czech] (2002) 6 *Justiční praxe* 391.

35 See F Zoulík 'An essay on our contemporary legislature' [in Czech] above n 32 at 14.

36 On this issue, see M Hrušáková et al *The Family Act. A Commentary* [in Czech] (Praha, C H Beck, 3rd edn, 2005) 181ff. From the sources devoted to motherhood, see, eg, D Melicharová 'Determination and denial of motherhood, the issue of surrogate motherhood' [in Czech] (2000) 7–8 *Zdravotnictví a právo* 24ff; from older works see J Fiala and V Steiner 'Theoretical aspects of the determination of motherhood according to the Czechoslovak law' [in Czech] (1970) 1 *Právník* 33, and J Haderka 'On some issues of determination (and denial) of motherhood' [in Czech] (1979, July–September) *Bulletin advokacie* 14ff. On the issue of motherhood, or more generally parenthood, compare the essential work by S Radvanová 'Who the parents of a child are – only seemingly a simple question' [in Czech] (1998) 5 *Zdravotnictví a právo* 7–13, 6 *Zdravotnictví a právo* 4–7, 7–8 *Zdravotnictví a právo* 9–13, and further J Haderka 'The issue of motherhood and fatherhood after Act No 91/1998 Coll becoming effective' [in Czech] (1998) 9 *Právní praxe* 530ff.

stating the identity of the mother in the child's document is possible. However, these regulations were accepted in social and economic conditions diametrically different from the situation in the contemporary Czech Republic.[37] Many countries are nowadays trying to amend the laws passed in their turbulent times.[38]

The cited Act gives rise to many questions and throws the legal order of the Czech Republic back by many years – not to the period of communism but even farther. This particular problem of Czech legislation evidences the state of Czech society which is able to tolerate suppression of children's rights and to close its eyes before the advocating of particular interests at all costs.[39] On this issue we can only rely on the Constitutional Court and its so-called negative creation of rules as a guardian of constitutionality.[40]

In addition to the problems created by the cited Act on the so-called secret childbirths there appeared in the Czech Republic baby-boxes enabling the 'putting aside' of unwanted children by mothers who did not give birth in hospital and whose children were not registered in compliance with the law and the above-mentioned conventions. It is alarming that this pitiful situation has, besides a number of critics,[41] many supporters and promoters (including doctors!). The state remains silent. We may only note that the situation could be even worse. For example, in Slovakia the law itself creates grounds for this non-pro-family conduct by regulating expressis verbis the so-called 'salvation nests'.[42]

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37 On the arguments in favour of and against anonymous and secret childbirths see A Flídrová 'An anonymous childbirth?' [in Czech] (2004) 4 *Jurisprudence* 10ff.

38 On the situation in other European countries see E Hubálková 'Anonymous childbirths from the point of view of Article 8 of the European Convention on Human Rights' [in Czech] in Proceedings from a conference 'Family and the law of personal status (status law)' [in Czech] (2003) 5/6 *Správní právo* 283. The author among other things argues that the Spanish Supreme Court has recently decided, because of the discrepancy with the constitution, on the repeal of Art 47 of the Register Act that made the entry 'mother unknown' in the register possible.

39 The importance of the problem is evidenced, among others, by an initiative of the Health Ministry in the form of the Methodical Directive No 9487/05/OZP/3 in the gazette of the Health Ministry No 6/2005, effective from 1 June 2005, which emphasises that the law imposes on health facilities the obligation to inform the bodies of social and legal protection of children about the fact that the mother abandoned her child after the birth and that substitute family care is mediated by the state and its bodies (Art 5). Compare also the activities of the Ministry of Work and Social Affairs. Further see Z Králíčková 'The case of the so-called legally free child' [in Czech] (2004) 2 *Právní rozhledy* 52ff.

40 See above n 7.

41 On the history, the contemporary state and, unfortunately, the future of the boxes for abandoned children see M Zuklínová 'Several notes on the legal questions on the so-called baby-boxes' [in Czech] (2005) 7 *Právní rozhledy* 250ff. Compare further the conclusion, not very favourable for the Czech Republic and its legislative practice.

42 'Salvation nests' is the preferred term for what are more commonly known as 'baby boxes'.

(b) Halfway in registered partnership[43]

After many futile attempts the Parliament of the Czech Republic passed the Act on Registered Partnership (No 115/2006 Coll, henceforth the ARP). The President of the Czech Republic applied his power of veto but he was overridden in the second proceeding and the Act was passed. The main point of the President's objections was that the draft did not regulate partnership rights and duties of the partners but just registration itself. He was right. In addition, the new law is said to be without any conceptual basis, as is typical for drafts based only on MPs' activities.

The new Act has three sources: (a) the drafts from the 1990s; (b) the present Family Act on the regulation of marriage (some Articles are identical); and (c) the draft of the new Civil Code regarding registered partnership. The Act on Registered Partnership is more or less a mixture of concepts. Its idea, its terminology, its systematic and logical nature are problematic, too. Registered partnership is sometimes similar to marriage (maintenance duty between the partners and ex-partners) and sometimes similar to cohabitation without marriage (no duty to live together, no duty to be faithful to each other, no duty to help each other, no community property, no common tenancy of the flat by operation of law, no right to adopt a child as a common one, no right to become common foster parents and guardians, no right to have a child in joint custody, etc).

According to the new Act, registered partnership is a permanent community of two persons of the same sex established in the manner stipulated by the Act (§ 1, ARP). Under the new law, couples of identical sex, older than 18 years, with full legal capacity, not brothers, not sisters, not descendants, not ascendants, at least one of them being a citizen of the Czech Republic, are allowed to get registered (§ 4, ARP). Registration shall be done in front of a state registrar (§ 3/1, ARP). The ending of a registered partnership is similar to the ending of marriage:

(a) death of one of the partners; and

(b) cancellation (not divorce) of the relationship by the court on the motion of either partner (§ 14, ARP). There are two grounds for the court decision:

    (i) proof that the relationship between the partners in fact ceased to exist (§ 16, ARP); and
    (ii) there does not have to be made any proof of relationship if the second partner joins the motion of the plaintiff – then the court shall not examine whether the relationship between the partners in fact ceased to exist or not (§ 17, ARP). The partners are not allowed to

[43] For details and critical comments see M Holub 'Registered partnership? Betwixt and between' [in Czech] (2006) 9 Právní rozhledy 313–317.

file a motion to this effect jointly because of the problematic conception of the Civil Procedural Code (1963; the same applies to spouses regarding divorce of their marriage).

The Act on Registered Partnership does not include an Article declaring that 'the Family Act or Civil Code shall apply in the case when the Act does not provide otherwise'. So, it may be quite difficult to overcome its gaps. Because of a lot of defects in ARP, an amendment is now being prepared.

(c) Domestic violence out of focus

The Family Act imposes a duty on the spouses to create a sound living environment and background (Act No 94/1963 Coll). The so-called Great Amendment to the Family Act broadened the spouses' duties adding the duty to respect one another's dignity (Act No 91/1998 Coll; for details, see above). However, there are no real sanctions for breaching the duties neither in the Family Act nor in the Civil Code. Of course, there are general rules protecting personality in the Civil Code (see § 11ff of the Act No 40/1964 Coll) but they are quite difficult to use in practice.

The Communist state kept its eyes closed to the problem of domestic violence although experts were proving that homes were not as safe as they should have been. Actually, nothing has changed in that respect since the so-called Velvet Revolution of 1989. The Parliament of the Czech Republic does not consider domestic violence as a big problem and that is why the Czech legal order does not include a complex regulation of that phenomenon. The draft No 828 of 2004 could have been a good step to bringing the Czech Republic closer to the European standards.[44] Unfortunately, it was not passed as a whole. Effective private law provisions against domestic violence are still missing. We may only hope that the new Civil Code will be passed as it is drafted. Its second part dealing with family law and also regulating marital and family dwelling is supposed to include a complex protection inspired by the latest European trends.

Anyway, there are some important steps on the way to the effective protection against domestic violence:

- the amendment to the Criminal Code (No 91/2004 Coll) introduced the new § 215a on the battering of a person cohabiting in the common flat or house;

- the amendment to the Act on the Police of the Czech Republic, Civil Procedural Code, Criminal Code and others (No 135/2006 Coll, in force

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[44] For details see Z Králíčková 'Civil law sanction against domestic violence – thoughts on the proposed law regarding the bill No 828' in 'Proceedings from the international conference Law against domestic violence' (2005) 2 *Acta Iuridica Olomucensis* 50ff.

since 1 January 2007) introduced the possibility of banishing (expelling) someone from the family home and prohibiting that person's returning there.

Pursuant to the new law the policeman is entitled without any motion (ex lege, ex offo) to banish a suspected person and prohibit the person's return to the flat or house shared with the victim and its surroundings for 10 days. The civil court is authorised to impose, on the motion of a victim and by an interlocutory injunction, the duty on a defendant to leave temporarily the flat or house and its surroundings and the duty to refrain from meeting the victim and creating contacts with the victim for one month. The court may prolong the period on a motion. The interlocutory injunction ceases to be effective by the expiry of time (not longer than one year). The court must immediately organise the execution of its decision.

IV THE RIGHT TIME FOR RE-CODIFICATION – SEARCHING FOR THE EUROPEAN STANDARDS: A NOTE ON THE HARMONISATION OF EUROPEAN FAMILY LAW

The explanatory note to the first version of the Draft of the Civil Code (2005) mentions several times that the form of Czech family law was a result of sovietisation in the past and that one of the major programme objectives of the proposed code is to achieve discontinuity with the communist Civil Codes of 1950 and 1964 (and with the communist Family Acts of 1949 and 1963) and that it is necessary to provide the Czech Civil Code with the function of a 'systematically integrating focus' of the legal order, as it is common in standard legal orders of the Continental Europe type. We may fully agree with this. We can also fully agree with the general statement that 'Czech private law must come closer to European standards'.[45]

However, what are the European standards as far as the family law is concerned? There is no simple answer to this very simple question.

It is commonly known that family law in each country is based on the tradition, culture and religion and is a reflection of the society of that country. In Europe, there exist different kinds of family law: family law influenced by the French Code Civil, family law of the German speaking countries, family law of the Scandinavian countries, family law of the countries previously under the Soviet influence, etc. In the Italian legal literature, a quotation of an Italian family law expert is often cited that 'family is a rocky island which family law can only

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[45] See the explanatory note, I General Part, pp 1ff, and the partial explanatory notes to the individual clauses of the Second Part – Family law, pp 92ff of the *Draft for the Civil Code. Part One to Four. Draft of the working committee* (Praha, Ministry of Justice, Spring 2005) [in Czech] [main compilers: K Eliáš and M Zuklínová] (in further footnotes referred to only as the 'Draft'). Then, see the 2008 version of the Draft – www.justice.cz (15. 7. 2008).

wash with its waves'.[46] Also the renowned Czech family law expert, Jiří Haderka, had some thoughts on the limits of family law.[47] It is certain that anywhere in the world, family law cannot be changed, so to speak, overnight and at all costs, and even less so by experimental legal institutions.

However, for legislation in many European countries the essential changes in the relationships of the family and society, especially after the Second World War and mainly in the 1970s and 1980s, resulted in the necessity to look for common paths. The emphasis on protection of human rights, on the advocating of full equality of men and women in society, marriage, and family, equal rights for children born out of wedlock, migration, new problems in life, assertion of the principle of private autonomy and its limits have been discussed for a long time especially in connection with the need to transform family law[48] and to follow the ideas on the harmonisation of the law of the European Union members and the ideas of European family law.[49] In connection with this, several authors held a rather optimistic view that due to the fall of the former Soviet bloc unification of family law appears to be achievable more easily.[50]

The first step towards the European family law is supposed to be activities of the scholars and a comparative analysis which should lead to understanding the differences and similarities contained in the legislation of the Member States and to a comparative synthesis.[51] The results of jurisprudence should be formulated into the principles of European family law and should serve as an inspiration for the domestic and international lawmakers or as an alternative to or a support of domestic law.

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46 Compare A C Jemolo *La Famiglia e il Diritto* (Annali della Facoltà Juridica della Università di Catania II, 1948).

47 See J Haderka 'Limits of the law in regulating family relationships' [in Czech; a speech before the Deputies' Chamber of the Czech Parliament] (1995) 6 *Právní praxe* 330ff.

48 The opinion that a full transformation of family law was not reached anywhere in the world due to the 'strength of traditional legal institutions' and the scepticism about European family law can be found in A G Chloros *The reform of family law in Europe* (Kluwer, 1978) especially in the Foreword, vii.

49 In the extensive literature on this issue compare D Martiny 'Europäisches Familienrecht – Utopie oder Notwendigkeit?' (1995) 3/4 *Rabels Zeitschrift* 419ff, D Martiny 'Is Unification of Family Law Feasible or Even Desirable?' in A Hartkamp et al (eds) *Towards a European Civil Code* (Kluwer Law Int, 2nd edn, 1998) 151ff, M Antokolskaia 'The Harmonisation of Family Law: Old and New Dilemmas' (2003) 1 *European Review of Private Law* 28ff, C Jeppesen and I Summer 'Perspectives for the Unification and Harmonisation of Family Law in Europe' (2003) 2 *European Review of Private Law* 269ff, W Pintens 'Grungedanken und Perspektiven einer Europäisierung des Familien und Erbrechts' (2003) *Zeitschrift für das Gesamte Familienrecht* Teil 1, 331ff, Teil 2, 417ff, Teil 3, 499ff. See the study K Boele-Woelki 'The path to European family law' [in Czech], Proceedings from the conference held in Prague in 1998, organised by the International Society of Family Law (1999) 2/3 *Právní prax*e 119ff.

50 On this, see D Martiny 'Is Unification of Family Law Feasible or Even Desirable?' above n 48, 164.

51 See the study K Boele-Woelki 'The path to European family law' [in Czech], Proceedings from the conference held in Prague in 1998, organised by the International Society of Family Law (1999) 2/3 *Právní praxe* 119ff, mainly 120–123 with reference to a relatively extensive list of sources cited there.

The Czech Republic does not stand aloof from harmonising tendencies in family law. Czech society and the Czech family have also changed and are still changing.[52] As has already been mentioned above, the Czech legal order undergoes changes, too. As far as Czech family law is concerned, many positive steps were taken due to the conventions mentioned above, especially those of the Council of Europe. However, Czech law still awaits adoption of some essential steps.[53]

It is not only the fact that concerning lex scripta the law is a product of the time in which it originated and that it is marked by non-conceptual and often chaotic amendments but also the interpretation and application that should have been given within the framework of the principles on which the new Civil Code is to be built.[54]

Family law as a whole is to be regarded as a value that must be protected and developed. The Draft of the new Civil Code gives family law a deserved place. As far as the content is concerned we may at a glance see that the main authors have aimed at a comprehensive and systematic approach. We may have reservations about individual parts but the whole fully respects and develops the values stated hereinafter.

It is not the aim of this contribution – and with regard to the limited space it cannot be – to provide a detailed analysis of special institutions of Czech family law included in the draft of the Civil Code. However, in general it can be said that the European standards to which we should hold while performing the reform undoubtedly include the following principle*s*:

(a) indivisible and general values of human dignity, freedom, equality, and solidarity;

(b) respect for the family life of a person, regardless of which form they opt for,[55] including the so-called single-style;

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[52] On this issue see S Radvanová 'The state of the Czech family and the family law at present' [in Czech] (1999) 2/3 *Právní praxe* 94–102, 'A Portrait of a Family (on the background of the legal order)' [in Czech] (2004) 2 *Zdravotnictví a právo* 15–22 and other publications by the same author.

[53] On this compare Z Králíčková 'Harmonisation and unification of European family law' [in Czech] (2003) 3 *Právo a rodina* 1ff, 'Czech family law on the way to traditional institutions (at the edge of the harmonisation and unification)' [in Czech] in P Blaho and J Švidroń (eds) *Kodifikácia, europeizácia a harmonizácia súkromého práva* (Proceedings from the conference VIII Lubyho dni Bratislava, Iura edn, 2005) 415ff.

[54] The necessity to 'anticipate' an interpretation was also mentioned by Prof Tymen J van der Ploeg in his contribution in connection with the re-codification of the Dutch civil law. See his paper 'Pros and Cons of the New Civil Code' in J Hurdík and J Fiala (eds) *Starting points and trends of the development of Czech law after the accession of the Czech Republic to the European Union. Proceedings from a conference held in Brno on October 5, 2005* (Brno, Acta Universitas Brunensis, Iuridica, No 294, Masarykova universita, 2005) 85ff.

[55] Compare the regulation of marital status in § 528ff of the draft and the institution of registered partnership established in § 836–854 of the draft.

(c) autonomy of the will of an individual and its free application in all matters where there is no reason to limit it, either in the form of ius cogens or legal institutions in the case of status laws, or other limitations resulting from the natural assertion of the principle of solidarity in marriage and family and the unhurried assertion of the principle of the protection of the weaker one[56] – the so-called economically weaker of the partners;[57]

(d) separation of any kind of cohabitation by consent as a comprehensive and final settlement of personal and property matters between the partners[58] with a suitably drafted 'hardship' clause;[59]

(e) the best interests of the child, including the right to know the parents – searching for harmony of biological, social and legal parenthood;[60]

(f) the right of the child to live with the parents and other relatives in a common dwelling in joint custody, the right to regular contact with both parents, the right to substitute care secured by the state – but always as a subsidiary to the care provided by the family and looked upon as the service to the child;[61]

(g) participation rights of the child;[62]

(h) property interests of the child, the right to the same standard of living as the parents;[63]

(i) solidarity in the property law of the spouses,[64] in the law of the marital and family dwelling,[65] and in the case of maintenance between the spouses as well as divorced spouses;[66]

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[56] On this see F Zoulík 'Private-law protection of the weaker party of a contract' [in Czech] (2002) 3 *Právní rozhledy* 109ff.

[57] Compare e g the limits of the autonomy of will affecting the ability of the husband to provide for the family established in § 586, para 1 of the draft.

[58] Compare the right of the spouses to file a common motion for divorce and arrange property matters, dwelling, alimony for the time of the divorce, if applicable, by a contract, established in § 624 of the draft.

[59] See § 622, para 2 of the draft, regulating the cases when the parties to a marriage cannot be divorced.

[60] See the case *Paulík v Slovakia* [2006] ECHR 10699/05 No 90, 10 October 2006.

[61] Compare the legal regulation of motherhood and fatherhood in §§ 643–663 of the draft. Further compare the new conception of the adoption of a minor child established in §§ 664–719 of the draft, especially the thorough regulation of the consent of the parents in § 680ff of the draft.

[62] See especially § 746, para 1 of the draft. For published sources, see M Hrušáková *The child, the family, and the state. Essays on the legal position of a child* [in Czech] (Brno, Masarykova univerzita, 1993).

[63] Compare the relatively extensive institution of 'Care of the child's property' established in § 766ff of the draft and 'Maintenance obligations' regulated in § 871ff and following of the draft.

[64] See the institution of 'Usual equipment of the common dwelling' regulated in § 571 of the draft and the rules for dealing with exclusive property in the regime of separated property of

(j) effective civil-law protection against domestic violence;[67] and

(k) alternate/alternative forms of solution to marital and family conflicts or arguments (mediation).[68]

V CONCLUSION

In spite of the problems mentioned above with searching for European standards,[69] Czech family law according to the proposed law moves towards the traditional family law institutions included in the Civil Code as the basis of private law. The new regulation of family relationships will be very similar in its concept to the large foreign codes of private law, for example the Austrian General Civil Code (ABGB), which is the basis of civil jurisprudence[70] and institutions that are still in the minds of both experts and lay people. We can agree with the opinion that the new private law code should include, as a principle, all private law matters, i e also family law in such a way which is usual in countries with comparable legal environments, with reference to the necessity of the unity of private law.[71]

As already mentioned with reference to the explanatory note on the Draft of the Civil Code, the main authors' aim at discontinuity with the communist law and creating a code comparable with European cultural conventions is quite apparent. As for the future incorporation of Czech family law into the Civil

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the spouses in § 592 of the same draft. Compare the limits of the autonomy of will affecting the ability of the husband to provide for the family established in § 586, para 1 of the draft.

65 See 'Some clauses on the dwelling of spouses' established in § 609ff of the draft, namely the institution of the 'right to dwelling' and a number of limitations on the rights of the exclusive owner or the exclusive tenant of the dwelling, e g § 613ff of the draft.

66 See the institution of 'Alimony of the divorced spouses' in § 627ff of the draft.

67 See the relatively comprehensive protection in the form of 'Special clauses against domestic violence' established in §§ 617–619 of the draft.

68 Compare especially the new conception of the institution of 'Making decisions in family affairs' established in § 565 of the draft and the explanatory note to it which says: 'The court should . . . lead the spouses to agreement, if necessary, even by using a mediator (intermediary in family matters)' and the institution of 'Exercise of the parental duties and rights after divorce' in § 778 of the draft, which says: 'When deciding on entrusting child to care, the court will always recommend the parents to use advice of an intermediary in family matters', including the explanatory note to it.

69 See I Schwenzer and M Dimsey *Model Family Code. From a Global Perspective* (Antwerpen–Oxford, Intersentia, 2006) 257ff.

70 Compare K Eliáš 'Nobility of the civil law tradition and the post-modern approaches to civil law' [in Czech] (2003) 8 *Právní rozhledy* 413, and K Eliáš 'The Civil Code and the Czech legal culture' [in Czech] in A Gerloch and P Maršálek (eds) *The Act in the Continental law* [in Czech] Proceedings from the international conference 'The place and the role of law in the continental culture: tradition, present, and developing tendencies' (Praha, Eurolex Bohemia, 2005) 213ff, and K Eliáš 'Theoretical questions on the reform of the private law (and its practical problems)' [in Czech] in K Eliáš (ed) *Soukromé právo v pohybu* (Plzeň, A Čeněk, 2005) 54ff.

71 For the theoretical questions and legal-theoretical starting points compare the study M Zuklínová 'The future Civil Code and the family law' in 'The issues of re-codification of private law' [in Czech] (2003) 1/2 *Acta Universitatis Carolinae, Iuridica*, 141ff.

Code, it must be in essence a return to the civilised forms of family law. Family law must be comprehensive – from the legal regulation of status matters in marriage and family, including the registered partnership, the regulation of property relationships, including the marital and family dwelling, to clauses against domestic violence. The best interests of the child must be the key ones – including the right of the child to get to know the parents with the aim of achieving harmony of biological, social and legal parentage. The individual traditional institutions must be enriched with such elements that will contribute to the development of a person and to the cohesiveness and solidarity of the family. Let us hope that the draft of the Civil Code which has been widely discussed at the moment will be a work that fully accepts those essential values.

England and Wales

WHEN DID YOU LAST SEE YOUR FATHER?

Mary Welstead[*]

Résumé

Pour des raisons pratiques et culturelles, la majorité des enfants a tendance à rester avec les mères lors d'une rupture familiale, ce qui a inévitablement une incidence sur les liens avec le père. Bien que certains pères parviennent, à l'amiable, à aménager des liens, d'autres n'y arrivent pas. Ces derniers ne cherchent pas nécessairement à poursuivre une relation avec leur enfant, soit parce qu'ils préfèrent se concentrer sur leur travail et leur nouvelle liberté, soit parce qu'ils ne souhaitent pas affronter une bataille familiale supplémentaire. Ce qui semble incontestable, cependant, est que les enfants qui continuent d'avoir des contacts fréquents et réguliers avec leur père en tirent un bénéfice. Cette année, ma contribution à *l'International Survey of Family Law* (l'étude internationale sur le droit de la famille) se concentre sur quelques-unes des nombreuses décisions rendues en 2007 impliquant le lien ou la résidence paternels. Ces décisions traitent du lien paternel dans les situations suivantes: preuve de la paternité, maltraitance, changement de sexe, création d'une famille transfrontalière, résidence habituelle, réinstallation, enlèvement, hébergement, adoption, et sanctions. Mon objectif est de dessiner un panorama des difficultés rencontrées par les pères et par les tribunaux dans le règlement des différends relatifs au lien avec le père.

I INTRODUCTION

William Frederick Yeames' painting, 'When did you last see your father?' (1878), hangs in the Walker Art Gallery in Liverpool. It depicts a young boy during the English Civil War being questioned by the Parliamentarians about his Royalist father's whereabouts. It is a poignant painting which illustrates the young boy's sadness about his father's absence, and fear for his father's and his own future. His sister stands by weeping and his mother looks on terrified that her son will be taken away from her. The painting is an iconic image for all those involved in familial disputes and, particularly so, for those who are concerned about fathers who do not have contact with their children.

It is not easy to obtain accurate information about the level of paternal contact. One study suggests that only 10% of contact disputes end up in court

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and in the majority of those cases, the father obtains some right to contact.[1] However, another study claims that almost half of all children from separated families do not see their fathers.[2] For practical and cultural reasons, the majority of children tend to remain with mothers on family breakdown which inevitably has an effect on paternal contact. Although some fathers do manage to agree contact arrangements in an amicable manner, others are unable to do so. This latter group of fathers may not bother to pursue contact, either because they prefer to concentrate on work and their new found freedom, or because they do not wish to face yet one more familial battle. What seems to be indisputable, however, is that children who continue to have frequent and regular contact with their fathers benefit from the relationship.[3] Interest groups such as Families Need Fathers (www.fnf.org.uk) and Fathers 4 Justice (now disbanded) have drawn attention to the importance of paternal contact, and have attempted to help fathers who do want to have contact with their children.[4]

My contribution to this year's *International Survey of Family Law* concentrates on some of the numerous decisions in 2007 which relate to disputes about paternal contact or residence. My aim is to give a picture of the difficulties faced by fathers and by the courts in resolving these disputes.

II DOUBTS ABOUT PATERNITY

(a) Revealing the truth

Men who apply for contact with children may face opposition from mothers on the grounds that there is doubt about the children's paternity.[5] Whilst the courts have maintained that it is in the child's interest to learn the truth about his or her biological origins, they have also stated that truth must be balanced against the child's need for stability.

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1 Joan Hunt and Alison Macleod, *Outcomes of applications to court for contact orders after parental separation or divorce*, Oxford Centre for Family Law and Policy, Department of Social Policy and Social Work, University of Oxford, 2008.

2 *The Guardian* (UK), 27 February 2007.

3 *ALSPAC-Children of the 90s*, Department of Social Medicine, Bristol University, UK (Avon Longitudinal Study of Parents and Children).

4 The Judicial Communications Office issued the following statement in 2007 in response to the interest group's sometimes misguided actions: 'There is no justification or public interest served in publishing the home addresses or other private details of judges. It can serve no purpose other than to intrude into the privacy of the judge, and encourage harassment of the judge and his/her family in their family home. In the case of their court work family judges have to make difficult decisions based on the individual circumstances of a case. By their very nature, these cases are emotional and feelings often run high on the part of a dissatisfied party. However, all parties have the opportunity to express their opinion to the judge in person prior to a decision being made, and the right to seek to appeal decisions that they regard as unfair.'

5 At least 10% of all children are believed to have a different biological father from the person whom they regard as their father, see EAH Emery, *Elements of medical genetics* (Churchill Livingstone, 6th edn, 1983), cited in John Harris, 'Assisted reproductive technological blunders' (2003) *Journal of Medical Ethics* 29: 205–206.

The complex family life of the 11-year-old child in *Re D (Paternity)*[6] led the court to deny contact to a man who claimed to be the child's father. The man had met the child's mother and had had a relationship with her when they were aged 15 and 16 respectively. They were both in the care of the local authority at the time the mother became pregnant.

At the time of the application, the child lived with a woman who regarded herself as his paternal grandmother, but she was not the mother of the applicant. The child's family life was somewhat fragile. He and the other children, who lived with him, had been placed on the child protection register because of neglect; he had also been excluded from school. His only stability, and that was very limited, was dependent on the woman he believed to be his grandmother. The child refused to have anything to do with the applicant.

The child was aged 7 when the applicant discovered his existence. The delay had been caused because the applicant had been in a state of confusion about the identity of his own father; he had found out that the man whom he believed to be his father was not. In the application for contact with the child, the court had first to decide whether to order DNA testing to resolve the issue of paternity.

The court held that, whilst it was in the child's best interests to know the truth about paternity as soon as possible, it was not in his best interests to do so now. The risk of destabilising his life was too great. The court, therefore, made an order that the applicant should supply relevant samples for DNA testing to CAFCASS (Children and Family Court Advisory Support Service) and the local authority. They would be asked to store the results of the analysis with the child's files. The court asked the guardian ad litem to talk to the child about the order when he was ready. Should the child agree to be tested in the future, the social worker or the guardian would be under an obligation to inform the applicant of the test results.

(b) Paternity denied

A man who has been led to believe that he is a child's father is likely to be very distressed and angry when he discovers that he is not. Yet he may still wish for contact.

In *A v B (Damages: Paternity)*,[7] an older man had had a relationship with a much younger woman, during which a child, now aged 10, was born. The man believed the child to be his until the child reached the age of 5 when the relationship broke down. The mother decided at this point to arrange a DNA test. The test made clear that the man could not be the child's biological father. The man was devastated when he learned the truth; he had not expected to

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6 [2007] 2 FLR 26; see also *Re F (Paternity: Jurisdiction)* [2008] 1 FLR 225.

7 [2007] 2 FLR 1051.

become a father at such a late stage in his life. He had fallen in love with the child and desperately wanted to continue his relationship with him.

For 5 years, the man had helped to take care of the child, and had financially maintained him. He had also financially supported the mother. Once he discovered the truth, the man refused to make any further financial contributions for the child but applied for contact. The mother objected. The child psychiatrist's report emphasised the need for a father figure in the child's life, the man was that father figure. The court refused the application for contact; the man appealed.

The Court of Appeal dismissed his appeal, although the court did suggest to the mother that she might like to change her mind and allow him contact.

The man was sufficiently angry to take further action against the mother for the tort of deceit. He claimed damages on the grounds that the mother had been fraudulent in deliberately, and repeatedly, assuring him that he was the child's biological father when she knew otherwise. The court accepted that the man's distress, on learning that he was not the father, was very real. It awarded him £7,500 compensation. In addition he was awarded £14,900 for 50% of his expenditure on holidays and restaurant meals for himself and the mother. The court declined to make any award for expenditure solely for the child's needs. The man had enjoyed a sexual relationship with the mother and the benefits of family life with her and the child before learning that he was not the father. In such circumstances the child had to be looked after and it was not unreasonable for the man to incur expenditure for that purpose regardless of whether or not he was the father.

III CONDUCT AND CONTACT

(a) Domestic violence

In January 2007, the Family Justice Council's Report, *Everybody's Business: Applications for Contact Orders by Consent,* was published. The President of the Family Division, Sir Mark Potter had requested the Council to make recommendations on the approach to be adopted by courts in cases of contact orders by consent where domestic violence was raised as an issue.[8] The President's request was triggered by the deaths of 29 children, from 13 different families, at the hands of their fathers during contact visits with them.[9] In five of the cases, the court had ordered contact and in three of the cases an order was

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[8] The Family Justice Council (FJC) (www.family-justice-council.org.uk/) was set up to promote an inter-disciplinary approach to family justice which would serve the needs of families and children involved in the family justice system, Sir Mark Potter, President of the Family Division chairs the Council.

[9] See 'Twenty-Nine Child Homicides: Lessons to be learnt on Domestic violence and Child Protection', Women's Aid Federation of England, 2004.

made by consent. In these eight cases, allegations of domestic violence preceded the killings.[10] Three cases were described in detail in the Report: TB, CF and OF.

(i) TB

TB's father strangled him during a contact visit. At the trial, it was revealed that the father, angry with TB's mother for leaving him, had also planned to kill TB's brothers. During the year prior to TB's death, a number of court hearings had taken place in which the mother had alleged serious domestic violence against her. However, she maintained that she believed contact to be important. In a telephone call to the mother prior to the killing, the father said 'if I can't have you, you can't have TB'.

(ii) CF and OF

The father of CF and OF, aged 6 and 9 respectively, hanged them during unsupervised contact with them, before killing himself. Previous charges of domestic violence had been made against him, and investigations had taken place of an alleged rape of the mother at knifepoint. The judge who agreed the contact order maintained that he thought the children were not at risk because the father's anger was aimed at the mother rather than the children.

The Report made the following recommendations:

- there should be a move away from the approach that contact is always better than no contact;

- contact must always be safe and positive for children;

- an updated Practice Direction should be issued.[11] It should state clearly the procedure to be adopted in cases of consent orders for contact which involve allegations of domestic violence. There should not be an automatic bar to contact. Rather, the allegations should be taken into account as part of the court's balancing exercise in determining whether to allow contact. The court should consider the conduct of both parties towards each other and towards their children, the risk of violence and its effect on the children and on the residential parent, and the motivation of the parent seeking contact;

- the message should be emphasised that safety is paramount when deciding whether contact is in a child's best interests and a risk assessment should be undertaken by the court;

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[10] Lord Justice Wall's report to the President of the Family Division, 2006 (www.judiciary.gov.uk/docs/report_childhomicides.pdf).

[11] It should be based on the guidelines issued in *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334.

- there should be improved multidisciplinary training on domestic violence issues for lawyers and the judiciary;

- court forms should be amended to make it easier for the court to identify cases in which domestic violence is an issue, and to enable more detailed information to be obtained at an earlier stage, to assist CAFCASS with screening for risk;

- the Law Society should strengthen the Family Law Protocol and make clear that a solicitor's duty, when acting for either parent in a contact or residence application, is to consider the safety and welfare of any child;

- consideration should be given to establishing a system which would give judges feedback about orders which subsequently resulted in harm to the child; and

- Her Majesty's Courts Service (HMCS) and the Department for Education and Skills (DfES) should explore how the family court process should become part of serious case or domestic violence homicide reviews.

(b) Domestic violence and indirect contact

Where the domestic violence is such that a father is denied contact with his child, indirect contact in the form of cards and presents may, nevertheless, be appropriate in order to keep the relationship open. Circumstances may change over time, and anger may die down. The courts have made clear that the way must be kept open if at all possible to enable a relationship between fathers and their children.

In *Re F (Indirect Contact)*,[12] a father had been imprisoned for violent behaviour towards the mother but had always showed love and affection towards the child. When he was in prison, and without his knowledge, the mother and child had moved house and assumed new identities. On his release, the father tried to track them down and applied for contact with his child. The President of the Family Division rejected his application because he thought that the mother would be at risk if the father found out where she was living. However, he did not believe that she would be if he made an order for indirect contact with very specific instructions. The mother appealed. The guardian added to the concerns, which she had already expressed, and maintained that indirect contact, by keeping the relationship between the father and child alive, would unsettle the child.

The Court of Appeal dismissed the appeal. The President had satisfied himself that suitable arrangements could be made to safeguard the whereabouts of the mother and child and had taken that into account along with other aspects of

[12] [2007] 1 FLR 1015.

the child's welfare. He wanted to allow memories to be kept alive for both father and child and so reassure the child of a welcome by the father if the child chose to seek him out at a future date.

(c) False allegations of abuse

In *D v B (Flawed Sexual Abuse Enquiry)*,[13] a mother alleged that the father, and the paternal grandmother, had sexually abused their child, aged 3, during an unsupervised contact visit. She also maintained that the father had abused her daughter, aged 5, from a previous relationship. After a long delay, and based on the assumption that abuse had taken place, the daughter underwent therapy. Her therapist informed social services, in the area in which the child lived, of the abuse; chaos ensued. Social services believed the therapist, whilst, in another part of the country, the judge believed the father, and granted him an order for contact. As a result of a later multidisciplinary case conference the children were both registered as having been emotionally harmed. A different judge heard evidence from a 'veracity expert' who maintained that the daughter's allegations from the therapy sessions were true, but immediately wrote to the judge seriously qualifying what she had said. The court found that the evidence could not support the allegations of abuse. The children's evidence was hearsay; the mother was an unreliable witness whose fears had been led by some of the professionals. Her own experiences had caused her to be over aware of risks of sexual abuse. The paternal grandmother and the father were completely innocent of the allegations made against them.

(d) Self-defeating conduct

The following two decisions illustrate the problem where fathers, who remain angry with the mothers of their children, use the issue of contact as a revenge mechanism and thereby jeopardise any possibility of contact with their children.

In *Re W (Permission to Appeal)*,[14] the father, who was not represented, sought permission to appeal against an order for supervised contact; he wanted unsupervised contact with his two children, aged 4 and 5. The relationship between the parents had degenerated to such a state that the father was not permitted to know the mother's address. The court had offered him the possibility of a psychiatric assessment along with the mother, which he refused to accept, although the mother had already done so. On his application to appeal, it was held that the judge had found that the father's lack of contact with his children was the result of his own behaviour. Unsupervised contact had been denied because the court did not trust him not to express his hatred of the mother to the children. The father claimed that the mother was deceitful;

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[13] [2006] EWHC 2987; [2007] 1 FLR 1295.
[14] [2008] 1 FLR 406.

that she had deliberately alienated the children from him; that the family justice system was gullible and corrupt, and that it had dishonestly and deliberately taken the mother's part.

The Court of Appeal held that this was not a case of parental alienation or maternal deceit; the only reason the father was not seeing his children was his irrational refusal to accept the court's order.

The father in *RH v BK and R (By His Guardian Instructed by the National Youth Advocacy Service (NYAS))*[15] had made it very clear that he would continue to make applications for his child to have extra overnight staying contact until he achieved what he wanted. There had been numerous court hearings before several different judges over a period of 7 years. The court found that the father was hostile not only to the mother but also to the whole of the family law system. He had refused to provide any child maintenance because he felt cheated as a result of the divorce settlement.

The court not only refused to extend the overnight staying contact but actually brought it to an end and ordered monthly visiting contact. The court held that the father had conducted the litigation in a manner which was deliberately harassing of the mother and emotionally damaging to the child. It made an order under s 91(14) of the Children Act 1989 restricting any further applications by the father until the child reached the age of 16.

In his judgment, Judge Bellamy discussed the difficulties in cases where the issue of contact had become intractable. He stressed the importance of judicial continuity; here the father had appeared before 13 different judges. He also emphasised the exceptional nature of the order. It restricted the father's rights but was necessary to protect the child who was emotionally disturbed by the numerous court proceedings and derived little benefit from contact. The father's main interest in making the applications was to harass the mother. The father had previously been advised to seek therapy but had not done so.

The decision illustrates the difficulties when a father behaves in such an antagonistic manner; his conduct brings about the very action he is trying to avoid – denial of contact with his child, and his problems escalate still further. The child ends up having a close relationship with his maternal extended family, rather than his paternal one. The child remains ignorant of the details of the father's life, as does the father of the child's life. These factors are then used as evidence to show that the father's relationship with the child is of such a minimal nature that it would be emotionally damaging for the child to spend more time with him.

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[15] [2007] Fam Law 960; The National Youth Advocacy Service (NYAS) is a UK charity providing socio-legal services. It offers information, advice, advocacy and legal representation to children and young people aged 0–25, through a network of over 150 advocates; NYAS is also a Community Legal Service.

In *Stringer v Stringer*,[16] the parents had been in dispute over their two children, now aged 11 and 7, for several years. A very large number of hearings had taken place. In 2004, the father withdrew his application for residence, and the judge ordered indirect contact and made a direction under s 91(14) of the Children Act 1989, prohibiting the father from making any further applications for residence or contact without leave until the children reached the age of 16. It also attached conditions to any further applications; they must be heard by the same judge, if practicable, and be accompanied by a psychological or psychiatric report demonstrating that the father had received treatment. The father sought leave to appeal.[17]

The Court of Appeal gave leave to appeal and upheld the main part of the judgment. However, it held that the court did not have jurisdiction to attach conditions to an order, and deleted them. It explained that there is a substantial difference between the imposition of conditions on an order and a judge telling a father, when the order is imposed, that, unless he can show that he has addressed his behavioural problems, any further application which he makes is likely to be unsuccessful. The latter, which is not binding on either the father or the judge, is permissible; the former is not.

(e) Change of gender

In *Re C (Contact: Moratorium: Change of Gender)*,[18] a father had had no contact for 5 years with his two daughters, aged 11 and 8, since he began treatment for gender dysphoria. After undergoing gender reassignment surgery, he applied to the court to be allowed contact with them. Section 12 of the Gender Recognition Act 2004 provides that a person's change of gender does not affect his or her parental status.

The psychiatrist at the hearing expressed concern that, if the children did not learn the truth as soon as possible, and in a structured and sensitive manner, they were likely to discover the truth for themselves which could be damaging to them. The mother's attitude towards the father was very negative, and the psychiatrist recommended that NYAS be asked to help explain the truth to the children. The judge ordered that nothing should be done for 20 months, other than to allow very limited indirect contact in the form of Christmas, Easter and birthday cards. At the end of that time, the mother would be asked to state how she proposed informing the children of the father's new gender.

The father appealed and the Court of Appeal allowed his appeal. It held that the judge had failed to explain why he had not taken the psychiatrist's

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16 [2007] 1 FLR 1532.

17 His application was joined with another and heard as *Re S (Children) (Restriction on Applications)*; *Re E (A Child) (Restriction on Applications)* [2006] EWCA Civ 1190, [2006] All ER (D) 92 (Aug).

18 [2007] 1 FLR 1642.

recommendation into account. The children needed to know, and were entitled to the professional help of NYAS in discovering and coping with the truth.

IV GEOGRAPHICAL DISTANCE AND CONTACT

Many disputes relating to contact arise because of geographical problems. Cross-border family creation has become a common fact of modern life; it carries with it the problem of parental contact on family breakdown when one parent wishes to return to his or her country of origin, move to a new country (perhaps to create yet another international family), or relocate within the jurisdiction. The decisions relating to paternal contact in this context involve the issues of habitual residence, applications to relocate, abduction, and asylum. The issues tend to overlap, and there is an element of pragmatism in the decisions.

(a) Habitual residence

In a number of cases, the courts have had first to decide on the complex issue of habitual residence in the jurisdiction before they are able to determine the children's future.

In *P v P*,[19] a saga of to-ing and fro-ing between Nepal and England, a mother applied for her two sons aged 13 and 5, who were living in Nepal with their father, to be made wards of court. The father objected to the application. The parents were born in Nepal, were married there, and their first child was born there. They relocated to England and left the child in Nepal with his paternal grandmother. The child joined his parents just before the birth of the second child. Soon after the birth, the second child was taken to Nepal to be cared for by the paternal grandmother. Three years later, the mother visited Nepal for a holiday but was unable to return to England for 2 years because the father confiscated her passport. In the meantime, unbeknown to the mother, and without her agreement, the second child was sent back to England to live with the father, who promptly applied for himself and the two children to be given indefinite leave to remain in England. The mother, who described herself as a reluctant but biddable wife, agreed to sign the relevant documents in support of the boys' application. Soon after the mother returned to England, the father decided unilaterally to take the boys back to Nepal without informing her. A court order was issued for their return to enable the jurisdictional issue to be decided. The father complied with the order.

The court explained the principles of habitual residence:

- in the absence of any contrary agreement, a child's habitual residence is determined by the habitual residence of his parents, if they are married

[19] [2007] 2 FLR 439.

and have joint custodial rights. If the parents are divorced separated or unmarried, habitual residence is determined by the parent with custodial rights;

- habitual residence is not solely determined by the physical location of the child;

- a married parent cannot unilaterally change a child's habitual residence without the agreement of the other, unless the facts independently establish the change;

- a joint decision by parents to remove a child from his or her habitual residence is subject to their continuing to agree to the change. Either one of them may unilaterally revoke the agreement and seek to have any issue relating to the child to be decided in the country where the parents have their habitual residence.

The court found that both parents were habitually resident in England at the date the mother applied to ward the children, and had joint custodial rights. The older child was clearly habitually resident in England. His removal to Nepal without the mother's consent did not change his habitual residence. The younger child had been habitually resident in Nepal with his parent's actual or implied agreement. His residence was changed when he was returned to England with the parents' intention that he should be permanently resident in England; both parents had agreed to the application for indefinite leave to remain in England. He had also been enrolled at nursery school in England. His peremptory and unilateral removal to Nepal by his father did not destroy that habitual residence. The mother, therefore, had the right to apply to ward the children and the father risked the court making decisions about any future residence and contact.

A more pragmatic approach was taken to habitual residence by the court in *Re A (Wardship: Habitual Residence)*,[20] which resulted in the father retaining custodial rights over his child. The father and mother had married in Kurdistan, but had relocated to England where their child was born. Nineteen months after the birth, the parents went to Kurdistan for what the mother believed to be a business trip and a holiday. The father left the mother and child with the paternal grandmother and returned to England. A few months later, the father divorced the mother. She signed an agreement approved by the Kurdistan court which granted custody of the child to the father. The child remained in the care of the grandmother, and the mother, who was forced to leave the home. She visited the child once a week until the father banned her from doing so. The mother returned to England without the child, who by then was aged 4, and applied for an order for wardship.

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[20] [2007] 1 FLR 1589.

The court declined to consider the application because the child was not habitually resident in the jurisdiction. After the divorce the mother had agreed with, or at least accepted, the father's intention that the child should reside in Kurdistan. This was evidenced by her acceptance of the court order. She only withdrew her intention when she left Kurdistan to return to England. The question of a child's habitual residence could not always be determined by reference to the combined intention of the parents or a change in it. Ultimately the question depended on whether it was realistic to find that the child was habitually resident in the jurisdiction.

A similar pragmatic approach was taken in *Re A (Abduction: Habitual Residence)*.[21] The father, a US citizen, and an English mother married in England where their child was born. In 2006, the father returned to the United States, the plan being that his wife and child would join him there. On arrival in the United States, the mother realised that the marriage had broken down. One week later she returned to England with the child. The father applied for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Although he accepted that he had consented to the child going back to England, he maintained that it was only for a temporary period of 3 months. The mother claimed that the agreement was that the child could live in England with her and merely return to the father for holidays.

The court dismissed the father's application on the grounds that the child, now aged 7, had never been habitually resident in the United States. The mother and child had not really lived there, and all the child's connections were with England. There was, therefore, no wrongful removal from the United States.

(b) Relocation

The guidelines outlined in *Payne v Payne*[22] have resulted in parents with residence orders, usually mothers, succeeding in applications to take their children with them when they decide to relocate. The approach of the court has tended to the view that a child's welfare rests on the emotional and psychological stability of the parent with whom the child has been living prior to the request for relocation. If the request for relocation is seen as reasonable rather than a mere desire to go adventuring in search of a dream, and a refusal to allow the child to relocate would destabilise the parent with residence, the request will be granted.

The decision in *Re F and H (Children)*[23] is directly in line with *Payne*. The mother, a US citizen with a child from a previous relationship, married the father in September 2001; their child was born in January 2002. The couple

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21 [2007] 2 FLR 129.
22 [2001] 1 FLR 1052.
23 Unreported, Court of Appeal, 7 June 2007.

separated soon after the birth. The mother applied to the court to take the children with her to live in the United States. Her application was granted.

The father appealed; he maintained that the judge was wrong to allow the relocation when the mother's proposal lacked information about the schools the children would attend or how the mother would provide for them. He also argued that the judge was wrong to find that there would be a serious impact on the mother if her application were refused.

The Court of Appeal dismissed the appeal. In a case such as this, where the mother was returning to a familiar environment, the bar was far lower for her to surmount than in a case where an applicant had no previous connection with the place to which she wished to relocate. That bar was lowered still further when the mother was returning to a completely familiar home life after a comparatively brief absence of 6 years.

By contrast, in *Re H (Removal Outside Jurisdiction)*,[24] the mother, a US citizen who had moved to the United Kingdom in 1999 to live with the English father was denied permission to relocate with their 6-year-old daughter who was born in England. The mother had become very homesick and felt unable to settle in England. The couple's relationship broke down but the father remained in weekly contact with the daughter who was close to his new partner and her paternal grandparents. The mother remarried another Englishman and applied to the court for permission to take the daughter to live in North Carolina close to her twin sister's home. The father objected to the application. The judge held that the proposed relocation, which he described as a mere change of lifestyle for the mother, would be adverse to the daughter's best interests. He found that any possible distress on the part of the mother was unlikely to affect her care of the child. Fatal to her application was the fact that she had told the court that, if her new husband were to be refused permission to enter the United States, she would remain in England and make the best of it. The judge described her as a person who was restless and unhappy and he had misgivings about her ability to settle anywhere. The mother appealed.

The Court of Appeal dismissed her appeal. It held that, although the judge had been wrong to categorise the case as one of a mere change of lifestyle, that did not interfere with his understanding of the mother's history as well as her present situation. This understanding had led him to the not unreasonable conclusion that the child's future in England would not be jeopardised by a refusal to allow the mother to relocate with the child. The father would therefore not lose contact.

In *Re J (Leave to Remove)*,[25] the court, in addition to the guidelines outlined in *Payne*, accepted that financial pressures might necessitate relocation. Here, a Bulgarian mother and father were living in England, albeit separately. Two of

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[24] [2007] 2 FLR 317.
[25] [2007] 1 FLR 2033.

their children, aged 15 and 11, lived with the father and refused to have any contact with the mother. A third child, aged 6, lived with the mother but had frequent contact with the father and the two older children. The father made an urgent application to take the two older children with him to Bulgaria. He explained to the court that he was unemployed, was in a poor financial state, and had been offered employment in Bulgaria which would secure the economic stability of the family. His application was granted. The mother appealed and argued that the father's practical arrangements including his future housing, employment and the children's education had not been clarified to the court.

The Court of Appeal held that the guidelines in *Payne* could not be strictly adhered to in circumstances where the family's future could only be secured by the father relocating to find new employment. The subtext of the decision can perhaps be seen as a refusal to allow a foreign family to become a liability on the state.

Where a parent wishes to relocate with the child within the jurisdiction, courts have been reluctant to interfere. The parent is regarded as having a right to live wherever he or she chooses. The assumption seems to be that the non-resident parent will have little problem in remaining in contact with the child given the comparatively small distances involved. For example, in *Re G (Contact)*,[26] a British couple who were living in Australia when the marriage broke down decided to return to England. They applied to the Australian court for an order to permit the wife to bring their son, aged 10, to England where he would live with her, and attend a specified school where the father was to work. The father was to have significant contact with the child.

On her return to England, the mother decided to live with her extended family. This decision made it impossible for the child to attend the school specified in the order; the distance was too great. The child refused to see his father who successfully applied to the English court for an order identical to the Australian court order. The mother appealed.

The Appeal Court held that courts should not normally attach conditions to a residence order which would force the parent with residence to live in a particular locality. Any attachment of such a condition to a residence order should be exceptional and should only be imposed when there is doubt about the resident parent's ability to care for the child.[27] Specifying attendance at a particular school before the parent with residence knew where she would be

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[26] [2007] 1 FLR 1663.

[27] See *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 where the first instance judge required that the children continue to live in London rather than be moved by their mother to Blackpool, in order to facilitate regular contact with the father. Butler-Sloss LJ (as she then was) regarded this as an unacceptable interference with the mother's right to choose where she lives in the United Kingdom. She maintained that only in exceptional cases should a condition be imposed, see e g *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277, comment at [2001] Fam Law 870 (prohibited steps order preventing father relocating to Northern Ireland); *Re S (A Child) (Residence Order: Condition) (No 2)* [2002]

living was putting the cart before the horse. Given the mother's lack of income and the availability of any alternative accommodation, she had chosen, quite reasonably, to live with her family. The child could not travel to the school from the mother's new home and it was completely unrealistic to expect the mother to move. The contact order made by the judge at first instance, which reflected the Australian court order, was impracticable. The matter should be remitted to the High Court for a decision; the parents would have to accept a compromise.

The Court of Appeal stressed the fact that the child was being damaged by his parents' obstinacy. It was important that the boy, as he approached adolescence, should re-establish contact with his father and get to know him as a real person. The ability of the parents to compromise would enable that to happen.

(c) Abduction

Fathers' rights to have children, who have been abducted, returned under the Hague Convention on the Civil Aspects of International Child Abduction 1980 are never sacrosanct. The objectives of the Convention are twofold:

(1) to protect the rights of a custodial parent and ensure the rapid return of a child in the event of wrongful removal by the other parent; and

(2) to safeguard the welfare of the abducted child.

Recent cases suggest that the latter objective has become more important than the former, and abducting parents have become more likely to succeed in their bid to have their children live with them.

In *Re M (Abduction: Zimbabwe)*,[28] the House of Lords allowed the children to remain in the United Kingdom after their mother had abducted them from the custody of their father in Zimbabwe. The two children were born in Zimbabwe and their parents had Zimbabwean nationality. When the parents separated, the children remained with the father. During a contact visit, the mother brought the children to the United Kingdom and claimed asylum; her claim was refused. There was a moratorium on the return of failed asylum seekers to Zimbabwe, and the mother and children were able to remain in England. The father took some 6 months to discover where the children were. He failed to apply for their immediate return because he was unaware that he could apply under the Hague Convention. By the time he made an application, 2 years had elapsed since the children's abduction.

EWCA Civ 1795, [2003] 1 FCR 138 (mother not permitted to relocate to Cornwall with child suffering from Down's Syndrome); and *B v B (Residence: Condition Limiting Geographic Area)* [2004] 2 FLR 979.

[28] [2008] 1 FLR 251.

The Hague Convention provides, under Art 12, that if the wrongful removal has been for less than one year, the requested state must order the child's return. If the removal has been for more than one year, the requested state must order the child's return unless it finds that the child is now settled in his new home country.

Article 13 provides for discretionary exceptions to return:

- if the applicant parent was not actually exercising custody at the time the child was removed, or consented or acquiesced to the removal;

- if the return would expose the child to the grave risk of physical or psychological harm or otherwise place him in an intolerable situation;

- if the child objects to return and has attained an age and degree of maturity where it is appropriate to take his or her views into account.

Article 20 provides that a contracting state may refuse to return the child if the return would be contrary to the protection of human rights and fundamental freedoms.

The mother argued under Art 12 that the children were settled in England, therefore, they should not be returned. She also pleaded the defence, under Art 13(b), of grave risk to the children if they were to be returned to Zimbabwe, and that the children, now aged 13 and 10, objected to leaving England.

The judge accepted that settlement had been established but held that he nevertheless had a discretion whether or not to return the children. In the exercise of that discretion, he held that he had to find something exceptional which was over and above the defences pleaded of settlement and the children's objections to return. He concluded that, although the children were of sufficient age and maturity for their views to be taken into account, their views were not sufficiently strong to determine their future. He rejected the defence that the difficulties of life in Zimbabwe meant that the children were at risk of harm. The mother appealed and the Court of Appeal dismissed the mother's appeal.

In the mother's successful appeal to the House of Lords, their Lordships accepted that there was a judicial discretion, under the Hague Convention, whether or not to return a child even in cases where it was established that the child was settled in the new environment, under Art 12. In exercising this discretion, Baroness Hale maintained that:

> '. . . it is wrong to import any test of exceptionality . . . under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention.'

The House of Lords emphasised that judicial discretion was at large in this context. Courts were entitled to take into account the various aspects of Convention policy; the circumstances which gave the court a discretion in the first place; the wider considerations of the child's rights and welfare; the child's views, the extent to which those views were genuinely those of the child and not the consequence of the influence of the abducting parent; and, in settlement cases, the child's integration in the new environment. Their Lordships stated clearly that children should not be returned and be made to suffer for the sake of general deterrence of the evil of child abduction worldwide.

The judgment, whilst rightly protecting children's welfare, inevitably undermines the rights of custodial parents whose children have been illegally removed from them. It may encourage abducting parents to attempt to delay the legal proceedings in order to establish settlement under Art 12, or plead the Art 13 defences for spurious reasons.

In *Klentzeris v Klentzeris*,[29] a Greek father relocated his medical practice to Athens in 2003. His children remained in the United Kingdom with their English mother; they saw their father when he visited England or they visited Greece for their holidays. In 2006, the mother sold the home in England, and relocated to Greece with the two younger children aged 12 and 10. The relationship broke down soon after the mother arrived in Athens. The children alleged that they had seen their father assault her. The older daughter, aged 19, promptly took the two younger children to England without the father's knowledge or agreement. The mother followed them the next day. The father immediately applied for the return of the children. The mother put forward the defence, under Art 13 of the Hague Convention, that, if they were to be returned to Greece, there was a grave risk of physical or psychological harm to the children. She pleaded, in the alternative, that the children's own objections to going back to Greece should be taken into account, given their age and degree of maturity. The children were interviewed by a CAFCASS officer who reported that the children were articulate and intelligent and that a return to Greece would likely damage them both psychologically and emotionally. The officer had not seen the evidence of the numerous happy communications between the father and the children. The judge accepted the defence and exercised his discretion not to order the return the children to Greece. The father appealed; he maintained that a court cannot refuse to return a child on the basis of Art 13 of the Hague Convention 'if it is established that adequate arrangements have been made to secure the protection of the child after his or her return' (see Art 11(4) of Brussels II Revised). The father had offered the family a home in Athens totally separate from him; he was also prepared to make them financially independent.

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[29] [2007] 2 FLR 996.

The Court of Appeal dismissed the appeal. It accepted that the judge was well aware of his normal obligations to order the return of the children but was in no doubt, based on the CAFCASS officer's evidence, that this case fell within Art 13.

Children's wishes are increasingly being taken into account in abduction cases. In *Re F (Abduction: Child's Wishes) (No 2)*,[30] an English mother married to a Spanish father left the matrimonial home in Spain with the 7-year-old child, after an unhappy marriage. She remained in Spain and made a new home nearby. Both parents agreed that that the mother and child would spend Christmas with the maternal grandmother in England and would return to Spain in the New Year. The mother returned to Spain for a while but left the child behind with the grandmother, and the child went to the local school. Later in the year, the father applied for the child to be returned. The mother pleaded the defences, under Art 13, that the father had acquiesced to the removal and that grave risk of physical or psychological harm to the child would result if return were to be ordered. She also stated that the child must be allowed to be heard. The court rejected the mother's pleas.

The mother applied for leave to appeal and for an extension of time. The Court of Appeal allowed the appeal. It accepted that the court had a duty to hear the child's view, but also stressed the obligation to conclude the proceedings within 6 weeks (see Art 11(2) of Brussels II Revised).

In *Re D (Abduction: Rights of Custody)*,[31] the House of Lords considered the removal of a child, aged 8, from Romania. In 2000, his English mother and Romanian father divorced in Romania. In 2002, unbeknown to the father, the mother took the child to England. In 2003, the father began proceedings for abduction. The judge asked for an explanation from the Romanian court on the meaning of the orders made by it, at the time of the Romanian divorce. In 2005, the Romanian Court of Appeal ruled that the child's removal to England was not illegal under Romanian law because the father did not have a right of veto to the removal or custodial rights over the child. The English court asked for further evidence from an expert on Romanian law, jointly instructed by the parents. The expert disagreed with the view of the Romanian Court of Appeal. The judge ordered the child's return to Romania. The mother's appeal to the Court of Appeal failed. The child made clear that he did not wish to return to Romania. The mother appealed to the House of Lords.

Their Lordships held that a foreign court is much better placed than the English court to understand the meaning and effect of its laws in terms of the Hague Convention. Delays of the sort which had occurred here negated the object of the Hague Convention to secure the swift return of children. Delay is one of the factors that must be taken into account in deciding whether the child's return will place him in a situation which he should not be expected to

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[30] [2007] 2 FLR 697.
[31] [2006] UKHL 51.

have to tolerate. The House of Lords also held that a child should have the opportunity to be heard having regard to his age or degree of maturity, not only in cases within the EU, but in all cases of child abduction. Article 12 of the United Nations Convention on the Rights of the Child 1989 applied.

(d) Asylum

In *EM (Lebanon) v Secretary of State for the Home Department*,[32] the Lebanese father had his custodial rights over his child confirmed because the Lebanese mother was denied asylum in England. She had argued that if she and her child were to be sent back to Lebanon, Sharia law would automatically grant custody of the child, aged 7, to the father. The mother maintained that this law was a breach of her right to family life under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. On appeal to the House of Lords, her application for asylum was refused because the Lebanese courts had power to grant her a right to continued contact with the child. This meant that, although her rights to family life would be affected, they would not be extinguished completely.

V HOUSING

A father may wish to behave responsibly and co-operate with the mother of his children over shared residence. However, he may be dissuaded from doing so because of factors outside his control. The decision in *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council*[33] illustrates the Kafkaesque type of conduct which may hinder parental collaboration.

The father and mother had four children; the family lived in council accommodation. When the relationship broke down, the court made a shared residence order by consent with respect to the three younger children. The father agreed to leave the family home. He applied to the local housing authority to be housed, under the Housing Act 1996, Part VII, on the grounds that not only was he homeless but he also needed a home for his children. The Act requires that the housing authority take into account whether a dependent child might reasonably be expected to live with him. The housing authority rejected the father's application. It argued that because he shared residency with the mother, the children's need to be housed was already met. On review, it maintained that the children were not living with the father but merely visiting him.

The father appealed. The county court decided that the housing authority was entitled to take into account that, if it were to provide separate housing for both parents, each house would be under-occupied for part of the time. The father appealed to the Court of Appeal. He maintained that the residence order

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[32] [2007] 1 FLR 991.
[33] [2008] 1 FLR 1061.

made by the family court determined the question of whether a dependent child might reasonably be expected to live with him.

The Court of Appeal granted the father's appeal on the grounds that the reviewing officer had misinterpreted the father's shared residence order and found that the children would be merely visiting the father rather than living with him. The Court of Appeal distinguished between a shared residence order which was made when a parent opposed the order and one where the order was made by consent. In the former case, the court had a duty to consider the ability of the parents to house the children, and, where relevant, enquiries would be made of the housing authority's ability to provide accommodation. The authority would be able to respond to these enquiries. If that were to happen, the local authority could not reconsider the issue of the reasonableness of the father's expectation that the children would be living with him when he applied for accommodation. However, where an order was made by consent, the local authority could consider afresh the reasonableness of the parent's expectations, but it should not take into account the scarcity of its housing stock in making its decision. If the housing authority decided that the parent's expectations were not reasonable, the parent would have to return full circle to the family court for the order to be reconsidered. In the meantime, the father would remain homeless and without a place for his children to visit.

VI PATERNAL RIGHTS AND ADOPTION ORDERS

In *Re L (Adoption: Contacting Natural Father)*,[34] a mother had rejected her child at birth, and the child was in the care of the local authority. She did not want her own family to be told of the child's birth, and refused to tell the local authority who the father was or give any information which might reveal his identity.

The local authority sought the court's guidance about whether it should make efforts to find the father or contact the mother's family. The judge ordered that the authority need not contact the maternal family, but demanded that the mother attend court to be questioned about the father's identity. The mother attended but refused to provide any further information. The court accepted that in certain circumstances, it was lawful to respect the mother's desire for confidentiality. Although it was almost certain that there had been no family life between the mother and father, the court felt that it would not have been safe to proceed on that basis. It therefore assumed that the father's rights, under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), were engaged. However, the court accepted that, even if it could theoretically order the mother to reveal the father's identity, it could not, realistically, force her to do so. To attempt to cross-examine and expose her to a charge of contempt of court was a completely unattractive and perturbing possibility.

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[34] [2008] 1 FLR 1079.

VII LACK OF DESIRE FOR PATERNAL CONTACT

A father may not wish to have contact with his child, born outside of marriage, because to do so would risk his relationship with his wider family and the cultural community to which he belongs. In *Birmingham City Council v S, R and A*,[35] the mother of the child was a Muslim convert. She had two children by a previous marriage who lived with their father because social services felt that she was unable to care for them. Subsequently, the mother had a relationship with a young unmarried Muslim by whom she became pregnant. After the baby girl's birth, social services once again intervened and placed the baby with foster parents because the mother appeared to be incapable of caring for her daughter.

The woman separated from the baby's father but continued to remain friends with him. They both visited the child regularly. The father did not tell his parents of the baby's existence because they were devout Muslims and he feared their disapproval and rejection. He was also afraid that he would be ostracised by his wider cultural community because of his behaviour. The father was not an irresponsible man and was willing to pay for the child's, and her mother's maintenance, and keep in contact with her.

The court, in deciding the child's future, accepted the recommendation of social services that the mother and child should first be assessed in a residential unit. If it became evident that the mother was unable to look after the child, she would be placed for adoption unless any family members came forward and offered to care for her. The father was extremely worried that this would mean that his parents would be informed of the child's existence. He applied to have the issue as to whether this would happen determined by the court. The mother, the local authority and the guardian opposed his application. The application was dismissed. The court's starting point was to consider the rights of the child. The close, 2-year relationship between her father and mother, the father's ongoing contact with her, and his offer to support the mother if she were to be reunited with the child all amounted to family life within the meaning of Art 8 of the ECHR. Article 8 provides for a right to respect for one's private and family life. The right to respect for family life includes the child's right to be brought up by her paternal family if any of its members choose to do so. This conflicted with the father's assertion of his right to respect for his private life.[36] Furthermore, under the Adoption and Children Act 2002, s 1(4)(f), the court or an adoption agency has a duty to have regard to the relationship a child has with relatives, their ability to provide a secure environment for the child, and their own wishes and feelings.

The court held that the father's application was to be decided after a consideration of all the facts of the case and was not just dependent on

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[35] [2007] 1 FLR 1223.

[36] See also *Marckz v Belgium* (1979) 2 EHRR 330, *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 and *Z County Council v R* [2001] 1 FLR 365.

whether he came within the terms of Art 8. On the evidence it was likely that a person within the father's family might wish to be considered as a potential carer if the child were to be placed for adoption. The father had at first suggested that his mother might be prepared to care for the child but had subsequently contradicted himself by stating that his parents would want nothing to do with her. Given the circumstances, the court held that the child's right to family life came before any risk to the father's privacy. His parents must be informed of their granddaughter's existence and be given the opportunity to decide if they wished to form a relationship with her. To deprive them of information about a child, who might otherwise be adopted, could only be justified if there were compelling reasons to do so. It was the child's only chance to retain links with her blood relatives.

The court gave the father a limited period of time to talk to his parents. If he failed to do so, the local authority and the guardian would be entitled to tell them of the child's existence.

VIII SANCTIONS FOR BREAKING CONTACT ORDERS

Any contact between a father and his child requires ongoing co-operation with the child's mother. If the parents fail to co-operate with each other, the court may deny the recalcitrant parent contact or may even change the child's residence to the other parent. As a final sanction, although one which the courts will not use too readily because of the risk of emotional damage to the children, the court can impose a custodial sentence on a parent, who refuses to obey a contact order, for contempt of court.

(a) Denial of contact

In *Re F (Contact)*,[37] the court could not fail to ignore the appalling conduct of the father of two children, aged 9 and 6 years old, who applied for shared residence with the children's mother. The father lived with his new partner, in a Mexican seaside home, which he had shared with the mother, prior to the breakdown of their relationship. He wanted the children to spend 6 months with him in Mexico and 6 months with the mother in England.

During 2 years of litigation over residence and contact, in which the father acted for himself, he had harassed the mother and her solicitors and was committed to prison. The mother and children were forced to move home three times, and had spent time in a domestic violence refuge. The father had also threatened to abduct the children and had taken steps to secretly obtain passports for them at the embassy in Mexico, claiming that their passports had been lost. In 2006, the court ordered that the children continue to reside with

[37] [2008] 1 FLR 1163.

the mother in England and the father have only supervised contact. It was made clear to the father that he would have to change his attitude if he were to be permitted supervised contact.

The father continued to make further applications during which he made wild allegations about the mother's neglect of the children, and the risk of sexual abuse by her partner. He maintained that the judge was biased and should recuse himself, and applied for the guardian to be removed.

The mother applied for suspension of contact and committal of the father to prison for a breach of the undertaking not to search for her and the children; for continuing his hostile, harassing conduct, and for threatening to remove the children. She applied to change the children's surnames in order to reduce the risk of the father continuing to search for them, and an order to prevent further applications without leave of the court under s 91(14) of the Children Act 1989.

The court held that, whilst it was agreed that supervised contact had gone well and the boys missed their father, his conduct had not changed except perhaps for the worse. The change of surname would be allowed to provide some extra protection against abduction which would add to the children's welfare. The mother was right to equate her well-being with that of the children, and an order would be made under the Children Act 1989, s 91(14) order for 2 years, which would prevent any further hopeless applications, and relentless abuse and threats. The court could not see how there could be meaningful and beneficial contact by the father with the children, given his attitude and history. The future for contact was bleak unless the father took advice and reformed his behaviour.

(b) Transfer of residence order

A change of residence because one parent is guilty of continually sabotaging contact arrangements is rare, but it did occur in *Re A (Residence Order)*.[38] The mother and father had separated when their son was aged one; he was now aged 8. At the date of separation, the child lived with his mother whilst the father had regular contact with him. However, the mother began to interfere with these arrangements and continually made contact impossible. Several court hearings were held to attempt to resolve the problem. Although the child had a good relationship with the mother and expressed a wish to remain with her, an independent social worker and an expert psychologist recommended that he should be removed from her and be sent to live with the father. They felt that the mother was incapable of changing her negative conduct which was potentially damaging to the child.

The court ordered that residence be given to the father. The mother applied for leave to appeal, which was granted, but her appeal was dismissed. The Court of Appeal held that, in principle, it was unsatisfactory for it to have to consider an

[38] [2007] EWCA Civ 899; [2008] 1 FCR 599.

appeal after the child had been removed from the mother and was already living with the father. When a judge decides on an order which will make an immediate and significant change in the arrangements for a child and is told that an appeal will be mounted, he should normally give consideration to delaying the implementation of the order for a brief period of time until the appeal has been decided. It is not acceptable to implement a change of residence order which might be reversed soon after and destabilise the child.

(c) Imprisonment for contempt

Custodial sentences for parents who are in contempt for frustrating contact orders are not given lightly. In *Re P (Committal for Breach of Contact Order)*,[39] a mother continually frustrated contact arrangements between the father and the child, now aged 7. She would fail to attend contact appointments, or she would claim that the child refused to go to them. CAFCASS reported that the mother did not provide structured care for the child, whilst the father was found to provide routines and impose boundaries. He was interested in her and her progress at school. CAFCASS also reported that the mother was likely to continue to block contact between the child and the father.

An order reinstating contact with the father was made, with a committal notice attached to it. The mother did not change her approach and was served notice to give reasons why she should not be sent to prison. She failed to attend the hearing; the judge refused an adjournment, and ordered that the mother be imprisoned for 7 days for contempt. However, he suspended the order on condition that she complied with the previous order. Contact between the father and child had been resumed. The mother appealed on the basis that the judge had dealt with the matter on a summary basis which was indefensible.

The Court of Appeal dismissed her appeal. The appropriateness of a judge's decision to proceed with a committal application, in the absence of the mother, had to be looked at in the circumstances of the case. The judge had detailed knowledge of the history of the mother's conduct; she had been served with notice of the proceedings; she had had the opportunity to obtain legal advice and give reasons for her non-attendance, and had not done so. The judge was entitled to refuse an adjournment. He was in a position to proceed with the case and was satisfied that if the mother were to understand the importance of compliance with the contact order, it was desirable that an order in the nature of a sword of Damocles, such as committal, be made. The order had proved to be beneficial for the child; the contact with her father and the structured and interesting life she enjoyed with him advanced her welfare.

In the well-publicised case of *Hammerton v Hammerton (No 1)*[40] the father had applied for contact with two of his five children. During the proceedings he had undertaken not to contact or communicate with the mother, or to use or

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[39] [2007] 1 FLR 1820.
[40] [2007] 2 FLR 1133.

threaten to use violence against, or to intimidate, harass or pester the mother, or to encourage anyone else to do so. The mother alleged that the father had breached the undertaking and sought to have him committed to prison. The judge decided to hear the committal application at the same time as the father's application for contact. The father had no legal representation. The judge found that the father had written letters to the mother, spat in her face and had been abusive to her solicitors. He was sent to prison for 3 months. The father appealed; by the time his appeal was heard he had already finished his prison sentence.

The Court of Appeal allowed the appeal. It held the judge had been in error in hearing the contact application and the committal application together; different burdens and standards of proof applied. The court had not warned the father that he was not required to give evidence in the committal proceedings. This had placed him in an impossible position; had he exercised his right, he would almost certainly have failed in his application for contact. Having found that the father was in breach of his undertakings, the judge had moved immediately to sentencing him in spite of the fact that the undertakings were too wide and should not have been accepted by the court in the first place. The judge had not considered whether the father needed legal representation, and, if so, his entitlement to it at public expense if necessary, because he was at risk of deprivation of his liberty (Art 6 of the ECHR). In family cases, a different approach to prison sentences for contempt was required from that applied in other cases of contempt. There were inevitably heightened emotional tensions and the parties often needed to continue to be in contact with each other which had to be taken into account.

Unfortunately, the grant of the father's appeal did not satisfy his search for justice and retribution. In *Hammerton v Hammerton (No 2)*,[41] 4 days after the Court of Appeal's decision, the father interrupted the private family proceedings being heard by the judge who had sentenced him. He threw eggs at the judge, whilst at the same time shouting out passages from the Court of Appeal judgment. A different judge imposed a 2-month immediate prison sentence for the contempt. The father had felt an acute sense of grievance and appealed.

The Court of Appeal held that the father's action was a serious contempt. It was premeditated and a gross insult to the judge. It had disrupted the court proceedings. However, the Court of Appeal accepted that the father had been overwhelmed by frustration. In these unusual circumstances, the court would substitute a sentence of 28 days.

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[41] [2007] EWCA Civ 465.

IX HELP FOR FATHERS

The cases discussed in this chapter illustrate the dilemmas which face the courts when dealing with contact disputes. In many cases, these disputes reflect, and may even be used as a vehicle to continue, couples' anger and disillusionment over the breakdown of their own relationships. Fathers (and mothers too) may need help to enable them to prioritise successful relationships with their children over their search for retribution. The adversarial approach not infrequently exacerbates paternal frustration over contact; alternative solutions need to be explored. The decision in *Re W (Contact Order)*,[42] provides a helpful example of a different, and more positive, way of resolving paternal contact problems.

In *Re W*, after the breakdown of their relationship, the mother and father agreed a consent order for the father to have contact with their two children. The order provided that the father would see the children for 8 hours each Saturday and for the whole of Boxing Day. At first, contact took place but it rapidly came to a sudden end because the mother maintained that the father drank heavily and was aggressive and frightening in front of the children. She applied for a variation of the contact order. The father responded with an application to enforce it. The court revised the order and gave the father indirect contact with his children by way of Christmas, Easter and birthday cards; he was also allowed two other letters each year. The father applied for permission to appeal the order.

In his consideration of the father's application, Wall LJ concluded that the report presented to the court by CAFCASS was arguably superficial. It had not explored the nature of the breakdown in the father's relationship with the mother or examined his relationship with the children. The report had not presented any proposals, such as supervised contact, to enable satisfactory contact to be re-established. The judge had not, therefore, explored alternative possibilities. The father explained that he was prepared to consult Families Forward, an organisation whose role is to assist in difficult contact situations and help reduce parental anger. It was prepared to offer the father help and to prepare a report on the outcome. Public funding was available to fund this.

Wall LJ granted the father leave to appeal and proposed that the father should return to court with clear and realistic plans for the resumption of contact, and a firm proposal to manage his anger with help from Families Forward. This would reassure his children that there would be none of the aggressive behaviour which they had seen in the past. The Court of Appeal allowed the appeal. It stressed the importance of paternal contact if it is at all possible.

Lip service is paid to the importance of paternal contact but, if it is to become reality, either by way of court orders or by parental agreement, new ways must be found to help parents achieve it. Fathers may need to learn how to manage

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[42] [2007] EWCA Civ 753; [2007] 2 FLR 1122.

anger. Children are used to the environment in which they live with a resident parent; their friends are there; their possessions are there. Fathers may require help in finding ways of coping with children who may feel disturbed or resentful during contact visits which occur infrequently. New technology could be used to improve the experience of indirect contact between fathers and children. Both parents may need help in putting aside their animosity towards each other on relationship breakdown, and learn how to co-operate to ensure that contact, which is so beneficial to children, is successful.

Hungary

COHABITATION, REGISTERED PARTNERSHIP AND THEIR FINANCIAL CONSEQUENCES IN HUNGARY

Dr Orsolya Szeibert[*]

Résumé

Le nombre de couples non mariés est en constante progression, ce qui a conduit les juristes à se pencher sur leur statut juridique. Le Code civil hongrois prévoit des dispositions spécifiques en la matière. Le code reconnaît l'union de fait des couples de même sexe et des couples hétérosexuels, alors que le mariage est réservé à ces derniers. La Cour constitutionnelle a confirmé plusieurs fois que le mariage hétérosexuel jouissait d'une protection constitutionnelle et que cette protection excluait la possibilité de reconnaître le mariage entre personne de même sexe.

Le processus de réforme du Code civil hongrois a commencé à l'aube du 21e siècle et il entend créer un nouveau régime visant à répondre aux nouvelles réalités sociales et économiques. Étant donné que cette réforme englobe le droit familial, il était nécessaire d'en revoir les principes. Même si l'opportunité de revoir le statut des conjoints de fait a provoqué de nombreux débats, le projet de loi sur le nouveau Code civil prévoit des dispositions détaillées qui renforcent le statut de l'union de fait, tant dans ses aspect personnels que financiers. Ce projet est actuellement à l'étude au Parlement.

En décembre 2007, une loi sur le partenariat enregistré fut adoptée et elle devait entrer en vigueur en janvier 2009. Cette loi, qui ouvre le partenariat enregistré aux couples de même sexe et aux couples hétérosexuels, fut cependant annulée par la Cour constitutionnelle en décembre 2008.

Une autre loi fut adoptée en avril 2009, visant la reconnaissance du partenariat enregistré (mais limité aux couples de même sexe) et la facilitation de la preuve d'une union par l'instauration d'un registre des déclarations de cohabitation. Cette loi a été signée et promulguée le 8 mai 2009.

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I GENERAL OVERVIEW

(a) Legal regime being in effect in spring of 2009

In Hungary marriage is regulated in the independent Family Act with all of its legal consequences, including the property relations of spouses. The Family Act is Act No IV 1952, which entered into force in 1953 and has been revised and modified several times. Marriage is the only kind of partnership which is regulated in this Act in harmony with our Constitution, which protects the family and marriage. However, another kind of partnership, namely informal cohabitation, is accepted according to the Hungarian legal system currently in force. Not the Family Act, but the Civil Code (Act No IV 1959 which entered into force in 1960) contains some rules, only really brief legal provisions with regard to cohabitation. Only the definition and some property consequences have been defined laconically since 1977.

Different-sex partners can marry each other and also can live together as cohabitants. This is not true for same-sex partners, as they are permitted to live in unmarried partnership within the frames of cohabitation but cannot enter into marriage. Originally, in 1977 cohabitation was restricted to different-sex partners but later, in 1996 the gates of this partnership were opened to same-sex partners. This opening was the consequence of one the decisions of the Constitutional Court, namely Decision No 14/1995. According to the arguments of the Constitutional Court, marriage has to be maintained for different-sex couples but cohabitation does not deserve such strong constitutional protection as it is not a familial relationship but only an institution of the civil law.

(b) The 2009 Act concerning unmarried partnerships and its preliminaries

Parliament accepted a new Act on 20 April 2009 (Act No XXIX 2009) on registered partnerships, modification of the legal rules in connection with registered partnerships, and the facilitation of the proof of cohabitation. Although it seems to be a really new piece of legislation, it has actually a relatively long background.

(i) The Bill on the new Civil Code

The recodification of the Civil Code has been going on since 1998. It has been a long process until now with different steps and events during these 12 years. As the Family Act would be one part of the Civil Code, this process has involved the modernisation of family law and the revision of the legal regime of partnerships. The proposal of the new Civil Code contains important modifications affecting both cohabitants and registered partners. According to this proposal the Family Law Book would have rules primarily on marriage and

afterwards also on registered partnership and cohabitation. This Bill was submitted to Parliament in June 2008. Its regulations have been debated several times, but it has not been accepted yet.

(ii) The 2007 Act on Registered Partnership[1]

More or less in line with this process stronger and stronger efforts were taken to introduce a marriage-like institution for same-sex partners which would guarantee a protected legal position for them especially in case of termination of the partnership. On 27 December 2007 an Act was approved on registered partnership. Act No CLXXXIV 2007 on Registered Partnership made it possible for both different-sex and same-sex partners to enter into this kind of partnership. Although some differences between marriage and registered partnership on the one hand, and between registered partnership of different-sex partners and registered partnership of same-sex partners on the other hand were maintained, this Act ordered the application of rules on married partners and marriage to the registered partners and registered partnership as a general rule.

This affected all financial consequences of the partnership. The aim of the Act was to provide the same property rights and obligations to registered partners which are guaranteed for spouses. As the property consequences were intended to be entirely the same, a statutory property regime was introduced for registered partners, namely the community of property regime. (It is the statutory regime also for spouses from which they can derogate in contract.) Besides, both for maintenance of the registered partner and for the use of the common dwelling, the rules to be applied for registered partners were identical to the legal rules governing spouses. An important point was the succession. This Act modified the rules on inheritance in the Civil Code and ruled that the registered partner succeeded just like the widower or the widow.

(iii) The Decision of the Constitutional Court in 2008

This Act which contained some direct rules and a lot of regulations altering the legal rules in connection with the registered partnership – among others the Act on Maintaining the Register and the Family Act – was to enter into force on 1 January 2009. However, it never entered into force. In early 2008 the annulment of the Act was initiated before the Constitutional Court and the decision was handed down on 17 December 2008. Decision No 21/B/2008 declared the unconstitutionality of the Act on Registered Partnership. The Constitutional Court stated that the registered partnership for different-sex partners and for same-sex partners has to be distinguished and cannot be treated in the same

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[1] For more on same-sex partners in Hungary and Act 2007 on Registered Partnership in English, see Orsolya Szeibert-Erdős 'Same-Sex Partners in Hungary. Cohabitation and Registered Partnership', in Katharina Boele-Woelki (ed), *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia, 2009), pp 305–318. On Act 2007 on Registered Partnership in German, see Emilia Weiss 'Gesetz über die registrierte Partnerschaft in Ungarn' (2008) FamRZ 18, pp 1724–1725.

way. It admitted and emphasised in the first sentences of its argument that the creation of a registered partnership for same-sex persons is not unconstitutional as they cannot enter into marriage. The fundamental premise of the Hungarian Constitution that marriage can exist only between one man and one woman was also confirmed. (This was declared also in 1995 when the petition, according to which marriage should have been opened to same-sex partners, was refused.)

Concerning the constitutional possibility of the registered partnership for different-sex partners, the Constitutional Court considered the protected position of marriage and the content of the new institution. As a result it concluded that the registered partnership for different-sex partners was a special non-marital partnership in name but actually it was (almost) the same institution as marriage. Although the Constitutional Court admitted that there were some differences between marriage and registered partnership between a man and a woman, these were relatively slight ones in comparison with the equal consequences and almost equal status. (Concerning the issue of status, the process of a registered partnership's establishment would have been just the same as in the case of marriage. The partners would have declared their intention to enter into a partnership before the registrar and the institution would have been established by the declaration of the parties' identical intention before the registrar. So, the registration would have been only a declaratory act.)

The identical legal character of marriage and registered partnership led the Constitutional Court to the conclusion that the registered partnership is a 'quasi-marriage'. Because there would be an institution in the legal order which seemed to be a special non-marital partnership but would provide the same consequences as marriage, it was deemed to be unconstitutional. Besides, it was definitively stated that both legal certainty and the principle of constitutional protection of marriage would be undermined if institutions could function side by side with the same character but with a different title.

It has to be mentioned that the exact title of the institution is *registered cohabitation*. We called it *registered partnership* as it corresponded in terms of its content to the institution of registered partnership as this terminology is used in the European legal orders. Nevertheless, the Act used the phrase *registered cohabitation* according to the literal translation. (*Registered partnership* would be *bejegyzett partnerkapcsolat* or *bejegyzett társkapcsolat* in Hungarian, but the Act called the institution *bejegyzett élettársi kapcsolat,* which is literally translated as *registered cohabitation*.)

(iv) Act No XXIX 2009 on Registered Partnership and the Modification of Legal Rules in Connection with Registered Partnership and the Facilitation of the Proof of Cohabitation

In February 2009 a Bill based on the annulled and revised Act was submitted by the Government to Parliament. It was debated really quickly and on 20

April the Act was approved. Just at the time of finalising this chapter, on 8 May the Act was signed by the President of the Hungarian Republic, and it has been promulgated in the Official Gazette.

In spite of the fact that this Act has not entered into force yet, the most important regulations are worth mentioning. This Act has a double aim, and is intended to introduce two new measures, namely the registered partnership for same-sex partners and the facilitation of the proof of cohabitation. Concerning the registered partnership (registered cohabitation by literal translation) this instrument restricts it only to same-sex partners. These new regulations and their structure are the same as the rules and structure of the annulled Act. The new Act deals with the establishment of the registered partnership, its legal consequences and its termination.

According to its legal regime the main rule is that the consequences of registered partnership are identical to those of marriage. However, there are exceptions. The registered partners cannot choose a common surname, and neither of them can bear the partner's surname. Joint adoption is prohibited and the partners cannot participate in the process of artificial insemination. In keeping with these limitations, no paternal presumption is established by the registered partnership. Lastly, this part of the Act contains the regulations of several Acts which are to be altered. These are the Family Act, the Civil Code and the Act on Maintaining the Register, among others.

The other aim of the Act is to facilitate the proof of cohabitation which can be established both between different-sex and same-sex partners. As the institution of cohabitation in Hungary follows the factual model, there is no registration system for cohabitation regulated in the Civil Code. If the existence and the duration of cohabitation are in dispute, it is the court's task to decide whether or not the relationship in question had been cohabitation or not. The idea of providing cohabitants with the opportunity of getting their partnership registered had already emerged in the course of the recodification of the Civil Code. The proposal of the new Family Law Book issued in 2005 was intended to give them an opportunity to register their cohabitation although its existence would not have depended on the registration, but it would have made the proving of cohabitation easier. So, even according to this proposal, cohabitation would have preserved its factual character. However, this proposal was one stage in the course of the codification process and the idea was abandoned later on.

This Act regenerated the idea of a registration system which is not obligatory for the establishment of the relationship but makes it easier to prove. The Act would amend the Act on Notarial Non-Litigious Proceedings (Act No XLV 2008) concerning the tasks regarding the maintenance and management of the Registration of Cohabitants' Statements. Cohabitants could declare their statement, according to which they live in cohabitation as regulated in the Civil Code, before the notary. There are detailed regulations for the register and its management.

II COHABITATION – THE APPROACH OF CIVIL LAW AND FAMILY LAW

There are several rules in Hungarian law which give cohabitants almost equal status as married partners. This happens primarily in the field of social law and in both civil and criminal procedural law. While cohabitants are not treated as strangers when they ask for certain social benefits, they are almost strangers from the viewpoint of the civil law. Family law does not contain any rule concerning cohabitants as this relationship is not a familial one.

Concerning the personal consequences of cohabitation it is important to mention that they cannot bear a common surname and cannot bear each other's name. This approach is in keeping with the Hungarian legal conception, according to which the married partners' common name is inherently connected to marriage.

They cannot adopt a child jointly and no statutory parental presumption is connected to the fact of living together as cohabitants. In the case of a common child the unmarried partner has to make a voluntary recognition of paternity which is regulated in the Family Act. However, if the child–parent relationship is legally established, the unmarried parents have the same rights and obligations as married parents.

Although the Civil Code does not oblige the cohabitants, in contrast with spouses, to maintain each other in the course of the community of life and to be at one with each other, they are expected to do so both in society and by the courts. So the maintenance and taking care of each other are essential and intrinsic elements of cohabitation according to actual judicial practice. This approach is based upon the accepted opinion of society.

This solidarity contains both financial and personal elements and tasks. Nevertheless, the problems mostly arise when the partnership terminates and cohabitants cannot claim for maintenance, they do not have any right to use the common dwelling and the surviving cohabitant is not the statutory heir.

III FINANCIAL CONSEQUENCES OF COHABITATION ACCORDING TO THE CIVIL CODE NOW IN FORCE AND TO JUDICIAL PRACTICE[2]

(a) The property consequences

Some property consequences of cohabitation are contained in the Civil Code.

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[2] On the legal status of cohabitants and the judicial practice in detail in English, see Orsolya Szeibert-Erdős 'Unmarried Partnerships in Hungary', in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia, 2005), pp 313–330.

(i) The property regime of cohabitants

The statutory matrimonial property regime is the 'community of property' one, according to the Family Act. When codifying the property consequences of cohabitants the legal aim was to sharply distinguish between the financial rules of cohabitants and spouses to preserve and maintain the primacy of marriage. Unmarried partners acquire common property in proportion to the contribution they have made in acquiring such property according to the first sentence of § 685/A of the Civil Code. The main difference between the two property regimes, is that while the extent of the contribution is not relevant in the case of marriage, this is relevant when cohabitants' common property is divided. At the same time, this approach is very beneficial to cohabitants, especially if we compare it to other European regimes.

There are two points which make it clear that the property regime for Hungarian cohabitants places them in a relatively strong position. One is that common property comes into being upon the acquisition of the assets and not upon the termination of the community of life as happens in the community of accrued gains regime. Another point is in connection with the approach of what 'contribution' means. When establishing the community of property regime for spouses in 1952, the legislator took the position that this regime better provides for the equal rights of the spouses and emphatically takes into consideration the fact that one spouse's activity in managing the household and caring for children is equivalent to the other spouse's gainful employment. The same is true of cohabitants. When codifying the property consequences of unmarried partners, the legislator intended to maintain the equality of cohabitants. As a consequence, the Civil Code (third sentence of § 685/A) provides that any work done in the household is considered to be a contribution in acquiring this property. This phrase means that work of a woman who plays a really traditional role is evaluated in the property consequences.

According to a rule in the Civil Code (second sentence of § 685/A) if the proportion of contribution cannot be calculated, the property is considered to have been equally acquired. According to actual judicial practice this presumption can be taken into account only when there is really no evidence of the extent of contribution. At this point the community of property regime of spouses and the special community of property regime of cohabitants are very close to each other. It needs to be mentioned that the property regime of cohabitants does not have a special name and there are standpoints in the legal literature that refuse to use the name of 'community of property', as the difference and not the similarity is to be emphasised.

(ii) The meaning of common property

As the regulation of the cohabitants' property regime is laconic, the judicial practice has always had an enormous role in developing the methods to apply. The terminology of a marriage's financial consequences can be applied to the

relationship between cohabitants but cautiously. In the case of spouses it is unambiguous that there are three categories of assets in the community of property regime: the common property and the separate property of each spouse. According to the default regime the dominant role is played by the common property of spouses, as the assets acquired during the matrimonial community of life belong to the common property, except for the assets belonging to the separate property which are listed in the Family Act.

The property regime concerning cohabitants differs from the matrimonial property regime as the Civil Code does not use either the terminology of separate assets, or of common assets.

In legal disputes, when the court has to judge it, the question whether this or that asset belongs to the separate property or the common property often arises. At this point the judicial practice diverges. In some cases almost the same attitude is used as in matrimonial cases, but there are judgments showing another approach. In the first-mentioned case the presumption of common property exists, just in matrimonial cases, and either cohabitant can prove that the assets are his or her separate assets. According to the other approach there is no presumption of common property, so the assets can belong to the common property if it was the cohabitants' intention expressed by an explicit or at least an implicit consent. This concept causes severe problems of proof.

(b) The definition of cohabitants

Cohabitation, as was mentioned, means two people actually living together in Hungary. As an informal partnership, even whether there existed cohabitation or not is sometimes a question before the court. The Civil Code (§ 578/G(1)) gives a definition according to which unmarried partners – if there is no rule of law regulating the situation differently – are two persons who live together, without entering into a marriage, in a common household, in an emotional fellowship and in an economic partnership. This definition has great importance. I should mention that this list is not the only thing that influences the courts. There are other elements to be investigated and taken into account in practice: the common child, the stability of the partnership, the intention of the parties to live together, the appearance of belonging together to third persons.

If there is a dispute between the cohabitants concerning the financial consequences of the partnership's termination and even the existence of the partnership, each element of the definition is to be proved. The exact interpretation of these conceptual elements has been more or less crystallised in legal practice. Nevertheless there are some tendencies towards change even nowadays. Although there are legally interesting points concerning every element, the existence of an economic community has continuously increased in importance and it has become a decisive issue. The interpretation of the phrase 'economic community' has become more and more strict during the last 10 years. The method of managing the assets is not a determinative factor, as it

can differ according to the particular circumstances. However, economic community requires the cohabitants' close co-operation in financial issues, common investments, their intention to raise their living standards and to govern their common life financially. The existence of these factors is scrutinised very critically, so sometimes economic co-operation of a greater extent is required from cohabitants than from spouses.

IV FINANCIAL CONSEQUENCES OF COHABITATION ACCORDING TO THE BILL ON THE NEW CIVIL CODE

One of the most debated fields of family law during the recodification of the Civil Code and the Family Law Book was the regulation of cohabitation. The issues where and how this institution should be regulated were really meaningful. The reform of the whole civil law has been motivated by the great changes in private law resulting from the social and economic developments over the last few decades, but at the same time a fear could have been felt whether the decision to give new and wider rights to cohabitants was the right one. The Bill balances two opposite views carefully: the regulation of cohabitants should be contained in the Family Law Book and their legal position would be strengthened with new rights and obligations, but, at the same time, their legal position would be weaker than that of the spouses, so that the difference is underlined.

The definition of cohabitation is maintained. As there is no registration, judicial practice concerning the interpretation of this definition does not lose its importance, even if the 2009 Act introducing the regulation of the Register of Cohabitants' Statements enters into force, as use of the Register will not be obligatory.

The regulations governing financial consequences would be much more detailed than today. A new default property regime would be provided which takes into account the distance between marriage and cohabitation but makes efforts to protect the weaker party. There are some issues which are not regulated now but the Bill intends to govern: maintenance, use of the common dwelling and inheritance.

(a) Property regime

The Bill deviates from the special property regime of unmarried partners which is in force now. It proposes a special variation of community of accrued gains regime. The common property would come into existence only when terminating the partnership and the cohabitants' share would not be equal, as the share would be determined by the cohabitant's contribution which he or she made in acquiring the property. The equality of cohabitants is strengthened theoretically by determining that the work done in the household, the caretaking of children and also the work done in the other partner's business

are contributions. The Bill stresses the possibility for cohabitants to enter into a property agreement. Cohabitants can agree on their property relations now as well, but it is far from common.

(b) Maintenance and use of the common dwelling

According to the Bill the former cohabitant could claim for maintenance from the former partner after the termination of the unmarried partnership. The requirements are proposed to be almost the same as for spouses but the mere existence of the cohabitation would not be enough. There are some extra conditions, either a long-lasting unmarried partnership which means at least 10 years, or a common child and at least a one-year-long partnership. Nevertheless, in line with the classic principle of family law, the equity can be applied for in the case of shorter partnerships.

Another issue that is very significant in Hungary is the use of the common home. The Bill would strengthen the cohabitants' position primarily in the interest of the common child but also making efforts to protect the weaker party. Some extra conditions are the same as in the case of maintenance: a long-lasting partnership or a partnership of minimum duration where there is a common child.

(c) Inheritance

Concerning the law of succession, the Bill does not list the survivor cohabitant as a statutory heir, but he or she would get the right of lifelong use of the home and furnishings which were used together during the community of life. The aim of this rule is that the survivor partner should remain in his or her usual and customary circumstances. An extra condition is the duration of the partnership, namely 10 years.

V CONCLUSION

There are two kinds of partnerships open to different-sex partners: marriage and cohabitation. Although cohabitation provides much weaker personal and financial consequences than marriage, the position of a cohabitant if the existence and duration of cohabitation is not disputed is relatively strong, at least stronger than in several European legal orders.

Act No XXIX 2009 was promulgated in May 2009. The regulations entered into force a month later. The regulations regarding the introduction of registered partnership will enter into force on the first day of the second month counting from its promulgation. However, the rules regarding the registration of cohabitants' statements will enter into force only on the first day of the eighth month counting from its promulgation as the establishment of the registration system needs time.

If it happens, same-sex partners will be able to live in the framework of a registered partnership (registered cohabitation) which would offer the same property consequences as marriage. Although the Constitutional Court declared it unconstitutional to let different-sex partners live in a marriage-like registered partnership, the possibility of registration seems to be meaningful from the viewpoint of financial consequences.

The position of cohabitants will be strengthened by the approval of the Bill on the new Civil Code but it is waiting for the vote in Parliament.

India

CONFLICT OF LAWS IN INTERCOUNTRY ADOPTIONS: THE INDIAN PERSPECTIVE WITH SPECIAL REFERENCE TO THE POSITION AFTER INDIA RATIFIED THE HAGUE CONVENTION ON ADOPTIONS

*Ranjit Malhotra and Anil Malhotra**

Résumé

Cette contribution analyse les principes du conflit de lois et de la procédure en matière d'adoption internationale en Inde. Elle s'intéresse également à la législation qui doit être respectée par les étrangers et les indiens expatriés qui cherchent avec insistance à adopter des enfants indiens. Aujourd'hui, il n'y a pas de loi particulière régissant l'adoption d'enfants par des non hindous et des étrangers. Entre Hindous, l'adoption est permise par la loi. Au sein d'autres communautés, l'adoption est permise par la coutume. L'Inde a ratifié en juin 2003 la Convention de la Haye sur l'adoption internationale, mais jusqu'ici, les personnes désirant adopter un enfant en Inde qui résident à l'étranger en ont tiré peu de bénéfices tangibles.

Ces dernières années en Inde, une nouvelle problématique est apparue du fait de la complexité des lois et des procédures contraignantes en matière d'adoption internationale. Cette complexité a provoqué l'apparition des maternités de substitution, arrangements particulièrement utilisés par la communauté indienne expatriée. Cette problématique émergente est également discutée dans cette contribution.

I INTRODUCTION

This chapter analyses the conflict of laws position relating to intercountry adoption law and procedure in the Indian jurisdiction. It also looks at the relevant legislation to be complied with by foreigners and persons of Indian origin resident abroad permanently seeking to adopt children from India. At the outset, it is important to emphasise that at present there exists no exclusive general law on adoption of children governing non-Hindus and foreigners. Adoption is permitted by statute among Hindus, and by custom among some

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other communities. In India, in the last few years a new dimension has also taken place on account of tedious and complicated intercountry adoption laws and procedures. This is giving rise to surrogacy arrangements, preferred especially by the non-resident Indian (NRI) community overseas. This new emerging issue is also discussed in this chapter.

At present, non-Hindus and foreigners can only be guardians of children under the Guardian and Wards Act 1890. In practice, foreign nationals and persons of Indian origin domiciled overseas wishing to adopt children from India first obtain guardianship orders from the District Court or the High Court, as the case may be, within whose territorial jurisdiction the child is residing. This is with a view to adopting formally under the legal system of the country of their habitual residence.

The Indian Ministry of Welfare, pursuant to certain guidelines issued by the Supreme Court of India in a public interest litigation petition, *Laxmi Kant Pandey v Union of India*,[1] framed guidelines governing intercountry adoptions. This case was monitored by the Supreme Court from time to time until 1991, when the court scrupulously reviewed the existing procedure and practices followed in intercountry adoptions. The main objective was to prevent trafficking of children and to protect the welfare of adopted children.

In the further supplemental judgment of *Laxmi Kant Pandey v Union of India*[2] the apex court pointed out that ordinarily the court, entertaining an application on behalf of a foreigner seeking to be appointed guardian of a child with a view to eventual adoption, should not insist on the foreigner making a deposit by way of security for due performance of the obligations undertaken by him or her. However, in appropriate cases, the court may exceptionally pass an order requiring him or her to make such deposit. The court has also observed that it is at that point of time that the execution of a bond would ordinarily be sufficient.

The apex court in the second supplemental judgment of *Laxmi Kant Pandey v Union of India*[3] once again, among other issues, clarified this aspect of the matter. The apex court held that the guardian judge need not insist on security or a cash deposit or bank guarantee, and it should be enough if a bond is taken from the recognised Indian placement agency which is processing the application. This agency may in turn take a corresponding bond from the sponsoring social or child welfare agency in the foreign country. Some directions issued in *Laxmi Kant Pandey* (both the 1984 and the 1986 judgments) were also modified.

More importantly, Justice Bhagwati[4] incorporated a vital note of clarification, as follows:

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1 AIR 1984 SC 469.
2 AIR 1986 SC 272.
3 AIR 1987 SC 232.
4 Ibid 240, para 12.

> 'We would, therefore, direct that in the case of a foreigner who has been living in India for one year or more, the home-study report and other connected documents may be allowed to be prepared by the recognised placement agency which is processing the application of such foreigner for guardianship of a child with a view to its eventual adoption and that in such a case the Court should not insist on sponsoring of such foreigner by a social or child welfare agency based in the country to which such foreigner belongs nor should a home-study report in respect of such foreigner be required to be obtained from any such foreign social or child welfare agency, the home study report and other connected documents prepared by the recognized placement agency should be regarded as sufficient.'

After the implementation of the initial guidelines in 1989, it was felt necessary to revise them. Accordingly, a taskforce comprising a cross-section of representatives of adoption agencies under the chairmanship of former Chief Justice of India, Justice PN Bhagwati, was constituted on 12 August 1992. The taskforce submitted its report on 28 August 1993, and the Indian Government accepted its recommendations. Accordingly, the Government of India circulated revised guidelines in 1994 (hereinafter 'the Guidelines') to regulate matters relating to the adoption of Indian children. These guidelines were published by the Government in the Gazette of India on 20 June 1995. Subsequently, new further revised guidelines have come into place from 14 February 2006. The Central Adoption Resource Agency (CARA) has now submitted a draft of amended comprehensive guidelines to the newly created Ministry of Women and Child Development. These are called the Draft Guidelines on Adoption of Indian Children without Parental Care. These 2007 Guidelines have not been approved by the concerned Ministry as yet.

It may however be pertinent to point out that the apex court in *Anokha v State of Rajasthan*[5] has held that the above guidelines would not be applicable where the child is living with his or her biological parent(s) who have agreed that he or she is to be given in adoption to a known couple who may be of foreign origin. The court in such cases has to deal with the application under s 7 of the Guardian and Wards Act 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily with the parents being aware of the implications of adoption, ie that the child would legally belong to the adoptive parents' family; that the adoption is not induced by any extraneous reasons such as the receipt of money etc; that the adoptive parents have produced evidence in support of their suitability; and finally that the arrangement would be in the best interest of the child.

Much more recently the Supreme Court of India has again reiterated the guidelines in case of adoption of children by foreign parents, as originally laid down in the case of *Laxmi Kant Pandey v Union of India.*[6] While emphatically following these guidelines in *St Theresa's Tender Loving Care Home and others v States of Andhra Pradesh*,[7] the apex court pointed out:[8]

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5 (2004) 1 Hindu Law Reporter 351.
6 AIR 1984 SC 469.
7 (2006) 1 Hindu Law Reporter 122.

> 'While making the requisite and prescribed exercise it has to be kept in mind that the child is a precious gift and merely because he or she for various reasons is abandoned by the parents that cannot be a reason for further neglect by the society . . .'

II PRESENT PROCEDURE TO BE FOLLOWED IN INTERCOUNTRY ADOPTIONS UNDER GUIDELINES FOR ADOPTION FROM INDIA 2006

CARA Guidelines stipulate that every application from a foreigner wishing to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. Furthermore, the agency should be recognised by the CARA set up under the aegis of the Indian Ministry of Welfare. CARA is the principal monitoring agency of the Indian Government handling all affairs connected with national and intercountry adoptions.

No application by a foreigner to adopt a child should be entertained directly by any social or child welfare agency in India working in the areas of intercountry adoption or by any institution or centre to which the children are committed by the Juvenile Court. The reasons behind this directive have been summed up by MN Das:[9]

> 'Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly, it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secured family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it.'

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8 Ibid 128, para 10.

9 *Guardians and Wards Act* (Eastern Law House, 14th edn, 1995) 80–81.

III THE CENTRAL ADOPTION RESOURCE AUTHORITY

The Central Adoption Resource Authority (CARA) is an autonomous body under the Ministry of Women and Child Development, Government of India. Its mandate is to find a loving and caring family for every orphan/destitute/surrendered child in the country. CARA was initially set up in 1990 under the aegis of the Ministry of Welfare in pursuance of a Cabinet decision dated 9 May 1990. Pursuant to a decision of the Union Cabinet dated 2 July 1998, the then Ministry of Social Justice and Empowerment conferred the autonomous status on CARA with effect from 18 March 1999 by registering it as a society under the Societies Registration Act 1860. It was designated as the Central Authority by the Ministry of Social Justice and Empowerment on 17 July 2003 for the implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993). The Ministry of Women and Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care & Protection of Children) Act 2000' pursuant to the 16 February 2006 notification of the Government of India regarding reallocation of the Business.

In-country adoption of Indian children is governed by In-country Guidelines 2004 while intercountry adoption procedure is governed by a set of guidelines last issued on 14 February 2006. These Guidelines are a follow-up of various directions given by the Supreme Court of India in *Laxmi Kant Pandey v Union of India*.[10] These Guidelines have been amended and updated from time to time keeping in mind the welfare of such children. While CARA is engaged in clearing intercountry adoptions of Indian children, its principal aim is to promote in-country adoption. In fact, CARA ensures that no Indian child is given for intercountry adoption without the child's having been considered by Indian families residing in India. CARA also provides financial assistance to various non-governmental organisations (NGOs) and government-run homes to promote quality childcare to such children and place them in domestic adoption.

IV PRESENT PROCEDURE TO BE FOLLOWED IN INTERCOUNTRY ADOPTIONS UNDER GUIDELINES FOR ADOPTION FROM INDIA 2006

The following procedures are stated in the Guidelines for Adoption from India 2006.

> **'Step I Enlisted Foreign Adoption Agency (EFAA)**
>
> - The applicants will have to contact or register with an Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Government Dept in their country, in which they are resident, which will prepare the home study report

[10] Writ Petition Number 1171 of 1982 and other cases.

(HSR) etc. The validity of the home study report will be for a period of two years. A report prepared before two years will be updated at referral.

- The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government departments are not available, then the application may be sent by the enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India.
- The adoption application dossier should contain all documents prescribed in Annexure 2. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate government department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations. A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to the Recognised Indian Placement Authority (RIPA) by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

Step II Role of the Recognised Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for intercountry adoption with the applicant.
- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefore.

Step III Child being declared free for intercountry adoption – Clearance by ACA

- Before RIPA proposes to place a child in an intercountry adoption, it must apply to the ACA for assistance for Indian placement.
- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days, failing which it will issue a clearance certificate for intercountry adoption.
- ACA will issue clearance for intercountry adoption within 10 days in the case of older children above 6 years, siblings or twins and special needs children as per the additional guidelines issued in this regard.
- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a Clearance Certificate on the 31st day.
- If ACA clearance is not given on the 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) holding an Indian Passport will be exempted from ACA Clearance, but they have to follow all other procedures as per the Guidelines.

Step IV Matching of the Child Study Report with Home Study Report of FPAP ('foreign prospective adoptive parents') by RIPA

- After a successful matching, the RIPA will forward the complete dossier as per Annexure 3 to CARA for issuance of a "No Objection Certificate" (NOC).

Step V Issue of No Objection Certificate (NOC) by CARA

- RIPA shall make application for CARA "NOC" in the case of foreign/PIO ("person of Indian origin") parents only after an ACA Clearance Certificate is obtained.
- CARA will issue the "NOC" within 15 days from the date of receipt of the adoption dossier if complete in all respects.
- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for intercountry adoption without a "No Objection Certificate" from CARA.

Step VI Filing of Petition in the Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- As per the Supreme Court directions, the concerned Court may dispose the case within 2 months.

Step VII Passport and Visa

- RIPA has to apply to the Regional Passport Office to obtain an Indian Passport in favour of the child.
- The Regional Passport Officer may issue the passport within 10 days.
- Thereafter the visa entry permit for the child may be issued by the Consulate/Embassy/High Commission of the country concerned.

Step VIII Child travels to adoptive country

- The adoptive parent/parents will have to come to India and accompany the child back to their country.'

As of now, all intercountry adoptions are governed by the 2006 Guidelines. The authors have learnt from official sources that the draft 2007 Guidelines are likely to be finalised very soon. Nonetheless, the importance of the basic documentation cannot be undermined in intercountry adoptions. The starting point of course is the home study report.

The importance of the home study report is paramount. In fact, it is like a clear-cut balance sheet of the prospective adoptive parents. It is a very handy document through the entire stage of the adoption process, especially when guardianship proceedings are instituted in the Court of the Guardian Judge, within whose jurisdiction the minor child is residing, and, secondly at the time of the visa interview at the relevant embassy or consulate to impress upon the visa/consular officer as to the positive aspects of the application, with a view to enhancing the chances of the success of the application.

V THE HOME STUDY REPORT

Paragraph 2.14 of the earlier 1995 Guidelines categorically and emphatically enumerates the required contents of the home study report, which should include the following information listed below. Although this is the list of documentation stipulated in the earlier Guidelines of 1995, from the experience of the authors in handling family migration issues, we would still recommend compliance with the exhaustive documentation mentioned below for two clear-cut reasons mentioned in the preceding paragraph.

The home study report should include:

(1) social status and family background;

(2) description of the home;

(3) standard of living as it appears in the home;

(4) current relationship between the husband and wife;

(5) current relationship between the parents and children (if there are any children);

(6) development of any already adopted children;

(7) current relationship between the couple and the members of each other's family;

(8) employment status of the couple;

(9) health details, such as clinical tests, hearing condition, past illness, etc (medical certificate, etc);

(10) economic status of the couple;

(11) accommodation for the child;

(12) schooling facilities;

(13) amenities in the home;

(14) reasons for wanting to adopt an Indian child;

(15) attitude of grandparents and relatives towards the adoption;

(16) anticipated plans for the adoptive child;

(17) legal status of the prospective adoptive parents.

VI PREFERENCE TO PARENTS OF INDIAN ORIGIN

Another significant issue in intercountry adoptions is locating prospective adoptive parents, preferably of Indian origin. The Supreme Court of India, in *Karnataka State Council for Child Welfare v Society of Sisters of Charity St Gerosa Convent*[11] held that the rationale behind finding Indian parents or parents of Indian origin is to ensure that the children should grow up in Indian surroundings so that they retain their culture and heritage. This is definitely an issue, which has a bearing on the question of the welfare of the children. The best interest of the children is the main and prime consideration.

The Gujarat High Court in a progressive judgment in *Jayantilal v Asha*[12] upheld the validity of guardianship orders in favour of two Norwegian couples who were appointed as guardians of Hindu children. The court held:[13]

> '. . . if the biological parents have died rendering the child an orphan then the society owes a duty to the child that at least a semblance of comfort and care which the biological parents could have provided will be provided to the child, if some people from howsoever distant a corner of this planet, come forth to do so. In such a case a petty contention like the change of religion or culture of the child can hardly stand in the way of the court in sanctioning inter-country adoption. Unfounded and imaginary apprehensions also are of little consequence and once the court is assured that there is no possibility of the child being abused which assurance can flow from the independent agencies which are ordained for the purpose then nothing can and need prevent the court from sanctioning an inter-country adoption.'

Thus, the procedure described above and the supervisory role of the court serves as a double check on intercountry adoptions. Not only does this dual process ensure a check against suspected child abuse, but at the same time it also removes hyper-technical objections to facilitate the conclusion of the adoption process and to enable the adopted child to leave the country with his or her adoptive parents without further bureaucratic delays.

The Allahabad High Court in *Jagdish Chander Gupta v Dr Ku Vimla Gupta*[14] held that, under s 9 of the Guardian and Wards Act 1890, the application for guardianship of a minor shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. The supervisory role of the court in placing the welfare of the minor as the primary consideration is best reflected in the following words of the court:[15]

> 'It should not be lost sight of and must be emphasised that in custody cases, a child has not to be treated as a chattel in which its parents have a proprietary interest. It is a human being to whom the parents owe serious obligations. One's

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11 AIR 1994 SC 658.
12 AIR 1989 Gujarat 152.
13 Ibid 156, para 12.
14 (2004) 1 Hindu Law Reporter 282.
15 Ibid 285, para 16.

> own self interest sometimes clouds his perception of what is the best for those for whom he or she is responsible. It takes a very high degree of selflessness and maturity – which is for most of the people probably an unattainable degree – for a parent/proposed guardian to acknowledge that it might be better for the child to be brought up by someone else.'

VII RATIFICATION OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION BY THE GOVERNMENT OF INDIA ON 6 JUNE 2003

The Government of India has also ratified the Hague Convention on Intercountry Adoption on 6 June 2003. Although the Government has ratified the Hague Convention in this regard, in practice the same has not been publicised, and, from the practical point of view, not many tangible benefits are forthcoming at all to people residing abroad seeking to adopt children from India. In fact, one of the authors of this chapter at the Annual National Meet on Adoption organised in New Delhi on 3–4 May 2007 by the CARA, now falling under the newly created Ministry of Women and Child Development, strongly advocated the emergent need for setting up a committee or a task force to commission a comprehensive report to look at the potential benefits on India signing the Hague Convention on adoptions. If such a report is prepared, it can well be officially circulated to the foreign embassies and missions in India. This is, of course, with a view to creating awareness and publicising the advantages of India signing the Hague Convention on adoptions to prospective adoptive parents of foreign origin and persons of Indian origin domiciled overseas.

VIII DOCUMENTS REQUIRED FROM FOREIGN ADOPTIVE PARENTS AND OVERSEAS SOCIAL OR CHILD WELFARE AGENCY FOR INTERCOUNTRY ADOPTION APPLICATIONS

Experience of dealing with CARA and/or the concerned Ministry suggests that the documentation should be compiled meticulously in order to avoid bureaucratic delays. The following documents must be submitted by the foreign adoptive parents; it will be noted that the Indian requirements are quite similar to those prescribed in various appendices of RON 117 issued by the British Home Office:

(1) home study report;

(2) recent photographs of the adoptive family;

(3) marriage certificate of the foreign adoptive parents;

(4) declaration concerning the health of the foreign adoptive parents;

(5) certificate of medical fitness of the foreign adoptive parents duly certified by a medical doctor;

(6) declaration regarding financial status, together with supporting documents including employer's certificate, wherever applicable;

(7) employment certificate of the foreign adoptive parents, if applicable;

(8) income tax assessment order(s) of the foreign adoptive parents;

(9) bank references for the foreign adoptive parents;

(10) particulars of properties owned by the prospective adoptive parents;

(11) joint declaration tendered by the foreign adoptive parents stating willingness to be appointed guardians of the child;

(12) undertaking from the social or child welfare enlisted agency sponsoring the foreigner to the effect that the child would be legally adopted by the foreign adoptive parents according to the law of the country within a period not exceeding 2 years from the time of arrival of the child;

(13) undertaking from the foreign adoptive parents to the effect that the child would be provided with the necessary education and upbringing according to status of the adoptive parents;

(14) undertaking from the recognised foreign social or child welfare agency that the report relating to the progress of the child along with his or her recent photograph would be sent quarterly during the first 2 years and half-yearly for the next 3 years in the prescribed pro forma through the relevant Indian diplomatic post;

(15) power of attorney conferred by the intending parents in favour of the social or the child welfare agency in India which will be required to process the case. Such power of attorney should also authorise the lawyer in India to handle the case on behalf of the foreign adoptive parents, if they are not in a position to come to India;

(16) certificate from the recognised foreign social or child welfare agency sponsoring the application to the effect that the adoptive parents are permitted to adopt a child according to the laws of their country;

(17) undertaking from the recognised foreign social or child welfare agency to the effect that, in case of disruption of the adoptive family before the legal adoption has been effected, it will take care of the child and find a suitable alternative placement for the child with prior approval of CARA;

(18) undertaking from the recognised foreign social or child welfare agency that it will reimburse all expenses to the concerned Indian social or child welfare agency as fixed by the competent court towards maintenance of the child and the processing charge fees.

It is important to reiterate that all the above certificates, declarations and documents in support of the application should be duly notarised by a notary public whose signature should be duly attested either by an officer of the Ministry of External Affairs, the Ministry of Justice or the Ministry of Social Welfare of the country of the foreign adoptive parents or by an officer of the Indian Embassy or the High Commission or Consulate in that country.

IX DOMESTIC LAW

Having elaborated the law and procedure relating to intercountry adoptions, brief reference is now made to the domestic law governing adoptions by Hindus. The principal law relating to adoption in India by Hindus only is contained in the Hindu Adoptions and Maintenance Act 1956 (HAMA 1956).

(a) Requisites of a valid adoption

Section 6 stipulates four conditions for a valid adoption, namely:

(1) the person adopting has the capacity, and also the right, to take in adoption;

(2) the person giving the child in adoption has the capacity to do so;

(3) the person adopted is capable of being taken in adoption; and

(4) the adoption is made in compliance with the other conditions mentioned in chapter 2 of HAMA 1956.

Section 6(iv) requires that the adoption should be made in compliance with other conditions mentioned in chapter 2 of HAMA 1956. In other words, in order that the adoption should be valid, the provisions of ss 7–11 must be satisfied. Section 7 deals with the capacity of a male Hindu to take in adoption; and s 8 with the capacity of a female Hindu to take in adoption. Section 9 qualifies persons capable of giving children in adoption; s 10 categorises those persons who may be adopted; and s 11 enumerates other conditions for a valid adoption. Thereafter, s 12 elaborates the effects of a valid adoption.

(b) Other conditions for a valid adoption

Section 11 of HAMA 1956 stipulates other vital conditions for a valid adoption, and is reproduced below.

'11. Other conditions for a valid adoption

In every adoption, the following conditions must be complied with:-

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
(v) the same child may not be adopted simultaneously by two or more persons;
(vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth [or in the case of an abandoned child or child whose parentage is not known, from the place or family where it has been brought up] to the family of its adoption:
Provided that the performance of datta homam [a religious ceremony] shall not be essential to the validity of adoption.'

(c) Effects of a valid adoption

Section 12 specifically deals with the legal effects of an adoption made in accordance with the provisions of HAMA 1956. It can be pointed out that s 12 of HAMA 1956 satisfies the requirements of clause (ix) of para 310 of HC 395 of the current British Immigration Rules governing adoption. This clause in very harsh terms states that the adopted child 'has lost or broken his ties with his family of origin'.

As to the legal effects of a valid adoption, it is important to cite certain decisions of the Supreme Court of India. It was held by the Supreme Court of India in *Smt Sitabai v Ramchandra*:[16]

> 'The true effect and interpretation of ss 11 and 12 of Act No 78 of 1956 therefore is that when either of the spouses adopts a child, all the ties of the child in the family of his or her birth become completely severed and these are all replaced by those created by the adoption in the adoptive family . . .'

Similarly, it was held by the Supreme Court in *Kartar Singh v Surjan Singh*:[17]

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[16] AIR 1970 SC 343, 348, para 6.
[17] AIR 1974 SC 2161, 2163, para 7.

> 'The words in section 11(vi) "with intent to transfer the child from the family of its birth to the family of its adoption" are merely indicative of the result of the actual giving and taking by the parents or guardians concerned referred to in the earlier part of the clause. Where an adoption ceremony is gone through and the giving and taking takes place, there cannot be any other intention . . .'

Also, it was held by the Supreme Court of India in *Chandan Bilasini v Aftabuddin Khan*:[18]

> 'Section 12 of the Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family . . .'

Finally, s 15 of HAMA 1956 underlines the irrevocability of the validly performed adoption by stating that it cannot be cancelled or renounced. Therefore, under Indian law, once a legitimate adoption is obtained, in accordance with the procedure established by law, the margin for interference is minimal, except in certain exceptional circumstances.

X REGISTERED ADOPTION CAN BE CHALLENGED

Section 16 of HAMA 1956 reads as follows:

> **'16. Presumption as to registered documents relating to adoption**
>
> Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.'

In an important ruling concerning adoption by Hindus, *Jai Singh v Shakuntala*,[19] the Supreme Court of India has recently held that, though a document registering an adoption should be treated as final proof of adoption, it could still be challenged in a court of law if evidence to the contrary was put forward.

The apex court, in interpreting the statutory intent of s 16 of HAMA 1956, said that the presumption about the registered document relating to adoption 'cannot be an irrebuttable presumption'. Justices Umesh C Banerjee and Brijesh Kumar held:[20]

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[18] (1996) 1 Hindu Law Reporter 79, 81, para 6.
[19] 2002 (3) SCC 634.
[20] Ibid 636 and 637, para 2.

> '2. The section thus envisages a statutory presumption that in the event of there being a registered document pertaining to adoption there would be a presumption that adoption has been made in accordance with law. Mandate of the statute is rather definite since the legislature has used "shall" instead of any other word of lesser significance. Incidentally, however, the inclusion of the words "unless and until it is disproved" appearing at the end of the statutory provision has made the situation not that rigid but flexible enough to depend upon the evidence available on record in support of adoption. It is a matter of grave significance by reason of the factum of adoption and displacement of the person adopted from the natural succession – thus onus of proof is rather heavy. Statute has allowed some amount of flexibility, lest it turns out to be solely dependent on a registered adoption deed. The reason for inclusion of the words "unless and until it is disproved" shall have to be ascertained in its proper perspective and as such the presumption cannot but be said to be a rebuttable presumption. Statutory intent thus stands out to be rather expressive depicting therein that the presumption cannot be an irrebuttable presumption by reason of the inclusion of the words just noticed above . . .'

In the above-mentioned ruling, the Supreme Court also concurred with the similar tenor of law laid down by the Punjab and Haryana High Court in *Modan Singh v Sham Kaur*.[21]

Clearly, the ruling in *Jai Singh* will be of immense help to immigration officers of foreign missions/consulates/embassies in India in weeding out suspect adoption immigration applications lodged from within the applicant's own family designed to circumvent immigration controls.

XI PROBLEMS FACED IN INTERCOUNTRY ADOPTION

This is an issue of immense significance. At present non-Hindus and foreign nationals can only be guardians of children under the Guardian and Wards Act 1890. They cannot adopt children. The child loses out by being deprived of the benefits of a valid adoption. There have been disturbing press reports about 'greedy social activists'. Sharma Vinod, in his article 'Indian child losing out in adoption mart',[22] pointed out that at the root of the problem is certain placement agencies' desire for financial gain and their propensity to extort money from childless foreigners. In the same report, it was pointed out that in practice the paperwork is complex. The system is not working because of long delays at the different levels of scrutiny.

Additionally, according to in vitro fertilisation experts in New Delhi, the number of infertile couples from foreign countries opting for in vitro fertilisation is increasing. Low-cost and hi-tech treatment in India is helping NRI couples to realise their dreams of natural parenthood. Non-resident Indian couples are reluctant to opt for adoption for two major reasons. First, religious and social factors are a major issue. Secondly, it has been highlighted

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[21] AIR 1973 P&H 122.

[22] *The Hindustan Times* 9 September 1997.

that cumbersome adoption and immigration laws make it very difficult to take the child to the United Kingdom or the United States, after the adoptive child is chosen from the homeland.[23]

In a hard-hitting editorial opinion, entitled 'Maternity for hire',[24] it has been noticed that a new trend is emanating. India, after becoming a hub for medical tourism, is entering another new platform. India is emerging as a sought after destination for surrogate mothers. Desperate childless NRI couples are rushing to India to rent a womb. Anand, in Gujarat, has seen as many as 14 commercial in vitro fertilisation surrogacy cases in the last 2 years. It is a disturbing trend. A woman's womb is not a piece of real estate to be rented out. Going through such a commercial pregnancy, a woman undergoes considerable physical and psychological trauma.

This article sadly and rightly so laments:

> 'It is particularly sad because there are over 12 million orphaned children in India who need parents. And another 44 million destitute children who are denied the warmth of a family. If only people could transcend the desire to have a baby that is genetically theirs, India would be the logical place where childless couples could seek parental happiness through adoption. Research shows that parental love has less to do with biological ties and more with shared experiences, and that adoptive parents love their children as much as biological parents. But our adoption figures don't go beyond a few thousand per year. Playing spoilsport is a 115-year-old Act – the Guardians and Wards Act – which does not allow Muslims, Christians, Jews and Parsis to become a child's adoptive parents. They can only be a "guardian". Even the more liberal Hindu Adoption and Maintenance Act, 1956, does not allow non-Hindus to adopt a Hindu child. The adoption process is tedious and hemmed in by all sorts of unnecessary restrictions. It is ironical that in a country with so many children without a home, there's a long waiting list of couples wanting to adopt. We urgently need to change the laws, make the process less cumbersome and allow India to become a popular adoption destination.'

XII NEW DIMENSION: THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT 2006

The Ministry of Women and Child Development has of late been mandated to look after the subject matters 'Adoption' and 'Juvenile Justice (Care and Protection of Children) Act 2000' pursuant to 16 February 2006 notification of Government of India regarding reallocation of the business. Also, the Government enacted the Juvenile Justice (Care and Protection of Children)

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[23] For details see Sharma Jyoti 'How egg-citing! NRIs eye desi donors' *The Times of India* 29 August 2003.

[24] *The Times of India* (New Delhi/Chandigarh Edition) 24 February 2006.

Act 2000 ('the JJ Act') and further amended it in the year 2006 to ensure adequate protection and rehabilitation measures for children in need of care and protection.

The Juvenile Justice (Care and Protection of Children) Amendment Act 2006 ('the JJ Amendment Act') applies to all children as well as parents irrespective of their religion and gender. All adoptable children under the category of children in need of care and protection (as defined under the JJ Act) shall be processed under this specific legislation by district courts, city civil courts, family courts and other appropriate courts as may be defined under State Juvenile Justice Rules to be framed based on the above Act. The legislation, being child-focused legislation, guarantees all rights to an adopted child and it is also recognised under international obligations by all Hague member countries.

On implementation of the JJ Amendment Act 2006 and its State Rules, all cases of orphan, abandoned and surrendered children have to be processed under the Act so that unrelated children have adequate safeguards in their placement.

In an editorial article 'Adopting New Guidelines',[25] it has been analysed:

> 'In a bid to put adoptive parents of all faiths on the same platform, amendments to the Juvenile Justice (Care and Protection of Children) Act (JJ) have now been notified and guidelines framed. One of the most important amendments to the Act made clear that adoption under this legislation would allow an adopted child to become the "legitimate child of his adoptive parents, with the rights, privileges and responsibilities attached to the relationship". This is a significant move considering till now, adoption by non-Hindus has been guided by the Guardian and Wards Act (Gawa), 1890, which gives them the status of "guardians", a relationship that becomes void when the child entered adulthood. Conversely, it doesn't give the "ward" legal rights due to a biological child.'

In effect, non-Hindu parents can now claim full parenthood instead of just the interim 'guardian' status that they were allowed until recently. Prior to the enactment of the JJ Act 2006, only Hindu couples who adopted children could claim to be parents. Non-Hindus were just guardians to their adopted children. This, of course, also led to children being denied rights to inherited property and besides also creating day-to-day problems for parents at the time of school admissions and such like matters.

Another major upshot of the JJ Act 2006 is that intercountry adoptions are permissible under the same. The point to be noted is how the embassies and foreign missions in India would view adoption orders granted to Hindus and non-Hindus as well as foreigners. This is the moot point.

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[25] *The Hindustan Times* 19 November 2007.

All opinions are not positive. The JJ Act has drawn some amount of criticism as well. In an article entitled 'Time to unscramble the adoption tangle',[26] Swati Deshpande has come out with some very valid criticisms as follows:

> 'Activists emphasise that there is no clarity on the provisions for adoption in the Juvenile Justice (Care and Protection) Act. "There is a lot of confusion on the issue of adoption under the Juvenile Justice (JJ) Act," said child-rights activist Sangeeta Punalekar. She noted that adoption was provided for under the JJ Act in 2000 itself to aid the rehabilitation and social integration of orphaned, abandoned or neglected children. "But even then it met with hardly any response," Punalekar said. To date, there are no known cases of adoption under the JJ Act in Maharashtra, though there have been a few cases in Delhi. Punalekar said the law stipulates that instead of getting the approval of higher courts – like district courts and high courts (in the case of inter-country adoption) – adoption should be done locally by child welfare committees and juvenile justice boards. However, she and other activists said there seem to be no rules or infrastructure in place nor is there clarity on related issues, like if the law will apply to Muslims. As it stands, the amendment to the JJ Act defines adoption as the "process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities attached to the relationship". In other words, the Act would apply to all Indians . . . It is not clear how this law would override the provisions of other personal laws. The Muslim personal law, for instance, does not permit adoption, he noted. The government can't try and plug loopholes in one Act by amending another . . .'

Surrogacy has indeed arrived in India. In our day-to-day practice, we are confronted with queries from foreign lawyers as to the legal position relating to surrogacy arrangements. Here, it would be pertinent to briefly elaborate as to the legal position in this regard.

XIII THE LAW APPLICABLE IN INDIA AS TO THE LEGAL PARENTAGE OF CHILDREN BORN IN THAT JURISDICTION AS A RESULT OF A SURROGACY ARRANGEMENT

In India at the moment, we do not have any legislation on legal parentage as a result of surrogacy arrangements. At the moment, in India we have the Registration of the Births and Deaths Act 1969 which does not contain any provision regarding parentage as a result of a surrogacy arrangement. The said enactment laid down by the Parliament of India came into force on 31 May 1969. Surrogacy parentage was not an issue at the time the said legislation came into being. Neither have there been any amendments or additions with regard to any surrogacy issues in the said enactment pertaining to the registration of births and deaths in the Indian jurisdiction.

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[26] *The Times of India* 20 November 2007.

As far as legislation on surrogacy is concerned draft surrogacy proposals were going through the Parliament at some stage. The current position in this regard is not very clear. Guidelines dealing with Artificial Reproductive Technologies (ART) have been prepared by an expert committee of the Indian Council of Medical Research in association with the National Academy of Medical Sciences (India), which could in the future become a part of the final draft of a proposed legislation. The preface to the Guidelines as circulated in March 2004 specifically points out that '[t]here are no guidelines for the practice of ART, accreditation of infertility clinics and supervision of their performance in India. This document aims to fill this lacuna and also provide a means of maintaining a national registry of ART clinics in India'.

For this purpose the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India have been framed. These Guidelines provide a foundation for the proposed legislation relating to this field of law. These Guidelines state that the surrogate mother is under no circumstances considered to be the legal mother.

Paragraph 3.5.4 of the said Guidelines provides that in cases where the surrogate mother is biologically unrelated to the child, the birth certificate shall have the name of the genetic parents. Therefore, if the genetic parents are the commissioning parents, who have contributed their genetic material for the unborn child, they shall be automatically recorded as the legal parents, if DNA tests prove the same. No adoption procedure needs to be followed by the genetic parents under such circumstances. Paragraph 3.5.4 of the said Guidelines reads as follows:

> 'A surrogate mother carrying a child biologically unrelated to her must register as a patient in her own name. While registering she must mention that she is a surrogate mother and provide all the necessary information about the genetic parents such as names, addresses, etc. She must not use/register in the name of the person for whom she is carrying the child, as this would pose legal issues, particularly in the untoward event of maternal death (in whose names will the hospital certify this death?). The birth certificate shall be in the name of the genetic parents. The clinic, however, must also provide a certificate to the genetic parents giving the name and address of the surrogate mother. All the expenses of the surrogate mother during the period of pregnancy and post-natal care relating to pregnancy should be borne by the couple seeking surrogacy. The surrogate mother would also be entitled to a monetary compensation from the couple for agreeing to act as a surrogate; the exact value of this compensation should be decided by discussion between the couple and the proposed surrogate mother. An oocyte donor can act as a surrogate mother.'

However, in terms of the Guidelines mentioned above, in cases where the surrogate mother also donates her egg, the commissioning parents/infertile couple will have to legally adopt the child, and it is only after this legal procedure has been complied with that the infertile couple becomes the legal parents of the child born through such an arrangement. This fact will also have to be recorded in the birth certificate issued to such a child.

Furthermore, where the genetic material is supplied by third party donors, in such cases the birth certificate issued to the child will initially have the names of the genetic parents. Here, it would become mandatory for the infertile couple to legally adopt the child so born, before they can be referred to as the legal parents of such a child.

In order to avoid conflicts at a later stage, the said Guidelines categorically state that once the child has been legally adopted by the infertile couple, then the third party donor and the surrogate mother shall relinquish all parental rights connected with the child. Paragraph 3.5.5 of the Guidelines mandates as follows:

> 'A third-party donor and a surrogate mother must relinquish in writing all parental rights concerning the offspring and vice versa.'

However, it is submitted that the law relating to surrogacy in India is in its prenatal stage and unfortunately at the moment there is no legislation in existence prescribing a code of practice governing the moral, ethical and legal aspects of such surrogate arrangements. Hence, the Guidelines only have persuasive value at this moment in time.

XIV CONFLICT OF LAWS IN INTERCOUNTRY ADOPTIONS

During our time as counsel dealing with adoption applications at the British High Commission and other major embassies at New Delhi, we have quite frequently encountered a conflict of laws situation where NRIs, who have been residing abroad for several decades, adopt children from within their own family. The preference for adoption by immediate blood relatives is a common South Asian phenomenon.

The unsuspecting adoptive parents duly comply with the requirements of HAMA 1956 for taking the child in adoption. The adoption deed is proudly presented to the immigration authorities; and this is where the trouble begins. The United Kingdom immigration authorities completely disregard the Indian adoption deed, and they are legally justified in doing so under the Adoption (Designation of Overseas Adoptions) Order 1973.[27]

Under the 1973 Order, if a child has been legally adopted from a country whose adoption orders are recognised as valid under United kingdom law, ie from a 'designated' country, then the parents may apply for the child to join them in the United Kingdom as their adopted child.

If the child has not been legally adopted from a 'designated' country or the adoption is from a country whose adoption orders are not recognised as valid

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[27] SI 1973/19.

in United Kingdom law, ie the child is from a 'non-designated' country, entry clearance will have to be obtained for the child to travel to the United Kingdom for adoption through the English courts. India is specified as a 'non-designated' country under the 1973 Order.

The adoptive parents, then, are confronted with a refusal by the immigration authorities on the ground that the adoption deed is not valid under the 1973 Order, although there has been due compliance with the provisions of HAMA 1956. The only avenues available to the parents are to challenge the refusal by way of appeal or to lodge a fresh application.

The real dilemma in such a situation is to set back the clock to satisfy the requirements of British immigration law. How can NRI adoptive couple obtain a guardianship order from a local court once a formal irrevocable adoption process has taken place? Certainly, a guardianship order is on no better footing than a valid adoption under HAMA 1956. This is a proposition which, sooner or later, will have to be tested by the British courts.

Rather, it has been done so by the Court of Appeal in a judgment, upholding a judgment under the provisions of the HAMA, 1956. But, the central plank to uphold the validity of such an adoption is on the basis of right to family life. This judgment of immense significance has been analysed by our co-author Rambert De Mello in our book *Acting for Non-resident Indian Clients*.[28] His analysis is as follows:

> 'Recently, the Court held that the bias against Indian adoption custom was wrong and that it was a breach of the right to family life and discriminatory to refuse an adopted child entry clearance to the United Kingdom by giving less weight to an adoption effected by customary law in India and which was recognised as valid there, on the ground that it was not a recognised practice in English law: *Singh v ECO Delhi*.'

Singh[29] can be summarised as follows:

(1) The main principle arising for consideration in *Singh* was whether an adoption which does not meet the requirements of relevant international instruments should invariably be a reason for according little weight to it in determining whether family life exists or not. The adoption of the boy in the case of *Singh* was valid in India but not recognised in the United Kingdom.

(2) The court concluded that such a rigid and formulaic approach is not justified and that the failure to satisfy the requirement of relevant international instruments will vary from case to case, and that of considerable importance will be the nature of the departure from the provisions of a relevant instrument. If the departure is one of substance

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[28] (Jordan Publishing Ltd, 2004) 221–222.
[29] [2005] QB 608; [2004] EWCA Civ 1075.

rather than procedure and goes to the heart of the safeguards that the instrument is intended to promote, then it may well be appropriate to give the adoption order little weight.[30]

(3) In this case much might be said of the fact that the children had not been adopted and that their biological link with their natural parents was fluid, continuing and developing.

(4) The principles enunciated in *Singh* which are relevant in determining whether family life exists between an adopted child and adoptive parents are equally applicable in a situation which needs to be resolved whether there is family life existing between a child and his natural parents who are separated from each other.

(5) The best interests of the child will be relevant and may well be determinative at the stage at which the court has to decide the extent to which respect should be given to family life or whether interference with family life is justified under Art 8.2.[31]

(6) The potential for development of family life is relevant in determining whether family life already exists and this is not confined to cases involving children and their natural parents; unless some degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life or that the applicants have a genuine wish to bring this about.[32]

(7) The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what until comparatively recently would have been recognised as the typical nuclear family – the Convention is a living instrument.[33] The law must adapt itself to these realities.[34] There is no bright line test that the law can set. The infinite variety of the human condition precludes arbitrary defining.

(8) The existence or non-existence of family life is a question of fact depending upon the real existence in practice of close personal ties – a close personal relationship which has sufficient constancy and substance to create de facto family ties – the parents' cohabitation with the child will often be highly significant but this is not decisive.[35]

(9) The fact that the parents do not see their children frequently is not fatal to establishing family life; one must be cautious before setting too high a

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30 Ibid para [33].
31 Ibid para [34] per Dyson LJ, and para [68] per Munby J.
32 Ibid para [38].
33 Ibid paras [63]–[64] per Munby J.
34 Ibid para [65].
35 Ibid para [79].

> benchmark for the existence of family life certainly where there is the constancy and commitment which a parent has shown towards his child.[36]

It is strange, that this judgment has not got due recognition in the academic and the professional arena. This judgment should be publicised vigorously, so that prospective adoptive parents residing overseas can take due benefit of this path-breaking judgment. No doubt, this ruling is indeed laudable for building the edifice of the right to family life to recognise an adoption made in India under the provisions of HAMA 1956, which is otherwise in direct conflict with the provisions of British immigration law as contained in HC 395.

Likewise, the American Embassy and numerous European embassies at New Delhi also outright refuse to accept the adoption deeds, mentioned above, under the provisions of HAMA 1956. Hence, only guardianship orders are acceptable. These can be obtained only by lodging guardianship petitions under the provisions of the Hindu Minority and Guardianship Act 1956 in the court of the guardian judge, in whose jurisdiction the minor child is residing. It is like a full blown trial. It is very difficult to obtain guardianship orders. These petitions have to be supported by exhaustive documentation as to the background and standing of the proposed overseas adoptive parents. Sometimes, it can be a time-consuming exercise, and it is very difficult in such a situation for the foreign couple to spend long periods of time in India awaiting custody orders. With these custody orders, the adoption ultimately takes place in the foreign country of habitual residence of the adoptive parents. In India, we have no exclusive law of adoption for foreigners or NRIs.

Furthermore, adoptions within the family fold are not encouraged, while adoption applications by foreigners seeking to adopt children from orphanages and welfare homes are likely to receive positive treatment.

The noose of British immigration law has been further tightened by changes to HC 395, which were given effect by HC 538, and came into force on 1 April 2003. Reference in this regard is drawn to the observations of Richard McKee, a prominent Immigration Appeals Adjudicator:[37]

> 'Now HC 538 has not only lifted the restriction on third party support, but it has introduced a provision for de facto adoption. For all adopted children coming from countries whose adoption orders (if they have such things) are not recognised in the UK, the adoptive parents must have been living abroad, having assumed the role of the child's parents, for at least 18 months, of which the last 12 must have been spent living together with the child. This is to show a genuine transfer of parental responsibility. The expectation that the adoptive parents be married has now been dropped.'

The most worrying issue about these changes is that it is next to impossible for NRI couples to come and spend one complete calendar year with the adoptive

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[36] Ibid para [90].

[37] For details see Richard McKee 'New immigration rules' [2003] 17.2 IA & NL 127–129.

child in India. Certainly, no United Kingdom employer or any other overseas employer would grant such long leave to any employee. However, more positively, senior level expatriates posted in India could possibly comply with the time requirement stipulated by the newly introduced provisions of HC 538.

Furthermore, very recently, there has been a European Court of Human Rights (ECHR) decision on the basis of a friendly settlement having very wide ramifications, which could change the entire gamut of intercountry adoptions from India. This case was the fallout of the immigration officer's denial to permit an Indian couple to bring their adopted child to the United Kingdom, which resulted in the Government of the United Kingdom paying costs and damages totalling more than £42,000 before the ECHR. This was a friendly settlement in the case of *Singh and Others v The United Kingdom*.[38] The said application was lodged before the ECHR on 24 May 2000 and admitted for hearing thereafter, upon preliminary submissions and arguments.

Earlier, on 11 March 1997, the immigration authorities had refused permission to the adoptive parents to bring the child into the United Kingdom. This was because adoptions from India are not recognised for the purposes of entry clearance. Thus, the child fell out of the rules for entry clearance as he was not adopted because of any inability on the part of his parents to care for him. But, there was a genuine transfer of parental responsibility. Incidentally, this adoption application was lodged by us at the British High Commission, New Delhi. This judgment has not received much publicity and academic analysis at this moment in time. This case was reported in the London *Times* on 21 June 2006. Whether this judgment will be followed as a precedent in the time to come or effect any changes in law or otherwise by the British Government remains to be seen.

XV CONCLUSION

There has been a growing demand for a general law of adoption enabling any person, irrespective of his religion, race or caste, to adopt a child. There is now a clear case for overhauling the existing adoption law in India.

As far as the mechanics of intercountry adoption are concerned, all the major embassies in India are more than stringent in dealing with adoption applications. The refusal rates are very high. There is no room at all for compassion. The hurdles are almost insurmountable, causing a lot of hardship to childless NRI couples.

The question that now remains to be answered is as to how successful the revised 2006 Guidelines discussed in this article have been. Sadly, the answer

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[38] Application number 60148/00, disposed of on 8 June 2006.

can be found in a very recent Andhra Pradesh High Court judgment, *John Clements v All Concerned (AP)*.[39] The court lamented:[40]

> '59. Para 2.14 of the guidelines envisages that no application by foreigner for taking a child in adoption should be entertained directly by any social child welfare agency in India working in the areas of inter-country adoption or by any institution or centre or Home to which children are committed by the Juvenile Court. The very next paragraph says "the original application along with original documents as prescribed by the Supreme Court of India would be forwarded by the foreign enlisted agency to a recognised placement agency in India".
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> 60. Taking advantage of the inconsistency in the Guidelines and ignoring the judgment of the Supreme Court the foreign enlisted agencies started directly approaching the placement agencies in India and are trying to take the Indian children in adoption with their connivance and active support of VCA and CARA officials, who are simply putting their seal of approval on these adoptions without bothering whether the procedure prescribed for intercountry adoption of a child is followed or not. With the result, trafficking in female children is going on unabated in violation of the guidelines given by the Supreme Court.
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> 61. After the present scam came to light, the Government of Andhra Pradesh issued the Andhra Pradesh Orphanages and other Charitable Homes (Supervision and Control) Rules in GO Ms No 16, dated 18 April 2001. In para 11 (VII) of the said GO it is stated that "relinquishment" of a child by "biological parents" on family grounds of poverty, number of children, or unwanted girl child will not be permitted. Such children should not be admitted into Homes or "Orphanages" and, it admitted, the licence and recognition of the Home or Orphanage shall be cancelled or withdrawn.'

Therefore, it can be concluded that, although there is no doubt that CARA is doing good work in its policing role, the negative media feedback has definitely not escaped judicial notice.

The finalisation of the 2007 Guidelines is eagerly awaited. Hopefully, the consolidated comprehensive Guidelines shall carve out clear-cut and precise uniformity in areas and legal issues addressed in this article and not provide piecemeal reforms and solutions.

While the Government has been grappling on an ad hoc basis with lacunae arising out of the Guidelines which have been revised from time to time, in the interim, new issues have cropped up. First, there are legal issues connected with surrogacy. There is no legislation in India pertaining to surrogacy as yet. Secondly, no practical tangible useful benefits are forthcoming at all to prospective NRI adoptive parents and persons of foreign origin arising out of India's signing of the Hague Convention on Intercountry Adoptions. Thirdly, the proposed revised Guidelines of 2007 should also categorically attempt to provide a clear-cut direction in no uncertain terms to all major embassies, high

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[39] (2003) 2 Hindu Law Reporter 331.
[40] Ibid 331, paras 59–61.

commissions and consulates in India that all adoptions under the provisions of the JJ Amendment Act 2006 by NRIs, persons of Indian origin and foreigners as well, should be duly acknowledged and their validity accepted as well to facilitate movement of the adopted children in the country of the habitual residence of the adopting parents. This of course has to be hedged with safeguards and compliance with due process of law, both in India and abroad. But, the core issue is the recognition of adoption orders handed down by the designated courts in India under the provisions of the above-mentioned amended provisions of the JJ Act of 2006. It is very important that these three new major issues also receive the due attention they warrant in the present day and age.

Lastly, the authors' experience reveals that guardian judges, especially in small towns and cities in India, who deal with such cases are not particularly conversant with the interpretation of the intercountry adoption Guidelines discussed in this chapter. Therefore, in sum and substance it can be stated that a uniform but strict procedure must be evolved which can be easily followed and adhered to in both letter and spirit. No doubt procedural hurdles and legal formalities are necessary to prevent abuse of the process but separate and intricate adoption and immigration procedures often leave foreign adopting parents in confusion over differing interpretations. Therefore, if the adoption process and procedures are overhauled so that they conform to a uniform pattern, it may make the process more convenient, less cumbersome and easier to follow. All of this would be in the best interests of the child, which is undoubtedly the paramount consideration, and at the same time would allow both the letter and spirit of law to be adhered to. Considered changes are thus urgently required in the field of intercountry adoptions from India. The time has also come to enact legislation dealing with legal parentage issues of children born out of surrogacy arrangements.

Italy

THE LIVING WILL IN THE ITALIAN LEGAL SYSTEM

Federica Giardini[*]

Résumé

Ce chapitre porte sur les testaments de vie. Après avoir défini le concept, il s'intéresse aux directives médicales avancées, alors que le droit italien actuel ne prévoit aucune disposition légale particulière en la matière. L'exposé poursuit en faisant état des éventuels obstacles juridiques tant à la reconnaissance des testaments de vie dans l'état actuel du droit italien qu'au caractère contraignant de tels documents. L'auteur soutient qu'en regard de la Constitution et du Code civil les testaments de vie sont pourtant valides, même si la loi mériterait d'être clarifiée. Un projet de loi est actuellement à l'étude au Parlement, mais cette proposition pourrait bien représenter un pas en arrière et sa constitutionnalité est incertaine. Par exemple, avec ce projet, le testament de vie ne lierait pas les tiers et il ne pourrait pas porter sur l'alimentation et l'hydratation artificielles.

I INTRODUCTION

We use the terms 'living will', or 'advance medical directives', to designate an expression of will by which a person states in advance (and in the ways provided by the legal system they belong to) the medical treatment that they are willing to accept, should they become so incapacitated at some future date as to be unable to express their wishes at that time. To use the well-known definition of the Italian National Bioethics Committee, a 'living will' is:[1]

> '. . . the document by which a person, while enjoying full capacity, expresses his wishes about the types of treatment he desires to undergo, or not to undergo, in the event that in the course of an illness or through sudden injury, he is no longer able to express his consent or his lack of informed consent (to such treatment).'

It is not a correct classification to consider this legal phenomenon in terms of wills. However, the choice of the term 'will', used to describe rather than define advance directives, has now become part of the terminology commonly

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1 Italian National Bioethics Committee *Advance Treatment Directives* (18 December 2003) in the 'Introduction'.

adopted by many legal systems and has consequently entered the general language of each society. Still, from the technical legal angle, deep connotations distinguish advance medical directives from real wills, although the two instruments also possess some features in common.

In the Italian legal system – but also, more generally, from the comparative viewpoint, in most contemporary legal systems in the so-called Western legal tradition – a will is a revocable disposition by which a physical person, that is, a human being, provides for the disposal of all or part of his estate after his death, and makes any other disposition not relating to property that may be made by will in the legal system in question. The testamentary instrument has internal effect, as we may term it, for the testator himself, operating from the moment of its execution to the moment when the succession is opened; at this point, the will takes legal effect in relation to third parties, the starting-point for such effects coinciding with the death of the testator and the opening of his succession. Unlike a true 'will', then, the 'living will' is an instrument that comes into operation at a time before the death of the individual (hence the expression 'living will'). At the same time, if we wish to underline the features shared by both a true will and a living will, we may note that in both cases the dispositions made by the individual are designed to have effect in relation to third parties at a time when the person who made them is no longer capable of expressing the wishes contained in the will, either because, in the case of a true will, he is now dead, or because, in the case of the living will, he is incapacitated due to injury or illness.

Over the last few years, the importance assumed by living wills, or advance directives (however we choose to call the phenomenon) is correlated to progress in the field of medical science, and especially, achievements in the fields of reanimation and anesthesiology; such advances have made it possible to prolong a patient's life sine die – endlessly – even where he or she is unconscious and can only survive if artificially nourished.

The problem of the living will involves issues that inevitably fuel ethical and religious debate in circles that go beyond the strict confines of the law, but from a strictly legal point of view, there are two issues: the question of the form required to create a living will; and the question of its effect in relation to third parties, that is, the capacity to bind third parties by its provisions. The central question is therefore whether binding effect may be granted to the wishes expressed by the individual regarding types of treatment that he intends to undergo or refuse, in the event that he should become incapable of self-determination at the moment when the choice must indeed be made.

II THE SITUATION CONCERNING ADVANCE MEDICAL DIRECTIVES IN ITALIAN LAW IN THE ABSENCE OF SPECIFIC LEGAL PROVISION

The Italian legal system today still contains no specific legal provision, in general terms, covering private autonomy of the individual in the closing phase of his or her life. The only express legal provision concerns the subject of organ transplants,[2] but there is no general law on the so-called 'end of life'.

The legal problem posed can be broken down into different aspects. First, we must examine whether even today, in the light of the general principles of the legal order, but in the absence of a specific law on advance medical directives, current Italian law permits an individual to express his will concerning types of medical treatment he is willing to undergo at a future time, in the event that he later becomes incapacitated and unable to communicate his wishes. Secondly, we must examine whether and to what extent, in such a case, the will expressed by the individual may be considered binding on third parties, and primarily the medical and health care staff called upon to administer or refrain from administering the treatment.

As a forerunner to the conclusions we will reach and submit in this chapter concerning the problem before us, it may be stated that on principle, not only are there no legal arguments that absolutely preclude a person from expressing his will as described, but that such an expression of will may already today be considered binding. However, the present situation is one of uncertainty, despite some settled points arrived at both in the development of legal thinking and in scholarly writings, and in the development of the case-law; particularly on the criminal side, the courts have ruled on matters relevant to this topic, at least since the beginning of the 1990s.

The uncertainty referred to shows itself in a range of aspects, and is particularly present in situations where a refusal to undergo medical treatment may result in death. In such cases, some parties tend to view the cases as instances of passive euthanasia, as it is known, and underline that in the Italian legal system the right to life is not a right susceptible to individual disposal. This uncertainty manifests itself first in doubts as to the ways in which the 'true' will of the patient can be ascertained without a shadow of a doubt. Then there is uncertainty about the weight to be given to expressions of will given by the closest relatives, in the place of the patient, or even wishes by relatives conflicting with the patient's own. Then again, the question arises whether there exists a standard of reasonableness against which certain choices may be measured. In particular, doubts revolve around the choice of therapeutic treatment that those concerned are willing to contemplate, but also choice relating to 'quality of life', the type of existence one is willing to accept. In any

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[2] Law no 91 of 1999, on 'Dispositions concerning samples and transplants of human organs and organic tissues', available at: www.camera.it/parlam/leggi/eleletip.htm.

event, the question occurs, does it make sense to seek parameters, or in this specific area, should the will of the individual be considered sovereign?

The figure of the physician also has a place in the situation of uncertainty described above. In this regard, the Italian Criminal Code contains precise legal provisions (arts 575, 579 and 580) prohibiting all forms of euthanasia and of assistance, or at any rate, of assisted suicide; on the other hand, it is now a settled principle in medical practice that the physician must abstain from so-called 'relentless treatment'. That is, doctors today must refrain from administering extraordinary treatment that is not proportionate, not suitable in relation to the patient's clinical condition and the objectives of treatment. This occurs in particular when, with regard to the patient's state of health, his or her death may be foreseen as imminent, on the basis of a strictly clinical assessment. From another standpoint, the Italian Code of Medical Ethics today expressly provides that the physician must desist from therapy when the patient refuses it with awareness.

In this delicate subject area, Italian law contains certain other fundamental rules that may be considered settled law. The first such rule concerns the legal value of the patient's consent to therapeutic treatment. Consent is a technical requirement for the treatment itself to be lawful. It is only consent, representing the manifestation of the patient's will, that renders the action – the medical treatment – lawful, and saves it from being a civil wrong. Leading on from this rule is the technical result that a person may refuse treatment and decide consciously to interrupt it during all the phases of his or her life, including therefore the end-of-life phase. At stake here is the principle of self-determination in Italian law: its very authority and admissibility. In accordance with that principle, only the individual subject, that is only and exclusively the person concerned, should have the right to decide the destiny of his own body, of his health, of the treatment he may accept or refuse, to alleviate pain and prolong the course of his life.

III POSSIBLE LEGAL OBSTACLES TO INTRODUCING THE INSTITUTION OF THE LIVING WILL INTO ITALIAN LAW AND TO THE POWER OF ITS PROVISIONS TO BIND THIRD PARTIES

Some possible legal objections of a general character have been raised to the very admissibility of the living will in the Italian legal system. Specifically, such objections concern the possibility that the provisions contained in a living will could be considered binding in relation to third parties. This is a point that requires elucidation before we proceed.

To be precise, we must observe that the binding power of the dispositions contained in the living will, that is, the fact that the individual's dispositions, which concern the types of treatment that he is willing to accept, are binding

dispositions for third parties, is a characteristic pertaining to the very essence and nature of the living will. To speak of the living will without envisaging the concrete possibility that its dispositions should have binding effect means emptying this instrument of private autonomy of all meaning; it means changing the content and nature of the living will on the basis of external premises.

Having clarified this point, possible objections have been raised, as mentioned above, to the admissibility of the living will as an institution of the Italian legal system. Some critics note, for example, that in order to be binding, the individual's will should be subject to the requirement of 'immediacy'. In other words, the patient's will must be manifested at the moment when the medical treatment is necessary. Where such immediacy of consent is lacking, the physician's duty to intervene in protection of human life may not be overridden, whatever the previous wishes of the patient had been.

It is easy to see how this view actually tends to strip the instrument of the living will of its entire content and sense; this is certainly so if the requirement of immediacy is taken to mean a manifestation of the patient's will given immediately before the medical treatment is administered. It is quite clear that this meaning of 'immediacy' cannot be admitted. In any case the objection itself may be overcome, and thus cannot be considered by any means decisive. Indeed, it clearly conflicts with certain principles of the Italian legal system, such as the rules on which the entire system of testamentary devolution upon death is founded. A person's true 'will' is also an act that may be established by the individual many years before the opening of his succession and no one doubts its enforceability in relation to third parties. Provided the testator does not revoke its dispositions, with the opening of his succession and the publication of the will, this instrument becomes fully operative in law. From this angle, then, the immediacy of the manifestation of the individual's wishes by reference to the moment when it acquires effect towards third parties definitely cannot be used as a criterion for denying admissibility of the living will in Italian law.

A further obstacle to introducing the living will into the Italian legal system is apparently to be found in the rule in art 5 of the Civil Code, prohibiting acts of disposition of one's body. Article 5 expressly provides that acts of disposition of one's body are prohibited where they cause a permanent reduction of physical integrity or are otherwise contrary to public order or public morals. According to proponents of this view, the prohibition would come into play where, by effect of the dispositions in a living will concerning refusal to undergo specific medical treatment, the individual dies, thereby 'disposing' – in this sense – of his asset, life.

But this rule does not in principle preclude the introduction of the living will into Italian law, either, for a series of reasons. First, the norm is contained in the Civil Code of 1942. It is a provision of law introduced for the purpose of preventing trafficking by individuals of their own body parts. Article 5 of the

Civil Code, even in an initial phase chronologically in relation to its introduction, had a different rationale from the one now assigned to it as a supposed basis for excluding the living will. In addition, like all other provisions, it must be construed in light of the Italian Constitution. While on the one hand there is no doubt that art 5 of the Italian Civil Code excludes enforceability of a contract under which, for instance, the parties buy and sell a kidney or any other human organ, from another distinct angle, there is no doubt that kidney donation by one person to another is a valid, effective legal act, recognised in Italian law as having appreciable value and deserving of merit. Plainly, it is not so much the disposition of one's body in its own right that is prohibited by art 5 of the Civil Code, but rather the proprietary dimension of the act of disposition: trafficking – precisely – in one's own body. In the specific case, the dispositions contained in the living will cannot be considered to be acts of disposition of one's body and even less can they be considered acts of disposition for reward. Strictly speaking, even if one were prepared to consider rejection of medical treatment as equivalent to 'disposing' – however indirectly – of one's physical integrity, the scope of art 5 still cannot be stretched to embrace self-damaging acts, and would only operate in relation to 'assaults' made by third parties. In conclusion, the argument based on the provision of the Civil Code that has been examined does not exclude the possibility of introducing the living will into Italian law.

Not only are there no preclusions of a general character to introducing the institution of the living will complete with binding dispositions for third parties into the Italian legal system, but further, the basis for the dispositions contained in the living will may already today be considered admissible, and therefore enforceable, theoretically, even without specific legal regulation of the matter.

The foundation of the individual's right to self-determination in the sphere of treatment he is willing to undergo is contained in art 32 of the Italian Constitution, also applying the more general principle of self-determination recognised by art 13 of the Constitution. Article 32 expressly provides for the protection of human health as a fundamental right of the individual, and at the same time as an interest of the collectivity. It thus explicitly recognises both a collective dimension and a private dimension of the right to health. In the Italian legal system, health is protected as a public asset, then, but also as an individual and absolute right of the single person. In this second dimension, in the perspective of the absolute individual right of the subject, the right to health in itself may also be exercised in the negative by its holder. This is strengthened by the express provision of the second paragraph of art 32, clearly founding the right of each individual to self-determination. In fact, by virtue of art 32, second paragraph, no one can be compelled to undergo particular medical treatment, unless provided by a law and in no case can the law infringe the limits imposed by respect for the human person.

In the light of the above, the principles underlying recognition of the binding nature of a patient's advance directives on medical treatment, intended to have

effect should he become incapacitated, are already operative in the Italian legal system today, even in the absence of a special law to regulate the matter. And the patient's dispositions are legally significant as an extended form of the principle of informed consent, which for some time now has governed the lawfulness of all medical treatment administered. Legislative regulation is desirable only from one angle, with the purpose of eliminating uncertainty regarding proof of the patient's wishes; it would be opportune at a practical level, so as to ensure that the will of each individual is respected in practice, without the need for recourse to the courts to obtain enforcement.

IV THE ITALIAN DRAFT LAW ON LIVING WILLS

Discussion on the living will is currently under way in the Italian legal system. Following the *Welby* case,[3] and more especially the *Englaro* case,[4] both decided by the courts as part of Italian case-law, a Bill is currently being debated in Parliament, known as the draft law on 'Provisions concerning therapeutic alliance, informed consent and advance medical directives',[5] and has already been approved by the Senate. This draft legislation, however, fails to satisfy the requirements underlying the need for specific legislative regulation of the living will; and because of the Bill's contents, it instead risks curtailing the results obtained by case-law and scholarly writings over the last few years, emptying them of all meaning. The current formulation of the draft law also appears contrary to some fundamental principles long recognised at European and Italian national level concerning consent to medical care, self-determination, and the dignity of the human being.

Its salient features are the fact that directives on medical treatment under the provisions of the Bill are not binding on third parties, even where such directives are created by a person acting in full capacity in the form and ways laid down by the Bill itself. In particular, an individual may not give advance directives relating to artificial feeding and hydration, which, according to this Bill are not forms of medical treatment, and are defined instead as circumstances not subject to any form of self-determination on the part of the patient. If this draft law should be definitively approved in its present form, it would be highly likely to raise serious questions of incompatibility with the Italian Constitution.

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[3] Piergiorgio Welby suffered from muscular dystrophy. In 2006 he declared a wish to refuse ongoing life-saving medical treatment. After a court found no specific law governed the situation, a health professional acceded to Welby's request by shutting off the life support and Welby subsequently died.

[4] In the *Englaro* case, a woman had been in a persistent vegetative state since 18 January 1992. On 13 November 2008, Italy's highest court, the Supreme Court of Cassation, granted the woman's father the right to have artificial feeding and hydration suspended. She died on 9 February 2009.

[5] Available at: www.parlamento.it.

Japan

EQUAL PROTECTION OF CHILDREN: REFORM OF THE JAPANESE NATIONALITY LAW

*Megumi Nakamura**

Résumé

En 2008, la Cour suprême a rendu une décision fort remarquée dans laquelle elle déclare inconstitutionnelle la loi japonaise sur la citoyenneté. Au chapitre de l'acquisition de la nationalité, la loi distinguait les enfants légitimes des enfants illégitimes. Selon la Cour, cette distinction viole le droit constitutionnel à l'égalité et elle va à l'encontre de la Convention des Nations-Unies relative aux droits de l'enfant. À la suite de cette décision, le ministère de la Justice pris l'initiative de faire modifier cette législation afin de permettre le traitement égal des enfants en matière de citoyenneté, quelles que soient les conditions de leur naissance.

I INTRODUCTION

Since 2007, there have been many developments in Japanese family law. Concerning marital property law, the Welfare Pension Insurance Law, which facilitates the division of a pension at the time of divorce, took effect.[1] On the issues relating to assisted reproductive technology, there are no laws, and no Bill has yet been proposed, but, the famous case of the 'gestational mother' was reported in 2007. The Supreme Court held that the woman who had conceived and delivered the children with a fertilised egg using the intended father's semen and the intended mother's egg by means of assisted reproductive technology was their legal mother and that there was legally no mother–child relationship between the intended mother who had biological ties with the children and the children themselves.[2] These issues have already been discussed in a previous Survey.[3]

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1 See further details in Yuko Koishi, *Pension Division at the Time of Divorce: New Systems in Japan* at www.law2.byu.edu/isfl/saltlakeconference/papers/author.htm (which is a draft paper of the 12th World Conference of the International Society of Family Law in Salt Lake City, 2005).

2 The decision of the Supreme Court dated 23 March 2007, in *Minsyu*, No 61–2, p 619.

3 Concerning this case, see Ryoko Yamaguchi 'Recent Developments in Parent-Child Relationships, and Child Custody in Japan' in B Atkin (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2008) 223, at 230–232.

In 2008, the Supreme Court gave a remarkable decision that the Japanese Nationality Law was unconstitutional. Soon after the decision, the Ministry of Justice arranged for legislation and the Nationality Law was revised in the same year. In this chapter, I focus on this reform of the Nationality Law and examine its problems.

II BACKGROUND

(a) Prior to the reform

The Diet approved the Bill on the Reform of the Nationality Law on 5 December 2008 and the new Nationality Law took effect on 1 January 2009. Prior to this reform, former art 3(1) provided that:

> ' . . . a child (excluding a child who is already a Japanese national) under twenty years of age, who has acquired the status of a legitimate child by reason of the marriage of its father and mother and their acknowledgement, may acquire Japanese nationality by making notification to the Minister of Justice, if the father or mother who has acknowledged was, at the time of the child's birth, a Japanese national and such father or mother is presently a Japanese national or was, at the time of his or her death, a Japanese national.'

Article 2 provided that:

> ' . . . a child shall, in any of the following cases, be a Japanese national: (1) When, at the time of its birth, the father or the mother is a Japanese national; (2) When the father who died prior to the birth of the child was a Japanese national at the time of his death; (3) When both parents are unknown or have no nationality in a case where the child is born in Japan.'

In the case of a father acknowledging an unborn child, the father must, at the time of the child's birth, have been a Japanese national. In other words, it is a requirement to acquire Japanese nationality for the child to have a legal parent–child relationship with the father or the mother who is a Japanese national at the time of its birth. Where the child has a legal parent–child relationship with the father or the mother who acknowledges the child after the time of its birth, the child could not acquire Japanese nationality, unless the father and the mother got married. The former art 3(1) was added in 1984. As to the child born to a father who is a Japanese national and a mother who is not a Japanese national, the legislature thought that there were close relationships with Japanese society through the family life brought about by the marriage of the father, who acknowledged the child after its birth, and the mother.

(b) The judgment of the Supreme Court (court in banc)

There were two cases consolidated in the Supreme Court about the above provision of art 3. The relevant facts of these cases were almost the same. The

child, whose mother was a Philippine national and father a Japanese national, was born in Japan. The father acknowledged the child after its birth. Because its father and mother did not get married, the child did not have the status of a legitimate child. Article 18 of the Nationality Law provides that, in the case of a person who intends to acquire Japanese nationality and is under 15 years of age, the notification to acquire nationality under art 3 shall be made by the person's legal representative on his or her behalf. According to art 32 of the general rules on the application of the law, in situations like these cases, the law in the country where habitual residence exists, that is Japanese law, is applied. In Japanese law, the legal representatives of the child are his or her legal parents. However, with respect to an illegitimate child, the legal representative is his or her mother in principle. In these cases, the mothers who had parental rights and duties made notifications to the Minister of Justice for the children to acquire Japanese nationality (one was in 2003, the other was in 2005), but, because the requirement of marriage under the former provision of art 3 was not satisfied, the Minister of Justice rejected the notifications. So, they filed a petition to confirm the acquisition of Japanese nationality. The Tokyo District Court in both cases permitted the plaintiff's claim.[4] Contrary to these decisions, the Tokyo High Court rejected the claims to acquire nationality.[5]

In 2008, the Supreme Court held that:

(1) because art 3(1) under the Nationality Law discriminated between the child who is simply acknowledged and the child who is acknowledged by married parents, this discrimination was contrary to the equal protection provided under art 14 of the Japanese Constitution;[6] and

(2) the child born to a father who was a Japanese national and a mother who was not a Japanese national, acknowledged after the time of birth by the father, may acquire Japanese nationality by making a notification to the Minister of Justice.[7]

The Supreme Court decided that, in view of the situation, recent diversification of family life including marital life and parent–child relationships and the increase of personal exchanges between Japan and other countries,[8] there was no rational reason for this discrimination.

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4 One was the decision of the Tokyo District Court dated 13 April 2005, in *Hanrei Times*, No 1175, p 106. The other was the decision of the Tokyo District Court dated 29 March 2006, in *Hanrei Times*, No 1221, p 87.

5 One was the decision of the Tokyo High Court dated 28 February 2006, in *Kasaigeppou*, No 58-6, p 47. The other was the decision of the Tokyo High Court dated 27 February 2007, unreported.

6 Article 14(1) of the Japanese Constitution provides that 'all people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin'.

7 The decision of the Supreme Court dated 4 June 2008, in *Minsyu*, No 62-6, p 1367. In this decision, apart from the majority opinion (with four separate concurring opinions), there were two separate dissenting opinions.

8 Unlike the majority opinion, the dissenting opinion by three judges indicated that, according

III THE NEW NATIONALITY LAW[9]

Following the decision of the Supreme Court, the new art 3(1) provides that:

> ' . . . a child (excluding a child who is already a Japanese national) under twenty years of age may acquire Japanese nationality by making notification to the Minister of Justice, if the father or mother who has acknowledged was, at the time of the child's birth, a Japanese national and such father or mother is presently a Japanese national or was, at the time of his or her death, a Japanese national.'

Article 779 of the Japanese Civil Code provides that a father or a mother may acknowledge an illegitimate child. But, because the Supreme Court in 1962 held that, in principle, the legal mother–child relationship was determined by the fact of delivery,[10] the new art 3(1) applies in practice in the case of acknowledgement after the time of the child's birth by a father who is a Japanese national.

The applicable law under the General Rule on the Application of the Law determines whether or not an acknowledgment is effective. In the case of an acknowledgement by a father who is a Japanese national, under the Japanese Civil Code, he needs to have a biological relationship with the child. If there is no biological tie between the father and the child, making notification to the Minister of Justice is unlawful under the new art 3(1).

To prevent false acknowledgement and wrong notification, the new Nationality Law has a penalty clause. For the purpose of the illegal acquisition of Japanese nationality, a person who is not the biological father of a child whom the person acknowledges and who makes a notification to the Minister of Justice shall be punished by imprisonment of not more than one year or a fine of 200,000 yen or less.[11]

In relation to securing the truth of an acknowledgement, the Diet discussed the introduction of the DNA test into the acknowledgement procedure. But, the DNA test was not incorporated into this reform, because under the Civil Code the legal parent–child relationship is not based only on the biological tie.[12] If the DNA test had been introduced into the Nationality Law, the legal system of parent–child relationships under the Civil Code would have become confused.

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to the statistics for about 20 years, the increase in the number of live births of children whose father was a Japanese national and mother was not a Japanese national was small.

9 See Tomoko Sawamura 'Comment on the Reform of Nationality Law' 2009 *Koseki,* No 825, p 1; Minoru Akiyama 'The Outline on the Reform of Nationality Law' 2009 *Jurist*, No 1374, p 2.

10 The decision of the Supreme Court dated 27 April 1962, in *Minsyu*, No 16–7, p 1247.

11 Article 20 was added recently as a provision of the Nationality Law.

12 Under the Civil Code, there is a presumption of legitimacy. Article 772 of the Code provides that a child conceived by a wife during marriage shall be presumed to be a child of her husband. As to the illegitimate child, a father or a mother may acknowledge the child (art 779 of the Code). The court determines the legal parent–child relationship through different factors, e g stability of the family, welfare of the child, biological tie, substantial relationship.

In this reform of the Nationality Law, the aim was to treat the legitimate child and the illegitimate child equally in the case of the acquisition of nationality. The discrimination arose from the requirement of the parents' marriage being crucial for the child and this was against Arts 2 and 7 of the Convention on the Rights of the Child. Japan ratified the Convention on the Rights of the Child in 1994. It was right that the Supreme Court held in 2008 that the former art 3 of the Nationality Law was unconstitutional.

IV CONCLUSION

In 1996, the Council of the Ministry of Justice announced the interim law reform draft on the Civil Code but the Civil Code has not yet been reformed. The draft included the equalisation of the legitimate child and the illegitimate child under the inheritance law. The new Nationality Law may influence the discussion of the reform of the Civil Code. Under the Nationality Law, the notions of the legitimate child and the illegitimate child are based on the Civil Code. We should at least review these terms.

Malawi

SOCIO-LEGAL APPROACHES TO CHILDREN'S RIGHTS UNDER THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD: A DISCUSSION OF METHODOLOGY

Thoko Kaime[*]

Résumé

Le présent texte fait état des travaux de l'auteur visant à analyser les dispositions de la Charte africaine des droits et du bien-être des enfants tant au regard du droit international que du point de vue anthropologique. Il explique les choix méthodologique et leur justification. L'auteur conclut par une évaluation du rôle des enfants dans la recherche empirique et il examine les points de rencontre entre l'approche des droits de l'enfant et celle de la recherche socio-juridique. Le travail de terrain dans le cadre de la recherche empirique dont il est question ici, a été réalisé au Malawi.

I INTRODUCTION

After almost a decade of preparatory work the United Nations (UN) adopted in 1989 the Convention on the Rights of the Child ('the Convention' or CRC).[1] Amongst the human rights instruments that make up the UN human rights system, the CRC stands unique. Never before has a human rights instrument promoted under the auspices of the UN had so many states participate at the signing ceremony.[2] Never before has a human rights treaty gone into force within months after the UN General Assembly had adopted it;[3] and never before has a human rights instrument received near-universal ratification.[4] This overwhelming normative consensus affirmed a shared and welcome global

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1 Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res 44/25 (1989), UN Doc A/RES/44/25 (1989). Text also available in (1989) 28 *International Legal Materials* 1448 and (1990) 29 *International Legal Materials* 1340.

2 A record 60 states participated in the signing ceremony of the CRC. See C Price Cohen 'The rights of the child: Implications for change in the care and protection of refugee children' (1996) 3 *International Journal of Refugee Law* 675 at 676.

3 The CRC went into force less than 9 months after its adoption. See n 1 above.

4 The CRC has been ratified by every state in the world except Somalia and the United States of

recognition of the rights of the child.[5] It indicated increasing support and acceptance by the world community of the need to promote and protect the rights of the child.[6] Furthermore, the adoption of the Convention represents an acceptance on the part of the world community that the rights of certain categories of people are best protected in a single instrument designed for that purpose.[7]

Significantly though, the universal ratification of the CRC has not precluded attempts to temper the implementation of children's rights with the particular sociocultural experiences of the diverse societies which have subscribed to its normative framework.[8] The call for this 'culturalisation' has been justified by reference to the economic, social, cultural and political diversity that characterises the community of states.[9] There are regions with varying religious beliefs, social systems and economic organisation. These factors make it impossible for states, and even communities within a single state, to have a common conception and understanding of the normative prescriptions set out by the CRC.[10] In this regard, it has been argued that an approach which is sympathetic to these differences infuses cultural legitimacy and therefore efficacy to the whole enterprise of children's rights.[11]

In the context of Africa, the desire for the culturalisation of children's rights led to calls for a regime of children's rights not only founded upon the CRC but also reflective of and informed by African cultural values and heritage.[12] This approach decries the trumping of traditional African practices in favour of practices and ideologies perceived or described as non-African. Instead, it is

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America. See Office of the United Nations High Commissioner for Human Rights 'Status of ratifications of the principal international human rights treaties' available at www.unhchr.ch/pdf/report.pdf (accessed 12 June 2009).

5 B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' in P Alston (ed) *Best interests of the child: Reconciling culture and human rights* (Oxford: Oxford University Press, 1994) 80 at 82.

6 B Rwezaura 'Law, culture and children's rights in eastern and southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in eastern and southern Africa* (Aldershot, Brookfield USA, Singapore, Sydney, Dartmouth: Ashgate, 1998) at 289; MS Pais 'A human rights conceptual framework for UNICEF' (1999) *Innocenti essays* no 9 at p 5.

7 B Rwezaura n 5 above at 82.

8 See A Armstrong et al 'Towards a cultural understanding of the interplay between children's and women's rights: An eastern and southern African perspective' (1995) 3 *International Journal of Children's Rights* 333–368 where the authors 'investigate and develop a framework within which the applicability of certain key provisions of the [CRC] may be analysed within the cultural context of eastern and southern Africa'. See also Rwezaura n 6 above; B Ibhawoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *Human Rights Quarterly* 838 at 839.

9 See B Rwezaura n 5 above at 83 noting that 'the international community is very diverse. It is neither homogeneous politically, culturally, nor economically'. See also F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (Landsdowne: Juta, 2000) 214 at 218 noting that the CRC failed to address some issues which were particular for Africa due to the need for consensus.

10 B Rwezaura n 5 above at 83.

11 See generally the essays collected in P Alston (ed) *Best interests of the child: Reconciling culture and human rights* (Oxford: Oxford University Press, 1994).

12 See F Viljoen n 9 above at 218–219.

suggested that inspiration be sought from African cultural heritage, historical background and the values of African civilisation.

It is this ideological and philosophical posturing that motivated the adoption of the African Charter on the Rights and Welfare of the Child ('the African Children's Charter' or 'the Charter')[13] by African states. The Charter, which so far has been ratified by 39 out of Africa's 54 states,[14] is intended to take into account the economic, social, political, cultural and historical experience of African children[15] and thereby provide a distinctively African framework for the protection and promotion of children's rights.[16] However, the promulgation of a list of rules on the rights and welfare of the African child is only the first step. In order to ensure that African boys and girls across the continent enjoy the Charter's prescriptions, it is important to ensure that those particular rights enjoy sufficient cultural support in the communities within which the children live. Consequently, it is worthwhile to develop analyses that examine the translation of these prescriptions from paper into the lived reality of African children. I attempted to undertake such an analysis during my doctoral study[17] and in this chapter, I share the methodological approaches that I adopted.

II RESEARCHING CHILDREN'S RIGHTS UNDER THE AFRICAN CHILDREN'S CHARTER

The preamble of the African Children's Charter makes two important statements regarding the instrument's conception of the rights and welfare of the child. First, it identifies the Charter's foundation as the principles of international law on the rights and welfare of the child as contained in the declarations, conventions and other instruments of the Organisation of African Unity and the United Nations.[18] Significantly, the Charter specifically mentions the CRC and the Declaration on the Rights and Welfare of the African Child ('the African Children's Declaration').[19] Secondly, the Charter charges that the concept of the rights and welfare of the child should be inspired and characterised by the virtues of African cultural heritage, historical background

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13 African Charter on the Rights and Welfare of the Child, adopted July 1990 (entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990).

14 African Union 'List of countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child' available at www.africa-union.org/root/AU/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf (accessed on 4 April 2009).

15 See African Children's Charter, preamble para 3.

16 See African Children's Charter, preamble para 6, which declares that the virtues of African cultural heritage, historical background and the values of African civilisation should inspire and characterise the conception of the rights and welfare of the child.

17 *The promotion and protection of the rights and welfare of the child in Africa: An examination of the contribution of the African Charter on the Rights and Welfare of the Child,* a dissertation for the award of PhD degree (University of London, 2007).

18 African Children's Charter, preamble para 8.

19 Declaration on the Rights and Welfare of the African Child AHG/St 4 (XVI) Rev 1 1979. Text also available at www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg36.doc (accessed 12 October 2003).

and the values of the African civilisation. In other words, the rights and welfare of the child, which are derived from universal sources, must be alive to the reality of African children. In order to pay sufficient regard to this caveat, I combined library-based international law methods which focus on the texts of the documents with fieldwork-based socio-legal methods which enabled me to sketch a glimpse of the lived reality of African children in my analysis. The rest of this article outlines how I set about utilising these respective methodologies in my investigation into the cultural legitimacy of the African Children's Charter.

III LIBRARY-BASED METHODOLOGY

Recognising that the African Children's Charter is a derivative instrument,[20] the principal global human rights treaties, namely the International Covenant on Civil and Political Rights,[21] the International Covenant on Economic, Social and Cultural Rights,[22] the African Charter on Human and Peoples' Rights,[23] the European Convention on Human Rights,[24] and the American Convention on Human Rights,[25] along with other human rights documents and international instruments that refer to the rights of children and the principal themes of the African Children's Charter such as the Universal Declaration of Human Rights[26] and other declarations of the United Nations General Assembly serve as the main sources for elaborating the main themes of the Charter. In this regard, the African Charter is particularly useful because it is similar in conception and ideological posturing to the African Children's Charter.

The monitoring mechanisms of the human rights treaties referred to above are entrusted in the hands of various committees and tribunals.[27] These committees have, amongst other competencies, the duty to elaborate the

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[20] By this, it is meant that the principles in the Charter were sourced or developed from principles developed in other instruments.

[21] International Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976) GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.

[22] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966 (entered into force 3 January 1976) GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3.

[23] African Charter on Human and Peoples' Rights, adopted 27 June 1981 (entered into force 21 October 2001), OAU Doc CAB/LEG/67/3 rev 5, (1982) 21 ILM 58.

[24] European Convention on Human Rights, adopted by the Council of Europe on 4 November 1950 (entered into force on 3 September 1953) (ETS 5), 213 UNTS 222, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

[25] American Convention on Human Rights, adopted on 22 November 1969 (entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[26] Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948).

[27] See generally P Alston and J Crawford (eds) *The future of UN human rights treaty monitoring* (Cambridge: Cambridge University Press, 2000).

content of the instruments either through the examination of state reports or the consideration of complaints from individuals or other states parties or through the promulgation of general comments.[28] Their pronouncements serve as a rich and authoritative source of interpretation of the substantive provisions of the instruments.[29] Such pronouncements, therefore, provide a useful source for elaborating the provisions of the African Children's Charter.[30] Wherever relevant, particular attention is paid to the opinion of the African Committee on the Rights and Welfare of the Child, the body mandated to oversee the implementation of the African Children's Charter.[31] Other useful committees are the African Commission on Human and Peoples' Rights which is mandated to oversee the implementation of the African Charter,[32] the Committee on the Rights of the Child which supervises the CRC,[33] as well as the Committee on Elimination of Discrimination against Women.[34]

Domestic standards are another vital source for elaborating the rights of the child. International and domestic standards exist in a complementary relationship with the jurisprudential interdevelopment of these legal systems. Each system assists in refining the other systems and in shaping the ultimate direction of the rights of the child. The different approaches adopted by domestic legal systems also provide a useful cross-fertilisation between the international and domestic systems, thereby amplifying the manner in which the rights of the child may best be secured through the use of comparative methods.[35]

In the natural and medical sciences, progress has largely been due to extensive exchange of discoveries and opinions. This exchange happens as a matter of course so that its impact on scientific discovery is often taken for granted. The process is so entrenched that one does not encounter concepts such as Malawian chemistry or Saharawi biology. The same, however, may not be said of law. Juristic thought and legal development have attempted, with considerable success, to compartmentalise law within particular legal traditions or jurisdictions. It is, thus, correct to speak of English law or Malawian law

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28 See M Scheinin 'International mechanisms and procedures for implementation' in R Hanski and M Suksi (eds) *An introduction to the international protection of human rights: A textbook* (Turku, Abo: Institute for Human Rights, Abo Akademi University, 2nd revised edn, 2000) at 429.

29 See generally I Boerefijn 'The impact of the work of the UN treaty bodies on national courts and tribunals' (2000) available at web.abo.fi/instut/imr/research/seminars/ILA/Boerefijn.doc (accessed 12 June 2009).

30 See African Children's Charter, art 46.

31 See African Children's Charter, arts 42–45. The Committee is yet to have an official publication. See A Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child (2002) *African Human Rights Law Journal* 320–326.

32 See African Charter, art 45. See also African Commission on Human and Peoples' Rights *Annual Activity Reports* (1986–2003).

33 See CRC, Arts 43–45. See also CRC, *General comments* (2001–2003).

34 See 'Committee on the Elimination of Discrimination against Women' at www.un.org/womenwatch/daw/cedaw/committee.htm (accessed 4 April 2009).

35 LM Hammer *The international human right to freedom of conscience: An approach to its application and development*, PhD thesis (University of London, 1997) at 27.

even when the particular legal rules in question may be dealing with identical legal problems. This posturing of legal thought is constraining and serves to limit the range of solutions that may be available for the resolution of issues.[36]

Comparative law attempts to resolve this problem and increase the range of options available in the resolution of legal issues. It offers a method of comparing different legal systems' resolution of legal problems and inquiring whether one or the other legal system's solutions are more efficacious. If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules, and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that comparative law methods provide a much richer range of model solutions than a study which is devoted to a single legal tradition or system.[37]

In the context of my study, comparative law methods were adopted wherever possible to see how best the cultural legitimacy of children's rights may be enhanced within African societies. It is my firm belief that effective answers to the questions posed by the study could not come from one particular legal tradition but must instead be garnered from an eclectic mix of solutions straddling African indigenous law, international human rights law, domestic legislation and other such sources. This method was also in line with the philosophical approach of the study, which encouraged cross-cultural discourse in the enhancement of cultural legitimacy for children's rights in Africa. Further evidence that both international and domestic approaches to securing children's rights are viable sources of interpretation may be sourced from Art 38 of the Statute of the International Court of Justice ('the ICJ Statute')[38] and Art 46 of the African Children's Charter. Article 38(1) of the ICJ Statute does not appear to create a hierarchy of sources between international sources of law such as conventions and general principles of law as recognised by civilised nations. Similarly, Art 46 of the African Children's Charter does not create any hierarchical categories by its use of the term 'international law on human rights'. While judicial decisions are a subsidiary means for determining international law, there is no indication that they should be accorded secondary status, particularly because the individual's ability to raise an international human rights cause of action before a judicial tribunal develops within the domestic setting.[39]

Finally, the concepts and standards that are embodied in the African Children's Charter, the CRC, and other international instruments have been investigated, analysed and elucidated by many different authors in a variety of contexts and from wide-ranging perspectives. These writings constitute an important

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36 K Zweigert and H Kotz *Introduction to comparative law* (Oxford: Clarendon Press, 2nd revised edn, 1987) at 14–15. See also P de Cruz *Comparative law in a changing world* (London: Cavendish Publishing Limited 1995) at 1–29.

37 Ibid.

38 Statute of the International Court of Justice, adopted 26 June 1945, 59 Stat. 1055, 3 Bevans 1179.

39 M Scheinin n 28 above at 429.

resource for understanding and elaborating the principles in the African Children's Charter. Consequently, use is made of relevant books and journal articles on human rights generally, children's rights as well as legal anthropology.

IV FIELDWORK METHODOLOGY

Children's rights are not some objectively defined truths that exist out there or that are written down in international and regional children's rights documents. Rather, they consist of, reflect and are influenced by the daily practices of peoples within a variety of contexts. A socio-legal study, such as the one I sought to undertake, could not, therefore, afford to simply lay out and analyse the legal framework for the rights of the child but had also to attempt to present the views of the children themselves as well as those who play significant roles in their upbringing.

With this observation in mind, I set out to sketch a work plan that would enable me to conduct fieldwork within a context where the Charter's ideas could be investigated and tested. The initial stages of the work plan involved attending classes on social research methodology at the School of Oriental and African Studies (SOAS) as well at University College London. After eight methodology lectures, I still had no clear idea on how fieldwork was conducted. I, therefore, started scouring written fieldwork-based theses in libraries at the SOAS, the Institute of Advanced Legal Studies and the University of London central library. I found a wealth of helpful material on planning, data collection techniques, data analysis and presentation that helped set me on my way towards drawing up my own research plans. In this regard, I found Effa Okupa's ethnological study on the Himba law and child-rearing practices inspiring.[40] Although the study is not a treatise on how to conduct field study, it confirmed that there were alternative methods of studying children's rights other than through poring over legal texts in the SOAS library. Spurred on by the mistaken belief that I could replicate the sense of authenticity that emanated from Okupa's study, I started envisioning the field and asking myself the 'what', 'where', 'when' and 'how' questions.

Doing this exercise in the cold winter days of London was a particularly arduous task since it is so far removed from the locations and categories of persons involved in the promotion and protection of the rights and welfare of the African child. It therefore took some time before I came up with a presentable research plan covering what I considered the basic elements of the fieldwork. I drew up a list of questions that I wanted to investigate in order to test the cultural legitimacy of the African Children's Charter; I decided that I would do the fieldwork in Malawi between July and December 2004; and more importantly drew up a plan on how I would go about conducting the research.

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[40] E Okupa *Ethno-jurisprudence of children's rights: A study of the Himba of Namibia*, PhD thesis (University of London, 1995).

On paper, the research plan was flawless. In reality, fieldwork proved a little more difficult and a little less organised than neat notes presented to my supervisor and the faculty for approval of fieldwork. In the discussion that follows, I briefly outline my plans and how these panned out during the fieldwork.

(a) Getting started

After appraising myself on various theoretical models on social research methods, I began drawing up the research plan by drafting a set of questions that I intended to administer once the fieldwork got underway. Drawing up these questions required drilling down to the core of the thesis in order to isolate the issues that I would need to investigate during the course of the fieldwork. However, after only two terms of doctoral study, the majority of which time was spent in research method seminars, there was not really much thesis to go on. Isolating key elements to focus on during fieldwork was therefore not unlike identifying the beef in Ilford High Road 'special' beef samoosas. Consequently, this initial formulation of questions was frequently amended before the fieldwork commenced as the central issues in the thesis became clearer. During the fieldwork itself, these questions were refined further as the work progressed as key interviewees made suggestions on what questions I needed to ask or suggested the proper manner that certain questions should be posed.

Having decided on the general scheme of questions that I would be investigating during the fieldwork, I set about identifying the supplies and equipment that would be required when the fieldwork commenced. Due to funding requirements, final budgets had to be submitted before the trip was made. Consequently, difficult questions like the number of batteries I was going to need during 6 months of fieldwork became very relevant. Before long I was busy trawling through eBay, Amazon, Tottenham Court Road, and of course Ilford High Street; looking for quotations on important supplies like paper, pen, tapes, sticker pads, highlighters, note books, data cards, post-its and other essentials. I made reservations for audio recording equipment from the Audio-Visual Department at the SOAS. I arranged medical insurance and stocked up on over-the-counter medicines for common ailments. I also ensured that my access to the SOAS library's online materials would be live once I left London.

A few days before heading off, I had a final meeting with my supervisor. She asked me about my preparations. She asked questions about my substantive as well as technical arrangements. Even though I had told her that I had obtained recording equipment from the SOAS, she still insisted on giving me her own voice recorder. The significance of this gesture was to become clear merely 2 days into the fieldwork when I discovered the SOAS recorder was only recording voices in slow motion and that the sophisticated microphone with which the recorder was supplied was depleting batteries at a rate that required

me to have taken a small van of batteries on the fieldwork. The secondary voice recorder thus became the only recorder that I used during the fieldwork.

(b) Choosing the research site

Having decided on the scope of the study and made a list of the equipment I needed, I set about identifying a suitable site where the research could be undertaken. Since, the object of the field study was to examine how the central themes of the African Children's Charter had manifested themselves or failed so to do within an African traditional setting and thus test the African Children's Charter's claim to a characteristically Afro-cultural posture in its conception, I decided that the study would have to be conducted within an African setting. In particular, the field study would determine how and by whom the rights of the child are implemented and protected within such traditional settings. In a nutshell, the fieldwork aimed to map out the congruence between the Charter and practices on the ground and determine whether culturally appropriate ways for protecting the rights and welfare of children have manifested themselves.

In choosing a research site, the researcher must be aware of several dynamics which may affect the output of the research. These dynamics include the possibility of entry; the probability that a rich mix of the processes, people, programmes, interests and/or structures that may be part of the question will be present; the possibility of the researcher devising an appropriate role to maintain continuity of presence; and that the data quality and credibility of the study are reasonably assured by avoiding poor sampling decisions.[41] In this case, I chose to conduct the study in Malawi because as a Malawian citizen, I spoke the language and understood, or thought I did, the attitudes and cultural framework within which I would be operating. More importantly, however, the choice was made because most of Malawi's population (82%) lives in rural areas where the majority of people are still influenced and guided by African 'tradition, values and civilisation' to borrow from the language of the African Children's Charter. Consequently, the questions and issues that the fieldwork sought to investigate were sure to present themselves for investigation.

In view of these considerations, I decided to conduct the study at Mpondasi village near Lake Malawi in Mangochi District in southern Malawi. I did not have a prior research connection with Mpondasi village. However, I knew a contact who worked for a Catholic non-governmental organisation that run a feeding centre in the village. I had met the contact at a conference organised by Southern Africa Human Rights Trust in Harare in Zimbabwe many months before and we had kept in touch. He made arrangements for meeting the village elders and other key people who would help me get going with the study.

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[41] C Marshall and GB Rossman *Designing qualitative research* (Newbury Park, London: Sage publications, 1989) at 54; AW Bentzon, A Hellum, J Stewart, W Ncube and T Agersnap *Pursuing grounded theory in law: South-North experiences in developing women's law* (Oslo: Mond Books, 1998) at 132–119.

However, when I got to Malawi, I found out that there was an outbreak of cholera at Mpondasi and adjacent villages. Due to time constraints, it was not possible to wait for the situation to stabilise so that I could start my research. Consequently, a site that had been mooted as a possible research site became *the* research site. This alternative area was Magombo village in the Thyolo District of southern Malawi. I had worked as an assistant on a research project on girls' educational achievement in Magombo village in 1999. I had considered Magombo village as a possible research site but the arrangements made by the colleague in Mangochi seemed sufficient and thus the making of alternative arrangements seemed pointless. However, because of the new situation, I had to adapt my research design to the new site. I contacted Mr Musiyapo, a teacher at Thyolo Secondary School with whom I had made an acquaintance during the 1999 research. He suggested that I extend the investigation to cover two villages, Magombo and Ndalama, in order to increase the catchment area for the research. These two villages lie adjacent to each other and both straddle the *boma*[42] or local government administrative institutions as well as the outlying clusters of farming villages thereby possessing distinctively traditional characteristics spiced up with quasi-urban traits. The people of these villages are predominantly Lomwe[43] but largely converse in *Chichewa*, which is Malawi's *lingua franca*. Intermarriage, a by-product of the labour patterns prevalent in the tea-growing estates of southern Malawi, has resulted in the incorporation of a significant number of Yao[44] and Tumbuka[45] people into the Lomwe social structure. Due to the pervasiveness of Lomwe traditions and customs and of the need to gain social acceptance, these *obwera* or 'outsiders' have become more and more 'Lomwe' in their cultural and ancestral observations. However, the traffic has not just flowed one way but these *obwera* have also had quite a significant impact on Lomwe culture and custom. For example, whilst it is normal for the Yao to keep young men who are undergoing initiation in the bush until the rains started, the usual Lomwe practice was to keep them there only until the instruction was complete. However, in Magombo village, the 'first rains rule' has gradually crept in because according to Village Head Magombo 'the

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42 'Boma' is a Kiswahili word meaning 'enclosure' and was used during colonial times to denote administrative offices or outposts of the British overseas military administration. The name remained in common use after decolonisation and denotes, amongst other things, the principal government offices in every district. See PJ Kishindo 'Evolution of political terminology in *chichewa* and the changing political culture in Malawi' (2000) 9 *Nordic Journal of African Studies* 20 at 25–26.

43 The Lomwe are one of the four largest ethnic groups living in Malawi. They are located primarily in the southeast parts of Malawi with the largest concentration being in Mulanje and Thyolo district. Others live in Chiradzulu, Zomba and Liwonde. Smaller numbers are scattered throughout the southern region of Malawi. The Lomwe are originally from what is now Mozambique to the east and south west of Malawi. Even more Lomwe continue to live in Mozambique than in Malawi. However, the migration of large numbers of Lomwe to Malawi had already taken place before the missionaries, white traders and colonialists arrived in the latter part of the nineteenth century. There was a large influx of Lomwe into Malawi in the 1930s because of tribal wars in Mozambique.

44 See generally A Woods and ME Page *The Creation of Modern Malawi* (Boulder, Colorado: Westview Press, 2000).

45 Ibid.

settlers had become so settled that they started taking a leading part in initiation ceremonies'. When asked to explain the recruitment of *obwera* into the initiation process, the Village Head rhetorically asked: 'Is this not their home?'. Consequently, the composition of the village peoples provides a rich diversity from which to detail the custom and practice relating to the rights and welfare of the child.

Furthermore, the proximity of the villages to government and other social institutions meant that there were processes and structures which made it easier to access possible interviewees.[46] For example, within the catchment area of the villages there were eight Christian denominations, a mosque, a police station, a local magistrate's court, two primary schools, one government-funded secondary school, two private secondary schools, a hospital and a market. All of these institutions provided opportunities for interaction and investigating questions relating to the rights and welfare of the child. There were also other less institutional structures that served to present opportunities for interaction such as the maize mill, the barbershop, the *masese* or opaque beer garden and the football ground.

This mix of diverse people, structures and institutions ensured that I had a rich source of information from which I could draw upon in my investigations. The structure of social relationships within families and between different families as well as the interaction between the state, religion, traditional authority and individuals, to name but a few elements, created the possibility of observing authentic interaction as it happened. Additionally, the significantly large pool of possible study situations meant it was less complicated to identify relevant encounters for assessing aspects of the rights and welfare of children.

Thus, although Magombo and Ndalama villages did not feature in my initial plans, the two villages provided the general environment envisaged by the research plan. The flexibility and generality offered by the research design ensured that the fieldwork was not derailed by the unavailability of one research site.

(c) Gaining access

Having decided on the location, I had to make arrangements relating to access. In order to facilitate and augment the effectiveness of the fieldwork, I planned to live within in Magombo village for the duration of the research. This arrangement obviously raised questions of access because, in Malawi, one may not go out into a village and start asking questions without the knowledge and forbearance of the village fathers. Thus, even where one gives notice of an intention to conduct interviews in the village, the elders may still withhold consent where they consider the subject matter disruptive. The issue of children's rights is heavily contested in Malawian traditional settings and is sure

[46] I have not used the usual anthropologists' term 'informant' as the Lomwe equivalent of this word carries with it a negative connotation meaning 'one who reports others to authorities'.

to raise disputation. I had made arrangements for access into the Mpondasi village community through my colleague but no similar arrangements had been made for the two villages which I had substituted for the original research site. In this regard, I solicited the help of my old acquaintance, Mr Musiyapo, who sought the consent of the village heads just days before I travelled to the research site. Mr Musiyapo also explained to the elders what the research was about and what it sought to achieve and the role that they as elders were going play in the whole scheme. Consequently, when I arrived at the village my visit was anticipated and I was received warmly. The intermediary had arranged a meeting with Village Heads Ndalama and Magombo and they promptly gave me licence to roam freely within their respective domains. My accommodation was arranged at Mr Musiyapo's house and during the early days of my study, Mr Musiyapo was virtually my shadow, showing me places of interest and advising which short cuts to avoid; and from which lady to buy my favourite snack: raw groundnuts.

(d) Determining the pool of research participants

Due to the nature of qualitative research, my research plan did not prescribe numbers of participants that would be involved in the fieldwork. Instead, the general guideline was that the research would stop when the central themes were saturated or when time ran out. Consequently, having established access arrangements, the study relied on snowball sampling to make initial contact with a small group of persons who were relevant to the research topic and then use these to establish contacts with others.[47] These included teachers, traders at the market, religious officials and community workers. This snowball sampling technique was supplemented with theoretical sampling described by Glaser and Strauss as:[48]

> '[t]he process of data collection for generating theory whereby the analyst jointly collects, codes, and analyses [her or] his data and decides what data to collect next and where to find them, in order to develop [her or] his theory as it emerges. The process of data collection is controlled by the emerging theory, whether substantive or formal.'

This entails that the process of participant location in the field study is ongoing rather than a distinct and single stage, as may be the case, for example, in quantitative data collection methods.[49] Moreover, it is important to realise that it is not just people who were the objects of this study, but rather, the data gathering was 'driven by concepts derived from evolving theory and based on

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47 A Bryman 'Global Disney' in PT Taylor and D Slater (eds) *The American century* (Oxford: Blackwell, 1999); A Bryman *Social research methods* (Oxford: Oxford University Press, 2nd edn, 2001) at 98.

48 BG Glaser and AL Strauss *The discovery of grounded theory: Strategies for qualitative research* (Chicago: Aldine Press, 1967) at 45.

49 Eg statistical or probability sampling which is normally 'done to obtain accurate evidence on distributions of population among categories to be used in descriptions and verifications'. Ibid at 62.

the concept of "making comparisons" whose purpose is to go to places, people or events that maximised the opportunities to discover variations among concepts and to identify categories in terms of their properties and dimensions'.[50]

This component of the research is the most important but also the most difficult. It required seizing opportunities for conversations and creating some where none were available. The research pool initially focused on some key individuals but as the fieldwork got into its stride the focus shifted to children and their families. Since this study is about children, I planned to put them at the centre of fieldwork activities. However, whereas establishing conversation opportunities with adults was not so difficult, the situation was somewhat different with children. In terms of creating conversation opportunities with children from various backgrounds, ages and genders, the most efficient way of contacting them was through their respective families, schools or churches. Additionally, gaining access to children within their families or other social institutions meant gaining the consent of the parents or guardians first.

Consequently, including children within the intended research pool meant dealing with the gatekeepers. Once permission was granted to talk with children, I would then as a matter of procedure advise them on their right to refuse to take part, to stop the interview at any time, and to request that the recording equipment be stopped. However, it was only in a handful of cases where children elected not to answer particular questions. My impression was that once consent was given by the person whom the children considered to be in charge, they somehow felt bound to participate. Conversely, where consent was withheld by the gatekeeper, the child had no right to override that veto. Thus, the participation of children in this study highlighted issues that drive children's rights discourse such as those concerning agency, choice and autonomy.[51]

In total, I held one–to–one interviews with 47 children and 56 adults. Of the 47 children, 32 were boys; and of the 56 adults, 41 were women; 35 of the children were in the age range between 11 and 18 whilst the rest were between 6 and 10. Further to that, I recorded 11 conversations with families which I defined for my notes as group conversations with either a mother *and* a father or each one of these or both *and* a child or children. I also maintained two focus groups at Thyolo Secondary School and Mpinji Community Day Secondary School with 8 and 11 participants respectively. I recorded eight sessions with each of the focus groups.

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[50] A Strauss and JM Corbin *Basics of qualitative research: Techniques and procedures for discovering grounded theory* (Thousand Oaks, California: Sage Publications, 1998) at 20.

[51] See generally C Pole, P Mizen and A Bolton 'Realising children's agency in research: Partners and participants?' (1999) 2 *International Journal of Social Research Methodology* 39; C Manga Fombad 'Protecting children's rights in social science research in Botswana: Some ethical and legal dilemmas' (2005) 19 *International Journal of Law, Policy and the Family* 102 esp at 106–109. On children's agency and autonomy, see J Eekelaar 'The interests of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 *International Journal of Law and the Family* 42 at 49–57.

(e) Data capture methods

In view of the fact that the study sought to learn from the lived reality of the peoples of Malawi, it was ethnographical in nature.[52] Since 'ethnography involves an ongoing attempt to place specific encounters, events and understandings into a fuller, more meaningful context',[53] the study was conducted through a variety of methods, including direct observation, participant observation, and also by way of semi-structured interviewing.[54] These data collection techniques were used to gather information on child upbringing in Lomwe society, what it meant to be a child, the concept of human rights generally, children's rights, African traditional culture and beliefs and most importantly on the relevance and cultural legitimacy of children's rights within traditional society. Questions were also asked on the role of law in society and what distinguished law from general culture. In particular, a set of questions addressed issues such as the equality of children, maintenance, inheritance rights, marriage, participation of children in matters that affect their lives, forced marriages, child marriages, circumcision rites, duties of children and other issues. Questions were also asked regarding the elimination of traditional practices that impede the realisation of children's rights as well as the prospects, processes and procedures relating to the enhancement of cultural legitimacy for children's rights within the community. Specifically, I enquired into the operations of and relationship between the institutions that were used for maintaining law and order within the community and peace within and between families. I also attempted to find out whether these institutions could be employed to improve the cultural legitimacy of children's rights.

In particular, the direct observation involved the passive observation of practices, proceedings, events and social functions which relate to children and their upbringing. Observing the subjects of the study as they interact with their community, their families, traditional authority or state officialdom helped reveal why certain events occur and what influenced the behaviour and attitudes of the community being investigated.[55]

Devising a fairly inconspicuous role was difficult in the beginning, with groups of young children always tailing me wishing to be taped by *mnyamata wa kaseti* or 'the boy with the recorder'. However, as time went on, I became boring and ceased being a subject of harmless curiosity. I was able to gain enough trust that my presence in itself was no longer a source of interesting and animated conversation. The observation was carried out at diverse places and encounters such as funerals, a wedding, prayer meetings, football matches and the usual village meeting at the chiefs' compound. All of these events presented a rich

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52 A Bryman *Social research methods* n 47 above at 290–291; B Tedlock 'Ethnography and ethnographic representation' in NK Denzin and YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, London, New Delhi: Sage Publications, 2000) at 455–456.

53 B Tedlock, n 52 above at 455.

54 AW Bentzon et al n 41 above at 195–209. Some of the icebreakers and general questions that were used during the fieldwork are in the appendices to this thesis.

55 Ibid at 195.

and interesting source of data collection. For example, funerals, of which I attended four, are great places for sober conversation and, of course, hearing the latest village gossip. When there has been a bereavement, the customary requirement is that members of the community congregate at the deceased's home to 'help the family members cry'. These gatherings go on day and night until burial. When night descends, the women move inside the house or the compound at the back of the house whilst the men are left to sit around fires that are lit outside the house. If the deceased is a Christian, which is usually the case in Magombo and Ndalama villages, the men are expected to sing hymns until dawn. However, the singing often gives way to muted conversation as people become tired with singing. The muted conversation gives way to loud conversation tinged with occasional bouts of laughter which again gives way to singing. Some of the topics tackled during these conversations included national politics and why all politicians are thieves; the importance of marrying an ugly girl; advice on how to deny responsibility for a pregnancy; a presentation on how lawyers undertake special courses in deceit; the importance of staying in school; the importance of staying unmarried for life; the importance of respect towards elders; an anecdote on how being rich makes one miserable. I found my 'funeral conversations' profoundly interesting because unlike my football or wedding conversations, they were not focused on a single subject such as the football match or the wedding. They were so unstructured, so spontaneous and so thought-provoking that I was tempted to ask my hosts to always inform me of the venue of the next funeral.

Although a lot of information was gathered by passive observation, it was also important in many cases to contextualise events and encounters. Consequently, the direct observation was complemented by participant observation whereby I sought to gain first-hand involvement in the social world chosen for the study.[56] In this regard, data was collected through the participation in the ordinary activities of the village community.[57] One of my favourite pastimes in this regard was taking part in football matches at a bumpy clearing near Mpinji Community Day Secondary School. Almost every other day at around 3 pm, a sizeable group of boys would gather to have the customary kick-about. After watching the proceedings on at least seven occasions, I was invited to join Dennis's team. The verdict on my football skills was pronounced within 10 minutes of my joining the football game: I could play a bit but they thought I was a little bit too fat to actually play. However, since there were not enough people to play, I would be left to continue playing anyway. Another regular activity which offered opportunities for conversation was the self-help development project that involved the building of a road bridge connecting Ndalama village with the *boma.* In the beginning, this involved the gathering of rocks for the building of the bridge's foundation and, eventually, the actual building itself. Thus, on many Saturday mornings and Sunday afternoons, I often found myself hoisting rocks or buckets of sand at the bridge. In this and other activities, extensive notes were made on observations relating to

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[56] C Marshall and GB Rossman n 41 above at 79.

[57] M Hammersley and P Atkinson *Ethnography: Principles in Practice* (London: Routledge, 2nd edn, 1995) 139–151.

behaviour, and salient points gathered from listening to what was said in conversations both between others and with me.[58]

The above data collection techniques were further supplemented by semi-structured interviewing often described by researchers as 'conversation with a purpose'.[59] This method of data collection enabled me to pursue a few general topics to help uncover the participant's meaning perspective, but at the same time allowing the participants to frame and structure their responses in a way that was most suitable for them.[60] Furthermore, this technique allowed me to pose relatively more general questions than in a structured interview as well as retain the latitude to ask further questions in response to significant replies[61] or vary the sequence of questions depending on the flow of the conversation.[62] With regard to the focus groups, additional data was captured through essay writing activities that addressed various topics including, amongst other issues, democracy, children's rights, the duties of children within the home.

Whilst the identification of data collection methods and sampling procedures are crucial in accessing field data, the researcher needs to have at her or his disposal flexible data collection mechanisms.[63] Retaining a flexible design, this study relied on a variety of data recording techniques which included taking of field notes and the use of a tape recorder. This ensured that data recording activities did not interfere with the data collection activities such as observation or interview.[64] In some cases, the carrying of recording equipment led to suggestions that I was working for the government broadcaster or some government department. Consequently, before I began any semi-structured interview, I explained the presence of the recording equipment and that, if the potential interviewee was not comfortable with their voice being recorded, I would switch the machine off and put it away. One afternoon, after a lively conversation relating to discipline and rights with four mothers from Magombo village, I was asked to play back the recording so that the participants could hear what their responses and observations. During the playback, more opinions were given and many points elaborated.

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58 MV Angrosino and KA Mays de Perez 'Rethinking observation: From method to context' in NK Denzin and YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, London, New Delhi: Sage Publications, 2000) at 673; PA Adler and P Adler 'Observational techniques' in NK Denzin and YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, CA: Sage Publications, 1994) 377 at 388–390; JA Sluka 'Participant observation in violent social contexts' (1990) *Human Organisation* 49 at 114–126.

59 R Kahn and C Cannell *Dynamics of interviewing* (New York: John Wiley, 1957) at 149.

60 A Bryman *Social research methods* n 47 above at 110; C Marshall and GB Rossman n 41 above at 82.

61 A Bryman *Social research methods* n 47 above at 110.

62 R Kahn and C Cannell n 59 above at 149.

63 C Marshall and GB Rossman n 41 above at 110.

64 AW Bentzon et al n 41 above at 220–236.

(f) Data analysis

Once the data was collected through the above methods, it was analysed using the analytical scheme developed by grounded theorists.[65] In qualitative studies, data collection and analysis go hand in hand to promote the emergence of substantive theory grounded in empirical data.[66] Whilst at first I was guided by initial concepts and guiding hypotheses, my position certainly shifted and preconceptions were discarded as the data was collected and analysed. Once the data was collected, it was categorised and coded in order to generate concepts.[67] In the words of Charmaz:[68]

> '. . . we grounded theorists code our emerging data as we collect it . . . Unlike quantitative research which requires data to fit *preconceived* standardised codes, the researcher's interpretations of data shape his or her emergent codes in grounded theory.'

More importantly, this kind of analysis called for constant comparison and constant movement backwards and forwards in order to produce 'the verification of substantive theory'.[69] The selected data collection methods significantly assisted in this analytical process.

I used data cards, post-its, and highlighters to create maps on the data and impose some structure on it. At the beginning of the fieldwork, I endeavoured to do this at the end of every research day but after about 3 weeks, I realised that it was difficult if not impossible to keep up. The haste to analyse and code data resulted in the loss of some important nuances and patterns that could only be revealed by careful analysis. In the end, I set aside Fridays and Saturday afternoons for data coding, Saturday mornings having been taken up by the customary rock hoisting. However, despite these efforts, I still had not gone through all the data by the time I concluded the data collection at the research site. There were several tapes that still needed transcribing and whose data needed structuring. This made for a busy winter when I returned to London.

It is also imperative to ensure that the data recorded is verified. In the social sciences, this process is referred to as triangulation. Triangulation is the 'act of bringing more than one source of data to bear on a single point. Derived from navigation science, the concept has been usefully applied to ethnographic enquiry'.[70] In order to achieve this, data from different sources may be used to

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[65] See generally, A Strauss and JM Corbin *Basics of qualitative research: Techniques and procedures for discovering grounded theory* (Thousand Oaks, California: Sage Publications, 2006).

[66] C Marshall and GB Rossman n 41 above at 113.

[67] M Hammersley and P Atkinson n 57 above at 209–214.

[68] K Charmaz 'Grounded theory: Objectivist and constructivist methods' in NK Denzin and YS Lincoln (eds) *Handbook of qualitative research* (Thousand Oaks, CA: Sage Publications, 2000) 509 at 515. Emphasis in original.

[69] A Bryman *Social research methods* n 47 above at 393. See also AW Bentzon et al n 41 above at 182–185.

[70] C Marshall and GB Rossman n 41 above at 146.

corroborate, elaborate or illuminate the research in question.[71] Designing a study in which multiple cases are used, multiple informants or more than one data gathering technique greatly strengthens the study's usefulness for other settings.[72]

In the context of this study, the various data collection methodologies outlined above, were performed concurrently thereby providing multiple data sets from multiple sources. This diversity allowed data from each collection technique to be used to substantiate events, test hypotheses and make decisions about the research. As Becker and Geer point out, participant observation allows the researcher to check definitions of the terms the participants use in the interviews in a more natural setting (for example, during casual conversations with others). Secondly, it allows one to observe events the participants cannot report because 'they do not want to, feeling that to speak would be impolitic, impolite or insensitive'. Finally, it permits the researcher to observe situations described in interviews and thus become aware of distributions described by the participants.[73] Consequently, the multi-variant and flexible data collection and data sourcing strategies adopted by this study assisted in triangulation by offering comparative data sets and sources.

V CONCLUDING REMARKS: ANALYSING METHODOLOGY IN CHILDREN'S RIGHTS RESEARCH

The attempt to incorporate some grounded analysis into my research provided an opportunity to evaluate attempts to situate children at the centre of children's rights analysis. Whilst I was largely successful at obtaining what I had set out to do, profound questions relating to the appropriate role that children occupy in research endeavours such as the present one remain unanswered. I address some of these questions in this concluding part of the methodology review.

Starting from the design phase into the data collection and analysis, and presentation of research results, several structural and methodological factors served to limit the participation of children in the study. For example, the design of the research plan did not involve any input from children but relied on my own appraisal on what sort of questions I needed to investigate in analysing the cultural legitimacy of the African Children's Charter. Whilst the planning stages of fieldwork research could benefit from children's input, consideration of what constitutes acceptable research practice and output to funding bodies or examining bodies restricts the participation of children during this part of the research process. Although some modifications to

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71 GB Rossman and BL Wilson 'Numbers and words: Combining quantitative and qualitative methods in large-scale evaluation study'(1983) 9(5) *Evaluation Review* 627–643.

72 M Hammersley and P Atkinson n 57 above at 230–232.

73 HS Becker and B Geer 'Participant observation and interviewing: A comparison' in GJ McCall and JL Simmons (eds) *Issues in participant observation: A text and a reader* (Reading, MA: Addison-Wesley, 1969) 322 at 326.

specific aspects of the design were possible as the fieldwork was conducted, major revision of the principal methodological approach could not be undertaken. Consequently, it could be claimed that this study was based upon an adult-determined perception of how questions on children's rights and cultural legitimacy should be investigated.

Similarly, during the fieldwork, it was clear that children's participation was mediated through those holding positions of power over children. My principal means of identifying and contacting children was through their teachers, parents and guardians. Often, the consent of these gatekeepers also translated into the consent of participating children. I discussed this very issue with the focus group at Thyolo Secondary School. One of the members, Caesar Muluta, expressed the view that it was important to be seen as 'a good boy' in class and refusing to take part in the research would certainly subtract some points in the teacher's good book. Tiyamike Mayuni, another member of the focus group had another view. According to her, her parents taught her that, when someone needs help and one is in a position to help, then he or she must do so. She saw that I needed help and volunteered because she wanted to help.

Whatever the explanation, it is clear that children's participation in this study was negotiated largely with those who exercised control over them. Whereas none were coerced into taking part and in some cases the invitation to take part was declined, the location of children in institutions such as the family, school or church and the structure of power relations in these institutions seems to have predisposed children towards compliance with adults' requests. The lack of power for children to negotiate the terms of social interaction has an impact not only on a research process like this but also in the manner in which their rights are prescribed and enforced.

As I explained above, I attempted to conduct the analysis of the data as the research progressed. However, because of data volumes and compressed time frames, the bulk of the analysis was conducted offsite. As I conducted the analysis, I began to structure it into the framework of this thesis. At this stage of the thesis, the participation of children and indeed the adults who took part in the fieldwork was conspicuously absent; and I found it challenging to maintain the children's language and perspective in the consideration of issues that I had raised. As I struggled through the solitude of thesis writing, the urge to present the study in the familiar language of children's rights (which is more the language of lawyers than ordinary folk) meant that I had to engage in a process of interpreting the data and sifting it through the sieve of children's rights talk. Again, this impacts on the level of participation that children have in this study.

In recognising these limitations in children's rights research, I am not suggesting that the fieldwork or the library-based methods were unsuccessful. On the contrary, the fieldwork uncovered perspectives on the cultural legitimacy of children's rights that would not have been possible through library-based methods alone. The compromises made in designing the

methodology, accessing the fieldwork data and analysing it are not unusual and they do not invalidate in any way the perspectives of the young people who were kind enough to take part in this study. The point of the observations above is that grounded research, whilst crucial in providing perspectives that may not be obvious through strict international law methods, is not a panacea to developing linkages between the study of children's rights and the reality of children's daily lives. Developing such linkages requires the constant appraisal of accepted research practice as well as the development of innovative methods that attempt to capture the institutional and social character of children's rights. The combination of international law methods with socio-legal, as this study has done, is an example of such endeavours.

Malaysia

LEGAL STATUS AND RIGHTS OF ILLEGITIMATE CHILDREN IN MALAYSIA: THE CONFLICTING RIGHTS?

*Noor Aziah Mohd Awal**

Résumé

La «Loi sur les enfants de 2001» qualifie d'enfant toute personne âgée de moins de dix-huit ans. Un enfant est illégitime s'il est né hors mariage. En vertu du droit commun, l'enfant né en mariage est considéré comme légitime quel que soit le moment de sa conception. Cependant, le droit islamique édicte que l'enfant est illégitime dès lors qu'il a été conçu en dehors des liens du mariage. Il devient donc primordial de déterminer le moment de la conception. Le statut de l'enfant en dépend. L'illégitimité est encore et toujours un sujet tabou en Malaisie. Modernité et développement n'empêchent pas la société multiraciale de la Malaisie de rester très traditionnelle et religieuse. La plupart des lois font encore la distinction entre légitimité et illégitimité.

Depuis peu, les naissances d'enfants illégitimes sont pourtant en hausse et l'on peut s'interroger sur les causes de ce phénomène. L'ironie de tout cela est que de nombreuses mères sont elles-mêmes des enfants au sens de la loi. Notre présentation est basée sur une recherche intitulée «Les droits des enfants illégitimes: analyse comparée du droit islamique et du droit civil en Malaisie». L'étude met en lumière les causes de la hausse des grossesses illégitimes des adolescentes. Elle analyse le statut juridique des jeunes mères, notamment leur droit de déterminer l'avenir de leurs enfants. Ce texte s'intéresse également aux droits des enfants illégitimes eux-mêmes. Il est important de parvenir à un équilibre entre ces différents droits contradictoires.

I INTRODUCTION

According to the Child Act 2001,[1] a child is defined as a person below the age of 18 years old. A child is an illegitimate child if he or she is born out of wedlock.[2] According to the common law a child is legitimate if he or she is born within wedlock no matter when he or she is conceived. However, under Islamic law, any child conceived out of wedlock is deemed to be illegitimate.

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1 Act 611, s 2.

2 Paras Diwan *Family Law* (Delhi: Allahabad Law Agency, 2007) 303.

Hence it is very important to determine the period of pregnancy as the legitimacy of a child depends on it. Illegitimate birth is still taboo in Malaysia. Despite modernity and development, the multiracial society of Malaysia is very traditional and religious. Most of the laws still differentiate between legitimate and illegitimate birth.

Of late, illegitimate birth is on the rise. The question that comes to mind is what is the cause of such a rise? The irony of it all is that many of the unwed mothers are children themselves, ie under the age of 18 years old. This chapter is based on research entitled *The Rights of Illegitimate Children in Malaysia: A Comparative Study between Islamic and Civil Laws in Malaysia*.[3] It intends to highlight the factors which have caused the increase in number of illegitimate pregnancies amongst youth in Malaysia. It will also analyse the position of the young mother and her rights to determine the future of her child and the rights of the illegitimate child itself. It is important to strike a balance between the two conflicting rights.

II DEFINITION OF CHILD

In Malaysia the Age of Majority Act 1971 states that a child is a person below the age of 18 years old.[4] However, this law is only applicable if there is no definition given in any other written law.[5] For example, according to the Adoption Act 1952 a child is defined as 'an unmarried person under the age of twenty-one and includes a female under that age who has been divorced'. The Guardianship of Infants Act 1961 (GIA) defines a Muslim child as a person under the age of 18 whilst a non-Muslim child is a person under the age of 21.[6] However, in *Kanalingam v Kanagarajah*,[7] a girl, aged 18, left her father to live with the respondent. The father applied to the court under the GIA for the return of his daughter. The court of first instance held that the girl's marriage to the respondent was invalid and ordered the girl to be sent to her aunt's house. The respondent appealed. The Federal Court held that despite her age (she was under 21) she should be allowed to choose her own life and whom to live with.

According to the Law Reform (Marriage and Divorce) Act 1976:[8]

> ' . . . child of the marriage is defined as a child of both parties to the marriage in question or a child of one party to the marriage accepted as one of the family by the other party; and child in this context includes an illegitimate child of and a

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3 Noor Aziah Mohd Awal (Leader) Chef Norlia Mustafa, Nor Afilah Musa and Mohd Al-Adib Samuri, UKM-UU-04-FRGS0006-2006 'Hak Anak Tak Sah Taraf di Malaysia: Satu Kajian Perbandingan Antara Undang-Undang Sivil dan Shariah' (2007–2009).

4 Act 103, s 2.

5 Ibid, s 4(c).

6 No 13 of 1961, s 2(3)(a)(i) and (ii).

7 (1982) 1 MLJ 264.

8 Act 164, s 2.

> child adopted by, either of the parties to the marriage in pursuance of an adoption order made under any written law relating to adoption.'

Thus under this Act a child is a person under 18 who is a child of the family and it does not matter whether he or she is adopted or illegitimate or a child of one of the parties to the marriage.

The Child Act 2001[9] defines a child as a person under the age of 18 years and, in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in s 82 of the Penal Code. Section 82 of the Penal Code states that a child under the age of 10 cannot be held responsible for any criminal act or omission.

The Evidence Act 1950, s 133A used the word 'child of tender years' but gives no definition of that word. The Act made references to 'possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth' but 'in the opinion of the court does not understand the nature of an oath'. The Domestic Violence Act 1994 defined child to mean a person under the age of 18 years who is living as a member of the offender's family or of the family of the offender's spouse or former spouse.

Since Islam is the religion of the Federation and Islamic law is applicable to all Muslims in Malaysia, it is important to look at the definition of 'child' under Islamic law. According to Islamic law a child is a person who has not attained *baligh*. *Baligh* for a female is when she starts her menses and for male when he has a 'wet dream'.[10]

Shafie's School of thought argued that, if a child has no physical sign that he or she has become *baligh*, then the acceptable age of *baligh* is 15 based on the following news related by Ibn Umar ra, where he said:

> 'I offered myself to the Prophet during the Battle of Uhud and at that time I was 14 and he did not allow me to join the war. Later during the battle of Khandak, I was 15 and he allowed me to go to the war.'

Amir al-Mukminin Umar ᶜAbd al-ᶜAziz, when this hadith was related to him said that this was the difference between a child and an adult.[11] This view was criticised as the hadith was mudtarib or a weak hadis.[12] Furthermore, the

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9 Act 611, s 2. The Child Act 2001 repeals the Juvenile Courts Act 1947 (Act 90), Women and Girls Protection Act 1973 (Act 106) and the Child Protection Act 1991 (Act 468).

10 Surah An-Nur: 59. See also Muhammad bin Ali bin Muhammad al-Syaukani, *Fath al-Qadir,* Beirut: Dar al-Fikr; Abi al-Suᶜud, Muhammad bin Muhammad al-ᶜAmady, *Tafsir Abi Suᶜud*, Beirut: Dar Ihya'al-ᶜArabi, Vol 6, 193.

11 Ibn Kathir, Abu Fida' Ismail bin Umar, 1401, *Tafsir al-Quran al-Azhim*, Beirut: Dar al-Fikr, jil 1, hlm 454.

12 Mudtarib ialah hadith yang mempunyai pelbagai riwayat yang berbeza. Sebahagiannya meriwayatkan satu jalan cerita dan sebahagian yang lain meriwayatkan dengan jalan cerita yang berbeza. Dinamakan mudtarib kerana apabila kedua-dua sanad riwayat adalah sama darjah nilainya. Jika sekiranya salah satu riwayat lebih kuat daripada riwayat yang lain, sama

difference between the two wars was about 2 or 3 years and the age difference cited was only one year. Hence, it is believed that permission to join the war was based on physical strength and ability to use weapons. The Hanafi School on the other hand uses 18 as the age of baligh.[13] The argument used is based on the interpretation made by Ibn Abbas to the verse 34 of the Surah al-Isra.

The Hanafi's view is less criticised but is only used if the child did not show any physical sign.

Hence from the above there is a difference between a child under civil and Islamic law. Even under civil law, the definition of a child differs from one statute to another. It is not a surprise that Malaysia when ratifying the United Nations Convention on the Rights of the Child (UNCRC) had reserved Art 1 on the definition of child. When discussing the rights of the child the focus is on a person below the age of 18 years old.

III LEGITIMATE V ILLEGITIMATE CHILD

According to common law a child is legitimate if both parents are married to each other at the time of birth. A child who is born after its parents are divorced is also legitimate as it was conceived within wedlock or if it was conceived out of wedlock but born within wedlock. A child is illegitimate if it was born out of wedlock. It is immaterial when it was conceived. According to common law, an illegitimate child is related only to its mother and has no relationship with its biological father. The child may become a legitimate child of the biological father if the biological father marries the mother of the child and legitimises the child by the subsequent marriage under the Legitimacy Act 1971 in Malaysia or by adopting the child under the Adoption Act 1952.

For Muslims a child is legitimate if its parents are legally married to each other when the child was conceived and born. Legitimacy is an important issue for Muslims as it involves the issue of *nasab* which is pertinent to legitimacy matters. If a child is legitimate, his *nasab* is of his father and if illegitimate, of its mother only. An illegitimate child under Islamic law has no relationship whatsoever with his biological father. *Nasab* is important as it is the root of legitimacy. If a child is legitimate, it is through such a status that its other rights

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ada rawinya lebih kuat ingatan, atau lebih banyak mendampingi gurunya atau lain-lain perkara yg boleh menguatkan sesebuah riwayat, maka hukum perlu diberi kepada riwayat yang kuat. Maka jenis ini tidak dinamakan mudtarib. (Mudtarib is a hadith which has a number of versions given by the narrators. Some gave one version and the other another version. It is called mudtarib because despite the differences, the hadiths have same status and values. If one narrator's version is accepted to be a stronger version than any other because of his longer standing relationship with his teacher or because of his ability to remember well, then it must be given priority. This type of hadith is not mudtarib.) Refer to Abu ᶜAmru Uthman bin ᶜAbd al-Rahman, 1977, *Muqaddimah Ibn Solah*, Beirut: Dar al-Fikr al-Muᶜasir, jil 1, hlm 93.

13 ᶜAla' al-Din al-Kasani, 1982, *al-Badaiᶜ al-Sanaiᶜ*, cetakan kedua, Beirut: Dar al-Kitab al-ᶜArabi, jil 7, hlm 172.

arise such as the right to a father, the right to a good mother, the right to a name, the right to maintenance, inheritance and guardianship.

Nasab is explained in the Quran:[14]

> 'It is He Who has created man from water: Then has He established relationships of lineage and marriage: for thy Lord has power (over all things).'

And:[15]

> ' . . . nor has he made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. But God tells (you) the Truth and He shows the (right) way. Call them by (the names of) their fathers: that is just in the sight of God. But if ye know not their father's (names, call them) your brothers in faith, or your maulas. But there is no blame on you if ye make a mistake therein: (What counts is) the intention of your hearts; And God is of-returning, Most Merciful.'

In one hadis the Prophet said:[16]

> 'Whosoever alleged that he is not from his father's lineage, or mixed with a non-wali, Allah will curse him until judgment day.'

There are a number of ways to prove *nasab* or lineage but the common one is the length or period of pregnancy. The *Fuqaha* agreed[17] that the minimum period of pregnancy is 6 months from the date of lawful sexual intercourse. Abu Hanifah count the period from the date of solemnisation or '*aqad*' based on the hadith that: 'A child who is born from the lawful bed has a right to legal lineage and an adulterer should be stoned.'

The reason for a minimum 6 months is based on the quranic verses as follows: 'the carrying of the (child) to his weaning is (a period of) thirty months';[18] and: 'In travail upon travail did his mother bear him, and in years twain was his weaning (was two years).'[19] From the two verses it can be calculated that a minimum period of pregnancy is 6 months. The maximum period of pregnancy is 2 years based on the view given by Hanafi which was based on words from Aishah that 'a child in a mother's womb cannot be more than two years'.[20]

From this hadith where a woman who is pregnant and gave birth within the 2 years of her husband's death or from the date of her divorce, the child is the legitimate child of the ex-husband. According to the view of Imam Shafi'i and Hanbali the maximum period of pregnancy is 4 years based on true

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14 Surah al-Furqan 25:54.
15 Surah al-Ahzab 33:4–5.
16 Abu Dawud daripada Anas.
17 Bidayah al-Mujtahid, jil II, hlm, 352.
18 Surah al-Ahqaf 46:15.
19 Surah Luqman 31:14.
20 Translation: 'Diriwayatkan oleh al- Daruqutni dan dan al-Baihaqi dalam Sunan mereka.'

experiences.[21] From the above a child may be legitimate if it is born 6 months after solemnisation of marriage or 2 or 4 years after the husband's death or divorce.

IV IS IT TRUE THAT THE NUMBER OF ILLEGITIMATE BIRTHS IS ON THE RISE?

Based on some old data, it is believed that the rate of illegitimate birth is on the rise. It is to be noted that the author's efforts to get the figures from the Registration Department of Malaysia or Jabatan Pendaftaran Negara (JPN) failed as JPN claimed that the figures are confidential.[22] The latest figures made known by JPN were published by the *Kosmo* newspaper on 15 June 2006. These figures are from 1999 to 2003 where the total number was 70,430 as follows:

State	*Numbers*
Selangor	12,836
Perak	9,788
KL	9,439
Johor	8,920
Sabah	8,435
N Sembilan	4,108
Pahang	3,677
Kedah	3,496
P Pinang	3,412
Melaka	2,707
Kelantan	1,730
Perlis	691
Sarawak	671

[21] Fiqh & Perundangan Islam, Jil VII, (terjemahan) Syed Ahmad Syed Hussain et al, DBP, 2001, ms851. Selain dari pandangan di atas, Mazhab Maliki meletakan 5 tahun dan satu tahun qamariah mengikut Muhammad bin Abdul Hakam dan sembilan bulan qamariah dari pandangan Mazhab Zahiri dan Umar ra (Syed Ahmed Hussain et al, *Fiqh and Islamic Law,* Vol VII (Dewan Bahasa Pustaka, 2001) 851).(Apart from the above view, the Maliki Mazhab imposed 5 and one years qamariah (Muslim months) following the view of Muhammad bin Abdul Hakam and 9 months qamariah in the view of Mazhab Zahiri dan Umar ra.)

[22] Correspondence with JPN.

Trengganu	574

Source: Registrar Office (JPN) as reported in *Kosmo*

The Kuala Lumpur General Hospital figures are as follows:

Year	*Numbers*
2001	255
2002	291
2003	301
2004	325
2005	388

Source – Persatuan Pegawai-pegawai Pembangunan Masyarakat (Perubatan) Malaysia

Race

Race	Malay	Chinese	India	Other
Total	77%	5%	6%	12%

Level of education

Level of Education	College/ University	Secondary school	Lower primary school	Primary school	No formal education
Total	17%	2%	69%	11%	1%

Research done by NST Youth Quake in April 2002, involving 200 youths aged between 15 and 19 years old, revealed that 44% admitted having had sex at least once. Out of the total number, 80% admitted that their relationship was affected by the sexual relationship and about 43% said that they had sex out of curiosity. The research also showed that 82% of the youths felt that it was 'cool' to stay virgin.

The following is the result of research done on 58 respondents staying at two institutions[23] where they were interviewed.

[23] Noor Aziah Mohd Awal, Che Norlia Mustafa, Mohd Al-Adib Samuri and NorAfilah Musa

Age

Age	12 years	13 years	14 years	15 years	Total
Numbers	0	1	3	2+6	12
Age	16 years	17 years	18 years	19 years	
Numbers	2+9	2+9	1+1	4	28
Age	20 years	21 years	22 years	23 years	
Numbers	5	6	1	4	16
Age	24 years	25 years	30 years		
Numbers		1	1		2
Total	16	19	7	16	58

State of origin

State	*Numbers*
Kedah	3
Perlis	0
Kelantan	5
Trengganu	4
Pahang	10
Pulau Pinang	0
Perak	4
Selangor	7
Negeri Sembilan	1
Melaka	4
Johor	9

'The Rights of Illegitimate Children in Malaysia: A Comparative Study between Islamic and Civil Laws in Malaysia', UKM-UU-04-FRGS0006-2006 to be completed in February 2009. The Institutions are Taman Seri Puteri Cheras (Government) and Kem Modal Insan Kewaja, Gombak (private).

Kuala Lumpur	6
no information given	5
Total	**58**

Reasons for getting pregnant out of wedlock

No	*Reasons*	*Total*
(1)	Mutual/consensus	23
(2)	Too much faith/trust in men	8
(3)	Free and social life	6
(4)	Curiosity and wanting to try	3
(5)	No/little religious knowledge	2
(6)	Rape	11
(7)	Peer group influence	7
(8)	Others which include family pressure, stress, parental neglect, etc	0

Some of the respondents gave two or three reasons except those who were raped.

Asked if they will look after their child after birth?

Yes	No	Not sure
17	36	5

Reasons for not looking after their illegitimate child:

(a) safeguard family name and dignity;

(b) not allowed by the mother's parents;

(c) hope to give the child a better future;

(d) did not want the child to be stigmatised or belittled by the community;

(e) cannot afford to look after the child;

(f) the mother would like to continue her studies.

V HISTORICAL DEVELOPMENT OF THE RIGHTS OF THE CHILD UNDER COMMON LAW

For many decades the rights of the child were practically unheard of. Basically under common law what is recognised is the right of the father over the child. Later the mother's right towards her child is recognised and highlighted.

(a) Father's rights

According to Blackstone,[24] eighteenth-century England accepted that the power of parents over their children was derived from the need to enable a parent effectively to perform his duty toward the child and, to some extent, to compensate for the care and trouble taken by the parent in the faithful discharge of his duties. Parental power in English law was still sufficient to keep the child in order and obedience. The eighteenth-century parent, according to Blackstone:

> ' . . . may lawfully correct his child, being under age, in a reasonable manner: for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also directed by our ancient law to be obtained . . . and this is also another means, which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares or artful and designing persons; and next, of settling properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's estate, than as his trustee or guardian; for, though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for mother, as such, is entitled to no power, but only to reverence and respect) over persons of his children ceases at the age of 21: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, until that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his authority during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power the parent committed to his charge, viz. That of restraint and correction, as, may be necessary to answer the purposes for which he is employed.'

Historically fathers have been accepted as the sole guardian of a child. In *R v De Manneville*,[25] the father of the child denied the mother custody of her baby

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[24] Blackstone *Commentaries on the Laws of England* (4th edn, 1770) Book 1, ch 15, s 2.

[25] (1804) 5 East 221.

girl who was forcibly snatched from her. The court held that the father alone was entitled to custody in the absence of ill-treatment by him. In *Re Agar-Ellis*[26] the court refused to interfere with the father's 'natural rights' to control the religious upbringing of his teenage daughter.

(b) Do parents have rights?

The Law Commission in its first report on illegitimacy, taken up in its Working Paper on custody in 1986,[27] summarised the position of parents in this manner:

> 'Parenthood would entail a primary claim and a primary responsibility to bring up the child. It would not, however, entail parental "rights" as such. The House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[28] has held that the powers, which parents have to control or make decisions for their children, are simply the necessary concomitant of their parental duties. This conforms with our view that to talk of parental "rights" is not only inaccurate as a matter of juristic analysis but also a misleading use of ordinary language.'

Before 1989, English statutes referred to parental rights as 'parental rights and duties'; 'parental power and duties'; 'rights and authority' of parents. The Law Commission in their report on guardianship and custody were concerned with the continued use of such terms because it promotes the concept of parenthood as a right rather than as a matter of responsibilities. They accordingly recommended the introduction of the concept of 'parental responsibilities' where this concept 'would reflect the everyday reality of being a parent and emphasise the responsibility of all who are in that position'.[29] This concept has been fully utilised by the Children Act 1989 in England.

It is important to distinguish between the effects of parenthood and the effects of being vested with parental responsibilities. The first category is parents where their relationship with the child is partly the result of being parents and partly the result of having parental responsibility. This is definitely different from a person who is vested with parental responsibility because certain legal effects relate exclusively to parenthood, for example, rights to succession. Neither the child nor the non-parent with parental responsibility will have any claim on the other's estate in the event of intestacy. In England the Children Act 1989 provides that certain powers, which are considered fundamental to the status of parenthood or guardianship, are not to pass to a non-parent who obtains parental responsibility through a residence order.[30] Thus parental responsibility includes within it the bulk of powers over upbringing, which parents and guardians enjoy but it is a somewhat more limited notion than

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[26] (1883) 24 Ch D 317.

[27] Law Com Working Paper No 96 *Custody* (1986) para 7.16 and Law Com Report No 118 *Illegitimacy* (1982) para 4.18.

[28] [1986] 1 AC 112.

[29] Law Com Report No 118 *Illegitimacy* (1982) para 2.4.

[30] Children Act 1989, s 12(3) and s 33(6)(b). These are rights to consent or refuse to an application to free the child for adoption, to agree or refuse to the adoption order itself, and the right to appoint a guardian.

either parenthood or guardianship. It also does not accurately convey the status of unmarried father, who has the status of parenthood (under common law, this is not so because he is not regarded as a parent or guardian) but he does not possess any powers included in parental responsibility which constitute, in reality, the most important features of being a parent.

The traditional view has been that parental rights dwindle as the child approaches majority but at least survive until then. The older the child the less likely a court would enforce parental control against his wishes. Lord Scarman in *Gillick*[31] said that 'parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on matters requiring decision'.[32] He appeared to acknowledge that parental rights would survive until majority. Lord Fraser took the view that maturity alone should not be enough to justify the provision of contraceptives to 'under-age' girls without parental knowledge or consent. He was especially concerned that, in every case, the medical personnel should attempt to persuade the girl to allow parental involvement in the decision, although it has been suggested that failure to do so might be merely a breach of professional ethics rather than unlawful.

Taken as a whole the majority opinion in *Gillick* appeared to recognise the potential value of parents' participation in adolescent decision making but accorded priority to the views of competent adolescents. This seems to be in support of a form of participatory or inclusive decision making, which involves parents, children and third parties. It only involved what is being termed as 'consultative rights'.

It can be said that both parents and children possess rights and interests, separate and independent of each other, which ought to be recognised in law. However, the next question that comes to mind is the issue of when the interests of children and parents can truly be regarded as distinct and when they ought to be conflated. This problem is rooted in the welfare principle itself where, if the welfare of the child is paramount and the sole consideration, then the interests of parents are not only subordinate, they are actually irrelevant. This would mean a denial of an independent parental interest, which is now being questioned not only by the courts but also more directly by the academicians.[33]

VI RIGHTS OF THE CHILD AND THE UNITED NATIONS CONVENTION

The children's right movement can be traced as far back as 1879 but it was only it 1989 that the United Nations Convention on the Rights of The Child (UNCRC) was finalised and passed. It took almost 110 years to achieve such

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31 [1986] 1 AC 112.
32 Ibid, 155.
33 A Bainham and S Cretney *Children – The Modern Law* (Fam Law, 1993) 104.

recognition and even then it was not perfect law. In 1948 the United Nations General Assembly adopted a Universal Declaration of Human Rights. In 1959 the United Nations adopted a Declaration of Rights of the Child. It consisted of 10 rights and was not legally binding on the countries that signed it. In 1978 the Government of Poland submitted the draft convention to the United Nations Commission on Human Rights. On 20 November 1989, the Convention was adopted by the General Assembly. While preserving the spirit of the Declaration of Rights of the Child, the Convention reflected contemporary issues and concerns that had emerged in the past 30 years, such as environmental protection, drug abuse and sexual exploitation. It came into force in 1990 after being ratified by 20 countries. By 1 December 1993, 153 countries had ratified the Convention including Malaysia.

The Convention on the Rights of the Child is a United Nations agreement that spells out the range of rights that children everywhere are entitled to. It sets out basic standards for the children's well-being at different stages of their development. This Convention is the first universally binding code of child rights in history. It contains 54 articles and can be broken into four main categories**:**

(a) Survival rights
These are the right to life and the needs that are most basic to existence including an adequate living standard, shelter, nutrition and access to medical services.

(b) Development rights
These are things which children require in order to reach their fullest potential. They include the right to education, play and leisure, cultural activities, access to information, freedom of thought and conscience and religion.

(c) Protection rights
These are rights to be safeguarded against all forms of abuse, neglect and exploitation. They cover issues such as special care for refugee children, torture, and abuses in the criminal justice system, involvement in armed conflict, child labour, drug abuse and sexual exploitation.

(d) Participation rights
These rights allow children to take an active role in their communities and nations. These include freedom of expression, to have a say in matters affecting their lives, freedom of association and assembly.

Malaysia became a signatory to the UNCRC in 1995. Initially there were 12 reservations but 4 have been withdrawn. At present the remaining reservations are as follows:

(1) Art 1 (definition);

(2) Art 2 (non-discrimination);

(3) Art 7 (name and nationality);

(4) Art 13 (freedom of expression);

(5) Art 14 (freedom of thought, conscience and religion);

(6) Art 15 (freedom of association);

(7) Art 28(1)(a) (free and compulsory education at primary level); and

(8) Art 37 (torture and deprivation of liberty).

VII CONFLICTING RIGHTS: PARENT V CHILD

Since a child, including an illegitimate child, is entitled to the four basic rights, namely rights to survival, development, protection and participation, these rights may come into conflict with the rights of the parent. For an illegitimate child its right will conflict with the rights of the mother, since under common law as well as under Islamic law, an illegitimate child is related only to its mother. Worse still, a majority of these mothers of the illegitimate child are children themselves. The issue of consent to adoption, the right to custody and upbringing, and the right to education, name and origin are some of the rights that may conflict. In a country where illegitimate birth is a stigma and taboo, many illegitimate children are not even given the right to live where illegitimate fetuses have been illegally aborted or newly born babies were abandoned and found dead. The police may be able to give better statistics of the number of newly born found dead but the numbers of illegal abortions are difficult to trace because it was done illegally. This chapter will proceed to look at some of the conflicting rights between two children: mother and child.

(a) Rights to survival

All children have a right to life and a right to basic necessities like food, housing and medical care. This is provided by Art 6 of the UNCRC, over which Malaysia has no reservation. The question that comes to mind is whether such a right includes the right of a fetus to be born alive? Unfortunately, a fetus is not human until it is out of its mother's womb. Since a fetus does not come within the definition of a living person there are laws that regulate the position of fetus and in what circumstances it can be said that it is unlawful to kill a fetus. It is accepted that a fetus has a right to live but what is not clear is how far the court will enforce this right as against the rights of others.

When a fetus becomes a person is a matter of moral decision and is not one of scientific fact. The Roman Catholic Church holds that personhood and the

right to protection exist from the moment of conception. This may be supported by scientific analysis involving pre-implantation or pre-embryonic morula. However, there are those who would equate personhood with the intellect and with the power to make decisions.[34]

It is accepted that, although fetal rights may be established in utero or even before conception, they cannot be realised unless the fetus is born alive. The United Kingdom Congenital Disabilities (Civil Liability) Act 1976 further limited the concept of a separate existence under which the neonate must survive for 48 hours before being able to recover damages in negligence. Sir George Baker said:[35]

> 'There can be no doubt, in my view that in England and Wales the fetus has no right of action, no right at all until birth.'

Hence in the United Kingdom no suit for wrongful fetal death is recognisable.[36] However, courts are anxious to invest the fetus with as positive an identity as is possible with the current legal constraints. *Re T (Adult: Refusal of medical treatment)*[37] stressed the right of an adult to refuse life-saving treatment but acknowledged that there might well be an exception to the rule were a viable fetus to be involved. This obiter dictum was later used as a test in *Re S*.[38] In England in *Burton v Islington Health Authority; de Martell v Merton and Sutton Health Authority*[39] it has been held that the fetus has common law rights irrespective of the Congenital Disabilities (Civil Liability) Act 1976 and in Australia[40] it has been accepted that a fetus has a right to sue its mother for negligent injury in utero. Similar trends can also be seen in Scotland where a fetus has been recognised as a person when criminally injured under the Road Traffic Act 1972.[41] However, it all depends on the fetus being born alive; otherwise, there is still no action available to the fetus in the United Kingdom for its negligent death. Nevertheless, the cases demonstrate a clear intention to acknowledge personhood in the fetus when it is possible to do so. This is fuelled by two developments:

(1) fetal therapy; and

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34 M Tooley 'A Defense of Abortion and Infanticide' in J Feinberg (ed) *The Problem of Abortion* (1973) as taken from Mason and McCall Smith *Law and Medical Ethics* (Butterworths, 1994) 107.

35 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276 at 279.

36 *Bagley v North Herts Health Authority* [1986] NLJ Rep 1014. In this case damages were awarded to the mother, although damages in respect of bereavement under the Fatal Accidents Act 1976 were expressly disallowed on the grounds that negligence had caused the child to die in utero.

37 [1992] 2 All ER 649.

38 [1992] 4 All ER 671.

39 [1992] 3 All ER 833.

40 D'Brahams 'Australian Mother Sued by Child Injured in Utero' (1991) 338 *Lancet* 687 taken from Mason and McCall Smith *Law and Medical Ethics* (Butterworths, 1994) 109.

41 *McClusky v HM Advocate* 1989 SLT 175.

(2) an increasing recognition of risks to the health of the fetus which may be taken by a pregnant woman.

According to Islam, a fetus has a right to live based on the fact that Islamic law requires postponement of the death penalty for a pregnant woman until after she has given birth. The Shafie's School also makes provisions for cutting the belly of a dead pregnant woman to remove the fetus if there is any sign that the fetus is alive.[42] Of course today this can be performed on a woman who is alive through a caesarian operation. Apart from that, if a fetus is stillborn or if there was a miscarriage, the fetus must be buried. According to Ibn Abidin, a fetus which does not utter a sound at the moment of birth should be given the ceremonial bath, named and placed in a piece of cloth (*kaffan*) and buried, but no prayer should be read over it.[43]

The law of abortion in Malaysia is contained in ss 312–315 of the Penal Code.[44] Section 312 states that:

> 'Whosoever voluntarily causes a woman with child to miscarry shall, be punished with imprisonment for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to fine.'

Within this context a woman who causes her to miscarry is within the meaning of this section. However, this section does not extend to a medical practitioner registered under the Medical Act 1971 who terminates the pregnancy of a woman if such medical practitioner is of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to life of the pregnant woman, or injury to the mental or physical health of the pregnant woman, greater than if the pregnancy were terminated.[45] Thus the exception clause to s 312 softens the strict provisions of the abortion law. It allows termination of pregnancy by a registered medical practitioner, if he is, in good faith, of the opinion that:

(a) the continuation of pregnancy would involve risk to the life of the pregnant woman; or

(b) injury to the mental or physical health of the pregnant woman.

The Malaysian provision is an exact replica of the Indian Penal Code, s 312. The Code does not use the word abortion but 'miscarriage', which was not defined. Miscarriage refers to spontaneous abortion, whereas voluntarily causing a miscarriage, which is an offence under the Penal Code, stands for

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[42] Abu 'Abd Allah Muhammad Idris al Shafii, al Umm, Beirut: Dar al Marifahli al Tiba'ah wa al Nashr, 6,136 as taken from Abul Fadl Mohsin Ebrahim *Abortion Birth Control & Surrogate Parenting, An Islamic Perspective* (American Trust Publication, 1989) 76.

[43] Muhammad Amin Ibn Abidin *Hashiyah Radd al Muhtar* (Beirut: Dar al Fikr, 1979) 2:228.

[44] FMS Cap 45.

[45] Act A 727/89, s 9(a) that came into force on the 5 May 1989.

criminal abortion. Legally, miscarriage means the premature expulsion of the product of conception, an ovum or a fetus, from the uterus, at any time before the full term is reached. Medically, the terms abortion, miscarriage and premature labour are used to denote the same thing, ie the expulsion of a fetus at different stages of gestation. Abortion is used only when an ovum is expelled within the first 3 months of pregnancy, before placenta is formed. Miscarriage is used when a fetus is expelled from the fourth to the seventh month of gestation, before it is viable, while premature labour is the delivery of a viable child possibly capable of being reared, before it has become fully matured.[46]

The other phrases used in s 312 are 'woman with child' and 'woman be quick with child'. No definition or explanation is given to these two phrases. 'Woman with child' is to refer to the stage where gestation begins and 'woman be quick with child' refers to the motion felt by the mother in her womb. Thus, the word 'quickening' is a perception by the mother that movement of the fetus has started. It obviously refers to an advanced stage of the pregnancy. That is why the punishment is more severe in the latter case.

It is clear that under s 312 a woman is not exempted from being prosecuted for this offence. The desire of a woman to be relieved of her pregnancy is no justification for termination of pregnancy. In the case of *Ademma*[47] a woman was charged under s 312 of the Indian Penal Code for causing herself to miscarry. She had been pregnant for only one month and there was nothing which could be called even a rudimentary 'fetus' or 'child'. The lower court acquitted the woman because, having been pregnant for only one month, she could not be said to have been 'with child' within the meaning of the Code. However, the High Court held that the acquittal was bad in law and emphasised that it was the absolute duty of a prospective mother to protect her infant from the very moment of conception.

In *Munah binti Ali v Public Prosecutor*,[48] the accused tried to procure an illegal abortion by inserting an instrument into a woman's vagina with a view thereby of causing a miscarriage. However, the woman concerned, unknown to the parties, was not pregnant. The lower court found her guilty of an attempt to cause an abortion under s 312, which was read with s 511 of the Penal Code and sentenced her to 3 months' imprisonment. On appeal the High Court dismissed the appeal by a majority of two to one and held that, in a charge of attempting to cause a woman to have a miscarriage, it is not necessary for the court to be satisfied that the woman was 'with child' before the court proceeded to convict.

Even a doctor could be taken to court for terminating a pregnancy in bad faith. This can be seen in the case of *PP v Dr Nadason Kanagalingam*,[49] where a

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46 Modi's *Medical Jurisprudence*, p 325.

47 (1886) 9 ILR Mad 369 as taken from KD Gaur *Criminal Law: Cases and Materials* (NM Tripathi, 2nd edn, 1985) 499–504.

48 (1958) 24 MLJ 159.

49 [1985] 2 MLJ 122.

medical practitioner tried to use the exception given in s 312. In this case the accused, an obstetric and gynaecology specialist, was charged under s 312. The woman was his patient and had tubal legations done on her by the accused in 1977. She was examined by the accused on 8 August 1978 and was found to be 14 weeks pregnant and have enlarged varicose veins. The accused instantly gave her an injection of 150cc of saline and told her that she would be in labour within 48 hours. The next day she was admitted to his clinic and a male fetus was aborted. The accused was called upon to enter his defence where he said that the abortion was done in good faith for the purpose of saving her life because enlarged varicose veins might caused pulmonary embolism. A highly qualified expert in the field was also called to support the accused's evidence. The court held that, from the evidence adduced, the accused had not taken enough steps to examine the woman further and therefore failed to rebut the prosecution's case. He was found guilty by the court and fined $3,500.

Apart from s 312, the Penal Code provides that any act done with intent to prevent a child from being born alive or to cause it to die after birth and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with 10 years of imprisonment or fine or both.[50] Whosoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment for a term which may extend to 10 years, and shall also be liable to be fined.[51] The explanation of s 316 is that if 'A', knowing that he is likely to cause the death of a pregnant woman, does an act and if it caused death, this is culpable homicide. If it does not cause death to the pregnant woman but resulted in the death of an unborn quick child with which she is pregnant, 'A' shall be guilty under this section.

From the above it can be concluded that the law protects the right of the unborn whereby its right to be born alive must be safeguarded. It is unfortunate that no specific definition is given to the words 'woman with child' or 'quick with child' and no limits were set in terms of the stages of the pregnancy where abortion may be permissible. It seems that, if it could be proved that it is done in good faith and to save the life of the mother, it does not matter how long she has been pregnant. Furthermore in relation to an illegitimate child where the mother is a child herself, the question that arises is whether an abortion could be allowed if a medical practitioner certified that the continuation of the pregnancy could cause injury to the mental or physical health of the pregnant woman. Of course in this case, the mother is below the age of 18 and, from the research done in the two institutions, out of 58 unwed mothers 36 were under 18 years old. One mother was 13, two were aged 14 and eight were 15 years old.

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50 FMS Cap 45, s 315.
51 Ibid, s 316.

A child could be charged under ss 315 and 316 of the Penal Code for any act done with intent to prevent a child from being born alive or to cause it to die after birth and does by such act prevent that child from being born alive, or causes it to die after its birth. The punishment is up to 10 years' imprisonment but as we know a child (below 18 years) will be charged in a Court for Children and if she is below 14 she cannot be sent to prison. If she is sent to prison, she is denied the right to education, the right to development and later the right to sexual rights which include the right to have children and whom she likes to have them with. She is punished for an offence which may not even be an offence in another part of the world where abortion is legal. As a child herself, the mother is given certain privileges and protections from being prosecuted. Between the two rights whose rights shall prevail? In the current situation, the Court finds in favour of the mother. In the United Kingdom and many parts of the world where abortion is allowed mainly for the benefit of the mother rather than the fetus, the unborn child is left without a choice.

Since in Malaysia abortion is legal only in very special circumstances, many of the young unwed mothers have gone on with the pregnancy and later decided to give the child away for adoption. Can a child give consent to her own child's adoption? The Adoption Act 1952 defines a child as a person below the age of 21 including a female who has been married and divorced under that age.[52] The Act provides that the parent or guardian of the child must give consent to adoption and, if consent is not given properly, adoption may be quashed.[53] The question is whether a mother who herself is under 21 can give a valid consent to the adoption of her illegitimate child. It must be pointed out that the Act does not include a provision that prohibits a mother from signing a consent letter while she is still convalescing from childbirth as appears in the Sabah Adoption Ordinance 1960, s 6(3)(a), which provides that no consent should be given before the child is 6 weeks old.[54] From the research conducted, only 17 out of 58 unwed mothers refused to give their children up for adoption. The 36 who refused to look after their children gave the same excuse, namely that the parents or family refused to accept the child as part of the family and looking after the child could damage the family reputation. As these mothers are young and have no source of income, their rights to look after their own child are limited and therefore the law denied both mother and child a right to a name and dignity, and a right to family and maintenance.

The Child Act 2001 categorises a child who is pregnant out of wedlock as a child who is in need of urgent protection and as such she may make an application to be admitted to a place of refuge under s 41 of the Act.[55] She may be given protection until she gives birth to the child and has to live at a refuge centre like Taman Seri Puteri in Cheras where the research was conducted. In this way the illegitimate child can be assured of being born alive and will not be

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52 Adoption Act 1952, Act 257, s 2.

53 *TPC v ABU & Anor* [1983] 2 MLJ 79.

54 See also the English Adoption Act 1976, s 16(4) where agreement to the making of the adoption order is ineffective if given by the mother less than 6 weeks after the child's birth.

55 Act 611.

abandoned at birth. The Welfare Department also assists them in making arrangements for the adoption of the illegitimate child but the question is whether an unwed mother can give lawful consent to adoption or was consent dispensed with because the mother was *unfit to give consent* or did the mother's parents give consent to the adoption of their grandchildren? Can she (the unwed young mother) later sue the Department for such arrangements?

(b) Right to a name, identity and nationality

This is another serious issue in Malaysia. Under the UNCRC all children have a right to a name, family ties and nationality. Since an illegitimate child can only take its mother's name, it should be registered immediately upon birth. However, many illegitimate children's names were not registered immediately after birth. This is because the mother feels that her child will be discriminated against or stigmatised by society if he or she holds a birth certificate without the father's name. If she is a Muslim woman, she may be prosecuted for fornication or adultery under the Islamic criminal laws of each state and upon conviction may be fined up to RM5,000 or imprisonment of up to 3 years or both. Hence many unwed Muslim women decided either to give the child away for adoption and the child take the adoptive parents' name or simply to postpone registration until she married the biological father of the child. The JPN declared that all illegitimate children will only be called 'daughter of or son of Abdullah'. If the biological father finally married the mother, he may apply to insert his name as the father of the child under s 13(a)(2) of the Birth and Deaths Registration Act 1957.[56]

For a very long time in Malaysia adoption was through private arrangements. Many Malay Muslims adopted children in accordance with the adat laws but many have adopted by simply registering the adopted child as their own child. Of course this is illegal under civil and syariah law. Later many of these adopted children found out that they were adopted and wished to locate their natural family. It is not easy where adoption had been done privately and in secret. The excuse given was to safeguard the children's dignity as well as their emotional well-being. But for the many adopted children, to find out about their adoption so much later in their life was devastating and destroyed their self-confidence.[57] They were confused and felt that they had lost their origins or sense of belonging.

The issue here is the right of the child to a name and family ties. A child has a right to know his or her parents and nationality. Many illegitimate children have been denied this right. To many the priority is the parent or parents, not the child. If the parent herself is a child, the conflict of interests must be resolved for the betterment of children as a whole.

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[56] Act 299.

[57] Interviews with adopted children.

(c) Right to maintenance

As illegitimate children have no ties with their father, they shall be maintained by their mothers. The results of the research show that most of the unwanted pregnancies happened because of consensual sexual intercourse, ie both parties agreed to have sex. Almost half the unwed mothers claimed that they trusted their partners and believed that their male partners would marry them after sexual intercourse or after they got pregnant. However, this does not happen. So they felt cheated and were actually cheated by their partners. A non-Muslim unwed mother can sue the biological father for maintenance under s 3(2) of the Married Women and Children (Maintenance) Act 1950[58] but how can a woman prove that a man is the biological father of her child? In *Peter James Binsted v Jevencia Autor Partosa*[59] the respondent claimed that the appellant was her husband and the father of her child, and applied for maintenance under s 3(1). The appellant denied the claims and the respondent applied to the Magistrate Court for an order that the appellant and the child undergo deoxyribonucleic acid (DNA) tests. The appellant appealed against the order of the Magistrate. The High Court held that a DNA test can only be done if the person concerned consented to it, otherwise, such a test would violate s 323 of the Penal Code. Furthermore, there is neither legislation nor rule under the common law that empowers any courts in Malaysia to order a person to undergo a test to ascertain paternity. In the absence of such legislative provision it was wrong in law for the Magistrate to make such an order.

Hence, an illegitimate child may be without maintenance if its mother is also a child who is being supported by her own parents. That is the reason why many illegitimate children were given away for adoption or abandoned. The law certainly does not make it mandatory for the biological father to maintain his biological child. For Muslims illegitimate children have no right to sue their biological father in the syariah court, as the syariah court does not recognise such a relationship. If the relationship is consensual, the liability should be shouldered equally. At present Muslim unwed mothers can sue in the civil High Court for the maintenance of their illegitimate child under s 3(2) of Act 263. This can be seen in the case of *Mohd Hanif Fakkirullah v Bushra Caudri and Anor*[60] where the High Court held that an illegitimate child who is Muslim may take legal action under Act 263 because there is no special provision made under Islamic law for them. In his judgment Faiza Thamy Chik J said:[61]

> 'I am of the view that since there is no clear provision for maintenance of an illegitimate child from her father in the Islamic Family Law (Federal Territory) 1984, as can be seen from the facts of the case disclosed before the court, the Islamic Family Law (Federal Territory) 1984 does not contain a provision which

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58 Act 263.
59 [2000] 2 AMR 2002.
60 [2001] 2 CLJ 397.
61 Ibid 408.

> can be applied to the facts of the instant case and as such the respondent I think has rightly brought this action under the Married Women and Children (Maintenance) Act 1950.'

Hence an illegitimate child may be able to get some maintenance from its father, but how many of them are willing to come forward through their mother to sue their biological father? The law must be amended to ensure these children are not denied their rights to maintenance.

(d) Right to protection

Illegitimate children are vulnerable and as such are easily exploited and open to abuse. At present there are many private institutions that are open to give shelter to unwed pregnant mothers. Most of these institutions rely on fees as well as donations. Who monitors these institutions and how are we to know if any may turn their businesses into selling babies? There are many couples who would like to adopt children for all sorts of reasons and are willing to pay for it. Unwed mothers are vulnerable and may be victims of trafficking and selling babies. The law on adoption is clear that the only institution that can and may arrange for adoption of children is the Department of Social Welfare of Malaysia as provided by the Adoption Act 1952 and Registration of Adoption Act 1952. The Child Act 2001 makes the social welfare officer guardian ad litem and also protector of children in need of protection. However, it is a known fact that many private institutions like Raudhatul Sakeenah, a half-way house run by Jemaah Islam Malaysia (JIM), Kem Modal Insan (Kowaja) Gombak and a half-way house run by Persatuan Pegawai-pegawai Pembangunan Masyarakat (Perubatan) Malaysia, arranged for private adoptions. Many claimed that such adoptions were made with the consent of the mother and her family, and were personal arrangements. They merely assist them with proper documentation. Hence it is very difficult to see in whose favour it would be, the child or the mother and her family. Of course when the mother herself is a child, is it in her best interest that her child is given up for adoption and what other options were given to her? Is she given access to the child or, if she changes her mind, can she keep her child?

(e) Right to association, freedom of speech and religion

These rights are fundamental human rights and are safeguarded by the UNCRC. Unfortunately Malaysia decided to reserve Arts 13, 14 and 15 of the UNCRC when we signed it. In Malaysia such rights are guaranteed by the Federal Constitution and there is no reason why Malaysia should reserve Arts 13, 14 and 15 because the limitations under the UNCRC are almost the same as those provided by the Federal Constitution. The UNCRC provides that freedom of expression and association shall be guaranteed except if it contravenes national security, public order or public health or morals. Freedom of religion is subject to parental guidance and to a certain extent in line with the Federal Constitution. In relation to right to join an association, a child at

the age of 15 may join the Youth Association as provided for by Act 668. However, generally a child (under the age of 18) cannot become a member of any organisation or association until he or she has attained the age of majority.

Since the Federal Constitution, art 12(4) and the interpretation and application of it by *Teoh Eng Huat v Kadhi Pasir Mas and Anor*,[62] *Tan Kong Meng v Zainon bte Md Zain and Anor*[63] and *dan Sharmala a/p Sathiyaseelan v Dr Jeyaganesh a/l C Mogarajah*,[64] a child's religion is determined by his or her parent. The question is whether a parent who is also a child determine her child's religion. Or is the religion of the child determined by the grandparents (mother's parents in case of illegitimate child)? The *Tan Kong Meng v Zainon bte Md Zain and Anor* case needs special mention. In this case, the child was an illegitimate child given by the mother to a Malay family. At the age of 11, the mother and the biological father came to request her return which was refused by the adoptive Muslim parents. The Court held that the adoption under the Registration of Adoption Act 1952 was null and void but did not return the child to the natural parents. The High Court exercised its power and appointed Zainon (the adoptive father with the adoptive mother) as the guardian of the child but specifically told them that they cannot change the child's religion until she is 18 years old. No doubt the decision, with all due respect, is bad law but the Court felt obliged to follow *Teoh Eng Huat*. The Court could have just looked at the best interests of the child and on the balance of probabilities decided that, since the adoptive parents had looked after the child from birth until she was 11 despite being paid to do so, she had known no one else but her adoptive parents and to remove her from such an environment could be damaging to her psychologically. The decision in *J v C*[65] in England could have been considered to give support to such a decision.

Freedom of thought, conscience and religion poses a bigger challenge in the area of conflicting rights. A child has a right to choose a religion to practise and profess, but when will he or she be allowed to make a non-parentally guided decision on such choice? At what age can a child be given the autonomous right to decide on his or her religion?

VIII SOME RECOMMENDATIONS

(a) Sex education

Prevention is better than cure. It is important for children to know the dos and don'ts about sexual intercourse so as to avoid unnecessary and unexpected pregnancy. Parents must be educated and must be able to communicate to their children about some of these issues to prevent it from happening. But sex education is still controversial in Malaysia and considered a taboo. Many

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62 [1986] 2 MLJ 228 and [1990] 2 MLJ 300.
63 [1995] 3 MLJ 408.
64 [2004] 2 MLJ 241.
65 [1970] AC 668.

religious authorities look upon sex education as promoting sex before marriage and believe it should be prohibited. As such the issue is still hanging and undecided.

(b) Youth training

The majority of the unwed mothers who were interviewed were under the age of 18 and claimed that they had little or no religious knowledge or had never had any religious education at home. It is recommended that a special religious module be drafted and introduced as part of the curriculum at the refuge centres for unwed mothers. Most of the centres are only vocational or technical in nature and even National Service needs a special religious component so that our youth will realise their roots and maintain their culture and religion.

(c) Parental skills courses

Marriage courses for future brides and bridegrooms must contain parental skills. Parental skill courses must also be given at senior secondary level (form four (aged 16) and above). Children must know that marriage is not only about sex and a bed of roses but it is about commitment, responsibilities and liabilities. Children are not dolls but human beings who have basic rights. These rights must be safeguarded.

(d) Shelter homes for unwed pregnant children/youths

It is no secret that unwanted pregnancy due to illicit intercourse amongst youths has become a social problem in Malaysia. The increase in the number of illegitimate children[66] particularly born from a young mother (under 18 years of age) has given rise to the need to set up special shelter homes. At present the Government Taman Seri Puteri can only host a limited number of persons at a given time. A priority is given if the pregnancy is due to rape or incestuous relationships. Of course a person above 18 cannot apply to be sheltered. Hence, many youths who are pregnant out of wedlock have nowhere to go, and going to the authorities would be a last resort as they fear being prosecuted. Many shelter homes have been set up by non-governmental organisations (NGOs)[67] but it is not enough and there is no proper monitoring to ensure that these

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[66] Akhbar Kosmo 15/6/06 melaporan dari Sumber JPN dari tahun 1999–2003 terdapat 70,430 anak taksah taraf dilahirkan di Malaysia (*Kosmo* (newspaper), 15 June 2006, reported that from 1999–2003 there were 70,430 illegitimate children born in Malaysia. The newspaper quoted that the source was the Registration Department of Malaysia).

[67] Rumah Sakinah ditubuhkan oleh JIM dan Rumah Perlindungan Aishah oleh Majlis Perunding Wanita Islam, Yadim. Penulis terlibat dengan penubuhan Rumah Perlindungan Aishah, Yadim (The Sakinah Refuge House was established by an NGO called Jemaah Islam Malaysia (JIM) and Aishah Half Way House was established by the Muslim Women Consultative Council of Malaysia (MPWIM), an NGO under the Islamic Da'wah Foundation Malaysian (YADIM). The author was instrumental in the setting up of the Aishah Half Way House and has been involved with it since 2006).

young mothers are not exploited and manipulated. The Child Act 2001 provides for voluntary applications by unwed pregnant young mothers but space is limited. A special shelter for these mothers may be able to ensure that unwanted pregnancies are not aborted illegally or newly born babies abandoned. If the young mother gives birth in a safe place, her health care after childbirth will be much better. Such a shelter home must be equipped with a psychologist and therapist. Young mothers should be given knowledge of child-bearing and rearing. No doubt the suggestion to set up special shelter homes for unwed mothers on a voluntary admission has been heavily criticised in some quarters as a mode of encouraging free sex or sex before marriage. It is of utmost important that we are able to differentiate 'the tree from the trunk' as our main purpose is to safeguard the well-being of the child and the mother who is also a child. It is wrong to blame the illegitimate child for the wrongdoings or mistakes done by its mother and father. Most of the time the mother and child are victims of circumstances and must be rescued. Everyone, including parents, members of society and the State have equal responsibility in finding solutions to these problems. There is no point trying to blame one another over this issue but to find an acceptable solution to it. Of course the law should not be looked upon as the solution. If considered at all, the law should be a last resort. Prevention is better than cure and we must stand together to make that difference.

(e) Setting up of the maintenance agency

In relation to the maintenance of illegitimate children, the setting up of an independent agency to collect, pay and enforce maintenance as in New Zealand and Australia will resolve the issue of maintenance. An illegitimate child is the sole responsibility of its mother but laws can be passed to make the father equally responsible for the upbringing. The State is responsible for ensuring the well-being of children in general including illegitimate children. If the agency is set up as a Federal Institution, many problems could be resolved. However, in Malaysia as matters relating Muslims are governed by the State legislature, steps must be taken to unify the syariah courts systems through Federal legislation.

IX CONCLUSIONS

Children are given rights under the UNCRC. Malaysia has ratified and enforced the UNCRC with eight reservations. While seriously trying to enforce some of these basic rights of children the State must also look beyond those articles which are not being reserved. Illegitimate children are children and their rights are the same as legitimate children. As such some of the conflicting areas of rights between mother and child must be erased so that they can be given a better life.

Namibia

LEGAL PLURALISM AND THE APARTHEID PAST: CHALLENGES TO NAMIBIAN FAMILY LAW REFORM AND DEVELOPMENT

*Manfred O Hinz and Clever Mapaure**

Résumé

Près de vingt ans après l'indépendance de la Namibie, le droit de la famille y est encore et toujours un mélange complexe de couches multiples de droits. Des législations d'avant et d'après l'indépendance continuent à cohabiter avec des systèmes de droit ancestraux. Les droits et libertés fondamentaux de la Constitution de 1990 ainsi que les obligations découlant de la ratification de plusieurs traités internationaux ont eu un impact considérable sur le droit familial namibien. La première partie de cette présentation fait état de législations récentes dans différents domaines: les obligations alimentaire, les congés parentaux, la violence familiale, le viol, le statut de l'enfant, le droit des successions et les terres ancestrales. La deuxième partie s'intéresse aux réformes législatives dans les domaines des mariages et des successions coutumiers, de la protection de l'enfance et du droit coutumier en général.

I INTRODUCTION

Namibian family law is, after almost 20 years of independence, still a complex mixture of different layers of law. Pre- and post-independence pieces of legislation are coupled with traditional legal systems. Requirements from the 1990 Constitution of Namibia and its fundamental rights and freedoms together with international obligations flowing from the ratification of many international instruments have had a tremendous impact on Namibian family law.

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The following builds on what was published in previous articles in the *International Survey of Family Law.*[1] Section II of this chapter will concentrate on recent enactments relevant to family law, understood in the widest possible sense to mean all law which has a bearing on persons in family relations and which was passed by the Namibian Parliament after 2002. References to legislation already in place before 2002 will only be made where later developments deserve such references. Section III considers various projects on the drawing board of law reform, including efforts to reform relevant customary law from within, ie by the communities themselves. Concluding remarks will round up the report (Section IV).

II STATUTORY CONTRIBUTIONS TO FAMILY LAW

(a) The Maintenance Act[2]

The Maintenance Act of 2003[3] was enacted after a growing number of women raised their voices and complained about difficulties in securing maintenance from the fathers of their children. The inefficient operation of the maintenance courts was of particular concern.[4] The Law Reform and Development Commission completed its report on maintenance in 1997.[5] The Maintenance Act was eventually passed by Parliament in 2003 repealing the Maintenance Act of 1963.[6]

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1 F Banda 'Family Law Reforms in Namibia' in A Bainham (ed), *The International Survey of Family Law* (Martinus Nijhoff Publishers, 1998) 265ff. D Hubbard and E Cassidy 'Family Law Reform in Namibia: Work in progress' in A Bainham (ed), *The International Survey of Family Law 2002* (Martinus Nijhoff Publishers, 2002) 255ff. The article by Hubbard and Cassidy also gives an account of the international instruments acceded to by Namibia. Since then, Namibia signed the Protocol on the Rights of Women in Africa on 9 December 2003. The Namibian Parliament approved the ratification on 15 June 2004. As to Namibian family law in general, we refer to the collection of statutes by S Bekker and MO Hinz, *The Laws of Persons and Family Law: Statutory enactments and other material* (Windhoek, Centre for Applied Social Sciences, 5th edn, 2000); M Postler, *Die Vermögensbeziehungen der Ehegatten im namibischen Sach- und Kollisionsrecht* (Berlin, Nora Verlagsgemeinschaft, 2004); and W Visser and K Ruppel-Schlichting 'Women and custom in Namibia – the legal setting' in OC Ruppel (ed), *Women and custom in Namibia: Cultural practice versus gender equality?* (Windhoek, Macmillan Education Namibia, 2008) 149ff. T Namiseb gives an overview on the current reform projects of the Law Reform and Development Commission (LRDC). Cf 'Women and law reform in Namibia – Recent development' in OC Ruppel, above, 107ff. All the projects listed by Namiseb have been dealt with in this chapter with the exception of the cohabitation project on which no material could be obtained.

2 Cf on the reform of the Namibian maintenance law, Hubbard and Cassidy, above n 1, 269ff.

3 Act No 9 of 2003.

4 Cf D Hubbard 'Gender and Law Reform in Namibia: The First Ten Years' in MO Hinz, SK Amoo, and D van Wyk (eds), *The Constitution at Work: 10 Years of Namibian Nationhood* (Pretoria, University of South Africa, 2002) 9.

5 Law Reform and Development Commission, *Report on Maintenance, Project 5* (Windhoek, LRDC, 1997).

6 Act No 23 of 1963.

Section 3 of the Maintenance Act confirms the legal duty of parents to maintain their children who are unable to support themselves. Under s 3(3) the parental duty to maintain a child includes the rendering of support which the child reasonably requires for his or her proper living and upbringing and this includes provision of food, accommodation, clothing, medical care and education. Both parents are responsible for the support of children regardless of whether the children were born inside or outside of a marriage and whether or not the parents are subject to a system of customary law which may not recognise one or both parents' liability to the child. Further, under the new Act, the parent applying for maintenance can be granted an order by the court to receive maintenance in kind (goats or cattle) where the father is not employed but owns livestock.[7] Conversely in terms of s 4(2) the children also have the obligation to maintain parents who cannot support themselves. In this regard the Act creates Maintenance Courts and procedures to be followed by people claiming maintenance.

Although the Maintenance Act has been in force for some years, it is still too early to state to what extent the Act has successfully responded to the plea of women to get support from the fathers of their children. There are, in particular, many problems related to the interface between the Act as part of the general law of Namibia and the various customary laws in operation in the country. Many women bound to traditional environments feel that it is culturally and socially inappropriate to make use of the mechanisms of the Act as most customary laws do not provide for the obligation to pay maintenance on a regular basis.

To illustrate this: if a man impregnates a woman, he has to pay a one-off sum of N$1,400 (about US$140), under Oshiwambo customary law. This payment is not maintenance as such; it is regarded as 'damage' for the wrong of impregnating someone's daughter without his knowledge. Further, these communities follow a matrilineal kinship system according to which the socio-legal roles of biological fathers of children are not identical with the socio-legal position of the uncle (the mother's brother) of the child. This means that biological fathers of children do not pay maintenance, or whatever customary law may consider the equivalent of maintenance in the sense of modern maintenance law. Paying maintenance is considered the responsibility of the mother's brother. A further difference to modern maintenance law is that the translation of the mother's brother's responsibility into material support to the child is very much at the discretion of the uncle of the child.[8]

Under Oshiwambo customary law, it is also the practice that a man's social responsibilities are assessed in accordance with the size of his household, ie the cultivated fields and the number of cattle he has in his possession. The expected amount of support to others follows from this and is in no way standardised as

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7 Section 17(4).

8 See EM Iipinge and D LeBeau, *Beyond inequalities: Women in Namibia* (Windhoek, Harare, University of Namibia and the Southern African Research and Documentation Centre, 2005) 12.

modern maintenance law stipulates. Thus, the man has to give *something,* which usually materialises in providing clothes or giving money to the child. While the Maintenance Act expects monthly payments, Oshiwambo tradition leaves it to the provider to provide what he wants to give and when to give it.

It has to be seen how perceptions of this nature will change as time goes by. Indeed, the matrilineal kinship support system has lost its strength because of socio-economic changes which were not really conducive to the unchanged survival of matrilineal kinship systems. The rapid changes in the socio-economic set-up, which affected matrilineal communities since the introduction of cash-oriented economic practices and the full integration of the economies of the northern parts of Namibia into the overall economic system of the country after independence, led to changes in the perception of family relations according to which more and more men prefer to concentrate on their biological children.[9]

Although we do not have much of statistical evidence about the acceptance of the Maintenance Act, it has also been noted that the Act has changed the life of many children in many aspects. Despite the above-mentioned debate, the fact that regular payments are required by the new law will make a difference in the lives of at least those children whose mothers are from disadvantaged families and who cannot afford to maintain the child alone.

(b) The Labour Act of 2007

Given the growing number of women who work in employment, labour law that regulates employment has an important impact on the situation of families, the partners to a marriage and the other members of the family. The labour law of Namibia has gone through various changes since independence. In 1992, the inherited law was repealed and replaced with the Labour Act of 1992.[10] This Act was in force for a period of 12 years until a new Labour Act was passed in 2004.[11] This Act was never implemented and formally replaced with the Labour Act of 2007.[12] Some family law-related provisions of this Act will be taken note of in the following.

In contrast to the 1992 Act, the 2007 Act provides better protection for and benefits to pregnant women. Pregnancy is specified as another ground upon which it is unfair to discriminate. In terms of s 26(4) of the Act, a pregnant woman cannot be dismissed or subjected to retrenchment while she is on maternity leave. The employer can only deviate from this rule if he or she offers comparable alternative employment and the woman unreasonably refuses to accept such an offer.

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9 MO Hinz and P Kauluma 'The laws of Ondonga – Introductory remarks' in *Traditional Authority of Ondonga: The Laws of Ondonga* (Oniipa, Evangelical Lutheran Church of Namibia, 1994) 33ff.

10 Act No 6 of 1992.

11 Act No 25 of 2004.

12 Act No 11 of 2007.

According to the Labour Act a female employee who has completed 6 months of continuous employment is entitled to not less than 12 weeks' maternity leave of which 4 weeks can be taken before the expected date of confinement and 8 weeks thereafter.[13] According to the 1992 Act, an employer was not required to provide any remuneration during maternity leave. Under the 2007 Act, the provisions of the contract of employment remain in force, and s 26(3) provides that 'the employer must, during the period of maternity leave, pay to the employee the remuneration payable to that employee except the basic wage'. Section 26(4) then says that the Social Security Commission 'must, during the period that an employee is on maternity leave, pay to that employee such portion of that employee's basic wage as may be prescribed in terms of that Act'. Practically this means that the employer will pay all the wage and benefits for the employee and claim the payment from the Social Security Commission.[14]

This arrangement protects employees from loss of income whilst they are sick, pregnant, injured or old. The employees are only entitled to benefits if they are registered and have been contributing to the scheme. The Act extends the right to maternity leave with benefits should there be complications during the time of the pregnancy or after the birth of the child.[15] Such complications have to be confirmed by a medical practitioner.

Although the reported parts of the Labour Act of 2007 have been well received in particular by women and women's groups, there are still concerns in business circles.[16] Associations representing the private sector of the tourism industry have submitted grievances to the Minister of Labour and Social Services to approve six variations to new Labour Act.[17] The reservations sought range from closure of business on public holidays through meal hours, to leave days. The motivations for the variations are mainly based on business efficacy and the potential negative impact the provisions of the Act have on the Namibian economy.

The main question asked by some employers is why the employers are expected to claim their maternity payments from the Social Security Fund instead of being free from payments and leave the claim for payment from the fund to their employees.[18] The new labour law decided against this simple and profit-oriented calculation. Maternity leave and the benefits awarded during maternity leave respect the need to protect women during and after their

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13 Section 26(1) of the Labour Act.

14 The Social Security Commission was established by the Social Security Act, No 34 of 1994. Each employee is expected to register with the Commission upon which they are obliged to contribute a monthly payment into the Social Security Fund.

15 Section 27 of the Labour Act.

16 This section is the same as s 41 of the 2004 Act, which did not come into force after most employers objected to its principles and their impact on the Namibian economy. Under the 2007 Act employers are still airing reservations: see J Asheeke 'Fenata seeks variations to Labour Act' in *New Era* of 22 May 2009.

17 J Asheeke, ibid.

18 From communication with employers.

pregnancies. This means applying the constitutionally required protection of the family, in art 14 of the Constitution and in the regulations of the workplace by which women can require their share of protection from unfair dismissal or unfair practices in general. The obligation of employers to pay reflects the idea that the extension of the constitutionally required protection of the family entails an obligation to all. The fact the state supports this obligation through the Social Security Fund expresses the commitment of the state to the same obligation. At the same time, the system of shared responsibility creates an incentive in making employers register their employees, thus dealing with the low registration rates of social security membership by employees.

(c) Violence against women

(i) The Combating of Domestic Violence Act

As noted in the previous contribution to the Survey on Namibian family law[19] alarming reports about the rapidly increasing violence against women[20] prompted the call for legislative measures to respond to this evil by protecting victims and potential victims of violence. The Combating of Domestic Violence Act of 2003 was the answer.[21] The situation of women in Namibia was greatly neglected before independence. The responsible Ministry for women affairs stated in 2000:[22]

> 'The emergence of violence as a crucial issue for women and development in the developing countries has gained the attention of all women. Gender violence, whether in its most overt and brutal or its most subtle forms, is a constant issue all women's lives. An extremely conservative estimate extrapolated from this data would be more than 2000 cases of domestic violence are reported to the police annually.'

A report of the Legal Assistance Centre issued in the same year stated that most cases of domestic violence happen in the household, showing that 20% of the crimes occur within the context of domestic relationships.[23] About 86% of domestic violence cases reported to the police involve women. 93% of reported domestic violence cases are committed by men.[24] Iipinge and LeBeau observe that:[25]

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19 See Hubbard and Cassidy, above n 1, 265ff.

20 See Projects in development: Namibia. A project to educate professionals in the legal, medical and social service sectors about violence against women and new Namibian legislation to combat rape and domestic violence (on file with the authors).

21 Act No 4 of 2003.

22 Ministry of Women Affairs and Child Welfare, Report: *Namibia – National progress report on the implementation of an addendum on the prevention and eradication of violence against women and children* (Windhoek, Ministry of Women Affairs and Child Welfare, 2000).

23 Ibid.

24 See D Hubbard *Domestic violence cases reported to the Namibian Police: Case, characteristics and police response* (Windhoek, LRDC, 1999) 28.

25 See EM Iipinge and D LeBeau, *Beyond inequalities: Women in Namibia*, above n 8.

> ' . . . [r]ural women are more likely than their urban counterparts to say that they do not know if there is any specific law against domestic violence. Whether or not it is identified as a specific crime, all urban women and most rural women indicate that it is illegal for a man to beat his wife. Several rural women make the observation that domestic violence happens in their village but no one interferes because it is either regarded as normal, not illegal, seen as a family issue or the man's right to beat his wife. The law is not well understood by all, men and women alike.'

The Combating of Domestic Violence Act defines domestic violence as any action that includes physical, sexual, economic, emotional, verbal, and psychological abuse, as well as intimidation, harassment, and entering a property illegally.[26] Domestic relationship is, in terms of the Act, to be understood in the widest possible sense. It includes a relationship created by civil or customary marriage; by engagement; by a cohabitation situation; a relationship of parents who have children together, or are expecting a child (whether or not they lived together); and a relationship of family members related by blood, marriage or adoption.[27] Domestic violence is, in terms of s 21 of the Act, a crime when the action of violence is committed or alleged to have been committed against the person, or in relation to a person.

The Act offers several options to get the state's law enforcement agents involved in cases of alleged domestic violence. One is to apply for a special protection order in a magistrates' court. Another is to lay a criminal charge, which would then be pursued as any other criminal charge in terms of the Criminal Procedure Act.[28] As determined by s 4 of the Combating of Domestic Violence Act, a complainant, ie a person affected by domestic violence may apply to the courts for a protection order against his or her domestic partner. A protection order means an interim or final protection order granted under the Act.[29] This implies that the perpetrator of the violence is restrained from continuing the violence against the victim and may be ordered not to interact with the victim for a certain period of time. Further, during the period of the existence of a protection order, the police are obliged to make sure that the victim is not subjected to violence by the perpetrator.

In terms of s 14 of the Act, protection orders may include a provision restraining the respondent from subjecting the complainant to domestic violence, requiring the respondent to surrender a weapon, abstaining from contacting the complainant, moving out of the residence occupied by the complainant regardless of whose name the property or lease may be in, providing financial support for the complainant's accommodation, and/or temporarily relinquishing the custody of children in the care of the

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[26] Section 2 of the Act.
[27] Section 3 of the Act.
[28] Act No 51 of 1977.
[29] Section 1 of the Act.

complainant and the respondent. Any person, with specified interest in the well-being of a minor child can also lay a complaint and request a protection order.

Iipinge and LeBeau hold that the introduction of the Combating of Domestic Violence Act created a lot of awareness that violence within the home or family is not a private matter and is not tolerated.[30] However, as the Act is relatively new, there is still work to be done to make it a law understood by all in Namibia.

There is information that one in five women in Windhoek is in an abusive relationship. More than a third of women report having suffered physical or sexual abuse at the hands of an intimate partner at some point in their lives.[31] During the period 2007–2008, the interdisciplinary Task Force against Violence of the Human Rights and Documentation Centre at the University of Namibia conducted research on violence against women in Namibia.[32] The Task Force reported that 96% of the interviewees responded that violence against women was a problem in Namibia only 4% said it was not. An alarming 72% of the students had personally experienced violence, while 14% had witnessed violence, at least indirectly. Only 22% had not experienced any type of violence. A wide range of abuse occurs in the family and community at large, ranging from physical and sexual violence to psychological violence. The abuse mentioned included battering; the sexual abuse of children; dowry-related violence and rape. The female respondents provided distressing evidence of physical and/or sexual abuse by their partners.

(ii) Note on the Combating of Rape Act

The Combating of Rape Act was enacted in 2000,[33] noted in the 2002 *International Survey of Family Law.*[34] The following observations will therefore only highlight some points of importance, as they were not included in the 2002 chapter.

Under the common law in place before the enactment of the Combating of Rape Act, rape was defined as the unlawful and intentional sexual intercourse by a male person with a female person, without her consent.[35] This definition left many cases unprosecuted because they fell outside the legal definition, given that many forms of sexual assault (such as forced oral sex, sodomy or inserting objects into the vagina) were previously not defined as rape. Sentences

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30 Above n 8.

31 Sister Magazine, *Gender Violence* (Windhoek, December 2005). In Namibia homosexuality is a crime covered under the common law crime of sodomy.

32 Cf OC Ruppel, K Mchombu and I Kandjii-Murangi 'Surveying the implications of violence against women: A perspective from academia' in OC Ruppel (ed) *Women and custom in Namibia*, above n 1,19f.

33 Act No 8 of 2000.

34 Hubbard and Cassidy, above n 1, 265ff.

35 See *S v Gaseb and Others* 2000 (1) SACR 438 (NmS), as decided under the common law definition.

for such offences were lenient. The common law definition of rape also exempted, at least in accordance with prominently held views, *marital rape* from the crime of rape. The rationale was that, by entering into marriage, the wife had irrevocably consented to sexual intercourse with her husband. This reasoning can be exemplarily found in the case of *R v Gumede*.[36] An additional argument for ignoring marital rape was that 'it has become one of the invariable consequences of marriage that sexual intercourse between husband and wife can never be unlawful'.[37] This view, however, was not unchallenged.[38] Even prior to the Combating of Rape Act, some judges expressed their view that the exemption for marital rape was 'archaic' and should be jettisoned. It was as early as 1922 that the South African case of *S v Ncanywa*[39] held that there was no justification for the marital rape exemption. The court was of the opinion that existing case-law either assumed its existence or merely referred to it in obiter dicta.[40] The court also rejected the fiction that by entering into a marriage the wife irrevocably consented to intercourse with her husband as having no foundation in law and being offensive to the boni mores of any civilised society.[41]

Namibia passed its Combating of Rape Act according to which rape is understood as any sexual act committed under 'coercive circumstances'. Coercive circumstances are broadly defined to include physical force, threats of force, or other circumstances where the victim is intimidated. The important point to note here is that the Act replaced the old law by referring to the coercive circumstances as defined and, thus, abandoned the consent principle of the common law. Iipinge and LeBeau comment on this, as follows:[42]

> 'The word *consent* did not focus on the use of force or coercion used by the perpetrator. Under the new Act, the term used is *coercive circumstance* which is broadly defined to include physical force, threats of force, or other circumstances where the victim is intimidated. Hence, the new law also protects young girls and boys, as well as men against rape (given that it is a gender neutral law) and provides for stiffer minimum sentences for rapists and more strict bail conditions for people accused of rape. This is also a relatively new piece of legislation and the process of implementation, evaluation and monitoring has been under going revisions.'

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36 1946 (1) PH H68 (N).

37 See J D Sinclair (assisted by J Heaton) *The Law of Marriage* (Vol 1 Kenwyn, Juta, 1996) 431 and authorities mentioned therein.

38 See Sinclair, ibid.

39 1992 (2) SA182 (CkGD).

40 Ibid and see also the comments by Sinclair, above n 37 at 433.

41 *S v Ncanywa* 1993 (2) SA 567 (CkAD). This decision was partly reversed on appeal. See *Annual Survey of South African Law* 1992, 517. In *S v M*, the Supreme Court of South Africa held that the cautionary rule as applied in rape cases did not constitute discrimination against women, even though most victims in rape cases are women. Under this rule, a court has to take a cautionary approach when assessing the truthfulness of the statements of a rape victim. For critical discussions of this appeal and the case in the lower court see J Campam 'The marital rape exemption resurrected' (1994) 111 *South African Law Journal* 31.

42 Iipinge and LeBeau, above n 8, 11, emphasis added.

The Combating of Rape Act is clear in criminalising marital rape in s 2(3). No marriage or other relationship shall constitute a defence to a charge of rape under the Act. Although this is to make men understand that their wives are not their property and men cannot force them to have sexual intercourse against their will, research done by various organisations in Namibia indicates that many people are still unsure whether marital rape is illegal.[43] Iipinge and LeBeau summarise in their report[44] that:

> ' . . . [p]eople know that the new rape law exists but are still unsure whether marital rape is illegal. Urban men are divided as to whether a man can rape his wife, while the majority of urban women agree that a man can rape his wife. However, they say that most wives do not report it. Most rural women and men do not believe that marital rape is possible. Most women identify men's power and control as reasons for marital rape.'

(iii) The Criminal Procedure Amendment Act

The Combating of Rape Act and the Combating of Domestic Violence Act touch on issues which may lead to situations whereby one family member sues another for rape or violence. Speaking openly against a family member will not be an easy undertaking. Indeed, legal mechanisms are needed to protect victims of violence and witnesses who are prepared to testify against wrong doers. The enactment of the Criminal Procedure Amendment Act of 2003[45] was meant to cater for victims of crime needing protection.[46] This Amendment Act, commonly referred to as the Vulnerable Witnesses Act, was drafted to help in preventing survivors from being doubly victimised once by the perpetrators and then by the legal system. Its overall objective is to make the court process less traumatic for victims of crime and other vulnerable witnesses, especially in cases of sexual abuse and sexual assaults.[47]

The measures to apply to vulnerable witnesses are provided for in s 1 of the Amendment Act, now inserted as s 158A of the Criminal Procedure Act of 1977, entitled 'Special Arrangements for Vulnerable Witnesses'.[48] In accordance with this section, a court before which a vulnerable witness is to give evidence may on the application of any party to the proceedings or the witness him or herself, or even on its own motion, make an order that special arrangements be made for the giving of the evidence of that witness. These special arrangements may include steps whereby the trial is relocated to another location while the trial continues; the rearrangement of the set-up of the courtroom; and the granting of permission for a support person (who is a person fit for that purpose) to accompany the witness while he or she is giving evidence. The court can also allow permission to the witness to give evidence behind a screen or in another room which is connected to the courtroom by

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43 Ibid.
44 Ibid.
45 Act No 24 of 2003.
46 Hubbard and Cassidy, above n 1, 267ff.
47 Iipinge and LeBeau, above n 8, 12.
48 Act No 51 of 1977.

means of closed circuit television or a one-way mirror or by any other device or method that complies with the Criminal Procedure Act.[49]

The amended Criminal Procedure Act defines a vulnerable witness as a person under the age of 18:[50]

> '. . . against whom an offence of a sexual or indecent nature has been committed;[51] or against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship; and who, as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.'[52]

In terms of the amended Act, the court may give instructions to a support person prohibiting communication with the witness, or may instruct the support person to take such actions as the court may consider necessary.[53] When a witness gives evidence behind a screen or in another room, the accused, his or her legal representative, the prosecutor in the case and the presiding officer shall be able to hear the witness and also be able to observe the witness while giving evidence.[54]

Section 216 of the Act stipulates that the evidence in a statement by a child whose age is below 14 years is admissible. Under the common law such evidence was subject to the so-called cautionary rule. There is, however, a proviso to this position which stipulates that such evidence of a child will be admitted if there are indications of reliability in such a statement or when the child is unable to testify before the court. The child also has to make a confirmation that he or she is the one who made the statement. The statement does not necessarily have to be written, since the Act allows such evidence to be recorded as video or audiotape.

(d) The Children's Status Act

Before the enactment of the Children's Status Act of 2006[55] only children born of civil marriages were entitled to inherit from their deceased fathers. In terms of the general law of Namibia, children born out of wedlock – and given the view, held so far, that marriages under customary law did not qualify as marriages – could not inherit. This situation was seen to be unacceptable in terms of modern developments in family. Accordingly, inheritance law and

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49 Section 158A.
50 Section 158A(3)(a).
51 Section 158A(3)(b).
52 Section 158A(3)(d).
53 Section 158A(5).
54 Section 158A(6).
55 Act No 6 of 2006.

reforms were subsequently initiated.[56] They led to the drafting of a Children's Status Bill of 2005[57] which was eventually passed by Parliament to become the Children's Status Act after a long process of consultations.[58]

The aim of the Act is to provide equal treatment to children regardless of whether they are born inside or outside of marriage. Marriage means a marriage in terms of any law of Namibia and includes marriages recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which is recognised as a marriage by the laws of Namibia.[59] This means that even if a man who is married under customary law has extramarital relationships which result in children, these children may also be entitled to inherit from their father. The same applies when a woman has an extramarital child. Such a child will also qualify to inherit from the parents.

Unmarried mothers and fathers will have equal rights to custody of their children.[60] However, one parent must be the primary custodian and guardian of the child. The parents are to agree on who should be the primary custodian of the child.[61] Where such an agreement cannot be reached, either of the parents may make an application to the children's court for the appointment of a primary custodian.

Joint custody means that all decisions regarding the affairs of the child must be made jointly by the parents in consultation with each other. Equal rights to custody and guardianship also mean that a child born outside of marriage can live with either parent. This is contrary to the common law position before the Children's Status Act according to which an unmarried mother of the child was regarded as the sole custodian and guardian of the child. If the custody of an extramarital child is disputed between the parents, then either parent can approach a children's court to request sole custody. In terms of s 3(2)(b) the court's decision must be based on the best interests of the child,[62] and the court

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56 See submissions by the National Society for Human Rights, available at: www.nshr.org.na/downloadfiles/children/nshrSUBMISSION_ON_CSA.pdf (accessed 12 April 2009).

57 Ibid.

58 The Children's Status Bill was tabled in the National Assembly in February 2004 and referred to the National Assembly's Standing Committee on Human Resources, Social and Community Development. This Committee held public hearings at 28 locations around the country. In October 2004, it tabled its report to the National Assembly which made recommendations for amendments to the Bill. The revised Bill was passed by the National Assembly in November 2005, and referred to the National Council. Another round of consultations followed. In December 2005, the National Council referred the Bill to its Standing Committee on Gender, Youth and Information. Because of budgetary constraints, this Committee could only hold hearings in Windhoek. A host of organisations concerned participated in the hearings which took place in February 2006.

59 See s 1 of the Act.

60 Section 11 of the Act.

61 Section 11(2) of the Act.

62 Section 3(2)(b) of the Act.

will not approve an application for custody that appears to be based on a desire to avoid paying maintenance of the child.[63]

Regarding inheritance, the Children's Status Act gives children born out of wedlock the same rights as children born into a marriage. Section 16(2) of the Act states:

> 'Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage.'

Section 16(3) specifies that the words 'children' or 'issue' or any similar term used in a testamentary disposition shall apply equally to persons born inside or outside marriage, unless there is clear evidence of a contrary intention on the part of the testator.

Children who are a result of an act of rape qualify to inherit from the parent who committed the rape, while the rapist cannot inherit from the child. Section 16(5) states:

> 'With respect to rape which results in the conception of a person born outside marriage, the person who committed the crime has no right to inherit intestate from the person born as a result of the rape, but the person born as a result of the rape may inherit intestate from the perpetrator, and will be deemed to be included in the terms "children" or "issue" or any similar term used in a testamentary disposition.'

(e) The Estates and Succession Amendment Act

Inheritance law in Namibia is still in a problematic state. Many attempts have been made to reform the law of inheritance with special emphasis on customary inheritance law.[64] The only change in inheritance law, however, was prompted by an order of the court in the *Berendt* case.[65]

In this case, Martha Berendt, who died unmarried and intestate on 20 March 1999, had three children. The deceased belonged to the Bondelswart community, one of the Nama-speaking traditional communities in southern Namibia. The deceased owned a house in Windhoek in which she lived with her children. Upon her death a magistrate of the Windhoek magistrates' court appointed one of the children, Naftalie, as the executor of his mother's estate in agreement with the family.

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63 Ibid.

64 See MO Hinz 'Strengthening women's rights: The need to address the gap between customary and statutory law in Namibia' in OC Ruppel (ed) *Women and Custom in Namibia*, above n 1, 95.

65 *Berendt v Stuurman* 2003 NR 81.

However this appointment has to be seen in the context of the law applicable to what is still called in Namibia 'estates of natives'. The Native Administration Proclamation,[66] of which certain parts survived up to today, says in s 18(1):

> 'All movable property of whatsoever kind belonging to a Native and allotted by him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house shall upon his death devolve and be administered under native law and custom.'

Section 18(2) provides that:

> 'All other movable property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.'

These sections should be read together with s 2 of reg 70 of 1954[67] which provides that if a native dies intestate and at the time of death was married in community of property or was a widow, widower or divorcee, the property shall devolve as if he or she had been a 'European' with the consequence that the Intestate Succession Ordinance of 1946[68] would apply. The administration of an estate under such native law was not to be done by the Master of the High Court but left to an arrangement by the Magistrates Courts Proclamation as it maintained a racially discriminating system.[69] If the deceased does not fall into a class described above, the property shall be distributed according to 'native law and custom'.

The executor of the Berendt estate sold the inherited house to a certain Claudius Stuurman without involvement of the other heirs. As a result of this, they brought an application to the High Court of Namibia in which they challenged the appointment of Naftalie as executor by questioning the constitutionality of the relevant section of the Native Administration Proclamation. The High Court followed this argument and declared that s 18(1), (2) and (9) as well as the regulations made under s 18(9) are in conflict with the provisions of the Namibian Constitution.[70] The Court also held that the appointment of Naftalie Berendt as executor in the estate of the late Martha Berendt was unlawful, null and void and ordered that the Administration of Estates Act 1965 should apply to the estate of the late Martha Berendt. The Court also ordered that the Master of the High Court should supervise the administration of the estate of the late Martha Berendt in terms of the provisions of the Administration of Estates Act, and the deed of sale entered into between Claudius Stuurman and Naftalie Berendt was declared as null and void.

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66 Proclamation No 15 of 1928.

67 GN 70 of 1954; see in addition reg 192 of 1974.

68 Ordinance 12 of 1946.

69 Cf s 18(6) of the Native Administration Proclamation.

70 With this the High Court of Namibia followed the decision of the Constitutional Court of South Africa in the case of *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC).

To avoid a legal vacuum in inheritance laws, the court said that the impugned provisions are deemed to be valid until a new Act was passed and ordered Parliament to effect necessary legislative reforms. Parliament was given a deadline to enact a new law replacing the law declared as inconsistent with the Constitution. On the basis of this, the Estates and Succession Amendment Act was passed in 2005. The Act amends s 18 of the Native Administration Proclamation, 1928 by repealing subsections (1), (2), (9) and (10).[71] It also repealed the whole of the Administration of Estates (Rehoboth Gebiet) Proclamation of 1941[72] which entailed a special but similar scheme for the administration of estates for the inhabitants of Rehoboth, the traditional territory of the Rehoboth Basters.[73] The Act amended the Administration of Estates Act of 1965[74] by inserting s 4(a) which gives the Minister the authority to shift the powers of the Master to magistrates.

The magistrates were criticised in the past for failing to ensure that estates are distributed fairly, because there were no regulations in place to guide the magistrates, and they were also not compelled to report to the Master. The new law addresses this problem to a certain extent in that the powers and functions of the magistrate are derived powers and functions, meaning that the Master may require relevant information from the magistrate regarding the administration of an estate.[75]

Although the enactment of the Estates and Succession Amendment Act has to be seen as an important step forward to leave apartheid-inherited legislation in the past, the process that led to the new Act and the Act itself were also met with criticism. Critical voices regret that the reform concentrated only on the technicality of who is to administer an estate and did not go into the substance of the law of inheritance.

(f) The Communal Land Reform Act

The Communal Land Reform Act of 2002[76] is the legislative answer to legal questions that were debated before independence, but more so thereafter, and the latter on the basis of the Constitution of Namibia. The Act addresses issues in communal areas that were already raised during the National Land Conference.[77] The general consensus then was that, although the communal

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71 Section 1 of the Estates and Succession Act.

72 Act No 36 of 1941; see s 2 of the Act.

73 'Baster' is the accepted term for the people of Rehoboth who originate from the Western Cape of South Africa, being descendants from the indigenous inhabitants of South Africa and European settlers.

74 Act No 66 of 1965.

75 Cf M Ovis' Opinion article in *The Namibian* of 7 April 2007.

76 Act No 5 of 2002.

77 The land question was raised within the first month of Namibia's first independent National Assembly sitting. On 1 June 1990 a motion requested the Government, through the Prime Minister, to call a National Conference to debate how to deal with land reform in Namibia. The National Conference on Land Reform and the Land Question was held in Windhoek from 25 June to 1 July 1991.

land tenure system should be retained, gender inequalities required attention. The Conference recommended that 'women should have the right to own the land they cultivate and to inherit and bequeath land and fixed property'.[78]

The policy behind the Communal Land Reform Act took note of the fact that under many systems of customary law women's rights to land are seen to be secondary rights, ie derived through the membership of women in households and attained primarily through marriage.[79] The Communal Land Reform Act did not address this very basic problem of customary land law as such, but only problems related to the position of women and children after the death of their husbands.

In terms of s 26(2)(a), communal land reverts to the respective traditional authority for reallocation to a surviving spouse if the spouse consents to the allocation. If there is no surviving spouse, or if the surviving spouse does not wish to remain on the land, then it goes to 'such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law'.

III REFORMS UNDER CONSIDERATION

(a) The Customary Marriages Draft Bill[80]

Namibian marriage law is officially still stuck with the *Hyde v Hyde*[81] principle as adopted by courts in *Ebrahim v Mahomed Essop*[82] and *Ismail v Ismail.*[83] The Marriage Act of 1961[84] only governs the requirements for a civil marriage under Christian rites and the process of solemnisation. Customary marriages have historically been ignored and lack up to today official recognition. They lack official recognition because they are said to be at least potentially polygamous, a fact which was seen not to be in line with the aspirations of civilised societies. A customary marriage was, therefore, usually termed a 'customary union' and was understood not to be a marriage in the legal sense.

The time when customary marriages were called 'customary unions'[85] in order to indicate that family forms created under customary law did not deserve the

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78 W Werner *Land Reform in Namibia: The first seven years* (Windhoek, 1997, NEPRU Working Paper No 61) 2ff.

79 C Walker *Land reform in Southern and Eastern Africa: Key issues for strengthening women's access to and rights in land*, a report on a desktop study commissioned by the Food and Agriculture Organisation (FAO) (Harare, FAO, 2002).

80 The following part is taken from an article by MO Hinz 'Strengthening women's rights: the need to address the gap between customary and statutory law' in OC Ruppel (ed), *Women and Custom in Namibia*, above n 1, 95ff.

81 (1866) LR 1 P & D 130.

82 1905 TS 59.

83 1983 (1) SA 1006.

84 Act No 25 of 1961.

85 According to s 17 of the Native Administration Proclamation 15 of 1928.

status of proper marriages, as Christianity defined them, is gone. The time is also gone when customary marriages were denied recognition because of what courts used to invoke against their recognition, namely that customary marriages were – at least potentially – polygynous.[86] So, too, has the time passed when this potentiality would prevent customary marriages from being recognised as such, although the debate about the legal validity of polygynous marriages is not over in Namibia.[87]

The fact that the Namibian Constitution refers to customary marriages in two of its articles[88] and confirms customary law in the very general sense in the principal art 66 has nevertheless not concluded the long way to full legal recognition. When talking of the recognition of customary marriages, one speaks of matters of personal status. And when one talks about a person's status, one talks about very important matters with respect to a person's culture, identity and dignity. There are still many people in Namibia who marry under customary law. While 19% of Namibia's population as a whole are married under civil law, 9% are married under customary law. In the Caprivi Region, for example, 34% marry under customary law, compared with 5% under civil law. In the Kavango Region, 29% get married traditionally against 13% who opt for a civil marriage.

The recognition of customary marriages – as can be interpreted with reference to the Constitution of Namibia – does not, in fact, answer questions on a number of issues that are associated with the recognition of a marriage. For example, what are the criteria of a valid customary marriage? What are the rules governing the relationship between spouses? What is the matrimonial property regime? What are the grounds for divorce? And how is divorce effected? Although customary law will certainly provide answers to some aspects of these questions, even this will not be enough at the end of the day. Certainty for the parties to marriages, certainty for the benefit of the children, certainty for the public with whom spouses entertain transactions – all these require legislative intervention in terms of a statute comparable to the Marriage Act[89] or the Married Persons Equality Act,[90] to name only two that focus specifically on civil marriages.

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86 Cf here H Becker and MO Hinz *Marriage and customary law in Namibia* (Windhoek, Centre for Applied Social Sciences, 1995) 22ff and *Ryland v Edros* 1997 (1) BCLR 77 (C); concerned with a marriage under Islamic law, the previously held positions against Muslim marriages (and thus, incidentally, against marriages under customary law) are rejected.

87 Section 7(6) and (7) of the South African Recognition of Customary Marriages Act, 1998 (No 120 of 1998) allows polygyny, although the High Court or family court are obliged to approve such entering into marriage with an additional wife.

88 Article 4(3)(b), which addresses the acquisition of citizenship, and art 12(1)(f), concerning the privilege to withhold testimony against themselves or their spouses.

89 Act No 25 of 1961, as amended.

90 Act No 1 of 1996. Cf s 16 of the Act, which takes note of customary marriages, but explicitly excludes the applicability of the most important achievements of the Act to customary marriages.

Following substantial research,[91] in 2004 the Law Reform and Development Commission published its report on customary law marriages. Apart from summaries of the research, the report also contains a draft of the Customary Marriages Act.[92] Critical (and, to some extent, controversial) issues in preparing the report and the draft legislation were the requirements flowing from art 14 of the Constitution, the question as to whether and how customary marriages would need to be registered, the internal regime applying to customary marriages, the matrimonial property regime, and the dissolution of customary marriages.

Section 3(2) of the draft states that:

> ' . . . a customary law marriage must be concluded in accordance with the customs applicable to the traditional community to which the parties belong.'

While it was acknowledged that marriages under customary law were deeply bound to arrangements between two families, the draft legislation maintained that what art 14 of the Constitution prescribed as to the full age and free consent of the persons to enter into a matrimonial relationship should also be applicable to customary law marriages.[93] As to registering customary marriages, the debate on the draft legislation took note of the experience of other countries. In Zimbabwe, for instance, where registration is required for the validity of the marriage, registration rules are very often ignored by the parties entering into a customary law marriage.[94] Nevertheless, the Namibian Law Reform and Development Commission eventually supported mandatory registration, but with the involvement of traditional authorities.[95] Government-appointed customary law marriage officers would oversee the conduct of marriages under customary law, and issue certificates to the parties of the marriage.[96] Should these provisions come into operation, they will in fact change the customary law in place in some traditional communities in the

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91 Cf B Solomon, H Becker, O Kaishungu and MO Hinz *Improving the legal and socio-economic situation of women in Namibia: Uukwambi, Ombalantu and Uukwanyama integrated report* (Windhoek, Centre for Applied Social Sciences and Namibia Development Trust, 1994), which recorded relevant field research done in northern Namibia. Becker and Hinz *Marriage and customary law in Namibia*, above n 86, established the anthropological and legal foundation on which to build in further research and decision-making.

92 See Annexure B in Law Reform and Development Commission, *Report on customary law marriages, Project 7* (Windhoek, LRDC, 2004).

93 See ss 3 and 9 of the draft legislation.

94 See LRDC, above n 92, 6.

95 The fact that the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa stipulates that 'every marriage shall be recorded in writing and registered in accordance with national laws' (art 6(d)) prompted the Law Reform and Development Commission to propose mandatory registration. South Africa took a more lenient position in that their Recognition of Customary Marriages Act does not invalidate unregistered marriages, and allows for their subsequent registration (see s 4). Although South Africa maintained a reservation to art 6(d) of the women's rights protocol, it could nevertheless reasonably be argued that the more open South African approach would still be in line with the international obligation as entailed in art 6.

96 Section 5(5) of the draft legislation.

Caprivi and Kavango Regions, where traditional authorities have made use of their power to make customary law by issuing customary law marriage certificates.

The matrimonial property regime applicable to customary marriages was another issue of some controversy. While anthropological research in northern Namibia, for example, indicated that there was a strong inclination towards the regime of 'out of community of property', the Law Reform and Development Commission eventually proposed that the default system of customary marriages should be the same as that for civil marriages, ie 'in community of property', with the possibility of agreeing on a different property arrangement.[97]

The proposed rule on the dissolution of customary marriages goes beyond what we have under civil law. Customary marriages may be dissolved on the ground of irretrievable breakdown, and in using the procedural offers available under customary law. The dissolution of the customary law marriage would come into effect once the customary law marriage officer has issued a certificate of divorce.[98] This is again a change to the customary law in place in the Caprivi and Kavango Regions, where traditional authorities issue divorce certificates.

The Customary Law Marriages and Divorce Committee of the Law Reform and Development Commission was of the opinion that polygyny and 'malobola'[99] as well as any other marriage consideration paid by one party in a customary marriage to the other should be left open in the envisaged law on customary marriages.[100] The Law Reform and Development Commission did not agree with this opinion, and decided to outlaw polygynous marriages and to subject contraventions to the common law offence of bigamy.[101] Not much is said to justify this move.[102] There is not even a reference to the Protocol on the Rights of Women in Africa.[103] The Protocol has obviously taken note of the fact that practices of polygyny will not end simply because the law says they ought to end at a particular point. What the Protocol does is only to oblige Member States to 'encourage monogamy as the preferred form of marriage'.[104] A more open approach would have been helpful to accommodate the view held by many (including women) that polygyny is rooted in African tradition and should be allowed to be practised.

However, the fact that the draft Customary Marriages Act needs some reconsideration should not detract from the fact that this legislation is the result of a process of years of scientific research and consultation. Legal

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97 See s 10 of the draft legislation and the explanation following the section.
98 Section 12(2) of the draft legislation.
99 The usually used term for payments in marriage negotiations.
100 Cf the summary report by MO Hinz submitted to the Committee on 8 April 1999; internal document.
101 See s 4 of the draft legislation.
102 Cf LRDC, above n 92, 5.
103 As already referred to, above n 95.
104 Cf art 6(c) of the Protocol.

certainty in the field of customary marriages is needed. As it stands, the draft legislation – irrespective of any parts that may need amendment – would contribute to strengthening the position of women.

(b) Divorce law reform

The reform of the Namibian law on divorce remains a matter that is long overdue. The Law Reform and Development Commission has stated in its 2004 Report that the 'current divorce law is not in tune with everyday social realities'.[105] Namibian divorce law is based on the Roman Dutch common law amended by statutory law.[106]

There are four grounds for divorce: adultery; malicious desertion; the imprisonment of a spouse who has been declared a habitual criminal for at least 5 years; and the incurable insanity of a spouse which has lasted for at least 7 years. These grounds (with the exception of incurable insanity) are based on the principle of fault, ie one spouse must be guilty of having committed some type of wrong against the other spouse. This approach is inconsistent with the contemporary understanding of the marriage relationship which is based on consensus and according to which nobody should be forced to remain in such a broken relationship.

It is in this sense that the Law Reform and Development Commission proposed to change Namibian divorce law to allow for divorce in case of irretrievable breakdown, based on a submission by the Gender Research and Advocacy Project of the Legal Assistance Centre.[107] The Law Reform and Development Commission published its report in 2004. This report includes a Draft Divorce Bill. The Draft Bill suggests adopting the principle of irretrievable breakdown in divorce.

Clause 4(1) of the Draft Bill defines the concept of irretrievable breakdown of the marriage as occurring where a marriage relationship has reached such a stage of disintegration that there is no reasonable prospect of restoring a normal marriage relationship. This subclause is modelled on the similar definition in the South African Divorce Act.[108] Clause 4(5) sets out the list of factors which should assist the court in determining whether a marriage has irretrievably broken down. These factors include that the spouses have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date on which the divorce application is instituted, either spouse has committed adultery, either spouse has committed physical,

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[105] Law Reform and Development Commission *Report on divorce, Project 8* (Windhoek, LRDC, 2004) 1.

[106] Cf Divorce Laws Amendment Ordinance, 18 of 1935, the Matrimonial Causes Jurisdiction Act 22 of 1939, the Matrimonial Causes Jurisdiction Act, 35 of 1945 and the Matrimonial Affairs Ordinance, 25 of 1955.

[107] See Legal Assistance Centre, Proposal for Divorce Law Reform in Namibia, launched in July 2000, www.lac.org.na/projects/grap/grapfamilylaw.html. Accessed June 2006.

[108] Act No 70 of 1979.

sexual or psychological abuse against the other, or either spouse has been sentenced to an effective term of imprisonment of at least 5 years.

In support of the approach taken, the Law Reform and Development Commission refers to the Namibian High Court of *Snyman v Snyman*.[109] What the court said was that persons have the right to associate freely, which includes the right to enter into marriage, but also to withdraw from it. It is for the court against public policy to force a party to remain married under the circumstances where he or she is not interested in the continuation of the marriage relationship. The court noted the fundamental difference between the principles upon which Namibia as a secular state[110] is founded, and the foundation of common law as it was inherited by Namibia.

(c) Customary inheritance law reform[111]

In 1996 intensive research on customary inheritance law started in Namibia after some preparatory activities on customary law in general and the constitutional position of customary law. Within the Legal Capacity Building Programme funded by German development assistance[112] and housed in the Ministry of Justice, students of the University of Namibia's Faculty of Law conducted customary law inheritance research in all parts of Namibia.[113] The research culminated in a comprehensive report compiled as an internal Ministry working document in 1999.[114]

Additional research by the Legal Assistance Centre and the Multidisciplinary Research and Consultancy Centre of the University of Namibia was published in 2005.[115] The year 2005 also saw a draft Succession and Estate Bill completed and circulated for discussion by stakeholders. So far, however, the discussions have not led to an official – ie published – law reform document that would bring the need to regulate burning issues of customary inheritance closer to the much-needed Act.

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109 Case No (P) I66/2003, unreported.

110 Cf art 1(1) of the Constitution of Namibia.

111 The following part is taken from an article by MO Hinz 'Strengthening women's rights', above n 80, 99ff.

112 Gesellschaft für Technische Zusammenarbeit (GTZ; Association for Technical Cooperation).

113 The research produced some 100 files of materials, which are open to inspection in the in the office of the Customary Law Research Unit of the Faculty of Law of the University of Namibia.

114 Cf M Rünger *Customary law report; trends in customary law. A field research report* (Windhoek, Ministry of Justice, 1999).

115 D LeBeau, E Iipinge and M Conteh *Women's property and inheritance rights in Namibia* (Windhoek, University of Namibia, 2005); M Ovis and R Gordon *Customary laws and inheritance in Namibia: Issues and questions in developing new legislation* (Windhoek, Legal Assistance Centre, 2005); D Hubbard *Inheritance issues: Information and feedback from community consultations on inheritance law reform* (Windhoek, Legal Assistance Centre, 2005); R Gordon *The meaning of inheritance in Namibia: Perspectives on Namibian inheritance practices* (Windhoek, Legal Assistance Centre, 2005).

The issues at hand in customary inheritance law are much more complicated than in customary marriage law. The death of a person leaving his or her estate accessible in one way or another to all sorts of legitimate as well as illegitimate interests characterises the special vulnerability of the estate. Less powerful, but nevertheless legitimate interests (interests of women and children) call for protection. As the author of the above-quoted report on succession and estates noted in its conclusion,[116] the relatively simple and clear-cut modern inheritance law privileges the surviving partner to the marriage and their children. Customary inheritance law, however, recognises the interest to distribute shares of the estate to the family.[117] The need to respect family expectations, therefore, will not allow the unlimited introduction of the general law of testate succession; nor will it allow for the estate to be divided in accordance with mathematically calculated shares to the closest members of kin, as defined by the Western monogamous family concept.

While, for some, difficulties of this nature mean abolishing customary inheritance laws and replacing them with a unified system of law modelled after the modern systems of inheritance law, others maintain that such an Act will only meet with resistance by the people it affects. The latter pragmatic position will, therefore, lead to the exercising of a dual – or, rather, pluralistic – system of laws which, next to a modern system of inheritance, would maintain the continuation of customary inheritance laws as long as they do not conflict with constitutional principles, for example by excluding women from the possibility of inheriting from their husbands or succeeding them.

What, then, are the criteria for applying general inheritance law, and what are the criteria for subjecting the administration of an estate to customary law? The draft Succession and Estates Bill (as it stood in 2005) sets out certain criteria which appear worthwhile to discuss.[118] This first criterion is the wish of the deceased. If such a wish was not expressed, a number of facts appear in the Bill which should be used to ascertain the applicability of customary law. They all serve to determine whether or not the deceased was closely connected to customary law. Indications for such closeness are whether the deceased was ordinarily a resident in the communal area of his or her traditional community; whether the deceased entertained a traditional lifestyle; whether the deceased generally accepted the authority of his or her traditional authority; whether the deceased was married under customary law; whether, in the deceased's later years, he was dependent on rights or grants in respect of communal land; whether the deceased's estate included assets outside the communal area; and whether the deceased's estate included property related to businesses outside the communal area.

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116 M Rünger *Customary law report*, above n 114, 107ff.

117 In its varying definition in accordance with the customary law applicable to the given situation.

118 Section 7 of the draft Bill.

With respect to the administration of a customary law estate, the Bill allows traditional authorities to perform functions otherwise performed by the Master of the High Court.[119]

It is not clear what has happened to the draft Succession and Estates Bill since 2005. Although the 2005 suggestions would certainly need refinement before the Bill is tabled, the extraordinarily high amount of research done in preparation of legislative action should be sufficient to inform drafters and politicians about what is needed and pragmatically possible.

(d) The Child Care and Protection Draft Bill

The law regarding children in Namibia is based on the Children's Act.[120] This Act does not fully cater for the rights of the children under the new Constitution and international conventions ratified by Namibia. Recognising the shortcomings in the Children's Act, the Ministry of Justice embarked on a project to come up with a new statute. After consultations with various stakeholders a new Bill called the Child Care and Protection Bill was drafted in 1994. This Bill has been circulating for a while among government departments and non-governmental organisations and they have had their input into the Bill. Because of the extended lapse of time since the last public consultations around a previous draft back in 2001, and the many developments[121] in the situation of Namibian children during the intervening period, a new round of public and stakeholder consultation was proposed.[122] The most recent draft of the Child Care and Protection Bill was completed by the Ministry of Justice in 2008.[123]

The Government has consulted child law experts into the current phase of consultations.[124] The objectives of the current consultative process are to refine the Bill to ensure that it is appropriate to the Namibian legal framework and its international obligations. This process will include comparative assessments of child law developments in other countries and creation of public awareness on this law.[125] Of importance to note also in this consultative process is the fact that the experts will encourage public participation in refining the Bill. This will include taking the views of the communities into consideration.

This Bill deals with child abuse and neglect, adoption, children's courts, children's homes, places of safety and vulnerable groups such as street children and child prostitutes. On the issue of child abuse, the Bill will give increased

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119 Section 8.
120 Act No 33 of 1960.
121 The developments include Namibia's ratification of the African Charter on the Rights and Welfare of Child on July 2004.
122 Ibid.
123 D Hubbard *Namibia's Draft Child Care and Protection Bill: Process for Public Awareness and Input* (Windhoek, Legal Assistance Centre, 2009) 1.
124 W Tjaronda 'Child law under revision' in *New Era* of 20 April 2009.
125 Ibid.

emphasis to preventative measures which could avert problems at an early stage. The Bill also gives concrete content to the notion of the best interests of the child. To facilitate the process of resolving disputes and trial of child abusers, the Bill creates children's courts. This Bill is thus aimed at fully covering the affairs of children beyond the provisions of the Children's Act of 1960 which it is going to repeal.

(e) Repeal of section 17(6) of the Native Administration Proclamation of 1928

The Estates and Succession Amendment Act of 2005 did not put all the remaining parts of the Native Administration Proclamation to rest. Section 17(6) remained in force.[126] This section provides for different matrimonial property regimes to apply in the northern part of Namibia and the rest of Namibia (the so-called 'police zone').[127] While the automatic property regime in the central and southern part of the country is 'in community of property', the automatic regime in the north is 'out of community of property'. In southern and central Namibia the automatic regime can be changed by way of antenuptial contract to 'out of community of property'. In the North a declaration to the marriage office suffices to change to 'in community of property'.

The constitutionality of s 17(6) of the Native Administration Proclamation was an issue of debate for a long time. However, when the Law Reform and Development Commission submitted its report on s 17(6) and a draft Bill to bring the repeal into effect,[128] it based its main arguments on the need to provide for a uniformly applied matrimonial property regime. The proposed Matrimonial Property Amendment Act has not been tabled in Parliament yet.

(f) Customary law reform from within

Traditional authorities are playing an increasingly important role in the ascertainment of customary law.[129] While ascertaining their laws, many traditional authorities have enacted changes to their laws. Section 3(3)(c) of the Traditional Authorities Act confirms that traditional authorities are entitled to make customary law. An outstanding example of changing customary law will illustrate the potential of customary law reform from within.

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126 Cf here the Namibian Supreme Court case of *Mofuka v Mofuka* 2003 NR 1.

127 The division of Namibia between the 'police zone' of central and southern Namibia and the North goes back to the early years of colonialism in which a more direct rule of government was applied within the police zone and the northern parts under more or less strict indirect rule. Cf GN 26 of 1928 on Prohibited Areas, Schedule to GN 70 of 1954 and GN 67 of 1954.

128 Law Reform and Development Commission, *Report on uniform default matrimonial property consequences of common law marriages, Project 6* (Windhoek, LRDC, 2003).

129 This part of the article is based on MO Hinz 'Traditional authorities: Custodians of customary law development?' forthcoming in a collection of papers on the future of customary law in the twenty-first century.

Complaints about hardship and injustice arising from this matrilineal inheritance system date far back. They were caused by the substantial socio-economic changes which drastically affected communities based on economically balanced extended family structures for which cattle raising and small scale agricultural, primarily subsistence production were essential. Where the accumulation of individual wealth was not the prominent feature, the fact that the wife and the children were not legally kin to the husband and his family but only to the family of the wife was acceptably compensated by the latter relationship. This compensation failed to work when the balances underpinning the network of extended families ceased to exist. In many instances, the changed situations left widows and their children stranded between the families from which the deceased husbands emerged and the families from which the wives originated.

The need to effect substantial changes in the inherited customary law resulted in customary law enactments aimed at remedying the situation of widows and children. Some of the self-stated laws by the Oshiwambo-speaking communities reflect these enactments, which took place in the 1980s.

The first edition of the self-stated laws of one these communities, the Laws of Ondonga, was enacted in 1989. The laws were published as a small pocket-size booklet and contained some 30 sections dealing with various aspects of the Ondonga customary law. Section 9 of the 1989 laws contained a rule, which can be seen to express the growing understanding that widows and their children needed clear legal protection with respect to property belonging to the household of the widow and her deceased husband. According to s 9 of the Laws of Ondonga, the distribution of property was allowed to take place only after a period determined by the amount of time needed to conduct the funeral as requested by custom. This was an important change to the law in place before, according to which the widow was restricted to a determined area of the homestead during this period. This restriction in movement allowed the relatives the opportunity to search the homestead and carry away what they liked. The 1989 laws granted the widow the right to move freely in and around the homestead and hence secured its integrity until the end of the mourning period. As to the land occupied by the family of the deceased, the 1989 laws stipulated the possibility of the widow's remaining on the land against payments. Depending on the size of the land in possession by the family of the deceased, the widow was expected to pay between R300 and R400.[130]

However, and in view of the fact that many widows did not have money to pay, the reported change of the inherited matrilineal inheritance law did not lead to a substantial improvement of the situation of widows. Many cases were reported about widows and children chased away from the land after the death of the husband and holder of customary land rights. The cases of evicted

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[130] See s 9 of the 1989 Laws of Ondonga – Rand used to be the currency of South West Africa and during the first years after independence of Namibia. Rand is still an accepted currency in the country with 1 N$ being equivalent to 1 ZAR.

widows occupied the public discourse and even led to interventions in the Namibian Parliament and calls to change the customary law of inheritance.[131]

The Ondonga community respected the call and amended the 1989 laws in 1993. The new Laws of Ondonga were enacted after several debates of and consultations with the King of Ondonga and his Council. On 16 November 1992, a historic meeting of the Ondonga King's Council took place. After an intensive discussion between the members of the King's Council present, the Council decided to delete the provision dealing with payments for the land from the Laws of Ondonga. Widows and their children should not only be allowed to reside on the land after the death of their husbands, but also be allowed to remain there without any payment.[132]

The Namibian Law Reform and Development Commission in the Ministry of Justice played an important role in facilitating the further process of implementing the reported decision of the Ondonga King's Council. On 19 May 1993, the Committee paid an official visit to the Ondonga King's Council during which the 1992 decision was confirmed. The consultations with the King's Council demonstrated contradictory interests in the leadership of the community. Deleting the requirement of payment, indeed, had consequences in the income of traditional leaders at the village level who benefited from possible re-allocation of land after the land use rights reverted back to them. Nevertheless, the voice of the King and the majority of the Council won. Invited by the Women and Law Committee, the King of Ondonga attended a press conference in Windhoek on 12 July 1993 and announced publicly the change in the Ondonga customary law.

It is obvious that what has been summarised here influenced the debate, which eventually resulted in the enactment of the Communal Land Reform Act and its provision on the land rights of women after the death of their husbands, which has already been recorded above. This is certainly important to note. More important to note, however, is the contribution law-administering communities can make to necessary law reform.

The Council of Traditional Leaders[133] passed a resolution in 2001, according to which all traditional authorities were requested to embark on a project of self-stating customary law. Although the expected ascertained laws will deal with all sorts of matters relevant to the life of the various communities, we expect many provisions to take note of family-related issues, issues of inheritance, and issues concerning the position and rights of women and children. A first set of laws is to be completed later in 2009, a second in 2010.

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131 Cf MO Hinz and P Kauluma 'The laws of Ondonga – Introductory remarks', above n 9, 35.

132 See s 9 of the 1992 Laws of Ondonga.

133 The Council of Traditional Leaders was established under the Council of Traditional Leaders Act, No 13 of 1997, following the requirement set out in art 102(5) of the Constitution of Namibia.

IV CONCLUSION

Namibia inherited Roman-Dutch and English common law. Pre-independence apartheid and post-independence new constitutional legislation coupled with traditional legal systems have affected different areas of Namibian family law in an uneasy pluralism. In addition to this, international trends have had a great impact on Namibian family law, creating a plural field of law in constant dynamism. The interacting fields in family law will, therefore, keep reform and stakeholders active, making the reform process non-terminus.

Family law reform is never easy. Law reformers have to be conscious of the plurality of legal codes at play. Family law is very much living law and at the core of society. Consequently, reforms always touch on delicate arrangements in the community. Law reform therefore requires 'a human-centred, participatory, bottom-up approach in African laws, based on trial and error, not on prescribed blueprints imported from abroad'.[134] Looking back at what was in place when Namibia gained its independence and comparing this with what has been achieved so far, one may say that many reforms were completed, but that many are still needed, as shown by the projects currently on the drawing board.

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[134] Cf W Menski *Comparative law in a global context: Legal systems of Asia and Africa* (Cambridge, Cambridge University Press, 2nd edn, 2006) 492.

The Netherlands

IT ALL DEPENDS ON WHO YOU ASK: DUTCH PARENTAGE AND ADOPTION LAW IN FOUR ACTS

*I Curry-Sumner and MJ Vonk**

Résumé

2007 et 2008 ont été des années fastes pour le droit de la famille aux Pays-Bas. La publication de deux rapports de la Commission Kalsbeek sur la parentalité lesbienne et l'adoption internationale on suscité de larges débats. La présente contribution fait le point sur ces questions. La préoccupation principale est de savoir si la Commission Kalsbeek a été réellement objective dans ces recommandations au gouvernement.

I SETTING THE SCENE

In the autumn of 2008, three Bills were accepted by the Dutch Parliament that will have a substantial effect on Dutch family law. Although these proposals have been discussed in earlier versions of the Survey, it is nevertheless useful to briefly discuss some of the most important changes introduced by these new Acts. First, the Act of 7 October 2008,[1] which concerns a number of minor amendments regarding registered partnership, also introduces the possibility for a legal parent who has never had parental responsibility to file a unilateral petition for joint parental responsibility with the other parent. This is of particular importance for unmarried fathers when the child's mother refuses to co-operate in the acquisition of joint parental responsibility. Although the Dutch Supreme Court had already decided in May 2005 that an unmarried

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1 Wet van 9 oktober 2008 tot wijziging van enige bepalingen van Boek 1 van het Burgerlijk Wetboek met betrekking tot het geregistreerd partnerschap, de geslachtsnaam en het verkrijgen van gezamenlijk gezag, *Staatsblad* 2008/410 (Act of 9 October 2008 amending some provisions of Book 1 of the Civil Code relating to the registered partnership, surnames and joint custody, *Gazette of the Kingdom of the Netherlands*, 23 October 2008).

father having no standing to file a unilateral request for joint parental responsibility violated the father's right under Art 6 of the ECHR, the law remained in effect until now.[2]

The Bill on shared parenting after divorce, which was extensively discussed in previous Surveys, has also finally been accepted by the Dutch Parliament on 25 November 2008.[3] The most important effects of this new Act concern the abolition of the so-called lightning divorce, which enabled married couples to divorce within 24 hours by converting their marriage into a registered partnership, which could subsequently be dissolved without judicial intervention. Nonetheless the ability to convert a registered partnership into a marriage remains in effect, perhaps thus creating the idea of a 'second-class' form of relationship. Another important element of this Act is the obligation for parents who are seeking a divorce to submit a parenting plan along with their divorce petition. The court will not hear the case until the couple submits such a plan or it is shown that the couple cannot reasonably be expected to submit such a plan. The rationale behind this new requirement is that the parenting plan will help separating parents to consider how they will parent jointly after the separation. Whether the plan will have the desired effect remains to be seen. On 1 October 2008, another Bill was submitted to Parliament which would allow notary publics to prepare and file a divorce petition for couples who are not obliged to submit a parenting plan.[4]

Finally, the Bill that proposed to simplify the procedure for partner adoption for female same-sex couples and to enable same-sex couples to jointly adopt a child from abroad was accepted by the Dutch Parliament on 21 October 2008.[5] Accordingly, as of 1 February 2009 it is easier for the female partner of the child's mother to adopt a child born into their relationship since it is possible

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2 C Forder and I Curry-Sumner 'The Dutch Family Law Chronicles: Continued parenthood notwithstanding divorce' in A Bainham (ed) *The International Survey of Family Law 2006 Edition* (Jordan Publishing Ltd, 2006) 267–269.

3 Wet van 27 november 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap, *Staatsblad* 2008/500 (Law of 27 November 2008 amending Book 1 of the Civil Code and the Code of Civil Procedure in connection with the promotion of continued parenting after separation and the elimination of the possibility of transforming a marriage into a registered partnership, *Gazette of the Kingdom of the Netherlands*, 16 December 2008).

4 Wijziging van het Wetboek van Burgerlijke Rechtsvordering in verband met verlening aan de notaris van bevoegdheden in verband met gemeenschappelijke verzoeken tot echtscheiding en tot ontbinding van een geregistreerd partnerschap, *Kamerstukken II* 2008-2009, 31714, nrs 1–3 (Revision of the Code of Civil Procedure to provide the notary with powers in relation to joint applications for divorce and dissolution of a registered partnership).

5 Wet van 24 oktober 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met verkorting van de adoptieprocedure en wijziging van de Wet opneming buitenlandse kinderen ter adoptie in verband met adoptie door echtgenoten van gelijk geslacht tezamen, *Staatsblad* 2008/425 (Act of 24 October 2008 amending Book 1 of the Civil Code relating to the shortening of the adoption process and amending the Act to include foreign children for adoption by same-sex spouses together, *Gazette of the Kingdom of the Netherlands*, 4 November 2008).

for the female partner of the birth mother to file an application for adoption prior to the child's birth. The court will adjudicate on the application after the child's birth, but if the adoption request is granted, the child will be considered the child of the co-mother with retroactive effect as of the moment of its birth. If the request is filed within 6 months of the birth, the adoption order will have retroactive effect and the child will be considered the co-mother's child as of the filing of the adoption request (art 1:230(2) of the Dutch Civil Code). These changes were made because, according to the law prior to the amendment, in those cases where the birth mother died during or shortly after the birth, the adoption request could not be granted and the child had no a legal parent as of the moment of its birth. As a result of this amendment, this situation has been rectified and now even if the birth mother dies before or shortly after the birth, the adoption can still go ahead and the other parent will be regarded as the child's legal parent. With regard to the granting of the application and the position of the sperm donor, a distinction is drawn between female same-sex couples who use a known sperm donor and couples who use an unknown donor. Couples who can produce a statement from the Donor Data Foundation that the child was conceived by means of artificial conception in the sense of art 1(c) of the Donor Data Act (*Wet donorgegevens*)[6] will in principle be granted the right to adopt unless adoption is not in the interests of the child. In cases where the couple cannot produce such a statement the court will have to ascertain that the child has nothing further to expect from the biological donor father as a parent, as is at present the case for all same-sex couples. Furthermore, as of 1 February 2009, same-sex couples are allowed to apply for joint intercountry adoption.[7]

As was reported in last year's Survey, during discussions on this adoption Bill a Commission was installed to advise on the possibilities for legal motherhood of the birth mother other than through adoption and on the future of intercountry adoption. The establishment of the Kalsbeek Commission and the publication of its first report, *Rapport Lesbisch Ouderschap,* on lesbian parenthood was one of the most important developments of 2007. In May 2008 the Commission's second report, *Rapport Interlandelijke Adoptie,* on intercountry adoption was published. The main body of this survey will be concerned with the content and reception of these two reports.

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6 For an extensive discussion on the introduction of this Act see C Forder 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in A Bainham (ed) *The International Survey of Family Law 2000 edition* (Jordan Publishing Ltd, 2001) 256–261.

7 See I Curry-Sumner 'Party Autonomy and Responsibility' in B Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing Ltd, 2008) 264–265.

II LESBIAN PARENTHOOD CONTINUED

(a) Introduction

The Report on Lesbian Parenthood centred on the question whether and how the female partner of the birth mother should be attributed with the status of legal parent with regard to the children born during their relationship. The Commission concluded that it should at any rate be possible for a co-mother to recognise her female partner's child regardless of the relational status of the couple. The Commission did not, however, answer the question whether a married female couple should *both* become legal parents by operation of law, but considered this to be a decision that needed to be made by the legislature. The two points of departure chosen by the Commission are the child's interests in growing up in a stable family environment and the interests of the female same-sex couple in equal treatment.[8] However, these are not the only factors that play a role. The best interests of the child entails more than a stable family environment, even though this is of the utmost importance. The child also has an interest in the possibility to discover his or her genetic parentage, as well as possibly in a relationship with the other biological parent. Moreover, it may also be the case that a biological father may have a legitimate interest, for instance when he is convinced that he will play an important role in the child's life. The latter may in particular be of importance where the mothers and the biological father have agreed that he will play a role in the child's life.

The recommendations of the Commission involve a substantial step forwards in the process of realising a favourable legal position for all children regardless of the relationship status and sex of their parents. Nevertheless, in particular where the balancing of the interests of the parties involved is concerned, the report is somewhat lacking in depth. The Commission does not always do justice to the complexity of the issues involved and pays only little attention to important questions concerning the relationship between the child and the biological donor father.

(b) The child and its origins

> *Sarah and Jane have been in a relationship for a number of years when they decide to realise their desire to raise a child in their family. Sarah conceives a child with donor sperm.*

This is the standard situation that the Commission has taken as its starting point. The proposals of the Commission to grant the co-mother the right to recognise her female partner's child has advantages and disadvantages. The disadvantage of recognition is that the co-mother does not become a legal parent by operation of law, but has to undertake legal steps to ensure her

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[8] For a comparison of the legal position of same-sex couples and different-sex couples see M Vonk *Children and their parents: a comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law* (Intersentia, Antwerp – Oxford, 2007) 147-206.

parentage is determined.[9] Part of this problem can be solved by introducing the possibility to have the parenthood of the co-mother established by the courts, if she is unwilling to recognise or if the mother is unwilling to consent to recognition.

One of the advantages of recognition is the fact that it offers an opportunity to register the child's genetic history.[10] The Commission, however, does not see the need and states the following on this issue: 'We do not see why female same-sex couples should be obliged to register the identity of the donor father where such an obligation does not exist for heterosexual couples.'[11] From the principle of equality it may indeed seem reasonable not to introduce such an obligation for female same-sex couples. But things are not that simple. The child's right to know its origins cannot be made subordinate to the equal treatment of co-mothers unless there are very convincing arguments to do so.[12] Moreover, the child's right to know its origins and the equal treatment of co-mothers need not be conflicting aims, but meeting both aims requires a more substantial adaptation of Dutch parentage law than has been foreseen by the Commission.[13]

At present the right to knowledge of one's origins is best protected for children conceived with donor gametes in a hospital or clinic, or where donor sperm was obtained through the sperm bank.[14] This does not necessarily concern an unknown donor, as couples can use sperm from their known donor in a clinic or hospital. In such cases, a number of important data about the donor are stored for children conceived in this manner by the Donor Data Foundation (*Stichting donorgegevens kunstmatige inseminatie*). This does not concern only medical data, but also physical and social data about the donor, and most important in this context, person identifying information. Once a donor-conceived child reaches the age of 12 she may have access to the physical and social data and once the child reaches the age of 16 she will in principle

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[9] Legal motherhood by operation of law would only apply to married female couples; the position of couples who have entered into a registered partnership has (unfortunately) not been addressed.

[10] This is also possible in the case of motherhood by operation of law, for instance at the time of the registration of the birth. See M Vonk, above n 8, 271–276.

[11] Kalsbeek Commission *Rapport Lesbisch Ouderschap* (2007) 28.

[12] See for instance Asser-De Boer, nrs 692 and 692a regarding Art 7 of the CRC and the Valkenhorst judgments: *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht*. Deel 1 Personen- en familierecht (Zwolle, Tjeenk Willink, 17th edn, 2006); C Forder 'Opening up marriage to same sex partners and providing for adoption by same sex couples, managing information on sperm donors, and lots of private international law' in A Bainham (ed) *The International Survey of Family Law 2000 Edition* (Jordan Publishing Ltd, 2001) 256–261; R Blauwhoff 'Tracing Down the Historical Development of the Legal Concept of the Right to Know One's Origins Has "To Know or Not to Know" Ever Been the Legal Question?' *Utrecht Law Review*, June 2008, 99–116.

[13] One could for instance consider registering donor data for all children conceived with donated material.

[14] Wet van 25 april 2002, houdende regels voor de bewaring, het beheer en de verstrekking van gegevens van donoren bij kunstmatige donorbevruchting, Staatsblad 2002/240 (Act of 25 April 2002 laying down rules for the preservation, management and delivery of details of donors in artificial donor insemination).

have access to the person identifying information. The medical data is accessible to the child's general practitioner at all times. For children conceived without the intervention of a hospital, clinic or sperm bank, such data is in principle not stored in the Donor Data Register. These children depend on their parents for information about their donor.

Of course, one may presume that the overall majority of co-mothers will store donor data for their child. These children will know that a third party was involved in the conception and that there is a donor to whom they are genetically related. Moreover, some courts in The Netherlands store donor data information obtained during the adoption procedure by the co-mother in their court files. The adopted child may have access to these files at a later date and thus discover the identity of the sperm donor.

For children conceived with donor material within heterosexual relationships, things are often more complex. In contrast to children conceived in same-sex relationships, many of these children may not be aware of the fact that they were donor conceived. Research shows that a substantial group of parents does not inform their children about the involvement of a donor in their conception.[15] This is one of the reasons why it is so difficult to guarantee a child's right to knowledge of her origins. The discussion about donor data should not be limited to female same-sex families if one really wants to solve this problem.

In conclusion, it may be said that the Commission's argument against an obligation to register the identity of the sperm donor when the co-mother recognises her partner's child is not convincing. The argument that such an obligation would violate the principle of equal treatment of the adults involved, without having regard to the child's interest in this matter, is in itself not substantial enough to warrant the conclusion that such an obligation should not be introduced. The legal position of children in heterosexual relationships regarding the right to knowledge of their origins is as yet not optimal, in particular where children are conceived outsides clinic or hospital, and may therefore not be the most appropriate starting point. Would it not be much more elegant to say that both the legal position of children within their same-sex family and their right to knowledge of their origins are optimally guaranteed, instead of merely focusing on the equal treatment of their parents?

(c) The child and the intentions of the biological (donor) father

> *Elisabeth and Susan have been in a relationship for a number of years. Last year they were married. Both women are very eager to raise one or more children within their marriage. John, a close friend of Elisabeth, has indicated a number of times that he*

[15] D Van Berkel, L Van de Veen, I Kimmel and E Te Velde 'Differences in the attitude of couples whose children were conceived through artificial insemination by donor in 1980 and 1996' *Fertility and Sterility* (1999) vol 71, no 2, p 226–231 in particular p 229 and O van den Akker 'A review of family donor constructs: Current research and future directions' *Human Reproduction Update* (2006) vol 12, p 91–101.

> *would be very happy to donate his sperm to Elisabeth and Susan. The three of them decide that Elisabeth will carry the child conceived with John's sperm.*

In the case sketched above the donor is a friend of the female couple. This does not necessarily mean that he will play a role in the child's life beyond the donation of sperm, but it is possible. However, if Elisabeth, Susan and John have foreseen a more or less important role for John in the child's life, the law at present offers the possibility to formalise this role. Since at present the (married) co-mother does not become a legal parent by operation of law, the mothers and the biological father have the opportunity to share parenthood by having the biological father recognise the child after its birth with the birth mother's consent. In that case the birth mother and the biological father will be the child's legal parents, and the birth mother and the female partner will share parental responsibility (provided they have entered into a formalised relationship). This set-up will in principle not change if the co-mother is granted the opportunity to recognise the child. The difference will be that there will be two candidates who can recognise the child, the co-mother and the known donor, whereas only one of them can actually do so.[16]

But what happens if the parties have different ideas about the role the biological father should play in the child's life? In the case above, there are a number of variables concerning the intentions of the biological father that will have different consequences. The known donor may have no parenting intentions at all or he may have the intention to recognise the child after its birth. However, it is also possible that the parties have different ideas about the role the donor should play and have never really discussed this issue with each other, or the parties may change their minds during the pregnancy.[17] The mothers may for instance have agreed that the donor would recognise the child after its birth, but once the child is born, they may feel very differently. The donor, on the other hand, may initially have felt content with a very limited role in the child's life, but then changes his mind after the birth of the child. An English High Court judge ruling in a dispute between a female same-sex couple and a known donor stated this problem as follows:[18]

> 'One of the things that struck me most forcefully in this case was how, notwithstanding that they were all highly intelligent and self-possessed individuals, biology had ambushed all of the adults in one way or another, whether it be in the unexpected impact of the arrangements for D's conception or the unanticipated strength of emotions once D was born.'

In the Kalsbeek Report very little attention has been paid to such problems. The report includes a short section on the position of the biological father, but

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[16] If legal motherhood ex lege for the married co-mother is introduced, this possibility will no longer exist, unless Dutch law embraces the idea that a child can have more than two parents.

[17] For instance in Hoge Raad (Dutch Supreme Court) 24 January 2003, *NJ* 2003, 386 the donor claims that the birth mother had agreed that she would consent to his recognition of the child after the birth, but the birth mother denies this.

[18] Black J in *Re D (Contact and PR: Lesbian mothers and known father) No 2* [2006] EWHC 2 Fam, para 65.

here the Commission states that 'there usually are no problems between the female same-sex couple and the biological father. The biological father is given the role that he intended and the female same-sex couple does not frustrate him in fulfilling this role'.[19] Moreover, the Commission is of the opinion that legislation in this field should be geared towards the standard situation and not the exceptions, ie the situation where there are no disagreements. The fact that the position of the biological donor father will be weakened if the co-mother is granted the right to recognise is no problem in the eyes of the Commission, but a logical consequence of the fact that the legal solution should be geared towards the standard situation.[20] At present a co-mother can only become a legal parent through adoption. During the adoption procedure the biological donor father may play a role if the court is convinced that there is 'family life' between the child and the biological father. In the recognition procedure as proposed by the Commission, however, the biological donor father with family life will play no role at all. Very little attention has been paid to the situation where the donor is not given the opportunity to play the role he was intended to play.[21] The Commission states that a donor with family life may have some options to prevent recognition by the co-mother or to challenge such a recognition afterwards, but it is questionable whether these options do exist in practice. Moreover, is it at all possible for a donor to have family life with a child born to a female same-sex couple if the co-mother can recognise the child before the birth? Can agreements made between the parties play a role here?

A recent decision by the Dutch Supreme Court may shed some light on this issue. The case concerned the question whether a known donor has standing to apply for a contact order with his biological child. Under Dutch law a person who is in a 'close personal relationship' with a child may apply to the court for a contact order.[22] The lesbian birth mother and the homosexual biological father had been friends for a number of years. They had discussed having children a number of times; the man had indicated that he would be willing to provide his sperm. Both the man and the woman were not in a relationship at the time they decided to have a child. During the pregnancy parties fell out over the question what role the biological father should play in the child's life and they stopped meeting. The man did not attend the birth and only saw the child once. The Supreme Court had to decide whether the donor could apply for a contact arrangement. The biological connection between father and child in itself is not sufficient ground for granting a contact arrangement; there must be a close personal relationship between the biological father and the child. The Court of Appeal had ruled that there was a close personal relationship between the biological father and the child on the basis of the intentions of the parties

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19 This statement has not been corroborated by statistical data or any other kind of evidence by the Commission.

20 Kalsbeek Commission *Rapport Lesbisch Ouderschap* (2007) 29. In case of adoption by the co-mother the court will have to establish that the child has nothing to expect from the donor as a parent now or in the future. If the possibility for the co-mother to recognise instead of to adopt is introduced in the form proposed by the Commission, the donor's intention will no longer be tested.

21 Hoge Raad 24 January 2003, *NJ* 2003, 386.

22 Article 377a of the Dutch Civil Code.

prior to the conception of the child and the fact that the donor continued to express these intentions after the child's birth, despite the fact that the mother made contact between the biological father and the child impossible. The Court of Appeal bases this conclusion on the following facts: both the man and the mother had intentionally selected the other as the parent of their child, which means that the man was *not* a random donor; the man and the woman were close friends before the conception of the child; they met frequently and planned to continue doing so after the child's birth; and furthermore, both the man and the woman intended the man to play a role in the child's life; it was the intention of both parties that the man would recognise the child.[23]

The Supreme Court confirms the Court of Appeal's interpretation and adds that additional requirements, such as the existence of a close personal relationship between a biological father and a child may not be interpreted so strictly that conflicts that may arise between a biological donor father and a birth mother about the intended and actual role to be played by the biological donor father in the child's life, cannot be brought before the court because the biological donor father would have no standing. This addition may in particular play a role where disputes arise about agreements made before the birth on the position of the biological father in the child's life. To what extent the decision in this case was influenced by the fact that the birth mother was not in a relationship when the child was conceived is as yet unclear.

The reasoning in this particular case has influenced other cases, for instance a recent decision in the Baby Donna case, a case that was discussed extensively in last year's Survey.[24] This case did not concern an agreement made between a female couple and a sperm donor but between a biological father and a surrogate mother.[25] Such a biological father has more or less the same legal position under Dutch law as a sperm donor. The biological father in this case also applied for a contact order and would not have had standing if the requirement that there must be a 'close personal relationship' between him and the child had been interpreted very strictly. The Amsterdam Appeal Court in this case decided that there were enough additional circumstances to constitute a close personal relationship, despite the fact that the biological father had hardly seen the child concerned. These additional circumstances included the fact that an agreement had been made between the biological father and the birth mother, the fact that the mother agreed to become pregnant for this particular man and the fact that both the birth mother and the biological father had meant the child to grow up in the biological father's family.

Given these developments in case-law it is not such a far-fetched idea to test the intentions of the donor and to check whether agreements have been made

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23 Hoge Raad 30 November 2007, *LJN*: BB9094 ro 3.3.

24 Curry-Sumner 'Party Autonomy and Responsibility' in B Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing Ltd, 2008) 263-264.

25 Hof Amsterdam 25 November 2008, *LJN*: BG5157.

about his role in the child's life.[26] One could for instance consider asking the co-mother to produce a statement that the biological father has no parenting intentions at the time of recognition. When such a statement (or a statement from the Donor Data Foundation that use has been made of an unknown donor) cannot be provided, recognition might not be possible without further inquiries. However, this latter option does not relieve the co-mother of her responsibility that has come into being through her consent to the conception of the child by her partner.

(d) Possible side effects of changing the legal concept of motherhood

> *Caroline and Marcia have been together for a number of years. Lately they have been discussing starting a family of their own. Marcia is not very eager to be the one to become pregnant, but Caroline is. However, it turns out that Caroline cannot become pregnant with her own eggs due to medical problems. Caroline and Marcia decide that Marcia will 'donate' an egg to Caroline, so that she can carry and give birth to the child. They use sperm obtained through a sperm bank.*

In this case there appear to be no conflicts of interest or other problems, the donor is unknown, the child can apply to the Donor Data Foundation for information about the sperm donor, so what can possibly go wrong? If the co-mother is granted the possibility to recognise her partner's child, the Commission has proposed introducing regulations for the denying and challenging of non-biological legal motherhood akin to the existing regulations for non-biological legal fathers. 'This means that the child . . . can clear the road for establishing legal family ties with his biological parent.'[27] This may seem self-evident and straightforward. But are things really that simple? Can we simply transpose a legal rule that applies to non-biological fatherhood and use it for non-biological motherhood? Or when phrasing the question in the context of the case described above, should the child be able to deny the legal motherhood of Marcia because she is not the biological mother?[28] Before one can answer this question it is necessary to distinguish between the various kinds of mothers and fathers on the basis of their biological, genetic and social link with the child.

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[26] See on this topic M Vonk 'The role of formalised and non-formalised intentions in legal parent-child relationships in Dutch law' *Utrecht Law Review,* June 2008*,* 117–134.

[27] Kalsbeek Commission, *Rapport Lesbisch Ouderschap* (2007), 39.

[28] It will be clear that the first situation will occur more often than the second. However, this does not mean that no attention should be paid to the second situation. It would be interesting to obtain data about the frequency of this kind of 'egg donation'. See for the legal problems that may be the result of such constructions in American law B Steinbock 'Defining parenthood' in JR Spencer and A Du Bois Pedain (eds) *Freedom and responsibility in reproductive choice* (Portland Oregon, Hart Publishing, 2006) 107–128.

(i) Mothers

A distinction has been made between four types of mothers:

- *biological and genetic mother* – woman who supplies the ovum and gives birth to the child;
- *genetic mother* – woman who supplies the ovum, but does not give birth to the child;
- *gestational mother* – woman who gives birth to the child, but does not supply the ovum; and
- *non-biological mother* – woman who raises the child but is not genetically related and has not given birth to the child.

The concept of legal motherhood which is based on gestating and giving birth to the child (biological motherhood) covers the first and the third type of mother: the biological and genetic mother and the gestational mother. The purely genetic mother is not covered by this concept, just like the non-biological social mother.

(ii) Fathers

A distinction has been made between two types of fathers:

- *biological father* – man who supplies the sperm; and
- *non-biological father* – man who raises the child but is not genetically related.

If we apply the distinctions made above to the case at hand, Caroline is the biological mother, she has given birth to the child, Marcia is the genetic mother, she has supplied the ovum, and the donor is the biological father. Marcia, who is the genetic mother, is *not* the biological mother. Does this mean that her legal motherhood can be challenged by the child? This depends on where one looks for the parallel with non-biological fatherhood. Dutch parentage law recognises two kinds of biological fathers: biological fathers who have begotten their child in a natural manner (begetters) and biological fathers who have not begotten their child in a natural manner (sperm donors). This distinction is of particular importance for the question whether a biological father can become a legal father if this does not occur ex lege. The concept of legal fatherhood, as it applies ex lege, is based on the relationship between the man and the birth mother, regardless of his biological relationship with the child; non-biological fatherhood can later be challenged by the child.

In those cases where the biological father is *not* married to the birth mother, a distinction is made between begetters and sperm donors. Where the birth

mother and the biological father are not married, the 'begetter' can become the child's legal father even where the mother does not consent. However, in those cases where the biological father has not begotten the child in a natural manner and is thus a 'sperm donor', he cannot become the child's legal parent without the birth mother's consent, unless there is 'family life' between him and the child.[29] However, this distinction between begetters and sperm donors does not play a role where a child wants to challenge the legal fatherhood of either type of biological father. Once a biological father (begetter and sperm) has become a legal parent, his paternity cannot be challenged by the child (or any other party for that matter).

It seems most opportune to place sperm donors and genetic mothers on an equal footing. The genetic mother would be given the same legal position as the sperm donor. In practice this would mean that once the legal motherhood of a genetic mother has been established, it can no longer be challenged by the child (or any other party).

(e) And beyond?

> *Eva and Thomas want a child of their own, but a couple of years ago Eva had a hysterectomy after a life-threatening disease. Eva's close friend, Frederica, offers to act as surrogate mother and to give birth to a child conceived with Thomas' sperm. Frederica is not married. Shortly before the birth of the child Eva recognises Frederica's child.*

As will be clear from the case sketched above, the introduction of the possibility for a woman to recognise the child of another woman may have consequences far beyond those envisaged by the Commission. This will in particular be the case when the existing regulations for fathers are simply declared applicable to co-mothers. Whether that is a problem remains to be seen. It does, however, show that it may not be very wise to try to solve the problem of the legal motherhood of co-mothers in a vacuum. The discussion should be broadened and include subjects such as co-fatherhood and surrogacy. In all these different arrangements and their legal consequences, it may not be the equal treatment of the adults involved that should come first but rather the need to ensure that every child, regardless of the sex or relationship status of her parents, has the most favourable legal position in her family. This legal position should mirror the child's everyday family experience. It is obvious that this should hold true not only for the children in female same-sex families, but also for children who grow up in a male same-sex family and for children who grow up in a combined female same-sex and male same-sex family, and of course for children who are conceived through surrogacy.

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[29] Hoge Raad 24 January 2003, *NJ* 2003, 386.

The Commission's task, however, was confined to the legal position of female same-sex families. In the short time allotted for their task, they managed to do a lot of work. The result, however, is not always as well-balanced and thorough as might be desirable.

(f) The Minister's reaction

On 12 August 2008 the Minister of Justice finally responded to the Kalsbeek Report on lesbian parenthood published in October 2007. The Minister stated that he agreed with the main lines set out in the report. However, he proposed to make a distinction between known and unknown donors when attributing legal motherhood to the co-mother. In those cases where married couples or registered partners have used an unknown donor and can produce a statement by the Donor Data Foundation that the child was conceived by means of artificial conception in the sense of art 1(c) of the Donor Data Act, the co-mother who has entered into a marriage or a registered partnership with the birth mother will become a legal parent ex lege. For unmarried female same-sex couples and couples who have made use of the sperm of a known donor, recognition will be introduced. However, the Minister concluded that before he will introduce a Bill to this effect in Parliament further research is required into the legal position of the known biological donor father in the light of his rights under Art 8 of the ECHR. This research is at present being conducted. Moreover, the Minister also considered that the child's right to information about her or his origins warrants more attention in the legislative proposal than it has at present received.

III INTERNATIONAL ADOPTION RECONSIDERED[30]

(a) Introduction

On the 29 May 2008, the Kalsbeek Commission published its second report, 'Everything of value is defenceless' (*Alles van waarde is weerloos*). The report contains a number of recommendations, of which the two most important will be discussed here, namely the partial mediation adoption procedure and age limits imposed on aspirant adoptive parents.[31] During the course of 2007 and 2008, a number of intercountry adoption cases have raised concerns with regards to the legitimacy of the current adoption procedure. For example, in May 2007 commotion arose concerning a young boy who had supposedly been adopted from India with the assistance of a Dutch accredited body (*vergunninghouder*). The birth mother argued that she had never released the child for adoption, but instead that the child had been stolen and placed for

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[30] This section is based on I Curry-Sumner and M Vonk, 'Ontwikkelingen op het gebied van internationale adoptie', *Tijdschrift voor familie - en jeugdrecht* (2008) 264–272.

[31] They are considered to be the most important due to the amount of discussion they have created, as well as their apparent controversy in Parliament, the media and academic literature.

adoption without her permission.[32] Furthermore, a case involving an attempted illegal adoption from Sri Lanka gained headline news when the 'adoptive parents' were accused of falsifying their permission to adopt in principle (*beginseltoestemming*). Finally, the ongoing saga of Baby Donna dominated the news once again.[33]

In all these cases, the media coverage has been negative and placed adoptive parents in a disparaging light. Oftentimes, the motives of illegal adoption have been foisted to the forefront of the story. However, from an academic point of view, it is important to draw a distinction between legal adoptions, whereby adoptions take place via the regulated and recognised channels, and illegal adoptions, that take place without the required permissions, procedures and checks and balances. It is certainly not advantageous for any discussion of this topic to confuse these two sorts of cases. This section will, therefore, only focus on legal adoption procedures and is thus restricted to those cases satisfying the conditions laid down in the 1993 Hague Adoption Convention.[34]

In the introduction to the report, the Kalsbeek Commission rightly indicated that the 1993 Hague Adoption Convention regards intercountry adoption as an 'ultimum remedium', a last resort, only to be used should the domestic possibilities for both adoption and foster care have already been exhausted. It is, therefore, important to bear this perspective in mind when considering the two main recommendations of the Kalsbeek Commission with regard to the so-called 'partial mediation procedure' (Section III(b)) and the relevant age limits (Section III(c)).

(b) Partial mediation adoption procedure

In its report, the Kalsbeek Commission proposes the abolition of the 'partial mediation' adoption procedure (*deelbemiddeling*). Before discussing the three arguments put forward by the Kalsbeek Commission to abolish this procedure (Section III(b)(iii)), the term partial mediation will first be defined (Section III(b)(i)). Section III(b)(ii) will focus on the interesting point that the majority of these cases involve the United States of America.

(i) Definition

Partial mediation is not a legal term. The term is used neither in the Hague Convention nor in relevant Dutch legislation. Partial mediation or 'do-it-yourself adoption' is a term from the adoption world that has come to be associated with a certain type of adoption procedure. As a result, it is absolutely essential that this term first be defined clearly.

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[32] For the sake of clarity, this case involved a full mediation case in The Netherlands, and did not involve the so-called 'partial mediation' procedure, as will be discussed later.

[33] For further details, see previous Surveys.

[34] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. For more information see www.hcch.net.

As soon as a couple living in The Netherlands possesses permission to adopt in principle (*beginseltoestemming*) provided by the Dutch Ministry of Justice, the adoptive parents are faced with a choice: adoption via one of the accredited bodies (*vergunningshouders*), the so-called full mediation procedure (*volledige bemiddeling*), or finding a contact of their own abroad via the partial mediation procedure (*deelbemiddeling*). If adoptive parents should choose the route of partial mediation, they are required to make contact themselves with the foreign persons, authorities and institutions responsible for the adoption process. As soon as they have established that this contact is willing to assist them, the details of this contact must be passed on to an accredited body. The accredited body must subsequently verify whether this contact satisfies the required standards with regards to the 'soundness and carefulness' (*zuiverheid en zorgvuldigheid*) of the adoption procedure.[35] At this moment, an amount of €1,000 is paid by the aspirant adoptive parents to the Dutch accredited body to undertake this research. On the basis of this research, the accredited body will advise the Dutch Central Authority whether this foreign contact meets the required standards applicable in The Netherlands.[36] After this advice has been received, the Ministry of Justice will decide whether the adoptive parents may proceed with the adoption procedure via this contact.[37]

It is, therefore, necessary at this stage to note that the distinction between Hague Convention Adoptions and non-Hague Convention adoptions does not necessarily need to coincide with the distinction between full and partial mediation cases in The Netherlands. Full mediation does occur in some non-Hague Convention countries, and as will be argued here, partial mediation is also permitted in Hague Convention countries.

(ii) Countries associated with partial mediation

Up until now, partial mediation has occurred with respect to a variety of countries. However, as is stated by the Kalsbeek Commission,[38] the vast majority of these cases involve intercountry adoptions from the United States. Accordingly, any proposals to amend the partial mediation procedure will have a greater impact on adoptions from the United States than any other country. Furthermore, since same-sex couples can, at present, only adopt from the United States,[39] steps taken in relation to partial mediation will have a greater impact on this section of the adopting population.

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35 Article 7a(1), last sentence, Act pertaining to the placement of foreign foster children (*Wet opneming buitenlandse pleegkinderen,* hereinafter 'the Wobka').

36 Article 7a(2) of the Wobka.

37 Article 7a(3) of the Wobka.

38 Kalsbeek Report, p 40.

39 I Curry-Sumner and M Vonk 'Adoptie door paren van gelijk geslacht. Wie probeert de wet te beschermen?' *Tijdschrift voor familie- en jeugdrecht* (2006) 39-44.

(iii) Arguments proffered for the abolition of partial mediation

Diminishing number of cases

The first argument put forward by the Kalsbeek Commission is that the number of partial mediation cases will diminish since the United States has ratified the Hague Adoption Convention as of the 1 April 2008. The Kalsbeek Commission argues that in principle partial mediation is not possible between Hague Convention countries, because the Convention determines that all communication should be funnelled through the Central Authorities. There are, however, exceptions to this rule. One such exception is laid down in Art 22(2) of the Convention. This provision states that the duties of the Central Authority may be delegated to other accredited authorities within the jurisdiction. A Contracting State wishing to make use of this provision must expressly notify the Permanent Bureau of the Hague Conference of this desire and provide a list of those authorities permitted to execute the delegated tasks. Until recently, only Colombia had made use of this possibility.[40]

The question, therefore, arises whether the ratification of the Hague Adoption Convention by the United States has changed this situation? The United States has, indeed, made use of the possibility laid down in Art 22(2) to delegate the competencies of the Central Authority to other authorities. As a result, all communication does not need to be sent via the Central Authority. Multiple authorities retain concurrent jurisdiction in any given case. This, therefore, means that even after 1 April 2008, Dutch couples should still be able to make use of the partial mediation procedure in relation to adoptions from the United States, subject to the condition that the authority with which they work is included on the list deposited by the United States at the Permanent Bureau of the Hague Conference.

The argument that the Hague Adoption Convention prohibits partial mediation is, however, substantiated by the Kalsbeek Commission with reference to a case from the Council of State (*Raad van State*). In this case, the Council of State explicitly held that the Hague Adoption Convention does not permit partial mediation. This case centred on a couple who wished to use their own contact in Brazil. The 1993 Hague Adoption Convention entered into force in Brazil on the 1 August 1999, but Brazil never made use of the exception laid down in Art 22(2). The Council of State therefore held:[41]

> 'That Brazil has not deposited a declaration whereby mediation by a person or authority as meant in Article 22(2) of the Convention is permitted.'

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[40] Colombia made use of Art 22(2). According to the reservation, the duties of the central authorities have been delegated to eight authorities in Colombia: (1) Casa de la madre y el niño, (2) Fundacion los pisingos, (3) Fundacion para la asistencia de la niñez abandonada 'fana', (4) Asociacion amigos del niño 'ayúdame', (5) Fundacion centro de rehabilitacion para la adopcion de la niñez, (6) Centro de adopcion 'chiquitines', (7) Centro de adopciones corporacion casa de maria y el niño, en (8) Fundacion casita de nicolas.

[41] Authors' own translation.

As already stated above, this is not the case with the United States. As a result neither this case nor the Convention itself prohibits the use of the partial mediation procedure, meaning that the ratification of the Hague Adoption Convention by the United States will not necessarily lead to a reduction in the number of partial mediation cases.

Undermining the principles of the 1993 Hague Adoption Convention

The second argument used by the Kalsbeek Commission is that the continuation of partial mediation undermines the general principles of the 1993 Hague Adoption Convention, in particular Art 29. According to Art 29, there may be no contact between aspirant adoptive parents and the parents of the child prior to the adoption. The Commission argued that the partial mediation procedure (by virtue of the reduced supervision) allows for aspirant adoptive parents to be 'pre-matched' with a child prior to the foreign contact being approved by the Central Authority. In this sense, the Commission believed that the principle of Art 29 is endangered by the continued existence of a partial mediation procedure.

This conclusion is not altogether correct. The Kalsbeek Commission has not referred to the last sentence of Art 29 where it is stated 'unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin'. It is, therefore, permitted that aspirant adoptive parents and the legal parents of the adoptive child have contact prior to the adoption in certain cases. Since the majority of American states currently have a preference for open adoptions, whereby contact between the parties is possible prior to the adoption, this omission on the part of the Kalsbeek Commission is crucial.

The Kalsbeek Commission furthermore draws the conclusion that the partial mediation procedure is equivalent to the concept of independent adoption as described in the *Good Practice Guide* written by the Hague Conference. In the *Good Practice Guide*, the following definition of independent adoptions is provided:

> 'Those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt, *without* the assistance of a Central Authority or accredited body in the State of origin.' (emphasis added)

It is clear that this definition places enormous importance on the absence of any control of the Central Authority or accredited body in the State of Origin. In the partial mediation procedure as currently operational in The Netherlands, this is definitely not the case. As described above, the accredited bodies (*vergunninghouders*) and the Central Authority (Dutch Ministry of Justice) are both highly involved in the partial mediation process. The foreign contact must

be verified and controlled,[42] and the ancillary conditions must be satisfied.[43] Equivalence between the concept of independent adoption and partial mediation is therefore not suitable, with the fundamental distinction resting in the control exercised by the Dutch authorities in the partial mediation procedure.

Unsatisfactory control

In the 2004 Evaluation Report of the Act Pertaining to the Placement of Foreign Foster Children (the Wobka) reference is made to the 'unsatisfactory controllability' of the partial mediation process. This criticism was subsequently repeated and reinforced by the Kalsbeek Commission. However, since the publication of the 2004 Evaluation Report, a number of measures have been taken to improve the controllability of the adoption procedure. In 2006, a quality control working group was established aimed at improving the quality standards to which the accredited bodies could be held. The group published its finding in June 2008 in the form of a quality framework. Although the framework was not written with the partial mediation procedure in mind, the working group noted that the quality criteria and standards should be applied integrally to all adoptions, including partial mediation. It is, therefore, not yet known whether these improvements will lead to an improvement in the controllability of adoption procedure. It would appear peremptory to abolish the partial mediation procedure before knowing whether the suggested improvements in quality control have improved the situation.

(iv) Possible arguments for the retention of partial mediation

On the basis of the three arguments listed above, the Kalsbeek Commission recommends the abolition of the partial mediation procedure. Nonetheless, the Commission does not examine any of the possible arguments for retaining the current system. Although the Commission itself acknowledges that abolishing the partial mediation procedure does increase the 'risk of illegal placement of children', the Commission regards this risk as limited. Why and on what basis the Commission is able to reach this conclusion is unclear. Aspirant adoptive parents who are currently using the partial mediation procedure to adopt their child would have to find alternative routes to adopt a child, either by means of the full mediation procedure (*volledige bemiddeling*) or alternative routes (eg international surrogacy or illegal adoptions). Since this risk is present and the recommendations of the Kalsbeek Commission are directed towards improving the quality and controllability of the adoption procedure, it is unclear as to why more attention was not paid to this apparent and acknowledged risk.

Although the abolition of the partial mediation procedure would apply to all couples, the effect of this measure would have a greater impact on same-sex

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[42] Article 7a(1) of the Wobka.
[43] Article 8 of the Wobka.

couples. Since same-sex couples are not able to adopt from any other country than the United States at present, and at present no accredited body has contacts with an agency other than in the United States that permits adoption by same-sex couples, in practice the abolition of the partial mediation procedure would have a greater impact on same-sex couples than on different-sex couples who are able to adopt from other countries.

(v) The response

On the 28 October 2008, the Dutch Cabinet responded to the recommendations of the Kalsbeek Commission. With respect to the recommendation to abolish partial mediation, the Cabinet accepted this proposal without any real discussion of the pros and cons of such a decision. The arguments provided by the Kalsbeek Commission were restated, especially with respect to the inability to properly control the procedure and the possible contrary nature of the procedure with respect to Art 29 of the 1993 Hague Adoption Convention.

In November 2008, the Permanent Committee for Justice held a round table discussion regarding the recommendations of the Kalsbeek Report. The discussions were attended by representatives from a diverse number of background and interest groups, including the accredited bodies, associations representing the interests of adoptees, associations representing the interests of adopters, legal and sociological academics, etc.

Partially as a result of these discussions, two motions were submitted in November to Parliament demanding that the Government explain the reasons for the proposed abolition of the partial mediation procedure.[44] On the 22 April 2009, the Minister of Justice, Mr Hirsch Ballin, responded to these motions, as well as the questions raised in Parliament by Mr de Wit (Socialist Party) on the 9 March 2009.[45]

According to these statements, the Minister remains convinced that the partial mediation adoption procedure must be abolished although he states that Dutch couples should still be granted the possibility to 'choose' the agency with whom they work. This statement would appear slightly contradictory, since the full mediation adoption procedure is characterised by the lack of choice for aspirant adoptive parents. A further development is that the Minister now wishes to impose extra requirements with respect to adoptions from the United States, such as to only allow placements in The Netherlands of children over the age of 5, children who have already been taken into the American foster care system or children in special circumstances (eg medical or psychological complaints, or brothers and sisters who are difficult to place, etc). Why exactly these requirements will only apply to the United States is unclear. How exactly these proposals will fare in the planned parliamentary debate on the 11 June 2009 is unclear.

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[44] Parliamentary Discussions, 2008-2009, Nr 31700 VI, nr 45 and nr 75.

[45] Parliamentary Discussions, 2008-2009, Parliamentary Questions, 2009Z04190.

(c) Age limits

Whenever a child is regarded as suitable for adoption according to the conditions laid down by the 1993 Hague Adoption Convention, this means that in attempting to find a suitable, safe and stable familial environment for this child, international adoption is the only available means. This is the premise upon which the 1993 Hague Adoption Convention is based. The question arises, however, how this relates to the setting of age limits on aspirant adoptive parents. Is the setting of an age-limit for aspirant adoptive parents necessary and if so, should this limit be a fixed procedural condition necessary for acceptance to the adoption procedure?

At present, the maximum age at which a child can be adopted from abroad is 6 years old. The maximum age difference between the oldest aspirant-adoptive parent and the child is 40 years. Accordingly, the maximum age limit for aspirant adoptive parents is 46 years old. Nonetheless, the maximum age at which a person may apply for a 'permission to adopt in principle' (*beginseltoestemming*) is 42 years.

Originally the Minister of Justice proposed to raise the maximum age difference between the oldest aspirant adoptive-parent and the child to 44 years, and at the same time ensure that the age limits be increased so as to permit adoption until the youngest aspirant-adoptive parent has reached the age of 44 or the oldest the age of 56 years old.

This proposal was, however, not received well by all. In the previously mentioned Evaluation Report of the Wobka, it was argued that the current age limits set for adoption should remain applicable.[46] The Kalsbeek Commission also suggested amending the current age limits, although it did not adhere to the suggestions put forward by the Minister of Justice. Instead the Kalsbeek Commission suggested increasing the maximum age at which a child can be brought to The Netherlands from 6 to 8, and thereby increasing the maximum age of the eldest aspirant-adoptive parent from 46 to 48.

The Kalsbeek Commission reached these conclusions on the basis of the following points of reference and arguments:

- *Point of departure*: Adoption should always be in the best interests of the child. On the basis of this criterion, the Kalsbeek Commission believes it necessary to maintain an age limit.

- The *first argument* upon which the Kalsbeek Commission bases the proposed age limit is the fact that adopted children must be prevented from running an increased chance of losing their parents (and other important family members, such as grandparents) at an earlier age than their non-adopted counterparts.

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[46] Evaluation report, pp 163–167.

- The *second argument* not to increase the age limit is more of a procedural argument, namely that an increased age limit would increase the pressure on the current adoption procedure.

- Furthermore, the Kalsbeek Commission opts for the maintenance of a strict, fixed age limit at the beginning of the procedure and refuses to introduce a softer age limit which would play a role during the procedure.

This contribution will focus on the first argument and the choice made by the Kalsbeek Commission for the strict age limit.[47]

(i) Raising a child to 'adulthood'

The Kalsbeek Commission chose a strict age limit of 48 years in combination with a maximum age difference of 40 years between the oldest parent and the child. This strict age limit is chosen partly on the basis of the argument that adopted children should not be placed at a higher risk of losing their adoptive parents (and other important family members) at a significantly younger age than their non-adopted counterparts. Therefore, the Kalsbeek Commission attaches significance to the biological reality that a woman's fertility is drastically reduced after her 40th birthday. It is certainly not disputed that it is important that one should attempt to ensure that adoptive children, often with a volatile and disrupted past, should not have to suffer more loss and trauma. However, if the aim of the Hague Adoption Convention is to ensure that children grow up in an atmosphere of happiness, love and understanding, as it is so eloquently stated in the Preamble of the Hague Adoption Convention, is maintaining a strict age limit necessary to achieve this goal?

As stated in many reports, it is important that the aspirant adoptive parents are able to raise the child to 'adulthood'. But the question is: what is 'adulthood'? Some would refer to the age at which a child reaches the age of majority (18 years of age). Others would place the age higher, for example, the moment that a child itself becomes a parent (in The Netherlands approximately 28-30 years of age).

(ii) Age as an element in the home study

In the current proposal, the Kalsbeek Commission does not opt for a softer age limit, which could be taken in account as one of the general circumstances in the home study. The Kalsbeek Commission states:

> 'The statement that the age limits are unnecessary because the suitability to adopt, including the age, is adequately investigated during the home study, is not supported by the Commission. In this research [the home study], only the

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[47] For further discussion of the point of departure and the second argument, see I Curry-Sumner and M Vonk 'Ontwikkelingen op het gebied van internationale adoptie' *Tijdschrift voor familie- en jeugdrecht* (2008) 264–272.

> suitability at the moment of the research can be determined and no account can be taken of the – not individual but statistical – increased risk of death.'

The Commission has therefore opted to attach significance to the statistically increased risk of death at the start of the procedure. Therefore, one never need ask the question whether parents who have already reached this age are also suitable for adoption. It is exactly for this reason that the recently adopted European Adoption Convention does not opt for an age limit:

> 'There is no maximum age of the adopter(s) since each situation should be judged on its individual merits bearing in mind the best interests of the child to be adopted.'

No age limit is imposed in internal, domestic adoptions in The Netherlands either, which therefore raises the question why this is so much more necessary in intercountry adoptions. In domestic adoptions, the age of the aspirant-adoptive parents is taken into account during the home study. Why is this not possible in intercountry adoptions? Comparative research with 23 other European Union countries indicates that only Greece, Lithuania and Portugal currently maintain a strict maximum age limit for adoptive parents and that in all these countries the limit is set higher than that currently used in The Netherlands.[48]

IV EVERY END IS A NEW BEGINNING

Both Kalsbeek Commission reports have led to the instigation of new research and new reports. The discussions surrounding these topics have been intense and the likelihood is that both topics will be debated heavily in the Dutch Parliament later this year. The parliamentary debate for intercountry adoption was held on 11 June 2009 and will be reported on in a future Survey. With regard to the regulation of lesbian parenthood, the Minister has announced that he plans to introduce a Bill on this topic in Parliament before the summer recess.[49]

As already mentioned, the appointment of a Commission to look into the most appropriate regulation of lesbian parenthood has been a substantial step forward in the process of realising a favourable legal position for all children regardless of the relationship status and sex of their parents. Nevertheless, in particular where the balancing of the interests of the parties involved is concerned, the resulting report is somewhat lacking in depth. The Commission has not always done justice to the complexity of the issues involved and has paid only little attention to important questions concerning the relationship

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[48] See I Curry-Sumner and M Vonk, above n 47, with reference to the report of the International Social Services, 'The age prescriptions for prospective adoptive parents' (3rd edn, 2005).

[49] Parliamentary Discussions, 2008–2009, Parliamentary Questions, 2009Z04190.

between the child and the biological donor father. It is, therefore, not surprising that the Minister has ordered an additional study on the issue, which is due to become public in May 2009.

The Kalsbeek Commission report on intercountry adoption has indicated the need for independent research to be fully supported by scientific and scholarly evidence. Often the conclusions drawn by the Kalsbeek Commission are insufficiently well-founded and based upon assumptions instead of evidence. This is no better witnessed than with respect to the partial mediation adoption procedure. The Kalsbeek Commission only provided arguments *for* the abolition of this procedure and thus the conclusions cannot be said to have been reached on the basis of a well-founded balancing of both pro and cons. Misinterpretations of case-law and selective reporting of current academic writings are just two of the problems with the adoption report. It is, therefore, disappointing that, after being granted government priority with the appointment of a Commission, all of the questions surrounding this topic have not yet been answered.

These reports have shown the need for interdependent research in complex family law areas. The Government should be praised for granting these topics the necessary priority on the parliamentary agenda. However, the depth of the research conducted does raise questions. It can only be hoped that in the future, the Government, when appointing such Commissions, will also ensure that the Commission is granted sufficient time to produce a high-quality report and that the members of the Commission also look closely to whether the report fully addresses both sides of the coin.

New Zealand

DEVELOPMENTS IN DISPUTE RESOLUTION AND ACHIEVING FAIRNESS IN PROPERTY DIVISION

John Caldwell[*]

Résumé

En Septembre 2008, la Chambre des Représentants de Nouvelle Zélande a adopté le Family Court Matters Bill 2007, législation la plus significative de ces deux dernières années en matière familiale. Elle contient quelques voies procédurales importantes pour la résolution des litiges entre les titulaires de l'autorité parentale. Elle vise notamment la médiation et la couverture médiatique des affaires.

Un mois plus tard, l'essai du Parenting Hearings Programme (PHP), qui fournit une procédure clairement inquisitoriale pour les litiges urgents et insolubles relatifs aux enfants est arrivé à son terme. L'essai, qui a duré deux ans, est soumis aujourd'hui à une évaluation complète mais il est presque certain que ce mode de résolution des conflits sera adopté à l'échelle nationale dans un futur proche. Pris ensemble, la nouvelle législation et la procédure radicalement différente du PHP envoient des signaux très clairs: l'approche légale traditionnelle appliquée en matière de résolution des conflits portant sur les enfants en Nouvelle-Zélande est en passe de disparaître rapidement.

Sur un plan plus substantiel, les spécialistes de droit de la famille attendent impatiemment une décision de la Court of Appeal sur la question hautement controversée de la compensation discrétionnaire pour disparités économiques (équivalente à la prestation compensatoire).

Néanmoins, le problème fondamental avec cette compensation est intrinsèque à la formulation de la loi. Ainsi, il est probable qu'il persiste quelle que soit la direction prise par les décisions attendues de la Court of Appeal.

Enfin, cette contribution traite d'un important procès qui s'est tenu en 2008 à propos de la validité des sham trusts et des alter ego trusts. La Court of Appeal avait déjà énoncé un nombre important d'obiter dictum raisonnablement orthodoxes, sur la question des fondements juridiques nécessaires pour «percer le voile». La propriété détenue en Nouvelle-Zélande par des trusts familiaux (aujourd'hui des centaines de milliers), semble désormais moins vulnérable aux réclamations portées par des membres d'un couple séparé.

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I INTRODUCTION

The New Zealand House of Representatives in September 2008 completed its third, and final, reading of the Family Court Matters Bill 2007, the most significant piece of family law legislation presented before the House in the previous 2 years. Pursuant to a late Supplementary Order paper, this rather clumsily titled Bill was ultimately divided into 12 separate parts, culminating in the corresponding number of new amendment Acts.[1] While the original Family Court Matters Bill had initially been characterised by the Minister for Courts as a 'largely technical' measure,[2] the ensuing amending enactments introduced (along with changes of a minor substantive nature and the creation of Senior Family Court Registrars) a number of significant procedural initiatives for the process of dispute resolution in parenting disputes.

One month later, the Parenting Hearings Programme trial, which provided a distinctly inquisitorial process for urgent or intractable childcare disputes, came to an end. As at the time of writing, November 2008, the 2-year pilot is undergoing a full evaluation, but, in view of the fulsome enthusiasm for the Parenting Hearings Programme (PHP) already expressed by senior Family Court judges, this style of dispute resolution seems virtually certain to be nationally adopted in the near future. And taken together, the radically different PHP process and the 12 new Acts provide very clear signals that the traditional legal approaches previously applied to the resolution of childcare disputes in New Zealand are in the process of being rapidly jettisoned.

On the more substantive legal front, the New Zealand family law community in 2008 had awaited with considerable eagerness an anticipated decision from the Court of Appeal on the highly controversial issue of discretionary awards for economic disparity.[3] As at the time of writing, that particular decision of the Court had yet to surface. Nevertheless, as is analysed further below, the fundamental problems with economic disparity awards are intrinsic to the statutory wording, and are thus likely to persist whatever the direction of any judicial rulings from imminent appellate court decisions prove to be. Hence, as is also mooted below, the issue of economic disparity will seemingly ultimately require legislative rather than judicial attention.

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1 The Adoption Amendment Act 2008, the Care of Children Amendment Act 2008, the Child Support Amendment Act 2008, the Children, Young Persons, and Their Families Amendment Act 2008, the Domestic Violence Amendment Act 2008, the Family Courts Amendment Act 2008, the Family Proceedings Amendment Act 2008, the Family Protection Amendment Act 2008, the Intellectual Disability (Compulsory Care and Rehabilitation) Amendment Act 2008, the Mental Health (Compulsory Assessment and Treatment) Amendment Act 2008, the Property (Relationships) Amendment Act 2008 and the Protection of Personal and Property Rights Amendment Act 2008.

2 This was the description given by the Hon Rick Barker when moving the Bill's introduction, 641 NZPD, 23 August 2007, 11462.

3 The expected appellate decision was to be from the High Court decision of *X v X* [2007] NZFLR 502.

Finally, in one important 2008 case concerning the validity of 'sham' or 'alter ego' trusts, the Court of Appeal delivered a number of significant, albeit reasonably orthodox, obiter rulings on the available grounds for piercing the trust veil.[4] Subject to any future contrary ruling from the New Zealand Supreme Court, any property held in New Zealand family trusts (now numbering the hundreds of thousands) seems less likely to be vulnerable to successful claims from estranged and excluded partners. Once again, legislative reform may now be required.

II DISPUTE RESOLUTION

Consistent with the recommendations of a Report of the Royal Commission on the Courts in 1978, and the ensuing enactment of the Family Courts Act 1980, the Family Court has always endeavoured to resolve child law disputes in a non-adversarial manner that was quite foreign to the courts of general civil jurisdiction in New Zealand.[5] The Royal Commission had indeed specifically envisaged that the Family Court would essentially be 'a conciliation service with Court appearance as a last resort, rather than a Court with a conciliation service'.[6] Hence, consistent with the thrust of the overriding legislative paramountcy principle found in the relevant statutes on childcare, it had always been understood that a defended court hearing would only be invoked for the most difficult and intractable of cases. And, through a statutory process of State-provided counselling for parents and Mediation Conferences,[7] the goal of conciliated solutions was generally achieved in New Zealand. Only around 5–6% of filed proceedings resulted in defended hearings.

(a) Mediation

The Mediation Conference, though, did in fact possess some quite peculiar features. Most notably, the Family Proceedings Act 1980 designated a Family Court judge to be the Chair of the Conference; and thus, as a concomitant of that appointment, and the deference inevitably accorded to the office of a judge, the standard 1½ hour Mediation Conference generally bore a much greater resemblance to a judicial settlement conference than to a process of pure mediation.[8]

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4 *Official Assignee v Wilson* [2008] 3 NZLR 45.

5 See the judicial observations made in High Court judgments such as *Y v X* [2003] NZFLR 1126, para [77] per Heath J, and *K v K* [2005] NZFLR 28, para [62] per Heath and Venning JJ. Cf also the comment of Gendall J in *R v R* [2003] NZFLR 200 that 'custody and access' proceedings can be equally inquisitorial and adversarial in nature, para [32].

6 *Report of the Royal Commission on the Courts* (Government Printer, Wellington, 1978) para 484, 152.

7 See the Family Proceedings Act 1980, ss 13–16.

8 In the theory of mediation, the parties themselves are expected to control the outcome, and the mediator is merely a facilitator for the process.

In 2003, the Law Commission released a report *Dispute Resolution in the Family Court,*[9] and recommended, inter alia, that trained independent mediators be available for Family Court clients.[10] By way of response, the government agreed to fund and trial a regional non-judge led mediation pilot scheme for applications filed under the Care of Children Act 2004. In this pilot, conducted between 2005 and 2006, the majority of mediators were non-lawyers, and the mediations, generally lasting around 3½ hours, were conducted in the mediators' private rooms.[11]

While there was an unexpectedly low number of referrals, 257 couples did in fact complete voluntary mediation under this pilot scheme, and the official evaluation reported a reasonable degree of success. Of the mediations completed, 59% reached agreement on all matters, and a further 27% reached agreement on some matters.[12] Additionally, 70% of cases resulted in a mediation report being produced within the 6 weeks prescribed in the relevant guidelines.[13] The evaluators of the trial reported that 'once families reached mediation the experience for most was very positive', and that 'all participants in this evaluation saw family mediation as a valuable addition to the options available to the Family Court'.[14]

The Family Proceedings Amendment Act 2008 and the Care of Children Amendment Act 2008 have now finally endorsed and embraced into New Zealand statute law a system of non-led judge mediation. The amended Care of Children Act 2004 accordingly provides that a Registrar of the Court may, upon request, arrange independent mediation in respect of the following Care of Children Act proceedings: where there is a dispute between guardians,[15] where there is a request from a person who is party to an existing agreement over the child's care or upbringing (or is proposing to enter such an agreement),[16] and where one party alleges a breach of a parenting order.[17] Likewise, pursuant to the amending provisions of the Family Proceedings Amendment Act 2008, a party to a legally recognised relationship can request that the Registrar arrange mediation in relation to any matter arising with respect to that relationship under the principal Act.[18] Finally, under the amended Care of Children Act, the Family Court judges have now been given

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9 Law Commission, Report 82 (Wellington, March 2003).

10 Ibid, 219.

11 For discussion on this pilot, see Dunlop 'Breaking new ground: observations on the family mediation pilot' (2006) 5 NZFLJ 113.

12 See Barwick and Gray, extract from *Family Mediation – Evaluation of the Pilot* (2007) 5 NZFLJ 291.

13 As noted by Principal Family Court Judge Boshier 'Dispute Resolution in the Family Court' (2007) 5 NZFLJ 295, 296.

14 Barwick and Gray, extract from *Family Mediation – Evaluation of the Pilot* (2007) 5 NZFLJ 291.

15 Care of Children Act 2004, s 46F.

16 Care of Children Act 2004, s 46H.

17 Care of Children Act 2004, s 46R.

18 See Family Proceedings Act 1980, s 12C.

the power to direct mediation where either an application for a parenting order or an application to the Court for directions in a guardianship dispute has been made.[19]

Somewhat surprisingly, however, the new legislative provisions do not contemplate any significant substantive changes to the existing mediation conference system itself (although there is now provision for a wider right of attendance for a 'support person' for the parties at a Conference). It would thus seem that both judge-led mediation and independent mediation will co-exist as parallel options. One suspects, however, that the new provisions for independent mediation will prove to be but a first, albeit somewhat tentative, step towards the abolition of the somewhat oxymoronic notion of 'judicial mediation'. Certainly s 46J(2) and (3) of the Care of Children Act 2004 empower a Family Court Judge to direct that guardianship or parenting order applications proceed to 'mediation', rather than a 'mediation conference', and while some New Zealand judges may wish to retain their mediating role, it appears that most judges are generally 'very supportive' of specialist, independent mediation.[20] Principal Family Court Judge Boshier has accordingly predicted that 'Judges will cease to mediate in all but a few cases'.[21]

(b) Openness of proceedings

Consistent with the vision of the 1978 Royal Commission on the Courts, proceedings in the Family Court had traditionally been conducted in private, in order to protect the adult parties and, more especially, their children from the public gaze. Partly as a by-product of this regime of privacy, the Family Courts were subjected to quite widespread and vociferous criticism (from men's groups in particular), and allegations were frequently ventilated of judicial delay, incompetence and gender bias. In response, the Law Commission floated the suggestion in 2003 that a greater degree of transparency and public scrutiny of the Court would help build public confidence,[22] and then, one year later, the Commission made a definitive recommendation that accredited news media representatives should be permitted to attend family proceedings.[23]

With the backing of Principal Family Court Judge Boshier, who deemed the public concerns over the supposed secrecy of the Family Court to be his most critical challenge,[24] the Care of Children Act 2004 did include statutory

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19 Care of Children Act 2004, s 46J.

20 See Judge von Dadelszen 'Judicial Reforms in the Family Court of New Zealand' (2007) 5 NZFLJ 267, 272.

21 See his address 'New Pathways in the Family Court', Auckland District Law Society Conference, 22 September 2008, 10.

22 New Zealand Law Commission *Dispute Resolution in the Family Court,* Report 82 (Wellington, March 2003) 213.

23 New Zealand Law Commission *A Vision for New Zealand Courts and Tribunals: Delivering Justice for All,* Report 85 (Wellington, March 2004), R 148, 301.

24 See Judge Peter Boshier 'International Family Justice from a New Zealand perspective' [2008] IFL 149.

provisions authorising both media attendance at proceedings under the Act (with a judicial discretion to exclude), and the reportage of non-identifying details. Now, in the wake of the 2008 legislative reforms, a more sweeping default provision can be found in the amended Family Courts Act 1980 that finally extends, except where a specific statute provides otherwise, essentially the same level of openness in terms of attendance and publication to all Family Court proceedings.[25]

It remains to be seen, though, whether the media representatives will choose to enter the doors newly opened to them. In a study of media attendance at and reporting of the Family Court parenting and guardianship cases in the first year of operation of the Care of Children Act 2004, a New Zealand Families Commission Report found that '[t]he most striking outcome has been that the media does not appear to be interested in going to the court or writing about it much in depth at all'.[26] Thus, only 12 instances of media attendance were recorded.

When media representatives were interviewed, they tended to attribute the lukewarm media response to the legal proscription, under s 139 of the Care of Children Act 2004, of the publication of any particulars likely to identify the child, parties or witnesses.[27] Thus, while the proposed omnibus default provision found in the amended Family Courts Act 1980 is certainly more expansive in its provision for the range of proceedings potentially opened to media scrutiny, the continued prohibition placed on the media publication of any 'identifying information' (unless leave is obtained) where a person under 18 or a 'vulnerable person' is involved,[28] might well suggest the marked disinterest of the media in Family Court proceedings is likely to persist in most cases. Some barristers have expressed the fear, though, that the newly available opportunity of reporting on relationship property cases might prove rather more tempting for the media.[29]

(c) Counselling of the child

The need for the child to be treated as an autonomous human being with his or her own independent needs and voice, rather than as a mere adjunct to the parents' dispute, has been a discernible feature of recent legislative and case-law developments in both New Zealand and abroad. The continuing absence of any provision for counselling services for children in the Care of Children Act 2004 was accordingly the subject of a considerable degree of surprised and adverse comment from all those working in the family law arena. And, given the extant provisions for child counselling in both the Children Young Persons and Their

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25 See the amended Family Courts Act 1980, ss 11A–11D.

26 *The Family Court, Families and the Public Gaze* (Blue Skies Report 16/07, Families Commission, Wellington, 2007) 62.

27 Ibid, 60–61.

28 The meaning of a 'vulnerable person' is found in s 11D of the amended Family Courts Act 1980.

29 See, eg, Kazmierow 'Reforming family matters' *NZ Lawyer,* 17 October 2008, 12.

Families Act 1989 and the Domestic Violence Act 1995, the omission did certainly seem both anomalous and illogical.

Now, however, child counselling will be available under the Care of Children Act 2004 in three defined circumstances. First, the Court will be able to direct the child to attend counselling, in cases of 'exceptional need', where the Court believes that he or she might need assistance in accepting or adjusting to changes resulting from a court order.[30] Secondly, a child will seemingly be permitted, on a voluntary basis, to attend counselling when the day-to-day care, contact or guardianship of the child is in dispute and the parents and the counsellors have determined that the child should attend.[31] Thirdly, following discussion with a mediator, a child who wishes to participate in mediation will be able to request counselling in order to clarify his or her views in preparation for attendance.[32]

Principal Family Court Judge Boshier has indicated that for any 'hard end' cases the 'exceptional need' threshold found in the Care of Children Act will be interpreted liberally by the Family Court.[33] Despite this anticipated approach, the current Chair of the New Zealand Law Society Family Law Section has nonetheless expressed concern over the limited scope of counselling under the Act, and has suggested that further legislative reform for 'across the board counselling' will eventually be required.[34]

(d) Parenting Hearings Programme

On 1 November 2006, the Family Court commenced a pilot of the Parenting Hearings Programme (PHP). Based on an earlier successful Australian pilot, that was to eventuate in legislative amendments to the Family Law Act 1975 (Aus), the PHP greatly enhanced the inquisitorial nature of proceedings for the more difficult and challenging categories of parenting disputes coming before the New Zealand Family Court.

Two particular types of high-risk cases were admitted to the PHP process. First, where there was an urgent application made for a 'without notice' order (eg in circumstances of domestic violence, sexual abuse, or mental illness; a 'without notice' or 'ex parte' order is one that is made without notice to the respondent), or, alternatively, where an application had been made on notice but the time for filing a defence was reduced, or where an interim order required review or testing. Secondly, where the parties had been through the conciliation process of counselling and mediation without resolution, and early intervention was sought thereafter to prevent the case becoming intractable.

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30 Care of Children Act 2004, s 46P.

31 Care of Children Act 2004, s 46T(3)(c).

32 Care of Children Act 2004, s 46ZA.

33 See the comment attributed to Judge Boshier 'Reforming family matters' *NZ Family Lawyer,* 17 October 2008, 13.

34 As reported by Kazmierow 'Reforming family matters' *NZ Family Lawyer,* 17 October 2008, 13.

Under the PHP process the Family Court judge was required to take a distinctly proactive role, both in identifying the issues to be resolved in the particular case and in deciding the process for resolution of those issues. Close judicial management, integral to the PHP scheme, was designed to address and deal with the problems of excessive delay and costs long identified as major concerns in the Family Court system, and it was intended and anticipated that the focused, judge-led attention to the central issues of the case at an early stage of the proceedings would result in more successful and enduring outcomes for children and their families.[35] In particular, it was hoped that the inevitable damage caused by protracted and bitter litigation to the future prospects of good and effective co-parenting and child–parent relationships would be mitigated by early active judicial intervention.

While the essence of the PHP approach was that the process should be regarded as a single hearing, the PHP process could potentially involve four discrete steps:[36]

(1) a point of entry, where a suitable case was identified;

(2) an Urgent Judicial Conference (held within 14 days of entering the process);

(3) a Preliminary Hearing (held within 14 days of the Conference); and

(4) a Final Hearing (held within 2 months of the Preliminary Hearing).

Not all cases would involve the above four-stage sequence. The Briefing Paper thus provided that, following the appropriate judicial direction, a *new* case, in which urgent relief is being sought, would enter at the first step, whereas an *intractable* existing case (where no agreement has been reached at the conclusion of conciliation) would enter at the third.[37]

Under the PHP scheme, the Urgent Judicial Conference, the second step, essentially determined whether the allegedly urgent matter would be confirmed for entry to the third step of a Preliminary Hearing. The judge would accordingly hear submissions from the parties and counsel as to the suitability of the case for entry. If the proceedings were not to be contested, then they would be deemed unsuitable. Likewise, where the judge considered no urgent

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[35] See the Ministry of Justice Briefing Paper *Parenting Hearings Programmes* (September 2006) 1 and the analysis of Principal Family Court Judge Boshier 'Dispute Resolution in the Family Court' (2007) 5 NZFLJ 295, 297.

[36] For brief judicial comment see *JA v LAD [Relocation]* [2008] NZFLR 252, 254–255.

[37] Ministry of Justice Briefing Paper *Parenting Hearings Programmes* (September 2006) 5.

issues needed to be addressed or determined the parties might thereupon be referred to counselling and/or mediation rather than being immediately transferred to the third step.[38]

If, pursuant to the third step, the Preliminary Hearing was in fact convened, then the parents were required to watch an educational DVD prior to that hearing. The DVD attempted to explain to the parties the nature of the court process, the importance of placing the children's interests first, and the various strategies for achieving positive outcomes.

At the Preliminary Hearing itself, the judge endeavoured to identify the key issues that needed to be resolved and, where possible, would attempt to resolve them. In terms of the procedure adopted for the Hearing, the judge would commence by delivering a standard opening about the process to be followed. Then the parties, who would have given a prior oath or affirmation, directly addressed the judge on their issues, proposals and thinking, and the lawyer for the child would also contribute his or her views.

In Australia, the early direct oral dialogue between the judge and the parties was always regarded as a particularly important and valuable part of the original pilot,[39] and the parties were generally considered to have gained an important level of trust in the process, and to have adopted a more measured approach than might otherwise have been expected. Likewise, a recent survey of New Zealand legal practitioners has similarly indicated that 'direct interaction with parties is considered helpful and appreciated by the clients'.[40] Moreover, from the judge's perspective, it could reasonably be postulated that hearing the parties directly would enable the judge to get a helpful sense of the parties' dynamics and of their true underlying position and concerns.[41]

Once the issues had been addressed at the Preliminary Hearing of the PHP, the judge could then adopt one of two approaches (or, equally, could choose to use a combination of both approaches and shift between them). First, the judge could decide to convene settlement discussions between the judge, parties, lawyers and any witnesses as to the appropriate resolution of the issues. Secondly, the judge could determine to conduct a more traditional, conventional hearing, with possibly cross-examination and re-examination, in order to determine the less complex factual contested issues. If cross-examination were to be permitted, the judge would be able to set limits on its length and nature.[42]

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38 The process is described by Judge Smith 'Parenting Hearings Programme: Less Adversarial Children's Hearing ("PHP")' *Family Law –Flying High* (New Zealand Law Society, 2007) 177, 187.

39 See the Ministry of Briefing *Parenting Hearings Programmes* (September 2006) 7.

40 Zondag 'The Parenting Hearings Programme half way through its pilot: A view from the Bar' (2008) 6 NZFLJ 12, 20.

41 Ministry of Justice Briefing Paper *Parenting Hearings Programmes* (September 2006) 7.

42 Ibid, 17.

If matters could not be determined by consent or decision at the Preliminary Hearing, then the judge would direct a Final Hearing to take place within 2 months. Importantly, after discussion with counsel and the parties, the judge would at this point determine the issues for that Final Hearing and, perhaps most crucially of all, would give explicit directions as to the evidence to be filed. The judge would also determine whether a specialist report (from, for example, a psychologist, social worker, or cultural reporter) was required on defined issues, and might also proceed to provide a further brief for the lawyer for the child.

While, as at the time of writing, the official formal evaluation of the pilot scheme was yet to be undertaken, the early informal feedback on the programme had been described by Principal Family Court Judge Boshier as positive in both quantitative and qualitative terms.[43] The judge pointed, for instance, to the significant drop in median disposal times from 38.1 weeks, from the date of application to the date of disposal for defended hearing cases under the Care of Children Act 2004, to 18.1 weeks under the PHP programme.[44] On the other hand, a survey of family law practitioners revealed a degree of equivocation over the value of the scheme, and it painted a picture that was 'not overwhelmingly positive'.[45]

It seems, however, that the overall initial success of the PHP process has already prompted the Ministry of Justice to draw up guidelines for its permanent use,[46] and it is almost certain that this overtly inquisitorial approach will be adopted and applied to future child law disputes in New Zealand. Such a development, more typically associated with civil law jurisdictions, is of potentially immense significance, not only for child law proceedings but for the litigation process generally in New Zealand. Certainly the role of both family lawyers and Family Court judges is bound to be profoundly transformed, and, as has been the case with concerns over the requisite level of expertise for judges running Mediation Conferences, some legitimate questions might be posed as to the level of judicial training needed for the successful adoption and implementation of this revolutionary approach.

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43 'The Family Court – Challenges Facing the Family Court' (Public Law seminar, Victoria University, 22 April 2008).

44 A later analysis from the Ministry of Justice showed the median disposal time for PHP cases had increased to 22.5 weeks: Boshier 'New Pathways in the Family Court' Auckland District Law Society Family Law Conference, 22 September 2008, 5.

45 See Zondag 'The Parenting Hearings Programme half way through the pilot: A view from the bar' (2008) 6 NZFLJ 12, 19–20.

46 As related by Judge Boshier 'The Family Court – Challenges Facing the Family Court' (Public Law seminar, Victoria University, 22 April 2008).

III RELATIONSHIP PROPERTY

(a) Economic disparity awards

Writing in the 2004 edition of the *International Survey of Family Law*, Professor Atkin commented that the then newly introduced power of s 15 of the Property (Relationships) Act 1976 (providing the court with the discretionary power to compensate for economic disparity where a significant difference in income and living standards was likely to exist between the parties following the relationship property division) was controversial, because it introduced 'a major element of discretion and uncertainty into a system designed to be clear and straightforward through an equal division rule'.[47] In earlier writing, Atkin, a leading scholar on relationship property law, had remarked that the policy goals of s 15 were characterised by 'utter confusion and incoherence', and he had proffered the view that taking bets at the betting totaliser board might be more successful than trying to discern what the next batch of judgments would say.[48] Unfortunately the articulated fears came to transpire. In 2007, the same author lamented that s 15 remained both fortuitous and 'highly speculative' in its operation.[49]

At the present time of writing, the legal community has been anxiously awaiting an anticipated decision of the Court of Appeal in the much discussed case of *X v X [Economic Disparity]*. Judges, along with lawyers and academics, have been expressing the hope that some of the uncertainties surrounding the scope of the section might be resolved by an appellate decision.[50] Nevertheless, with a statutory provision of such a broad discretionary nature, it seems inherently improbable that any pronouncements of the Court of Appeal (or indeed of the higher Supreme Court) could ever ensure that the all-important question of the quantum of a disparity award would be imbued with the degree of certainty and predictability that should ideally attach to proceedings concerning the division of relationship property. Moreover, as the *X v X* case involves 'big money' (with Mrs X originally seeking an economic disparity award of $1,720,573), such a case might prove to be of only limited precedent value for the more quotidian s 15 application. At this juncture, therefore, legislative rather than judicial action seems necessary for the resolution of the various difficulties, some of which can proceed to be identified and addressed below.

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47 Bainham (ed) *The International Survey of Family Law 2004* (Jordan Publishing Ltd, 2004) 371, 380.

48 'Editorial: Courts trudge through statutory sludge' (2002) 4 BFLJ 31, 32.

49 'Economic Disparity – how did we end up with it? Has it been worth it?' (2007) 5 NZFLJ 299, 302.

50 See, eg, Justice Priestley 'Bedding Down the New Legislation – What are the Judgments Saying' in *Cradle to Grave: The Interface between Property and Family Law* (ADLS, 2008) 10, and Judge Doogue 'Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty' (2007) 5 NZFLJ 282.

(i) Enhanced earning capacity

Section 15, as currently worded, does not contain any express reference to a respondent's enhanced earning capacity, and the notion of 'compensating' in the section would most obviously seem to connote losses directly accruing to the claimant. However, in the leading Court of Appeal decision, *M v B,*[51] both Hammond J and William Young P were satisfied that not only were compensatory payments for the claimant's loss of earning capacity available under s 15, but so too were redistributive orders, of a restitutionary nature, for the redistribution of the respondent's enhanced earning capacity. While Judge Doogue, in an extra-judicial paper delivered in 2007, had argued that there could well be a significant and jurisdictional difficulty in applying the notion of 'compensation' to a claim against enhanced earning capacity,[52] it could probably be reasonably maintained that 'compensation' can legitimately be awarded for any benefits conferred on the partner that would be retained following the relationship. Overall, though, the Court of Appeal judges' overt acceptance in *M v B* of restitutionary claims based on partner equity must have, at least to some extent, authorised claims essentially founded on recognition of social justice objectives.

(ii) The causal nexus

Difficulties can arise where multiple causes exist for the requisite disparity in income and living standards, and where the disparity is caused by a combination of the division of functions within the relationship (the statutory test) with other legally extraneous factors such as, for example, a respondent's innate intelligence or special commercial acumen. In *M v B* William Young P ruled that it would be raising the jurisdictional bar too high to require the division of functions to be the 'principal' cause. Rather, William Young P declared that the jurisdiction to make a s 15 order required a 'but/for' causal relationship between the division of functions and the economic disparity.[53] Interestingly, Hansen J in the High Court decision of *X v X [Economic Disparity]* has also ruled that the free choice of the claimant to assume a particular role and to undertake domestic responsibilities at a time when income-generating opportunities were available to him or her did not preclude the jurisdictional causative nexus being established.[54] It is accordingly evident that the failure of so many economic disparity claims to cross the initial causation threshold cannot be attributed to any especial judicial stringency.

(iii) Quantum

Regrettably, no meaningful legislative guidance has yet been provided to the courts on the appropriate yardsticks for the measurement of either past losses

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51 [2006] 3 NZLR 660.

52 'Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty' (2007) 5 NZFLJ 282, 287.

53 [2006] 3 NZLR 660, para [201].

54 [2007] NZFLR 502, paras [116] and [118]–[120].

or future contingencies in their calculation of quantum. In the early High Court case of *P v P*,[55] Panckhurst and Chisholm JJ described the absence of any such guidance as 'remarkable';[56] and, hardly surprisingly, Hammond J in *M v B* observed that the judicial calculations of quantum had not always been models of clarity.[57]

While insisting that it was important that judges provided reasons as to how the awards were reached, Hammond J did reject the view that an award would simply be the sum of various actuarial parts. Likewise, Robertson J observed that s 15 awards are 'necessarily a matter of impression',[58] and that rote applications of a formula would be inappropriate. Young P similarly declared that 'a broad brush assessment' was necessary to produce an outcome that was 'just'.[59]

While a degree of a 'broad brush' assessment is well nigh inevitable, the earlier High Court judgment of *P v P* has in fact provided a pretty useful possible template for the reasoned and structured approach to quantum insisted upon by Hammond J. On this approach, a number of steps need to be taken:

(a) the identification of the differential between the parties' actual and potential income and living standards;

(b) the adoption of a multiplier (ie for the projected duration of the years of disparity);

(c) a deduction for future contingencies; and

(d) a reduction for present day value for the payment of an immediate lump sum.

Obviously the duration of any projected disparity in a particular case is entirely fact dependent, and expert evidence on this matter may well be required. In recent New Zealand Family Court cases the assumed period has ranged from 3,[60] to 6,[61] to 18 years.[62]

There is also considerable variation in cases as to the amount to be deducted for contingencies. While a deduction of 35% for contingencies has quite commonly been seen,[63] a lower figure has sometimes been regarded as appropriate, especially where the forecast projections are over a relatively short

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55 [2005] NZFLR 689.
56 Ibid, para [68].
57 [2006] 3 NZLR 660, para [271].
58 Ibid, para [147].
59 Ibid, para [179].
60 *Smith v Smith* [2007] NZFLR 33, at para [95] per Judge Murfitt.
61 *T v T [Economic Disparity]* [2007] NZFLR 754, para [80] per Judge Boshier.
62 *X v X [Economic Disparity]* [2007] NZFLR 502, para [134], [150] (HC); [2008] NZFLR 512, para [7] (FC).
63 See, eg, *X v X [Economic Disparity]* [2007] NZFLR 502, para [150].

period of time;[64] and sometimes, where the future income stream is being projected over a very long time, a higher percentage has been seen as warranted.[65]

The amount of the total pool of relationship property has proved important in the courts' deliberations;[66] and, because the award must be made out of the available relationship property, the impact of a s 15 award on the relationship property division (and on the value and share of relationship property for each party) has been influential in the court's deliberations on overall justice. Family Court judges can thus be found expressly analysing these types of considerations. In *X v X [Quantum]*,[67] for example, Judge Clarkson noted the award of $280,000 would only represent 3.5% of the asset pool, and her Honour ultimately awarded the sum of $240,000.[68]

(iv) Halving

There seems to have been some general consensus that any award of 'compensation' for the respondent's enhanced earning capacity should be halved.[69] Two possible arguments have been advanced in favour of this approach. First, it is argued that as income during cohabitation is shared equally, so too should any future income.[70] Secondly, it is contended that if the present value of enhanced income is to be treated as a form of relationship property, then halving the amount would once again seem appropriate.[71]

Some commentators believe the same approach of halving should apply in the same manner to loss of opportunity claims.[72] Certainly it can be argued that because the decision to have children is normally a joint one, the costs of children should accordingly be shared, and that each partner should shoulder presumptive equal responsibility for the ensuing loss for the mutual decision, rather than simply shifting the loss from one party to the other.[73] As well, it can

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64 See, eg, *Smith v Smith* [2007] NZFLR 33. Here, Judge Murfitt allowed a 20% deduction for contingencies over a designated 3-year period.

65 *X v X [Economic Disparity]* [2007] NZFLR 502, paras [150]–[151].

66 See, eg, *H v H [Economic Disparity]* [2007] NZFLR 711, para [20] per Ronald Young J.

67 [2008] NZFLR 512.

68 Ibid, para [68]. This is possibly the highest recorded award to date.

69 But cf *H v H [Economic Disparity]* [2007] NZFLR 711 where no such halving took place.

70 See the argument of Atkin 'The Disparity in Economic Disparity: the need for a full-scale overhaul of ss 15 and 15A maintenance' *Family Law: The New Era – Professionalism in the Family Court* (NZLS, 2005) 220.

71 See Judge Jan Doogue 'Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty' (2007) 5 NZFLJ 282, 287.

72 See, eg, Atkin 'The Disparity in Economic Disparity: the need for a full-scale overhaul of ss 15 and 15A maintenance' *Family Law; The New Era – Professionalism in the Family Court* (NZLS, 2005) 209, 220.

73 See Judge Murfitt's general discussion in *Smith v Smith* [2007] NZFLR 33, paras [57]–[60]. His Honour argued that if a monetary value was being placed on the disparity it was logical to halve the value of the disparity before fixing the compensatory award. That approach might not apply, his Honour reasoned, if a more broad brushed approach was taken to compensation (para [60]).

be accepted that awarding only 50% does make the distortion in relationship property outcomes somewhat less severe.[74] In *X v X [Economic Disparity]*[75] Rodney Hansen J declared himself to be in the camp that subscribes to the halving of losses,[76] and this approach was accepted by Judge Clarkson when she came to set the final quantum.[77]

On the other hand, as Judge Clarkson herself had once earlier reasoned judicially,[78] it may be misconceived to treat the disparity, or the ensuing payment, as 'property'. And there is certainly nothing in the wording of s 15 itself to hint at any notion of halving. To the contrary, it seems the legislative intent is to provide redress for the claimant party's economic inequality and disadvantage, and halving the claimant's loss and compensatory payment might well be thought to preserve the identified economic disparity.

The High Court thus opined in *P v P* that 'at least where the economic disparity is based on diminution or eradication of party A's earning capacity, the figure should not be halved'.[79] While that dictum does leave open the position with enhanced earning capacity, there has been at least one subsequent High Court decision where an award for enhanced earning was also ordered to be paid out of the respondent's share of relationship property (with no requirement of halving decreed).[80]

(v) Section 15 and maintenance – the relationship

Atkin has long consistently argued that the interface of s 15 with the law of maintenance has not been properly addressed, and that the financial equity goals of s 15 would be more ideally dealt with under maintenance laws.[81] There is certainly a great deal to be said for the argument that awards of compensation for economic disparity, while discrete in nature, have a closer conceptual link to income maintenance than to capital division; and Priestley J held, in the early leading authority on s 15, that the Court, in exercising its final discretion, needed to consider whether the question of economic disparity might not be more appropriately redressed by maintenance orders.[82] The essential problem of the section, as highlighted by numerous commentators, is

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74 See this concession by Priestley J, who firmly favours *not* halving, in 'Bedding Down the New Legislation – What are the Judgments Saying' in *Cradle to Grave: The Interface between Property and Family Law* (ADLS, 2008) 11.

75 [2007] NZFLR 502.

76 Ibid, para [153].

77 *X v X [Quantum]* [2008] NZFLR 512, para [65].

78 See the argument made by Judge Clarkson in *McGregor v McGregor (No 2)* [2003] NZFLR 596, 608.

79 *P v P* [2005] NZFLR 689, para [75].

80 See, eg, *H v H [Economic Disparity]* [2007] NZFLR 711, para [25] per Ronald Young J.

81 'The Disparity in Economic Disparity: the need for a full-scale overhaul of ss 15 and 15A and maintenance' *Family Law: The New Era – Professionalism in the Family Court* (NZLS 2005) 209, 226. Elsewhere, Atkin observed that the House of Lords had 'wisely' recognised the phenomenon of economic disparity by means of maintenance awards rather the property division: 'Mother England' (2006) 5 NZFLJ 155, 156.

82 *De Malmanche v De Malmanche* [2002] NZFLR 579, para [167].

that considerations of future income have been grafted onto an Act primarily concerned with the division of capital, and that the discretionary provision for compensation for future disparity patently conflicts with the otherwise strong statutory presumption of equal sharing.

What might be most truly required, therefore, is not a judicial ruling from an appellate court but a thorough legislative overhaul of both s 15 and the adult maintenance provisions of the Family Proceedings Act 1980.[83] Specific legislative provision for compensation by way of periodical maintenance payments would certainly avoid many of the problematic aspects of s 15 discussed above, such as the need for crystal-ball gazing when discounting for any unknown future contingencies, and an enhanced maintenance regime should therefore be seriously considered as the preferred legislative vehicle for compensatory payments. Certainly, in the absence of some significant legislative reform, it is unlikely that either the Court of Appeal or Supreme Court will be in a position to clear up the s 15 mess.

(b) Trusts

Comments made by the Court of Appeal judges in *Official Assignee v Wilson*,[84] a case concerning a claim in insolvency made on behalf of creditors against assets in a trust, seem destined to have important ramifications for future relationship property disputes involving trust assets. In New Zealand, a family trust has become an almost commonplace financial accessory for middle income and wealthy families alike – with the motivation for the establishment of such a trust commonly being one of providing financial protection of personal and family assets from creditor attack. Following the trust's creation, it is, of course, a fundamental nostrum that the legal and beneficial ownership of the trust property is always separated. In consequence, this generally means that the parties to a relationship cannot be said to beneficially own the trust property as either 'relationship' or 'separate' property; and at first sight, at least, any property held by a trust would appear to be quarantined from the statutory processes of classification and division of 'relationship' property.

Accordingly, where property held by a trust is available for only one partner's benefit, or where the trustees of a discretionary trust are likely to decide that a separated partner should receive no further benefits, an obvious question arises as to the compatibility of the conventional trust doctrines with the social policies and goals of the Property (Relationships) Act 1976. As discussed below, a number of various statutory remedies do exist to deal with trusts, but as will become evident, all those remedies have significant limitations. Thus, especially where a settlor had continued to treat the assets of a trust as though he or she still personally owned them, it was increasingly thought that the

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[83] See Atkin, 'The Disparity in Economic Disparity: the need for a full-scale overhaul of ss 15 and 15A and maintenance' *Family Law: The New Era – Professionalism in the Family Court* (NZLS, 2005), 209, 226 and 'Harmonising Family Law' [2006] NZLJ 356, 358.

[84] [2008] 3 NZLR 45.

courts would find a way of either looking through the 'trust', by holding it to be a 'sham' transaction, or ignoring it as the mere alter ego of the settlor.

First, though, the statutory remedies do need some introduction. Even prior to the important package of legislative reforms in 2001, the courts did enjoy the power under s 44 of the Matrimonial Property Act 1976 to order the transfer of property, or to make a payment in compensation, where a disposition of property had been made by any person 'in order to defeat the claim or rights' of any other party under the Act. In appropriate circumstances this provision, now s 44 of the current Property (Relationships) Act 1976, would cover dispositions of property to a trust, and it can be seen that the section allowed the court, in true 'trust-busting' manner, to make an order of transfer of trust property. The section was always inapplicable, however, and continues to remain so, where the reason for the original disposition was disconnected to any potential relationship property claims or rights (as, for example, where property was disposed to secure it from claims by creditors). Moreover, the section never had any application where the third party from whom relief is sought had acted in good faith and for valuable consideration.

The limits and hurdles of s 44 were carefully examined by the government-appointed 1988 Working Group on Matrimonial Property and Family Protection. That Group thereupon ultimately recommended that the Courts should be given wider legislative powers to order distribution of trust capital in order to facilitate a 'just' division of relationship property. In particular, the Working Group suggested that the Court should have the power, as a final resort, to claw back specific property from a trust, so long as this could be done without prejudicing the position of a third party who had acted in good faith and for valuable consideration.[85]

Nevertheless, when Parliament eventually came to deliberate upon the position of partners thwarted by assets being held in trust, the inclusion of the advocated 'trust-busting' provisions was eschewed. Rather, following the 2001 parliamentary package of legislative amendments, s 44C of the Property (Relationships) Act provided that where, subsequent to the commencement of the relationship, there had been a disposition of relationship property to a trust by either of the partners which had the *effect* of defeating a claim or right of the other, but without the intention of so doing under the current s 44, then the Court could make one of three orders. These orders were: (i) a compensatory order requiring the payment of money; (ii) an order transferring either relationship or separate property; and (iii) in certain defined circumstances, and only as a last resort, an order requiring the trustees to pay trust income to the partner. While the latter power of diversion of trust income was in fact one of the 1988 Working Group's proposals, it can be seen that, contrary to the recommendations of the Working Group, the trust capital itself does remain inviolable under s 44C. It can correspondingly also be observed that a partner

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[85] *Report of the Working Group on Matrimonial Property and Family Protection* (Wellington, October 1988) 30–31.

could be left severely disadvantaged under s 44C if the trust did not in fact generate income, and if there was little or no 'relationship' or 'separate' property from which to compensate.

One other provision of potential assistance to the claimant is s 33(3)(m) of the Property (Relationships) Act 1976. This section clearly provides the Court with the unqualified power to vary a trust, but it is essentially of an ancillary rather than originating nature. Moreover, a key question in these circumstances is whether a partner can be actually said to own any property 'right' or 'interest' within the trust. With the common discretionary family trust, the orthodox view has been that, until the exercise of trustee discretion, a partner who is a discretionary beneficiary holds merely a hope or expectancy, and not any classifiable or enforceable 'right' or 'interest' in property.

As a result of the various difficulties with the existing statutory provisions, considerable interest came to focus on equitable lines of attack as the means for demolishing the trust barricade. Thus, the notion of 'sham' and 'alter ego' trusts, the subject of judicial analysis in *Official Assignee v Wilson,* became the subject of particularly close attention from New Zealand family lawyers in recent years.

In general terms, a 'sham' trust could be held by the courts to exist where there had been an intention to create the false front of a trust structure in order to conceal the reality of the true situation. In such circumstances, the cloak of a 'trust' could be legally ignored, and the property would remain that of the settlor.

The doctrine of an 'alter ego' trust had been evident in various Australian judgments addressing the question of the 'financial resources' available to each party pursuant to s 79(4)(e) of the Family Law Act 1975. It appeared from those cases that the Australian courts were willing to look through the veil of the trust where the trust was under the legal or de facto control of another person to the extent that the trustees were effectively puppets of the controller. And, in New Zealand, the concept of the 'alter ego' trust was affirmed, in the context of relationship property disputes, in two well-known High Court decisions.[86] In turn, those High Court decisions were subsequently cited and accepted in a number of Family Court judgments.

In important obiter comments in *Official Assignee v Wilson,* however, the Court of Appeal not only effectively laid to rest the prospect of an 'alter ego trust' being pleaded as a separate cause of action in New Zealand proceedings, but also propounded an essentially restrictive, though intriguingly 'nuanced', test for sham trusts. With respect to the notion of 'sham' trusts, all three Court of Appeal judges agreed that where the trust could be described as 'bilateral' (in the sense that the 'trust' involved a trustee, perhaps a professional, who was separate from and distinct from the settlor), then it was necessary to find a

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[86] See *Prime v Hardie* [2003] NZFLR 481 and *Glass v Hughey* [2003] NZFLR 865.

common intention to create a sham or fiction from the trust's inception. On the other hand, Robertson and O'Regan JJ held that this requirement faded where the trust could be categorised as 'unilateral', in that the trust was settled and managed by the same person.[87]

The Court of Appeal further acknowledged that where the common intention of the settlor and trustee was in issue then, contrary to the usual practice of construction of commercial documents, the intention should be determined subjectively rather than objectively.[88] As Glazebrook J contended in her separate judgment, 'the whole point of a sham is that it is intended to have an effect other than the effect it would have if looked at objectively'.[89] Robertson and O'Regan JJ did insist, though, that the judges would only look behind a trust's ostensible validity, and an objectively ascertained construction of documents, where there was some 'good reason', such as the common intention to deceive.[90]

It can be noted here that the Court of Appeal's requirement of the need for a common intention to deceive certainly makes it less likely that 'sham' trusts would be set aside than if the subjective intention of the settlor alone were to be the relevant test in all cases.[91] Moreover, Robertson and O'Regan JJ held that not only was the inference of a sham unable to be made if another inference was at least equally open on the evidence, but also that a perfectly valid trust could exist even where the settlor might have contemplated breaching its terms and there was evidence of poor administration by the trustees.[92]

Nevertheless, it must be acknowledged that the judges' express rejection of a blanket approach to the need for common intention,[93] which is fairly meaningless with respect to a unilateral trust,[94] has the consequence that the resources of the trust remain potentially vulnerable to attack by an estranged partner where the settlor and trustee are one and the same person and can truly be characterised as a 'shammer'. It is also possible that a future Supreme Court decision may come to adopt Kirby J's recent suggestion, in the Australian High Court, that the general idea of a 'sham' trust should be broadened somewhat.[95]

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87 *Official Assignee v Wilson* [2008] 3 NZLR 45, para [41].

88 Ibid, para [50].

89 Ibid, para [108].

90 Ibid, para [52].

91 The test favoured by Palmer 'Dealing with the Emerging Popularity of Sham Trusts' [2007] NZ Law Rev 81, as cited by the Court of Appeal at para [47]. The contrary view of Conaglen, expressed in his article 'Sham Trusts' (2008) 67 CLJ 176, was also cited by the Court (at para [49]).

92 *Official Assignee v Wilson* [2008] 3 NZLR 45, paras [91]–[95].

93 Ibid, para [54].

94 The point made by Conaglen 'Sham trusts and mutual intention' [2008] NZLJ 227, 228. See also Palmer's more general continuing rejection of the need for common intention in 'What makes a trust a sham?' [2008] NZLJ 319.

95 *Raftland Pty Ltd v Commissioner of Taxation* [2008] HCA 21, para [159].

In the course of their judgment in *Wilson*, Robertson and O'Regan JJ briefly considered the concept of an 'emerging' sham trust. Here, the judges concluded that unless the later appearance of a sham could be traced back to the trust's creation, the trust would remain valid. The one exception to this general principle was said to be where an item of property was later transferred to the trust. In that case, it was held, the trust could be a sham with respect to the particular piece of property but that the remainder of the trust would remain valid.[96]

Finally, Robertson and O'Regan JJ ruled that 'alter ego' principles were relevant as evidentiary matters of a 'sham' trust. On the other hand, the 'alter ego' principles could not, their Honours declared, constitute a separate cause of action. In brief, the judges ruled that actual control of a trust did not, of itself, provide justification for looking through or invalidating a trust, and that the uptake of control by someone other than an authorised person could not be sufficient to extinguish the rights of beneficiaries. Glazebrook J essentially agreed with these propositions, but her Honour wished to leave open the question of whether the property in a so-called 'alter ego' trust could be treated as the property of the individual for the purposes of, for example, a relationship property claim.

While these general pronouncements of the Court of Appeal, in a case concerning creditors and a bankrupt property developer, mean estranged spouses and partners seeking to challenge trusts will now find themselves primarily reliant on the statutory possibilities of the Property (Relationships) Act 1976, Glazebrook J in her separate judgment did highlight s 182 of the Family Proceedings Act 1980 as another source of legislative relief for the disadvantaged partner. As with s 44 of the Property (Relationships) Act 1976, s 182 is genuinely 'trust-busting' in nature. The section applies where parties have been married, or in a civil union, and where the marriage or union has been dissolved. Given the changed circumstances of the terminated relationship, the Court has the discretionary power under s 182 to vary a trust where property has been settled on the trust for the benefit of one or both partners, and increasingly this section is being recognised as a 'powerful remedy against trust property'.[97]

Section 182 of the Family Proceedings Act does have its own limitations, and has no application, for instance, to de facto relationships. The section could appropriately be designated as a 'relic' from the past,[98] and it certainly has an awkward, anomalous fit with the Property (Relationships) Act 1976.[99] Nevertheless, on the more positive side of the ledger, it is devoid of one potential jurisdictional obstacle to be found in the Property (Relationships)

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96 *Official Assignee v Wilson* [2008] 3 NZLR 45, para [57].

97 See the observation of Ambler 'Where there's a wrong, there's a remedy – or is there with trusts?' (2007) 5 NZFLJ 311, 315.

98 See this characterisation of Heath J in *W v W [Trusts]* [2008] NZFLR 316, para [64].

99 See the discussion of Peart 'Academic Address: Strategies for Unravelling and Setting Aside Trusts' (Property Relationships Master Class, LexisNexis, 2008) 7.

Act 1976. A key section in the Property (Relationships) Act 1976, s 4, provides that the Act is a code and applies 'instead of the rules and presumptions of the common law and of equity'. While one commentator has noted that the courts had been perfectly willing in the past to allow spouses and partners to obtain equitable remedies such as 'sham' trusts,[100] the precise jurisdictional basis for such equitable claims, in the face of s 4, has always been just a little bit murky. Likewise, the possibility of an established trust holding some of the property on a constructive trust for the applicant partner must be susceptible to similar jurisdictional questioning.

The obiter pronouncements of the Court of Appeal in *Official Assignee v Wilson* now do at least provide some direction and clarity for family lawyers. As Professor Peart has noted, however, the decision is a 'major blow' for parties in relationships,[101] and this decision will assuredly render the capital held in trusts less susceptible to a successful challenge from estranged partners. The family law and trusts intersection remains a peculiarly tricky one to negotiate, and legislative reform is now seemingly needed.[102]

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[100] As pointed out by Ambler 'Where there's a wrong, there's a remedy – or is there with trusts?' (2007) 5 NZFLJ 311, 318–319. She points out that Robertson J in *M v B [Economic Disparity]* [2006] 3 NZLR 660 had indicated that remedies such as sham trust *may* be available in addition to the statutory remedies of ss 44 and 44C at para [119].

[101] 'Academic Address: Strategies for Unravelling and Setting Aside Trusts' (Property Relationships Master Class, LexisNexis, 2008) 1.

[102] Peart consistently calls for such reform in 'Academic Address: Strategies for Unravelling and Setting Aside Trusts', ibid, 1, 7, 13.

Norway

NEW DEVELOPMENTS AND EXPANSION OF RELATIONSHIPS COVERED BY NORWEGIAN LAW

*John Aslan and Peter Hambro**

Résumé

Le Parlement norvégien a adopté deux lois importantes en 2008. La première reconnaît le mariage entre personnes de même sexe. Celles-ci obtiennent ainsi les mêmes droits que les couples hétérosexuels, incluant le droit à l'adoption. La deuxième loi introduit un nouveau chapitre à la législation en matière successorale en accordant aux conjoints de fait certains droits de survie – mais pas tous – qui étaient jusqu'alors réservés aux époux survivants. Le présent texte fait un exposé succinct de la loi sur le mariage entre personnes de même sexe. Il présente par contre une analyse détaillée des dispositions concernant les droits successoraux des époux et des conjoints survivants. La question de la définition de la notion de conjoint de fait est importante et elle retient évidemment notre attention.

I INTRODUCTION

In 2008 the Norwegian Parliament (Storting) enacted a law which partially gives cohabitants the same rights as married couples have upon the death of one of the partners. In addition in 2008 same-sex couples were given the right to marry. It is our intention with this chapter to give a description of the various legal rights which cohabitants and same-sex couples have according to these new laws. A brief summary of the historical development of legal rights for cohabitants and same-sex couples seems appropriate as an introduction. During the last 50 years what may be termed the 'family structure' has in Norway – as in most Western societies – undergone several important changes. These changes have taken place in three areas.

(1) Norway is a country with a total population of 4.5 million people. Up until 1930 the annual number of divorces was under 1,000 per year. In 1993 this figure had increased to 11,000 and the number was roughly the same in 2004. In 1994 a survey showed that 48% of all marriages were

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terminated by divorce. Estimates from Statistics Norway from 2004 indicated a divorce rate of 50.4% of all marriages. The estimate from 2004 was a peak in the Norwegian divorce rates. The rates have decreased during the following years and were estimated to be 43.4% in 2007.

(2) 40–50 years ago men and women rarely lived together openly as cohabitants. In 1983 according to a survey there were 32,500 cohabitant couples, in other words 65,000 men and women living together. According to a later and probably more realistic survey in 1986 there were 145,000 cohabitant couples or a total of 290,000 persons. A survey in 1993 revealed that 25% of all men and women living together were cohabitants. This figure has subsequently risen to roughly 462,000 cohabitants.

(3) Another development during the last 20–30 years has been the increase in the number of men and women living together in same-sex relationships. For homosexuals and lesbians it has been an important issue for many years now to obtain the right to be married and have the same legal rights as married couples.

Important new laws were enacted in 2008 for the groups mentioned under (b) and (c).

II COHABITANTS AND SAME-SEX PARTNERS

Establishing equality between married couples and cohabitants has taken place gradually over a long period of time in Norway. Cohabitants have the same rights as married couples in a number of laws but the regulations are very fragmentary. A problem has been that we so far have no common definition of the term 'cohabitants'. As an example the Norwegian National Insurance Act applies to couples living together if they have common children or have previously been married to each other. A surviving spouse is exempted from paying inheritance tax on inheritance from the decedent spouse. This exemption now applies to most cohabitants. In the Act regulating inheritance tax the definition of 'cohabitants' is unmarried couples living together and having common children and couples who have lived together for 2 years. We have an Act from 1991 relating to the joint residence and household goods when a household community ceases to exist. This is the only Act we have which specifically regulates informal cohabitation. This law applies not just to couples who share bed and board, but also to other people who share a house or flat. The requirement is that the persons have lived together for at least 2 years or have common children. The purpose of this Act is to determine who shall have the right of ownership of the joint residence when a relationship ends by death or moving apart.

In 1993 Parliament passed a Registered Partnerships Act. According to this law two persons of the same sex may have their relationship or partnership registered and the law stipulates that same-sex couples upon registration obtain

the same rights as married couples. This means that when one partner dies the surviving partner has the same rights of inheritance as a surviving spouse. Last year (2008) Parliament enacted a new law giving homosexuals and lesbians the right to formally marry each other. The Act on Registered Partnerships was repealed as of 1 January 2009 and previously registered partners can have their partnership converted into a marriage. Finally, on 19 December 2008, a law was enacted giving cohabitants some of the rights a surviving spouse has upon the death of the other partner. The contents of this law will be described in details later in this chapter.

III SAME-SEX MARRIAGES

A comprehensive Marriage Act was enacted on 17 June 2008. The law was enacted after a lengthy debate in the Norwegian Parliament. The amended Marriage Act entered into force on 1 January 2009. The amendment gives lesbians and gay men the right to formally marry on the same basis as heterosexuals. Norway thereby followed the example of a considerable number of other countries which have passed laws making it possible for persons of the same sex to marry. The amendments are called the 'Gender-neutral Marriage Act' although most of the amendments relate to other laws apart from the Marriage Act. The Church of Norway and other recognised communities of the faith will have the right, though not any obligation, to consecrate marriages. For the time being homosexual marriages will mainly have to occur through civil ceremonies.

Until the amendments in the Marriage Act entered into force, same-sex couples as mentioned were able to register as partners and such registration provided the partners with most of the legal rights and obligations that apply to married couples. However, there was one major exception: the provisions of the Adoption Act concerning married couples did not apply to registered partnerships.

As a result of the new law it is no longer possible to establish new registered partnerships in Norway. The amendments to the Marriage Act include provisions for converting registered partnerships into marriages. If partners want their partnership converted to a marriage, they must together contact the national registry authorities. The re-registration is taken care of by the registry authorities (ie the tax offices). A written form for this purpose has been prepared. A partnership which is not converted remains in force. Such registered partnerships are now regulated by an amendment to the Marriage Act, s 95. This amendment provides the registered partners with the same legal rights and obligations as under the Registered Partnership Act. This means that registered partners have the choice of remaining registered partners or converting into a married couple.

An amendment to the Biotechnology Act provides the right for cohabiting lesbians and married lesbians to be considered for assisted reproductive

technology on the same basis as heterosexual couples. The biological mother's cohabitant/spouse will be granted co-mother status by the Child Welfare Act if:

(a) she has consented to the fertilisation;

(b) the fertilisation has taken place at an approved health care facility in Norway or abroad;

(c) the semen donor's identity is known.

The Ministry's proposed legislation did not include a requirement for the identity of the donors to be known, since there is no similar requirement to establish paternity in the case of heterosexual couples who have utilised assisted reproductive technology. The Norwegian Parliament, however, amended the legislation so that this requirement will apply in order for co-maternity of lesbian couples to be established in accordance with provisions of the Child Welfare Act. The co-maternity rule applies to children born after the legislative amendments took effect, ie from the 1 January 2009. For children born before that date, the only way to assert the parenthood of the biological mother's partner or spouse is through stepchild adoption. An amendment to the Norwegian Adoption Act makes it possible for lesbian and gay couples to apply for adoption.

After enacting two comprehensive marriage Acts, Parliament considered two additional Bills proposed by Members of the Parliament on behalf of two different political parties. Parliament passed the proposal to give health care personnel the right to decline to participate in the use of assisted reproductive technology. This legislation was phrased in general terms and thus applies to assisted reproductive technology for heterosexual as well as lesbian couples.

IV INHERITANCE AND OTHER RIGHTS FOR THE SURVIVING SPOUSE

(a) Regular inheritance

The surviving spouse is entitled to inherit a share of the estate left by the decedent spouse. The rights of the surviving spouse have gradually been increased during the last 150 years. Chapter 2 of the Inheritance Act 1972 is entitled 'Inheritance rights for the spouse'. If children or descendents of children survive the decedent, the surviving spouse inherits a quarter of the decedent's estate. If the heirs belong to the second group, ie parents and first-line collaterals, the spouse inherits half of the estate. Finally, if the decedent only has heirs in the third group, ie grandparents and second-line collaterals, the surviving spouse inherits the entire estate. The spouse's legal right to inherit is not what we call a forced or protected right of inheritance; it may be reduced or eliminated by a will from the decedent. The validity of a will is contingent upon the surviving spouse having received notification of the

contents of the will. If the spouses had (deferred) community property, the surviving spouse will of course receive half the net estate as his or her share.

(b) Minimum inheritance

Quite often a decedent spouse leaves a fairly modest net estate. In such cases the right to inherit a quarter or half will result in a rather small inheritance and the surviving spouse will have difficulties maintaining his or her standard of living. We can use as an example a case where the decedent leaves children from a previous marriage and the estate amounts to kr 500,000 which is roughly US$70,000 or €55,000. The surviving spouse's right to inherit one-quarter will amount to kr 125,000 and the children will inherit the remaining three-quarters. In cases such as this it is impossible for the surviving spouse to settle the estate with the children and keep the common residence. For this reason the surviving spouse has been given what we call the right of minimum inheritance. The minimum inheritance is an alternative to the regular share-inheritance and its practical application is limited to estates of a small value.

The amount of the minimum inheritance is connected to the basic amount used in rights under our National Insurance Act. Payments from the national insurance system are calculated in terms of an amount determined by Parliament each year. The current basis amount this year is roughly kr 70,000, in other words US$10,000 or €8,000. If the decedent has children or direct descendents from children, the surviving spouse is entitled to a minimum inheritance of four times the basic amount or kr 280,000. Using the example above the surviving spouse's regular inheritance was kr 125,000 but the minimum inheritance is kr 280,000. The surviving spouse would therefore choose the minimum inheritance and inherit kr 280,000 and the remaining estate is divided between the children. We can alter the example and use kr 2m as the value of the estate. The surviving spouse's right to inherit one-quarter will amount to kr 500,000 and the minimum inheritance is irrelevant in this case. If the decedent spouse leaves no direct descendents the minimum inheritance is six times the basis amount, kr 420,000 or roughly €48,000. The minimum inheritance is a protected right to inherit and cannot be reduced or eliminated by a will.

(c) Uskifte-right

By far the most important right for the surviving spouse has for at least the last 150 years in Norway been the right to keep the estate in 'uskifte'. 'Skifte' means to divide or settle and 'uskifte' means 'not-dividing'. Uskifte quite simply means that when one spouse dies the settlement of the estate is postponed and the surviving spouse keeps the entire estate undivided. Uskifte is not a right to inherit, but a right to keep the whole (deferred) community property until the surviving spouse dies, remarries or decides to settle the estate with the other heirs. Obviously the surviving spouse usually prefers to keep the whole estate in

uskifte rather than immediately settling the estate and having to pay out their inheritance to the heirs. The purpose of the uskifte arrangement is for the surviving spouse to be able to maintain his or her standard of living and be able to keep the joint residence. The system with uskifte is unique to Norway, Denmark and Iceland.

One major advantage of uskifte is that the law stipulates that the surviving spouse may freely dispose of the uskifte-estate as an owner. This means that the surviving spouse can sell assets including the joint residence, spend the entire income of the uskifte-estate, increase his or her standard of living and reduce the capital of the uskifte-estate. The only important limitation is that the surviving spouse is not allowed to give substantial gifts without the consent of the heirs.

If the spouses have (deferred) community property, the surviving spouse according to our inheritance law has the right to keep the entire estate in uskifte regardless of its size. If the spouses have had separate property, uskifte has to be agreed upon in a marriage contract or the surviving spouse will need the consent of the heirs. If the decedent spouse has children from a previous marriage or relationship, these children may demand their inheritance paid out immediately when their mother or father dies. Uskifte can in such cases only be established with their consent. This limitation has become an important limitation in the right of uskifte.

(d) Wills

Spouses may of course write wills in favour of each other. Spouses without children quite often write reciprocal wills whereby the surviving spouse becomes the sole heir. Children under the Norwegian Inheritance Act have a protected right of inheritance consisting of two-thirds of the deceased parent's estate. There is, however, a limitation in this protected right of inheritance which has become very important. The protected right of inheritance is limited to kr 1m for each child. Kr 1 m is only US$125,000 or €110,000 which is hardly a substantial amount in Norway today. If a person has two children the total protected inheritance would be €220,000 for both together and the testator can bequeath the rest of his or her estate as he or she wishes. This means that rich or wealthy people in reality can dispose of most of their estate even if they have children and wealthy people can by writing a will to a large degree secure the surviving spouse financially regardless of the protected right of inheritance.

V INHERITANCE AND USKIFTE-RIGHT FOR COHABITANTS

As already mentioned the second important development in family law during 2008 was the introduction of a right to inherit by law and uskifte for cohabitants. These changes were enacted by a law dated 19 December 2008

No 112. Most of the changes are contained in a new Chapter IIIA (ss 28a–28g) in the Inheritance Act. The new law became effective as of 1 July 2009. Previously, cohabitants have neither had the legal right to inherit or keep the estate in uskifte. Cohabitants have of course had the possibility to write a will in favour of each other, but if the cohabitants have children – either together or from a previous relationship – the children have a protected right to inherit two-thirds of the decedent's estate though limited as mentioned to kr 1m. The new law can be described as a very progressive regulation of the inheritance right for a surviving cohabitant. As far as we are aware New Zealand is the only country which has enacted a similarly progressive regulation protecting cohabitants upon death. However, the laws in New Zealand are even more progressive than the rights in our law from December 2008. Cohabitants fulfilling the definition in the law from New Zealand in general have the same rights as spouses.

The new Norwegian law first, states that cohabitants with common children will have a legal right according to the law to inherit from each other. This right to inherit is limited to four times the basic amount in the national insurance system meaning about kr 280,000. The cohabitant's right to inherit has priority before the protected right for children to inherit. A will is required if the cohabitants want the surviving cohabitant to inherit a larger share of the estate. This legal right to inherit applies to cohabitants who have, have had or expect a child together. In the recommendation from the legal department of the Ministry of Justice, cohabitants who had lived together for 5 years were to be given the right to inherit, but this proposal was not adopted. The Ministry of Justice reasoned that cohabitants without children were an inhomogeneous group and that unlike the case with cohabitants with children it would be difficult to presume that cohabitants without children in general wanted to secure the surviving cohabitant at death. In addition, another argument was that it would be an advantage to operate with the same definition of cohabitants as far as inheritance and right to uskifte were concerned.

Cohabitants who do not have children together but have lived together for at least 5 years may according to s 28b, first paragraph, second sentence, in a will give the surviving spouse the right to inherit an amount up to four times the basic amount and this right contained in a will shall have priority before the protected right to inherit of the decedent's children from a previous relationship. A cohabitant without children may of course as previously in a will dispose of his or her entire estate in favour of the other cohabitant.

Secondly, the law gives the surviving cohabitant the right to keep the estate in uskifte provided the cohabitants have, have had or expect a child together. This uskifte-right is limited to certain assets and includes the joint residence, household goods and a second home which has been used jointly by the cohabitants (s 28c, first paragraph, letters a and b). The enacted law includes more assets than the original proposal. Household goods can have a substantial value and the uskifte-right is not limited to what may be termed average household goods. Certain assets are not included in the right to keep the

decedent's property in uskifte such as items which merely have served for the personal use of one of the cohabitants, collections and investment objects which have been kept in the joint residence or second home. Automobiles mainly used for business purposes and a company second home are not included in the uskifte-right. Financial assets such as stocks, bonds and bank accounts are not included in the uskifte-right. It may lead to unreasonable or random results that joint residence and automobiles are included in the uskifte-right whereas financial assets are not included. Some couples rent their joint residence and keep most of their savings in bank accounts or in stocks. Another quite common scenario is that a couple has sold their large joint residence and moved to a smaller flat in which they intend to spend their years after retirement. The net capital after the sale of their former joint residence is put into a bank account or is invested in the stock market. Upon the death of one of the cohabitants the surviving cohabitant will have to choose between uskifte with the small flat or inheriting four times the basic amount of the national insurance.

The decedent's assets that do not become part of the uskifte are divided immediately between the decedent's heirs according to the provisions in the Inheritance Act or provisions in the decedent's will.

The surviving cohabitant using the uskifte-right thereby becomes personally liable for all of the decedent's debts (s 28d). This may lead to unreasonable results if most of the decedent's debts were connected to property that is not a part of the uskifte estate, ie financial assets and business assets. In such cases the inheritance of four times the basic amount of the national insurance may be a more favourable solution to the surviving spouse than uskifte.

Either by a will or consent from the decedent's other heirs the uskifte-right can be expanded to include other items (s 28c, first paragraph, second sentence). If such an expanded uskifte-right has been included in a will, this right for the surviving cohabitant has priority before the protected inheritance of children. On the other hand, the inheritance rights of children from a previous marriage or relationship have priority before the uskifte-right of the surviving cohabitant.

The new law has special rules for cases where either the deceased or the surviving cohabitant has an estate in uskifte from a previous spouse or cohabitant and the purpose of these rules is to avoid the situation where a surviving cohabitant can simultaneously have rights from several relationships. The law has included a new regulation for a surviving spouse having an estate in uskifte. If the surviving spouse establishes a cohabitant relationship and this new relationship lasts more than 2 years, or the cohabitants have or expect a child together, the heirs of the decedent spouse may demand the uskifte estate be divided (s 24, second paragraph, second sentence).

According to s 28c (fourth paragraph) everything the surviving cohabitant acquires and which naturally belongs together with the assets in the uskifte

estate becomes part of the uskifte estate. In other words a new residence, car, second home or household goods automatically become part of the uskifte. If a joint residence or second home is sold and the surviving cohabitant reinvests in similar assets at a lower price, the excess amount becomes part of the uskifte.

When the uskifte is finally divided between the heirs, the division is based on the proportional value of each of the cohabitants' assets included in the uskifte at the time the uskifte was established (s 28e). The net values are used as the basis for this calculation. If the division takes place during the lifetime of the surviving cohabitant, that cohabitant has the right to inherit four times the basic amount.

The regular rules concerning uskifte contained in Chapter III of the Inheritance Act apply also as far as possible to cohabitant-uskifte. For uskifte for the surviving spouse there are special rules if the spouses have separate property. For cohabitants the terms separate and (deferred) community property of course do not exist. In cases where there are special rules for uskifte, the rules for separate property shall apply to a cohabitant's uskifte-right. An example would be a case where the decedent owned property which is covered by the uskifte-right, but which according to a decision from a giver or testator is to be separate property for the recipient. Uskifte with such property is only possible with consent from the giver/testator or heirs who benefit from this clause.

The right to inherit and keep an estate in uskifte is dependent on the cohabitants fulfilling the definition of 'cohabitants' contained in s 28a. The law contains a general definition of the concept of cohabitants and in addition specific requirements have to be met in order for a surviving cohabitant to obtain the rights according to s 28. The general definition is that cohabitants are two persons above 18 living together in a marriage-like relationship. This means that in terms of the law a cohabitant relationship can only exist between two persons. This means that a person cannot simultaneously be a cohabitant with several persons and that the definition is more restricted than in the previously mentioned Act from 1991 relating to the joint residence in a household community. It is required that the persons live together which means they must permanently reside together. The requirement can be fulfilled even though the cohabitants for shorter periods of time live separately due to education, work, illness, living in an institution and similar circumstances. Further both parties must be at least 18 years of age which is our age of maturity, the age to decide marriage on one's own and the age for obtaining rights under the Act relating to joint residence in a household community. Both parties must be unmarried, not registered partners or a cohabitant with another person. This condition has been included in the Act to avoid collision of rights between several surviving persons connected to a decedent. Furthermore it is a requirement that the relationship is 'marriage-like'. Obviously this term is rather vague. It includes both heterosexual and same-sex cohabitants though for same-sex cohabitants this is for the moment theoretical since the law requires that the cohabitants have children or expect a child together. If the

persons are so closely related that they, according to s 3 in the Marriage Act, cannot be married, then they cannot in terms of the law be cohabitants.

The right to uskifte and inheritance may by writing a will be restricted or expanded (s 28, second paragraph and s 28c, third paragraph).

Puerto Rico

NEW RULES FOR THE ADOPTION OF MINORS AND OTHER ISSUES AFFECTING CHILDREN

*Pedro F Silva-Ruiz**

Résumé

Ce chapitre étudie quelques évolutions du droit de la famille portoricain au cours de l'année 2008. Premièrement, il revient sur une décision de la Cour suprême, dont le raisonnement n'est guère convaincant, censurant une position des juges inférieurs favorable à la garde conjointe. Deuxièmement, la jurisprudence a réaffirmé le droit des enfants majeurs (21 ans) d'obtenir une pension alimentaire s'ils en font une demande justifiée. Troisièmement, en matière d'adoption, de nouvelles règles ont été établies en 2008 afin d'accélérer la procédure, mais l'auteur s'interroge sur leur efficacité. Enfin, la révision du Code civil, qui comprend la loi sur l'adoption, avance lentement et est susceptible de prendre quelques années supplémentaires.

I INTRODUCTION

This chapter considers several developments in family law in Puerto Rico in 2008. The first is a Supreme Court decision that reversed orders by lower courts that had been made in favour of joint custody. Whether the Court's decision is convincing is doubtful. Secondly, case-law has reaffirmed the right of older children and those who are of age (21) to receive maintenance if they make out a proper case for it. Thirdly, in relation to adoption, new departmental rules were established in 2008 to help expedite the process but the author questions whether they are working effectively. Finally, the revision of the Civil Code, which includes the law on adoption, is progressing slowly and is likely to take several more years.

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II JOINT CUSTODY

In *Ex parte; Rivera Rios and Rivera Molina v Rivera Rios*,[1] a judgment[2] by the Supreme Court reversed both an inferior court's and an appellate court's orders granting joint custody to both parents. In a case of a divorce by mutual consent, the trial court granted 'patria potestas' (ie parental authority) to both parents, but custody[3] to the mother of the minor boy. Later, the father applied for a decree of joint custody in order to be able to enrol the son in a school requiring the parent seeking admission to possess 'parental rights' over the minor. The mother opposed. She stated that her former spouse, the child's father, wanted only to save money by trying to change the school the boy was already attending for a new one, as there were no charges for enrolment and therapeutic services because the petitioner was a federal employee and the school was located at the military base run by the federal government.

The courts of first instance and appellate jurisdiction granted the request for joint custody. The Supreme Court reversed the decision, stating that the petition for joint custody did not have enough grounds to change the original decree as it did not pay attention to the rule of the best interest of the minor.

The reasons stated by the court are not convincing. The reading by the Supreme Court of their own case-law – precedents, if you like – is too narrow. Out of the five judges sitting in the high court, two dissented. One of the judges issued a dissenting opinion. One of the judges in the majority died; the dissenting judge who wrote the grounds for his dissent retired. Today, there are only four judges in the Supreme Court out of a possible seven. Three new members to be appointed during 2009 may rule differently in a similar case in the future.

Probably, as the dissenting opinion states, the error of the trial judge was not to express directly and in blunt terms that the decision was taken in the 'best interest of the child'. This is not a matter of using magic words in the written decision. It is an issue of having the parties before the court and being able to appreciate their conduct and handling of the parent-child relationship during the weeks, months or years that the case is before the court for a decision.

III CHILD MAINTENANCE

Case-law reaffirmed that minor children have a fundamental right to receive maintenance. Even if they have been emancipated (18–21 years old) or are of

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1 2008 TSPR 70 (5 May 2008).

2 'Judgment' ('sentencia') does not establish a precedent, as the rule is not written in stone. However, there are many times where the same court has quoted from a 'judgment' as if it were a precedent, stating 'as we have ruled/said . . .', etc.

3 See art 153 of the Civil Code of Puerto Rico (CCPR), 31 LPRA 601; *Ex parte Torres* 118 DPR 469 (1973), *Nudelman v Ferrer Bolivar* 107 DPR 495 (1978), *Marrero Reyes v Garcia Ramirez* 105 DPR 90 (1976) and others.

age (21 years old), they are entitled to receive maintenance if they need it and the circumstances justify it.[4] Maintenance obligations, after all, are part of the right to life and are also of the highest public interest.

In a criminal case, a judgment can be suspended if, among other circumstances, the party who is under the obligation to pay child maintenance has complied with it.[5]

IV ADOPTION

Adoption of minors is regulated by both the Civil Code[6] and the Code of Civil Procedure.[7] The procedures for adoption were supplemented by interoffice rules adopted in the year 2008 by the Administrator of the Administration of Family and Children of the Department (ministry) of the Family.[8] The rules have been drawn up for the purpose of reducing the time it takes to complete the procedures for adoption, by implementing what is called an effective handling of the cases by the social workers in the said Department. It is not possible to analyse here the interoffice rules as they do not handle legal matters.

In my opinion, although I believe in some intervention by professionals other than lawyers in the handling of the procedure leading to an adoption, the rules and regulations in force are not working effectively. Interoffice rules were drawn to help expedite the procedures at the Department of the Family.

V REVISION OF THE CIVIL CODE

As already stated, the substantive rules of adoption are included in the Civil Code. The revision of the Civil Code of 1930 (as amended) will take several more years, unless unforeseeable events take place in the very near future.

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4 See *P v Vazquez* 2008 TSPR 109 (20 June 2008); Art 11, ss 1 and 7 of the Constitution of the Commonwealth of Puerto Rico; *Rodriguez v Depto de Servicios Sociales* 132 DPR 617, 633 (1993); Art 142 of CCPR, 31 LPRA 561.

5 See *P v Vazquez*, above n 4, and the Child Maintenance Act ('Ley Especial para el Sustento de Menores'), 8 LPRA 501 et seq.

6 Articles 130–138 of CCPR, 31 LPRA 531–539 (added 19 January 1995). Their origins are found in CCPR 1902, the Civil Code of the state of Louisiana, USA, and the Civil Code of Spain. Articles 130–138 of CCPR 1930 were repealed and substituted by the current articles approved by Law no 8 of 19 January 1995.

7 32 LPRA 2699–2699s (1995).

8 See 'Adopcion-Nueva Vision para un Modelo Simultaneo de Manejo de Casos' 8 July 2005, 5 pages. Also see slides (in colour), 9 pages, without numbers; the pamphlet 'San Agustin del Coqui, Inc' (vol 14, 1st edn, 2008); L Suarez Torres 'Familia anuncio Nuevo modelo de adopcion' in *El Nuevo Dia* (newspaper), 15 August 2008, p 12. Also see the letter of the Administrator of the Administration of Families and Children of the Department of the Family dated 10 September 2008 addressed to the author of this chapter, enclosing various documents (on file with the author).

Scotland

WHAT HAS A DECADE OF DEVOLUTION DONE FOR SCOTS FAMILY LAW?

Elaine E Sutherland[*]

Résumé

Le Parlement écossais célèbre son dixième anniversaire en 2009. D'énormes espoirs furent attachés à sa création et le présent chapitre fait le bilan de ce qu'il a fait pour le droit de la famille. Assurément, le Parlement écossais a été actif: adoption d'une loi réformant la condition juridique des enfants, place des pères non mariés, adoption, protection de l'enfant, mariage, motifs de divorce et de dissolution du partenariat civil et leurs effets, situation des concubins – à la fois pendant la vie commune et à sa rupture. En outre, il a coopéré à la législation adoptée par le Parlement de Westminster, sur la reconnaissance du genre et la création des partenariats civils, ainsi qu'à la loi actuellement en discussion sur la procréation assistée. Les différentes réformes sont appréciées au regard des critères d'égalité, de respect de la diversité, d'autonomisation et de protection.

I INTRODUCTION[1]

On 12 May 1999, at the first meeting of the new Scottish Parliament, Dr Winnie Ewing uttered the now famous words: 'The Scottish Parliament, which adjourned on 25 March 1707, is hereby reconvened.'[2] Thus began a new era for the people of Scotland, with the Scottish Parliament sitting in

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1 This chapter is dedicated to the memory of Professor Emeritus Alastair Bissett-Johnson who died in Dundee, Scotland, on 9 July 2008 at the age of 67. A founder member of the International Society on Family Law, Alastair will be remembered with great affection by members of the Society, not least as a lively and engaging participant at many of the Society's regional and international conferences. His career took him from England to Australia, Canada and, finally, Scotland, where he held academic appointments, becoming professionally qualified and participating in law reform in many of the jurisdictions. A fine scholar, prolific author, energetic law reformer and, perhaps most important of all, compassionate and generous human being, Alastair will be missed. More details of his life can be found in his obituary in *The Times* (23 July 2008), at: www.timesonline.co.uk/tol/comment/obituaries/article4379549.ece [accessed 30 October 2008].

2 Scottish Parliament, *Official Report*, 12 May 1999, Vol 1, Col 5, available at: http://scottish.parliament.uk/business/officialReports [accessed 30 October 2008]. Dr Ewing, the oldest qualified Member of the Scottish Parliament (and a long-serving member of the

Edinburgh and legislating on 'devolved matters', while the United Kingdom Parliament continues to sit at Westminster and retain jurisdiction for Scotland on 'reserved matters'.[3] In essence, federalism had come to the United Kingdom.[4] For some, this is the conclusion of years of negotiation aimed at finding a better way to govern the various parts of the country. For others, it is simply a step on the road to Scottish independence.[5] A sense of the growing confidence of the government in Scotland is reflected by the fact that, while it initially styled itself 'the Scottish Executive', it is now known as 'the Scottish Government'.[6]

Regular readers of the *International Survey* will be familiar with the complaint that insufficient time has been found at Westminster for Scottish legislation, in general, and for reform of Scots family law, in particular.[7] As a result, many excellent law reform proposals, often recommended by the Scottish Law Commission, languished and gathered dust for years.[8] With the rebirth of the Scottish Parliament, there was the opportunity to address that problem and, furthermore, to effect reform that represented the wishes of the Scottish people. Of course, the people of Scotland are no more homogenous in their views on family structures and family law than any other national group. In any event, the Scottish Parliament has passed a whole raft of family law legislation, reforming the status of children; the position of non-marital fathers; adoption law; child protection; marriage law; the grounds for divorce and civil partnership dissolution and the consequences thereof; and the position of cohabitants, both during the relationship and on its termination.

Understanding the content of Scots family law and the reform process requires appreciating another crucial part of the puzzle – the interaction of legislative

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Westminster and European Parliaments), chaired the first meeting, when Members were sworn in and a Speaker was elected. The formal opening ceremony took place on 1 July 1999, but the Parliament itself was up and running by then.

3 Scotland Act 1998 (c 46), ss 29 and 30 and Sch 5.

4 The National Assembly for Wales was created by the Government of Wales Act 1998 (c 38). As a result of the Government of Wales Act 2006 (c 32), it gained legislative power in some areas, albeit subject to veto by the Secretary of State or Westminster. The devolved authority in Northern Ireland is the Northern Ireland Assembly: Northern Ireland Act 1998 (c 47).

5 Competing debates on the 'way ahead' are underway, with a Conversation initiated by the Scottish Nationalist Party, *Choosing Scotland's Future: A National Conversation* (Scottish Government, Edinburgh, 2007), available at: www.scotland.gov.uk/Publications/2007/08/13103747/5 [accessed 30 October 2008]. In parallel, in 2008, the Labour administration at Westminster set up the Commission on Scottish Devolution under the chairmanship of Sir Kenneth Calman: www.parliament.uk/commons/lib/research/notes/snpc-04744.pdf [accessed 30 October 2008]. This duality stems from a desire to frame the questions and, thus, control the direction of the debate in the future.

6 To be fair, this also reflects the fact that the first administrations were led by the Labour Party, which had close (some would say too close) allegiance to the same party at Westminster. When that party suffered a dramatic loss of support at the 2007 election, the new (minority) administration was led by the Scottish Nationalist Party which supports independence.

7 See, EE Sutherland, 'Scotland: Consolidation and Anticipation', in A Bainham (ed), *International Survey of Family Law: 2000 Edition* (Jordan Publishing Ltd, 2000), p 329.

8 A particularly clear example is the *Report on Family Law* (Scot Law Com No 135, 1992), HMSO, Edinburgh, to which we will return throughout this chapter.

competence between the Scottish Parliament and Westminster. While most of family law is devolved and, thus, the province of the Scottish Parliament, numerous matters that impact upon it are reserved to Westminster. Reserved matters include child support (but not aliment, ie alimony or maintenance), welfare benefits, (most of) taxation[9] and, perhaps most controversially, abortion and assisted reproduction.[10] In addition, even where an issue is devolved to the Scottish Parliament, it may, by its own motion, authorise Westminster to legislate for Scotland.[11] The most cogent reasons to do this are where the topic at hand touches on both devolved and reserved matters or there is good reason to have a consistent approach throughout the United Kingdom. This legislative mechanism has been used in respect of gender recognition[12] and the creation of civil partnerships,[13] the marriage-equivalent for same-sex couples, prompting the suspicion that having Westminster legislate can sometimes be a convenient way for Scottish politicians to distance themselves from politically sensitive issues. Indeed, when one looks at the combined effect of 'reserved matters' and the use of delegating legislative competence, there are shades of Scotland's puritanical past with a sense of: 'No sex please, we're Scottish.'

While the European Convention on Human Rights (ECHR) had always been relevant to Scots law[14] and, sadly, Scotland had generated its share of cases reaching the European Court of Human Rights,[15] the passing of the Human Rights Act 1998 heralded a major change to the whole approach to human rights. That statute incorporated the ECHR[16] into the law of the various parts of the United Kingdom. For individuals, the most immediate impact of the Human Rights Act lies in the fact that remedies for infractions of the rights guaranteed by the ECHR are available in the courts throughout the United Kingdom. However, the more pervasive impact has been an increased awareness on the part of policy-makers, legislators, lawyers and judges of the possibility of human rights challenges. In the early days, there was a fear that

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9 The Scottish Parliament has certain powers to levy taxes: Scotland Act 1998, ss 73–80.

10 Scotland Act 1998 (c 46), Sch 5.

11 This is done by means of a Legislative Consent Motion (formerly known as a 'Sewel Motion'): *Scottish Parliament Standing Orders* (The Scottish Government, Edinburgh, 3rd edn (1st revision), September 2007), Chapter 9B. For further information on the current provisions, the background to them and the use made of such Motions, see the Scottish Government website, at: www.scotland.gov.uk/About/Sewel/ [accessed 22 June 2009]. In any event, the Scotland Act 1998, s 28(7), provides that the legislative power of the Scottish Parliament 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. For a discussion of the implication of this provision, see, G Little 'Scotland and Parliamentary Sovereignty' (2004) 24 *Legal Studies* 540.

12 Gender Recognition Act 2004 (c 7).

13 Civil Partnership Act 2004 (c 33).

14 See, eg, *S v Miller* 2001 SLT 531 and *S v Miller (No 2)* 2001 SLT 1404, where human rights considerations played a large part in the compromises offered by the state agencies and in the court's decision.

15 See, eg, *Campbell and Cosans v United Kingdom* (1984) 4 EHRR 293 (corporal punishment in schools) and *McMichael v United Kingdom* (1995) 20 EHRR 205 (child protection procedures and the role of the non-marital father).

16 (1950) ETS No 5 as amended by ETS No 155.

the courts would be swamped with, sometimes spurious, claims of violation of human rights but, after an initial flurry of activity, this has not come to pass.

Since 2009 marks the tenth year of the Scottish Parliament in operation, the time is ripe to assess its impact, overall, on family law. This chapter provides an outline of developments in Scottish family law over that period and further detail can be found in the many articles and textbooks available.[17] In addition, an assessment of whether these developments have furthered the goals that family law should seek to serve will be offered. Of course, any such analysis requires that the desired goals should be identified: hardly an uncontroversial process. Here, the goals identified are equality, respect for diversity, empowerment and protection.[18]

II PERSONAL CHARACTERISTICS

Since individuals are the building blocks of families it is appropriate to begin our examination of substantive law with a few words about some characteristics that may, or may not, be of legal significance in the family law context.

(a) Scottish connection

For many people, ancestry forms a part of identity and the possibility of recording one's link to Scotland may be of interest to some readers abroad, their descendants and genealogists of the future. Any person with an ancestral or birth link to Scotland may now register important life events in the Book of Scottish Connections (BSC), depending on the nature of the event and the person's link to Scotland.[19] For births and deaths, the applicant's parent or grandparent must have been born in Scotland or that person must appear in the BSC. For marriages, civil partnerships, overseas relationships and divorce or dissolution, the applicant must either qualify as for births or deaths, one of the parties to the relationship must have been born in Scotland, or one of the parties must have been resident in Scotland at the time of the event.

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[17] A wealth of articles can be found on the United Kingdom sections of LexisNexis and Westlaw. The most recent texts in the field are EE Sutherland *Child and Family Law* (W Green, Edinburgh, 2nd edn, 2008); EE Sutherland, *Family Law* (W Green, Edinburgh, 2nd edn, 2008) and A Cleland and EE Sutherland, *Children's Rights in Scotland* (W Green, Edinburgh, 2nd edn, 2001, 3rd edn, forthcoming 2009).

[18] The selection of these particular 'goals' is neither new nor peculiar to Scotland. Delivering the annual James Wood Lecture in 1989, Eric M Clive analysed family law reform, in Scotland, from the perspectives of liberty, equality and protection: EM Clive 'Family Law Reform in Scotland: Past, Present and Future' 1989 JR 133. More recently, John Eekelaar analysed family law from the perspectives of power, friendship, truth, respect, responsibility and rights: J Eekelaar *Family Law and Personal Life* (Oxford University Press, Oxford, 2006). In the US, Linda C McClain selected capacity, equality and responsibility as her criteria: LC McClain *The Place of Families: Fostering Capacity, Equality and Responsibility* (Harvard University Press, Cambridge, MA, 2006).

[19] Local Electoral Administration and Registration Services (Scotland) Act 2006, s 54.

(b) Gender reassignment

Scots law, in common with the rest of the United Kingdom,[20] had long adhered to the notion that an individual's sex and gender were matters fixed at birth. It was possible to correct errors in the original registration,[21] gender dysphoria was recognised by health professionals and treatment was available but, as a general rule, legal status remained static. This failure to respect the true diversity of human beings had long been criticised and reform of the law was already being discussed when the European Court of Human Rights added its voice to the impetus for change.[22] Finally, the Gender Recognition Act 2004 was passed.[23] It will be remembered that this is a Westminster statute, with the legislation extending to Scotland by virtue of the consent of the Scottish Parliament. Under the 2004 Act, an adult may now apply to the Gender Recognition Panel to be recognised as being of the gender other than that appearing on his or her original birth certificate provided that certain conditions are met.[24] The Panel must grant the application if it is satisfied that the applicant has gender dysphoria, has lived in the acquired gender for 2 years preceding the application and 'intends to continue to live in the acquired gender until death'.[25] Appeal against refusal of the application is provided for[26] and there is provision for recognition of a gender change effected under the law of a country outside the United Kingdom.[27]

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20 *Corbett v Corbett* [1971] P 83.

21 *X, Petitioner* 1957 SLT (Sh Ct) 61. See also, *Forbes Sempil, Petitioners*, unreported, 29 December 1967 (Lord Hunter), discussed in AIL Campbell 'Successful Sex in Succession: The *Forbes Sempil* Case' 1998 JR 257 and 325.

22 *Goodwin v United Kingdom* (2002) 35 EHRR 18 and *I v United Kingdom* (2003) 36 EHRR 53.

23 The Act was preceded by the *Report of the Interdepartmental Working Group on Transsexual People* (Home Office, London, April 2000) , produced by representatives from various government departments in Scotland, England and Wales and Northern Ireland, and *Civil Registration: Vital Change. Birth, Marriage and Death Registration in the 21st Century* (Cm 5355, 2002), available at: www.gro.gov.uk/images/wpeng_tcm69-3581.pdf [accessed 22 June 2009]. Despite this process, there is no mistaking the stubborn resistance of the House of Lords in *Bellinger v Bellinger* [2003] AC 467.

24 Briefly, the application must be accompanied by two medical reports, including details of any relevant medical treatment undergone or planned; a statutory declaration from the applicant that he or she has lived in the acquired gender for 2 years immediately prior to the application being made and intends to continue to do so in the future; a statutory declaration from the applicant as to marital or civil partnership status; and any other information required by the Panel: Gender Recognition Act 2004, s 3. Where the applicant is a spouse or civil partner, he or she may only obtain an interim gender recognition certificate, pending dissolution of the marriage or civil partnership and issue of the interim certificate itself is a ground for such dissolution: see part IV(e), below.

25 Gender Recognition Act 2004, s 2(1). In 2007, there were 30 entries in the (Scottish) Gender Recognition Register: *Scotland's Population 2007: The Registrar General's Annual Review of Demographic Trends* (Scottish Government, Edinburgh, 2008), p 53.

26 The applicant may appeal the decision, on a point of law, to the Court of Session: Gender Recognition Act 2004, s 8(1). Where the appeal is unsuccessful, no further application for a gender recognition certificate may be made for 6 months from the date on which the appeal was rejected: s 8(4).

27 Gender Recognition Act 2004, ss 1(1)(b), 2(2) and 3(5).

(c) Prisoners

Scottish prisoners (and their lawyers) were quick to appreciate the opportunities presented by the Human Rights Act 1998 and have had considerable success in litigating over prison conditions and grievances.[28] Prisoners had long been able to marry in Scotland, when the European Commission indicated its support for prisoners' rights to marry under Art 12 of the ECHR, in two cases emanating from England.[29] With the advent of civil partnership, that option was extended to prisoners. Since conjugal visits are not a part of the Scottish penal system, the obvious next step was for prisoners to assert violation of their other right under Art 12 – the right to found a family. How this might play out is unclear at the time of writing, but it can be anticipated that it may include access to assisted reproduction and the opportunity to adopt a child, as well as conjugal visits.[30]

A timely reminder that not every appeal to violation of human rights will succeed was provided in *Reid v Napier*.[31] There, a pregnant woman was convicted of supplying her partner with diamorphine while visiting him in prison and was sentenced to 2 years probation, subject to the condition that she does not visit him during that time. Her assertion that the condition violated her rights under Art 8(1) of the ECHR (right to respect for private and family life) and was disproportionate was rejected. In the light of her immaturity, the pressure she might face from her partner and the desire to ensure the success of the probation order, the court concluded that: 'The condition was reasonable and in her best interests.'[32] While the Court did not articulate any further reasoning, it presumably meant that the condition fell within the Art 8(2) exception of the prevention of crime (or possibly the protection of health or morals), since violating a person's human rights in that person's best interest is no justification under Art 8(2).

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[28] Modern Scottish case-law begins with *Napier v The Scottish Ministers* 2004 SLT 555 and *Napier v The Scottish Ministers* 2005 SLT 379 (slopping out in prisons) and continues. See, eg, *Smith v Scott* 2007 SLT 137 (the disenfranchisement of prisoners). See further, EE Sutherland *Child and Family Law*, above n 17, paras 2.146–2.150.

[29] *Draper v United Kingdom* (1980) Application No 7114/75, 10 July 1980 and *Hamer v United Kingdom* (1982) 4 EHRR 139.

[30] The issue of assisted reproduction has already been addressed in England and Wales: *Mellor v Secretary of State for the Home Department* [2002] QB 13 and *Dickson and Dickson v Premier Prison Service Ltd, Secretary of State for the Home Department* [2004] EWCA Civ 1477. See, EE Sutherland 'Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?' 82 Or L Rev 1033 (2003). For more recent input from the European Court, see, *Dickson v United Kingdom* (2007) 44 EHRR 21.

[31] 2002 SLT 129.

[32] Ibid, at para 11.

III CHILD LAW

The Registrar General for Scotland announced that: 'In 2006, for the first time since 1994, births outnumbered deaths, albeit only by some 600.'[33] Not only did that trend continue the following year, but there was a slight (3.8%) increase in birth rate, with 57,781 babies being born in 2007.[34] Given that, in Scotland, as in many other developed countries, there is a concern over falling fertility rates and an ever-aging population, this was good news. There is considerable diversity in the circumstances of birth, with the number of births to unmarried parents continuing to rise and reaching almost half of the total.[35] However, the number of children being registered in the mother's name alone has remained fairly constant at between 6% and 7%. Not only do both unmarried parents normally register as such, but frequently they are living at the same address, suggesting that the child will live, at least initially, in a nuclear family. For the children of married parents, again, their immediate future is likely to be in a stable family unit, albeit, for both groups of children, the picture may change in the future. So what has the Scottish Parliament done for these new arrivals and their older siblings?

(a) Children's rights

If children's rights are to be actively promoted and fully respected, it is essential that they are recognised when policy is being formulated, when legislation is being passed and subsequently interpreted and in the practices implementing policies and law. In addition, it is crucial that children and young people have access to the legal system and that their special position resulting from their youth, inexperience and vulnerability is accommodated by it. Constraints of space prevent full exploration of all of these themes here,[36] but progress has been made in a number of respects, in Scotland.[37] One indication of serious commitment to children's rights was the creation of the office of Scottish Commissioner for Children and Young People (SCCYP), a post taken up by Professor Kathleen Marshall on 26 April 2004.[38] Scots law often reflects the underlying principles found in the United Nations Convention on the Rights of the Child (UNCRC). So, for example, when a court or other body is reaching a decision about a child, it is usually required to apply the tripartite test under which the child's welfare is paramount; account is taken of any views the child

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33 *Scotland's Population 2006: The Registrar General's Annual Review of Demographic Trends* (Scottish Government, Edinburgh, 2007), p 18.

34 *Scotland's Population 2007*, above n 25, p 18.

35 In 2007, 49.1% of births were to unmarried parents (parents not married to each other). This compares to 37.7% in 1997 and 22.8% in 1987: ibid.

36 See further, EE Sutherland *Child and Family Law*, above n 17, paras 3.041–3.075 and A Cleland and EE Sutherland, *Children's Rights in Scotland*, above n 17.

37 For an assessment of progress by the (then) Scottish Executive, see, *A Report on the Implementation of the UN Convention on the Rights of the Child in Scotland 1999–2007* (Scottish Executive, Edinburgh, 2007), available at: www.scotland.gov.uk/Publications/2007/07/30114126 [accessed 30 October 2008].

38 Commissioner for Children and Young People (Scotland) Act 2003.

wishes to express; and no order is made unless to do so would be better than not making the order.[39] The United Kingdom has just completed its third cycle of reporting to the United Nations Committee on the Rights of the Child[40] and the Committee took the opportunity to highlight continuing deficiencies in the law and practice, throughout the United Kingdom, in terms of compliance with aspects of the Convention.[41]

(b) 'Abolition' of illegitimacy

Hitherto, modern law reform, in Scotland, has been directed at minimising the legal significance of parental marital status. In terms of the child's rights, the process was well advanced prior to the creation of the Scottish Parliament[42] and the Scottish Law Commission had long since recommended the complete abolition of any distinction between children dependent upon their parents' marital status.[43] However, the status of illegitimacy remained and a non-marital father was certainly not placed on an equal footing with his child's mother, nor with fathers married to the mothers of their children. In what was to become something of a pattern for much of family law reform, the issue was revisited both pre- and post-Devolution.[44] Finally, it seemed as if its goal of 'completing the task'[45] had been achieved when the Family Law (Scotland) Act 2006 amended earlier legislation to provide:[46]

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[39] Children (Scotland) Act 1995, s 11(7).

[40] *The Third and Fourth Periodic Reports of the United Kingdom of Great Britain and Northern Ireland to the UN Committee on the Rights of the Child*, CRC/C/GBR/4, 25 February 2008 (actually submitted 16 July 2007). The Committee had other relevant reports at its disposal, not least the report from the four UK Commissioners for Children, highlighting some of the deficiencies in current law and practice: *UK Children's Commissioners' Report to the UN Committee on the Rights of the Child* (2008), available at: www.sccyp.org.uk/UK_Childrens_Commissioners_UN_Report.pdf [accessed 30 October 2008].

[41] *Concluding Observations of the Committee on the Rights of the Child on the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4, 3 October 2008.

[42] The Law Reform (Parent and Child) (Scotland) Act 1986, s 1(1), provided: 'The fact that a person's parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person; and accordingly any such relationship shall have effect as if the parents were or had been, married to one another.' The Act provided for exceptions to that general rule, see s 9.

[43] *Report on Family Law*, above n 8, para 17.1–17.15 and rec 88.

[44] Many of the Commission's proposals were re-examined by the pre-Devolution Scottish Office: *Improving Scottish Family Law* (Scottish Office, Edinburgh, 1999). Post-Devolution, the Scottish Executive (now the Scottish Government) returned to many of them in 2000 and 2004: *Parents and Children: A White Paper on Scottish Family Law* (Scottish Executive, Edinburgh, 2000) and *Family Matters: Improving Family Law in Scotland* (Scottish Executive, Edinburgh, 2004). As a result, the Family Law (Scotland) Act was passed by the Scottish Parliament in 2006.

[45] That phrase is a subheading in the section addressing the issue: *Report on Family Law*, above n 8, p 129.

[46] Law Reform (Parent and Child) (Scotland) Act 1986, s 1(1), as substituted by the Family Law (Scotland) Act 2006, s 21(2)(a).

> 'No person whose status is governed by Scots law shall be illegitimate; and accordingly the fact that a person's parents are not or have not been married to each other shall be left out of account in –
>
> (a) determining the person's legal status; or
> (b) establishing the legal relationship between the person and any other person.'

However, it would be a mistake to see this advance as delivering the 'abolition of legal status of illegitimacy', as promised in the new section's heading. First, there are exceptions, and the so-called abolition of illegitimacy has no effect on the transmission of, or succession to, any title, coat of arms, honour or dignity and actions of legitimacy, legitimation and illegitimacy are expressly stated to remain competent in relation to them.[47] Granted, this will be of significance to very few people but, for them, discrimination remains and Art 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the ECHR might well provide avenues for challenge here. Secondly, as we shall see below, while the position of non-marital fathers has been much improved, it remains the case that the child's mother can obstruct his access to recognition.[48] For many children born to unmarried parents, the goal of equality has been achieved, but it continues to elude others. Whether this can be justified in terms of other goals, like protection (of the child or the mother), is a matter to which we now turn.

(c) Defining 'parents' and recognising their role

The place of parents in a child's life has two distinct aspects and both may be significant from the perspective of children's rights. The first may be described as 'parentage': that is, whom the legal system recognises as a child's parents. In the ordinary case, this should not usually be problematic. For adopted and donor children the position is more complex, since knowledge about origins forms an essential part of identity,[49] something acknowledged by the ECHR[50] and the UNCRC.[51] The second aspect relates to 'parenting': that is, the opportunity to participate in the child's upbringing, something that is secured, in Scotland, through having parental responsibilities and parental rights.[52] Recent law reform addresses both aspects, giving children greater access to information about their origins and accommodating the diverse circumstances

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47 Law Reform (Parent and Child) (Scotland) Act 1986, s 9(1)(c), as amended by the Family Law (Scotland) Act 2006, s 21(4)(a).

48 See part III(c)(i), below.

49 J Goldstein, AJ Solnit and A Freud *Beyond the Best Interests of the Child* (Free Press, New York, 1st edn, 1973, revised edn, 1979); J Triseliotis *In Search of Origins* (Routledge and Kegan Paul, London, 1973).

50 Article 8. The European Court of Human Rights has developed this theme in a series of recent decisions. See, *Mikulic v Croatia*, Application No 53176/99, 7 February 2002; *Odièvre v France* (2004) 38 EHRR 43; *Estate of KF Mortensen v Denmark (Admissibility)* (2006) 43 EHRR SE9; *Jäggi v Switzerland*, Application No 58757/00, 13 July 2006.

51 Articles 7 and 8.

52 Children (Scotland) Act 1995, ss 1 and 2.

of a child's birth by making possible the automatic acquisition of parental responsibilities and parental rights by a wider range of adults.

(i) Non-marital fathers

Given that just under half of the births in Scotland were to parents who were not married to each other, any discrimination founded on birth status affected a large section of the population. Efforts had long been made to minimise the impact on children in terms of rights they could acquire.[53] The same could not be said for the responsibilities and rights of non-marital fathers. Discrimination begins with registration of birth. A mother may register the details of her child's birth, as may a father who is married to his child's mother.[54] Where the parents are not married to each other, the father's name may only be registered if he and the child's mother agree that this should happen.[55] Failing agreement, either of them may seek a declarator of parentage from the court and registration will follow.[56] Recent reform of the law has made no difference to the law here although, as we shall see, it may have an impact on a woman's willingness to let her child's father register as such.

From the child's perspective, having two parents from whom to expect duties will arguably enhance the child's well-being – a point recognised by the UNCRC in Arts 2, 7, 8 and 18. In this respect, the law was improved immensely by the Family Law (Scotland) Act 2006. Previously, all mothers acquired full parental responsibilities and parental rights from the moment of the child's birth and that remains the case.[57] The same was (and remains) true for fathers who were married to their child's mother at the time of the child's conception or subsequently.[58] Prior to the 2006 Act coming into force on 4 May 2006, a non-marital father gained these responsibilities and rights only by agreement with his child's mother[59] or by convincing a court that to bestow them upon him would serve the child's best interests.[60] The whole position of the non-marital father had long been contentious in Scotland and opposition to giving responsibilities and rights to non-marital fathers was based on a desire to protect mothers from interference from unreliable men whose interest might be fleeting or inconsistent.[61] None of these problems is unique to women who have never been married to their child's father. The spectre of the child resulting from rape or incest was also cited as a reason not to give the non-marital father the same status as other parents. Undoubtedly, such cases present special difficulties, but they account for a tiny proportion of children born to

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53 See part III(b), above.
54 Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 14.
55 Registration of Births, Deaths and Marriages (Scotland) Act 1965, s 18.
56 Law Reform (Parent and Child) (Scotland) Act 1986, s 7.
57 Children (Scotland) Act 1995, s 3(1)(a).
58 Children (Scotland) Act 1995, s 3(1)(b)(i), as added by the Family Law (Scotland) Act 2006, s 23. The amendment here simply effected renumbering of the subsections.
59 Children (Scotland) Act 1995, s 4.
60 Children (Scotland) Act 1995, s 11.
61 Scottish Law Commission, *Report on Family Law*, above n 8, paras 2.36–2.50.

unmarried parents. It makes no sense to draft laws focused on the exceptional cases, while ignoring the more usual cases.

The change effected by the 2006 Act was that fathers who registered as such after the Act came into force now acquire parental responsibilities and parental rights automatically.[62] For the vast majority of children born to unmarried parents in Scotland, this is significant since, in most cases, both parents are named on the birth certificate. This good news is subject to qualifications – two minor and one major. First, registration only counts if it is under one of enactments listed in the 2006 Act and, effectively, this means that only births registered in a part of the United Kingdom count.[63] Secondly, a non-marital father who was already registered as such, prior to 4 May 2006, must re-register. It is the third qualification that may be of greater importance and it results from where the control of registration lies. Mothers and married fathers have the power to effect their own registration as parents. Non-marital fathers do not. The child's mother must agree to a man registering as the child's father and, failing agreement, he must go to a court and obtain a declarator of parentage. Even then, the father's path to a declarator can be impeded by the child's mother refusing to consent to a sample being obtained from the child in order that DNA testing can be carried out.[64] Faced with a mother who is unwilling to co-operate, a non-marital father will still be thrown back on the daunting prospect of litigation to gain parental responsibilities and parental rights. However, he simply has to establish paternity in order to register and, thus, gain parental responsibilities and parental rights, with the welfare test playing no part in that decision.

(ii) Assisted reproduction

Unlike the position of adopted children,[65] donor children throughout the United Kingdom were denied access to identifying information about their genetic parents. There were provisions designed to facilitate disclosure of a certain amount of non-identifying information and to avoid incestuous marriages, but gaining identifying information about a donor-parent was

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62 Children (Scotland) Act 1995, s 3(1)(b)(ii), as added by the Family Law (Scotland) Act 2006, s 23.

63 Children (Scotland) Act 1995, s 3(1A). This may lead to a challenge under European Union law which requires that nationals of one EU state enjoy equal treatment and the same social advantages as citizens of a host EU state. See, EU Directive 2004/38 (in force from 30 April 2006), Art 24(1). EU Regulation 1612/68, Art 7, entitles Community workers to the same 'social benefits' enjoyed by home nationals.

64 Only a person who has parental responsibilities or parental rights – or who has care of control of the child – may consent to the testing of a child who is too young to consent : Law Reform (Parent and Child) (Scotland) Act 1986, s 6. While the court may draw an inference from refusal to consent, this does not necessarily mean that the pursuer will succeed: Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 70. See, eg, *Smith v Greenhill* 1993 SCLR 994 (where the court refused to draw a contrary inference where a married couple refused to consent to testing of the child to whom the wife had given birth).

65 Scots law has always permitted an adopted child access to his or her birth records on reaching the requisite age, that age currently being 16: Adoption and Children (Scotland) Act 2007, s 55(4)(b).

beyond the child's reach.[66] It became apparent that some donor children found this to be insufficient, litigation followed[67] and the issue of disclosure was re-examined in a UK context, assisted reproduction being a reserved matter.[68] Clearly, there are interests at stake here that may be in conflict. On the one hand, there are the children who want to know more about their ancestry. On the other hand, there are donors who were promised anonymity at the time they donated. In addition, there is the prospect that removal of donor anonymity would reduce the willingness of individuals to become donors, putting donor programmes in jeopardy.[69] In the end, a very British compromise was devised in new regulations that came into effect on 1 July 2004.[70] Where the donor registered before 1 April 2005 (and has not re-registered), an adult donor child may still only require the disclosure of non-identifying information regarding the donor. Where the donor registered after 1 April 2005 (including past donors who re-registered after that date), identifying information must be disclosed to the adult child upon request. In addition, a pilot project has been set up to enable the child and the relevant donor(s), as well as half-siblings, to receive information provided that each registers with UK Donorlink.[71] The service is available only to persons over the age of 18 and the parties may choose to reveal either identifying or non-identifying information.

So much for parentage, but what of parenting? In its original form the Human Fertilisation and Embryology Act 1990 opted for a relatively simple scheme, providing that the woman who gives birth to the child is treated as the child's mother and her husband is treated as the child's father, both being endowed with parental responsibilities and parental rights.[72] Failing a husband, a parallel legal fiction awarded the role of father to a suitably participating male partner.[73] Where a child resulted from a surrogacy arrangement, an expedited adoption procedure was put in place to enable a married (by definition, different-sex) commissioning couple to adopt the resulting child provided that the surrogate consented.[74] Occasional lacunae and glitches aside, the system worked well for different-sex couples.[75] However, it completely ignored

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66 Human Fertilisation and Embryology Act 1990, s 31.

67 In *Rose v Secretary of State for Health* [2002] 2 FLR 962, the court found that the 'private life' aspect of Art 8 of the ECHR (right to respect for private and family life) was implicated by the withholding of identifying information.

68 *Donor Information: Providing Information about Sperm, Egg and Embryo Donors* (Department of Health, London, 2001).

69 It appears that the immediate impact of openness on a drop in donor numbers is already being felt in the UK; A Howarth 'IVF clinic forced to close after running out of sperm', *The Scotsman*, 5 June 2006.

70 The Human Fertilisation and Embryology Authority (Disclosure of Information) Regulations 2004, SI 2004/1511.

71 The scheme began operation on 21 April 2004. For further details, see the UK Donorlink website at: www.ukdonorlink.org.uk [accessed 30 October 2008]. At present, the scheme will apply only where treatment took place before the 1991 Act, which prohibits disclosure of identifying information, after it came into force, but it may be extended in the future.

72 Human Fertilisation and Embryology Act 1990, ss 27(1) and 28(2).

73 1990 Act, s 27(3).

74 1990 Act, s 30.

75 On lacunae see, eg, *R* v *Human Fertilisation and Embryology Authority, ex parte Blood* [1997]

same-sex couples who, it will be appreciated, are likely to be significant users of assisted reproductive technology. Assuming it passes (and it looks like it will), the Human Fertilisation and Embryology Bill will address this gap in the law. The woman who gives birth to the child will continue to be treated in law as the child's mother, regardless of genetic reality, and any husband she has will normally continue to be treated as the child's father. In the absence of a qualifying husband, the Bill introduces a new scheme for recognition of a second parent who satisfies the 'agreed fatherhood condition' or 'agreed female parenthood conditions'. In addition, the expedited adoption procedure applying to surrogacy cases will apply to married couples, civil partners and 'two persons who are living as partners in an enduring family relationship'. Effectively, the Bill brings same-sex couples in out of the cold.

(iii) Other family members

When the Family Law (Scotland) Act 2006 was making its way through the Scottish Parliament, two groups lobbied hard to gain greater recognition. The first was step-parents, since being a step-parent brings with it no automatic parental responsibilities or parental rights. Like any third party, a step-parent may apply to the court to be given some or all of them and the usual tripartite test would apply. Their goal was to avoid the court process by making it possible for them to acquire responsibilities and rights through simple agreement with the child's parents.[76] Opposition was based on concern that permitting a parent to hand out parental responsibilities and parental rights to their partners (and, possibly, to a series of partners) smacks of the commodification of children; that there was no way to guarantee the child's participation in the decision; and that there was ambiguity about how such responsibilities and rights would terminate should the parent's relationship with the step-parent break down. Step-families are enormously diverse with some step-parents taking a quasi-parental role in the child's life, while others may be little more than residents in the same household. In the event, it was decided (very wisely, in this author's view) not to introduce such agreements.

The second group that sought greater recognition was grandparents. Again, grandparents gain no automatic responsibilities or rights in respect of their grandchild and, again, they may apply to a court for them. Grandparents too are a diverse group, ranging from those who assume the care of their grandchildren, sometimes because the parents are unable, or failing, to fulfil

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2 All ER 687 (use of deceased husband's sperm), leading to the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. On glitches, see, *Re R (A Child) (IVF: Paternity of Child)* [2005] 2 AC 621 (where the woman changed partners in the course of treatment). See also the very sad case, *Evans v United Kingdom* (2006) 43 EHRR 21 (woman who had created embryos with her partner, prior to having her ovaries removed, was not permitted to have them implanted after he withdrew his consent).

[76] *Parents and Children: A White Paper on Scottish Family Law*, above n 44, paras 2.25–2.45 and proposal 2. Such agreements between parents and step-parents are available in England and Wales; Adoption and Children Act 2002, s 112.

their role, to the 'toxic granny' whose intervention is highly disruptive.[77] Again, the decision was taken not to extend even an automatic right to contact with a grandchild to grandparents.[78] In what was seen by many as a sop to grandparents, the Charter for Grandchildren, a wholly cosmetic statement of rather obvious sentiments, was published by the (then) Scottish Executive in 2006.[79]

(d) Adoption

Much had changed in the way adoption of children operated in Scotland, since the last Adoption (Scotland) Act was passed in 1978.[80] Adoption itself was much less common, with 441 adoptions being recorded in 2007, about a quarter of the annual total taking place during the 1970s.[81] The older picture of baby-adoption was rarer and more of the children involved were coming to adoption when older and after experiencing the child protection system.[82] Step-parent adoption featured more significantly, with just under a third of adoptions in 2007 being by step-parents.[83] In addition, certain problems had been identified in adoption procedure. An extensive review of both adoption policy and procedure was undertaken by a multi-disciplinary group of experts[84] and most of its recommendations were implemented in the Adoption and Children (Scotland) Act 2007. At the time of writing, work continues on drafting the regulations necessary to bring the Act into force and the resulting delay is causing considerable disquiet. Undoubtedly the most significant – and, for some, controversial – aspect of the Act is that it will enable civil partners and cohabiting couples (whether different-sex or same-sex) to apply to adopt a child. Previously, adoption was confined to married (by definition, different-sex) couples and single people and they continue to be eligible to apply.[85]

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77 For an example of the latter, see, G Gurrie 'Woman wins court fight to see her grandchildren – on condition she leaves the confectionary at home', *Daily Mail*, 24 November 2007.

78 *Parents and Children: A White Paper on Scottish Family Law*, above n 44, para 2.44.

79 The text is available at: www.scotland.gov.uk/Publications/2006/04/21143655/2 [accessed 30 October 2008].

80 See further, EE Sutherland *Child and Family Law*, above n 17, ch 5.

81 *Scotland's Population 2007*, above n 25, p 53.

82 Only 11% of the children adopted in 2007 were under 2 years old: ibid.

83 Ibid.

84 Adoption Policy Review Group, *Report of Phase II: Adoption: Better Choices for Our Children* (Scottish Executive, Edinburgh, 2005) (hereinafter '*Adoption: Better Choices for Our Children*'), available at: www.scotland.gov.uk/Publications/2005/06/27140607/06107 [accessed 30 October 2008]. The Review Group's report was preceded by the Adoption Policy Review Group, *Report of Phase 1* (Scottish Executive, Edinburgh, 2001) and A Plumtree *Choices for Children in Adoption and Fostering: A Discussion Paper on Legal Issues* (Scottish Executive, Edinburgh, 2003).

85 Adoption and Children (Scotland) Act 2007, s 29.

(e) Resolving intra-family disputes

Disputes arise over where a child will live or with whom a child will spend time and, while most are between never-together or separating parents, they may involve other relatives,[86] like grandparents or siblings.[87] Other disputes may relate to a specific issue, like the child's education or medical treatment.[88] The modern approach is to encourage the resolution of such disputes without resort to litigation[89] and emphasis has been placed on mediation, with collaborative law emerging more recently.[90] The Children (Scotland) Act 1995 provides the mechanism for resolution of such disputes in court, using the tripartite test of welfare, the child's views and no unnecessary orders.[91] Courts have emphasised the importance of listening to the child's views, albeit they are not bound to give effect to them where the child's welfare indicates a different course of action.[92] In assessing welfare, the court considers all relevant factors and proceeds on the basis of an individualised assessment of the child's situation, rather than generalised assumptions.[93]

Until recently, Scots law avoided any notion of a statutory 'welfare checklist',[94] albeit the literature provided a rich source of factors considered relevant by courts in past decisions. Concern over children being exposed to domestic abuse and so-called 'parental alienation syndrome' resulted in a slight departure from that general approach. There was extensive lobbying by groups with distinct agendas and the gendered nature of the different interests is unmistakable.[95] Groups working with abused women stressed the need to

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[86] See further, EE Sutherland *Child and Family Law*, above n 17, chs 6 and 7.

[87] Whether it is competent for a person under the age of 16, like a sibling, to apply for contact with another such child has resulted in conflicting lower court decisions: see, *D v H* 2004 SLT (Sh Ct) 73 and *E v E* 2004 Fam LR 115.

[88] See, eg, *M v C* 2002 SLT (Sh Ct) 82 (child's name and religious education).

[89] A package of materials is available to assist parents and others in developing parenting plans: see, the Scottish Government website at: www.scotland.gov.uk/Topics/Justice/law/17867/10388 [accessed 22 June 2009].

[90] Mediation is an established part of the Scottish legal landscape: see, Civil Evidence (Family Mediation) (Scotland) Act 1995. In the family context, it is offered by individual solicitors, accredited to do the job, and through Family Mediation Scotland: see www.familymediationscotland.org.uk/ [accessed 30 October 2008]. The Scottish Collaborative Family Law Group was launched in 2006: see www.scottish-collaborativelawyers.com [accessed 22 June 2009].

[91] Children (Scotland) Act 1995, s 11(7).

[92] *Shields v Shields* 2002 SLT 579; *Treasure v McGrath* 2006 Fam LR 100.

[93] See, *Palau-Martinez v France* (2005) EHRR 9, where the European Court of Human Rights was critical of a French court that proceeded on the basis of generalised assumptions about the harm posed by a Jehovah's witness mother.

[94] *Report on Family Law*, above n 8, paras 5.20–5.23. Such a checklist was rejected by the Commission on the basis that it would be necessarily incomplete, might divert attention from other factors which ought to be considered, and might result in judges taking a mechanical approach to decision making.

[95] The gendered nature of calls for law reform is not a uniquely Scottish phenomenon. See, H Rhoades and SB Boyd 'Reforming Custody Laws: A Comparative Study' (2004) 18 Int J Law, Policy and the Fam 119, highlighting the gendered nature of similar law reform lobbies in Australia and Canada.

protect against the continuing threat to victims of abuse and their children by abusers who use contact with a child as a means of continuing to abuse their victims, subjecting their children to the harmful effects of secondary abuse (being exposed to the abuse of another person). As part of their more general claim that the legal system is stacked against men, fathers' rights groups complained that nothing was being done to assist fathers in having contact with their children when the child's mother sought to disrupt or prevent contact. In response, the Family Law (Scotland) Act 2006 amended the 1995 Act in two respects. First, the court must 'have regard in particular' to the need to protect the child from abuse, defined as including abuse of another person.[96] Arguably, this does both too much and too little.[97] There is ample evidence of the harmful effects on children of exposure to domestic abuse and Scottish judges had shown themselves capable of taking account of it, so the amendment really adds nothing. Nor does the new provision tell judges what they should do. It would have been quite possible to create a rebuttable presumption of the kind found in other jurisdictions, against giving contact to abusers. The second amendment requires judges, when making an order that will require co-operation between two or more persons, to consider whether the order would be appropriate.[98] Again, the court is not told what to do thereafter and one wonders if the legislators really thought that judges were not already considering the likelihood of co-operation when they granted contact orders.

(f) Financial support for children

Scots law has always been premised on the principle that parents should support their children where they have the means to do so, with the state becoming relevant where family resources are inadequate. The traditional mechanism, the law on aliment, which is administered by the courts, is now found in the Family Law (Scotland) Act 1985. In 1991, a separate, administrative and UK-wide system for dealing with financial support for most children was introduced by the Child Support Act 1991, with the intention that child support would replace aliment for these children and would remove the issue from the courts, thus saving on court time and the legal aid bill.[99] The child support system as originally introduced and administered was widely acknowledged to be something of a disaster and various attempts were made, at Westminster, to salvage it by amending the 1991 Act.[100] The most recent –

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[96] Children (Scotland) Act 1995, s 11(7A)–(7C), as added by the Family Law (Scotland) Act 2006, s 24.

[97] Work continues in the attempt to protect children from exposure to domestic abuse. See, *National Domestic Abuse Delivery Plan for Children and Young People* (Scottish Government, Edinburgh, 2008) and *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse* (Scottish Government, Edinburgh, 2008).

[98] Children (Scotland) Act 1995, s 11(7D), as added by the Family Law (Scotland) Act 2006, s 24.

[99] Child support has never applied where the payer is a non-parent, like a step-parent. Nor does it apply (broadly) to children over the age of 16 who have left school. Since a duty to aliment is owed to a child who is under the age of 25 and undergoing appropriate education or training, aliment continues to apply in respect of a whole range of children, not least, university students: Family Law (Scotland) Act 1985, s 1.

[100] Child Support Act 1995; Child Support, Pensions and Social Security Act 2000.

and most radical – attempt is found in the Child Maintenance and Other Payments Act 2008. The Act abolishes the Child Support Agency (CSA) and replaces it with the Child Maintenance and Enforcement Commission (C-MEC), which will take over CSA responsibilities and administer the new system. If one expensive administrative body does not work, it seems, create another. The emphasis in the 2008 Act is on allowing all parents to make their own arrangements for child maintenance, benefits recipients will no longer be compelled to use the child support system and a greater part of amounts paid in child support will be disregarded when calculating a wider range of state benefits. Whether this latest attempt to salvage a failing system proves any more successful than its predecessors remains to be seen.

(g) Child protection

Child protection, in Scotland, is a multi-faceted process.[101] As we have seen, efforts have been made to protect children from the adverse effects of secondary abuse, by spelling it out as a factor that the court must take into account in decisions on residence and contact.[102] That issue aside, the underlying premise of child protection efforts is that living with family members is usually the best option for most children. As a result, the state, largely through local authority social work departments, is required to provide support and assistance to children and their families to enable the child to stay at home.[103] Where the child cannot live with his or her own parents, other relatives, like grandparents, often provide in-family care and kinship care is increasingly acknowledged as being valuable, with increased efforts being directed at supporting it.[104]

In addition, it is acknowledged that prevention will not always be successful and it is incumbent on the system to provide the requisite mechanisms to ensure prompt, appropriate and effective investigation of suspected abuse or neglect and, where it is found, responses to it. That the system has failed some children is attested to by their deaths and injuries,[105] sometimes followed by official enquiries and legislative change. Part II of the Children (Scotland)

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[101] See further, EE Sutherland, *Child and Family Law*, above n 17, chapter 9.

[102] See part IV(e).

[103] Children (Scotland) Act 1995, ss 19–30.

[104] The problem of kinship carers receiving less practical and financial assistance than non-relative foster carers was addressed in the *National Fostering and Kinship Care Strategy* (Scottish Government, Edinburgh, 2006), available at: www.scotland.gov.uk/Publications/2006/12/07091551/0 [accessed 30 October 2008], leading to (interim guidance) *Assessment and Support for Kinship Carers of Looked After Children* (Scottish Government, web only, 2008), available at: www.scotland.gov.uk/Publications/2008/09/11124435/0 [accessed 30 October 2008].

[105] See, eg, Dr Helen Hammond *Child Protection Inquiry into the Circumstances Surrounding the Death of Kennedy McFarlane* (Scottish Executive, Edinburgh, 2000), available at: www.dgcommunity.net/DGCommunity/Documents.aspx?id=11832 [accessed 22 June 2009] and *Inspection into the Care and Protection of Children in Eilean Siar* (Scottish Executive, Edinburgh, 2005), available at: www.swia.gov.uk/swia/531.html [accessed 22 June 2009]. Some

Act 1995 was a response to perceived failures[106] and introduced a range of orders – child assessment orders, exclusion orders, child protection orders and parental responsibilities orders – designed to meet the wide variety of situations presenting themselves. It was the last of these, the parental responsibilities order, removing the parents' parental responsibilities and rights and vesting them in the local authority, that was found to be inflexible and otherwise problematic. It did not vest any of the responsibilities or rights in specific individuals, like foster carers, nor did it accommodate continued parental involvement. Another response to children in need of permanency planning, the 'freeing procedure', allowed the court to declare a child free for adoption, often in the face of parental opposition. It too proved to be too slow and inflexible to meet the needs of many children. This prompted the Adoption Policy Review Group to recommend the abolition of both procedures and their replacement by the permanence order, designed to offer a more nuanced response in effecting permanency planning for a range of children including those who will be adopted and those who will not.[107] The Adoption and Children (Scotland) Act 2007 implemented the recommendation and, once it comes into force, the success of the new orders will be evaluated.[108] Meanwhile a more pervasive evaluation of the whole child protection system got underway under the umbrella title, 'Getting it Right for Every Child' (GIRFEC),[109] to develop 'a national approach to help all professionals supporting children and young people in Scotland', based on the belief that 'a collective, overarching methodology should help improve opportunities for all children and young people in the country'.[110] That project continues with legislation expected in the current legislative session.[111]

Another strategy employed, in the context of child protection, is the imposition of age limits that attempt to keep children and young people away from harmful substances and activities. The legal mechanism here makes it an offence for a person to supply the child with the commodity and, sometimes, for the child or young person to attempt to purchase it. Such prohibitions assume that, by making particular conduct criminal, people will not engage in it – an assumption that significant numbers of young people seem particularly keen to challenge.[112] In the name of protecting young people, there is no doubt that the Scottish Government has engaged in net-widening, through including

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cases involve attempts to sue by now-adult victims of long-past abuse and they often find their claims time barred: see, eg, *B v Murray* 2007 SLT 605, decision upheld, *B v Murray* 2008 SLT 561.

106 It took up many of the recommendations of the *Report of the Inquiry into the Removal of Children from Orkney in February 1991* (HMSO, 1992), itself a response to the notorious Orkney Case, *Sloan v B* 1991 SLT 530.

107 Adoption Policy Review Group, *Adoption: Better Choices for Our Children*, above n 84: see, part III(d), above.

108 Adoption and Children (Scotland) Act 2007, ss 80–104.

109 See the GIRFEC website at:www.scotland.gov.uk/Topics/People/Young-People/childrensservices/girfec [accessed 30 October 2008].

110 Ibid, opening screen.

111 *Strengthening for the Future – a consultation on the reform of the Children's Hearings System* (Scottish Government, Edinburgh, 2008).

112 A graphic example of this is found in attempts to prevent young people having access to

more commodities and increasing age limits. As a result sunbeds (tanning salons) are now beyond the reach of a person under the age of 18 years old[113] and the age at which cigarettes can be sold to a young person legally has been raised from 16 to 18.[114] Most recently, the Scottish Government sought to address the negative impact of alcohol consumption by launching a discussion of a coherent strategy.[115] The proposal to increase the age at which a young adult could buy alcohol for consumption off-premises from 18 to 21[116] met with strong opposition, not least from responsible young people in that age group who argued that they would be penalised for the actions of an irresponsible minority. Realising that it was unlikely to carry the day, the Scottish Government backtracked a little, proposing instead that the matter be left to local councils when granting licences to sell alcohol. Undoubtedly, age limits disempower young people, but such is the paternalistic nature of protection.

Yet another facet of child protection seeks to prevent people who pose a risk to children from volunteering or working with them and this is achieved by a process of vetting everyone who seeks to do so and barring certain people from such work.[117] Protecting children from sexual exploitation has resulted in a number of legislative initiatives, albeit not all of the initiatives are designed to protect only children. Certain sex offenders are required to register with the police upon their release from prison and to update their contact information for a specific period of time or for the remainder of their life, depending on their sentence.[118] In addition, the courts may grant orders restricting the activities of potential sex offenders[119] and a new offence, meeting (or attempting to meet) a child with the intention of engaging in unlawful sexual activity, was created and is designed to combat the 'grooming' of potential victims, particularly via the Internet.[120] It is safe to say that restricting the liberty of potential sex offenders meets with public approval.

Rather more controversial is proposed legislation currently making its way through the Scottish Parliament designed to discourage underage sexual

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alcohol. In a recent study, it was found that 49% of the young people under the age of 18 responding had purchased alcohol: P Bradshaw *Underage Drinking and the Illegal Purchase of Alcohol* (2003).

113 Public Health etc (Scotland) Act 2008, ss 95–96.

114 Smoking, Health and Social Care (Scotland) Act 2005 (Variation of age limit for the sale of tobacco purchase and consequential modifications) Order 2007, SI 2007/437.

115 *Changing Scotland's relationship with alcohol: a discussion paper on our strategic approach* (Scottish Government, Edinburgh, 2008).

116 Ibid, paras 83 et seq.

117 The Protection of Vulnerable Groups (Scotland) Act 2007.

118 Sexual Offences Act 2003, ss 80 et seq. As yet, in the UK, there is no blanket notification to the public of such an offender's presence in the area, but the police may notify specific persons, like a potential employer, in certain circumstances: *M v Chief Constable, Strathclyde Police* 2003 SLT 1007.

119 Sexual Offences Act 2003, s 105; Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s 2 (risk of sexual harm order) and s 17(4) (sexual offences prevention order).

120 Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, s 1.

activity by criminalising the actions of the young people themselves. Take the example of two heterosexual 15-year-olds who engaging in what would be consensual sex but for their age. At present, the male commits an offence, but the female does not, albeit he would most probably be dealt with by the children's hearing (as an offender) rather than a court.[121] The Scottish Law Commission examined this issue and recommended decriminalising consensual sexual activity where the parties were between 13 and 15 years old. It recommended that, instead, it should be possible to refer the young people to a children's hearing on the basis that their conduct warranted further exploration of their welfare (a non-offence referral).[122] Amid somewhat hysterical reactions in sections of the media, mischaracterising the proposal as 'legalising under-age sex', the Scottish Government chose to ignore this eminently sensible proposal and, instead, introduced the Sex Offences (Scotland) Bill which would render the action of both young people criminal.[123] The proposed legislation here would not simply be disempowering: that is, it would not simply put obstacles in the way of young people seeking to engage in an activity that most of the adult community would prefer them to postpone. It would brand them as criminals – and as criminals of a particularly odious kind. At the time of writing, it is unclear whether the proposed legislation will pass.

IV ADULT RELATIONSHIPS

Scotland has a population of a little over 5 million and adult living arrangements reflect considerable diversity.[124] There were 2.3 million households in 2007, a figure that is projected to increase considerably as a result of an ageing population.[125] Marriage remains popular, albeit less so than in the past, with a little under 30,000 weddings taking place each year.[126] Some of this buoyancy is explained by 'tourist weddings' since, in over a quarter of the marriages, neither party was resident in Scotland.[127] Conversely, a significant (but unrecorded) number of Scottish couples get married abroad. Reflecting the human capacity for hope over experience, over a quarter of men and women marrying had been married before and divorced.[128] It only became possible to register a civil partnership in December 2005 and 84 couples registered that month.[129] In 2006, 1,047 couples did so, with the number

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121 Criminal Law (Consolidation) (Scotland) Act 1995, s 5(3).

122 Scottish Law Commission, *Report on Rape and Other Sexual* Offences (Scot Law Com No 209, 2007), paras 4.43–4.57.

123 SP Bill 11 (2008), ss 21 and 22.

124 *Scotland's Population 2007*, above n 25, p 6.

125 Ibid, p 56. It is projected that households containing only one adult will increase from 809,000 (35%), in 2006, to 1.2 million (44%), in 2031: ibid.

126 Ibid, p 48. This contrasts with the Second World War peak of over 53,000 weddings, in 1940, and annual figures of about 40,000 in the 1970s.

127 Ibid, p 48.

128 Ibid, p 49. The proportion of widows and widowers marrying has declined slightly on previous years to just over 2%: ibid.

129 Ibid, p 53.

dropping to 688 in 2007.[130] The recent peak in divorce statistics should be viewed with caution since it coincides with a change in the law that made divorce more immediately accessible to a significant number of people who would have had to wait for several more years under the previous system.[131] The year 2008 drew to a close without a single civil partnership dissolution appearing in the Scottish law reports[132] and it is too soon to assess the durability of civil partnerships overall or to draw comparisons with marriage. The precise number of couples who are simply cohabiting (and neither married nor civilly enpartnered) is difficult to gauge, since there are reasons for under-reporting,[133] but is probably in the order of 300,000.[134] Since ending cohabitation requires no formal step, there are no statistics on the termination of such relationships. That, then, is the diverse nature of what is happening. To what extent does the legal system encourage this diversity, empower individuals by accommodating their choices and what are the implications for equality? Does it afford adequate protection to all those involved?

(a) Formal marriage

The legal landscape for marriage follows the familiar pattern of restrictions relating to capacity, consent and compliance with the requisite formalities: matters which have remained fairly settled since the current legislation, the Marriage (Scotland) Act, was enacted in 1977.[135] However, that statute has been amended, most recently by the Family Law (Scotland) Act 2006, and its main provisions are highlighted below along with other significant developments.

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[130] Ibid. The drop is explained by the fact that many couples in long-standing relationships had registered in 2006.

[131] Prior to the annual peaks of 13,373 decrees being granted, in 2006, and 12,773, in 2007, the annual figure had stabilised at around 11,000: ibid, p 51.

[132] A tabloid newspaper claimed that there had been one such dissolution in Scotland but, given the source, the claim should be treated with the utmost caution, not least because extensive enquiries by the author of family law practitioners produced no confirmation. See, N Sharpe 'The only gays in divorce court', *The Sun*, 20 June 2008, 2008 WLNR 13663742. The first 'celebrity gay "divorce"' was reported to have taken place in England in 2008. See, 'News review of the week', *The Sunday Times*, 26 October 2008, 2008 WLNR 20434027.

[133] Despite changing social attitudes to cohabitation, there may be some couples who still preferred not to disclose their status due to feelings of embarrassment alone. On a more practical level, cohabitation, as opposed to simply sharing a home, can have significant adverse consequences for a person who wishes to claim certain state benefits.

[134] This figure is produced by deducting the number of married couples from the 58% of people over the age of 16 in Scotland who reported themselves for the latest census as 'living in a couple': General Register Office for Scotland, *Scotland's Census 2001: Reference Volume* (2005) (hereinafter 'Scotland's Census 2001' and available at: www.gro-scotland.gov.uk), table CAS004.

[135] See further, EE Sutherland *Child and Family Law*, above n 17, chapter 12.

As a general rule,[136] a person acquires the capacity to marry on reaching the age of 16 years old and parental consent (or opposition) is irrelevant.[137] Marriage is restricted to different-sex couples.[138] As we have seen,[139] there is scope for an individual to have a change of gender recognised and he or she gains the capacity to marry in the acquired (newly recognised) gender. Marriage between certain relatives is prohibited and, as in many other jurisdictions, the prohibitions at what might be described as 'the margins' have changed over time.[140] Most recently, the prohibition on marriage between a former parent-in-law and former child-in-law, while the linking spouse or civil partner of either of them remained alive, was removed.[141]

That each party should consent freely and with full understanding of what he or she is embarking upon is essential to the whole notion of marriage as a consensual relationship and the Family Law (Scotland) Act 2006 amended the 1977 Act to clarify (and, in one respect, alter) the common law on what might interfere with the validity of consent.[142] Two distinct issues have been a source of increasing concern of late – forced (coerced) marriages and sham marriages.

Scots law has always taken the position that a purported marriage, where one party lacked the capacity to consent, is void. Impaired capacity might result from a permanent condition, like mental illness, or the temporary effects of drugs or alcohol.[143] In any case, there was a heavy onus on anyone seeking to avoid a marriage.[144] Similarly, where one of the parties was operating under error as to the nature of the ceremony or the identity – but not the attributes or the qualities – of the other party, the purported marriage is, again, void. Where one party's apparent consent was secured by duress, the purported marriage is void. There are a number of modern cases where family pressure was found to be sufficient to render the marriage void under the common law.[145] The 2006

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136 In the case of marriage between a former step-parent and step-child, both parties must have attained the age of 21 at the time of marriage and the younger party must not have lived in a household with the elder and been treated as a child of the family prior to reaching the age of 18: Marriage (Scotland) Act 1977, s 2(1A).

137 Marriage (Scotland) Act 1977, s 1. The provision is of extra-territorial effect since a marriage abroad, involving a domiciled Scot under that age, will not be recognised in Scotland.

138 Marriage (Scotland) Act 1977, s 5(4)(e).

139 See part II(b), above.

140 Marriage (Scotland) Act 1977, s 2 and Sch 1.

141 Marriage (Scotland) Act 1977, s 2 and Sch 1 as amended by the Family Law (Scotland) Act 2006, s 1. It is worth noting that this amendment had been recommended by the Scottish Law Commission (*Report on Family Law* above n 8, paras 8.6–8.13 and rec 46) well before the European Court of Human Rights condemned the prohibition as being in violation of Art 12 (right to marry) of the ECHR: *B v United Kingdom* (2006) 42 EHRR 11.

142 Marriage (Scotland) Act 1977, s 20A, as added by the Family Law (Scotland) Act 2006, s 2.

143 *Johnston v Brown* (1823) 2 S 495 (irregular marriage avoided where the woman was so drunk, not only at the time of the marriage, but for 3 days thereafter, as to be incapable of giving consent).

144 See, *Long v Long* 1950 SLT (Notes) 52 ('It does not follow from the fact that the defender is a mental defective that she was incapable of understanding the nature of marriage or of giving consent thereto.') and *Scott v Kelly* 1992 SLT 915 (unsuccessful attempt by a sister to have her deceased sibling's marriage declared void).

145 See, *Mahmood v Mahmood* 1993 SLT 589 (parental threats to disown a wholly-dependent

Act amendments simply gave statutory expression to the common law approach to these matters.[146] However, it may be questioned that enough has been done to protect individuals from coerced marriages and discussions are underway on further reform of the law.[147]

It is when we turn to sham marriages, designed to subvert immigration law, that the 2006 Act effected a substantive amendment. The question of tacit withholding of consent (having a mental reservation) to marriage was a source of considerable academic debate and judicial disquiet.[148] The common scenario was for the couple to participate in a civil marriage ceremony, giving every indication of consent. Later, one of them would seek to have it declared void on the basis that there had been no true consent, since, for him or her, only a religious ceremony would have been sufficient to create a marriage. While courts were not happy to see the legal system used in this way to secure an ulterior purpose, they could not avoid the conclusion that, if there was 'no true matrimonial consent', there could be no marriage.[149] One judge rebelled against this stance, but his decision was overturned on appeal.[150] It became clear that any reform here could only be effected by legislation and the 2006 Act did just that, amending the 1977 Act to provide that:[151]

> 'If a party to a marriage purported to give consent to the marriage other than by reason only of duress or error, the marriage shall not be void by reason only of that party's having tacitly withheld consent to the marriage at the time it was solemnised.'

In the attempt to counteract sham marriages further, immigration law and practice have themselves been amended.[152]

21-year-old daughter and send her to live in Pakistan, combined with relentless family pressure); *Mahmud v Mahmud* 1994 SLT 599 (similar pressure exerted on a 31-year-old man); and *Sobrah v Khan* 2002 SCLR 663 (bride's mother threatened to send her daughter to Pakistan and then commit suicide). See also, *Singh v Singh* 2005 SLT 749 (mother took daughter to India, purportedly on holiday, and the young woman went through a marriage ceremony after her mother threatened to destroy her passport and return ticket and leave her there).

146 Marriage (Scotland) Act 1977, s 20A, as added by the Family Law (Scotland) Act 2006, s 2.

147 Legislation is already in place in the rest of the United Kingdom: Forced Marriage (Civil Protection) Act 2007. See also, *Forced Marriage statutory guidance: Consultation Paper* (Foreign and Commonwealth Office, London, 2008), available at: www.fco.gov.uk/resources/en/pdf/forcedmarriage-consultation.

148 EM Clive *The Law of Husband and Wife in Scotland* (W Green, Edinburgh, 4th edn, 1997), at para 07.047, drawing a distinction between parties who go through an empty ceremony and couples who have an ulterior motive but, nonetheless, intend to get married for a particular limited purpose.

149 *Orlandi v Castelli* 1961 SC 113 at 120.

150 *Hakeen v Hussain* 2003 SLT 515 (Lord Clarke), reversed in H v H 2005 SLT 1025 (Ex Div). On appeal, Lord Penrose took the opportunity to remind the parties that it was open to the Court to report cases of this kind to the Lord Advocate with a view to prosecution in respect of the 'serious criminal offences' that may have been committed.

151 Marriage (Scotland) Act 1977, s 20A(4), as added by the Family Law (Scotland) Act 2006, s 2.

152 Registrars are now required to report suspected sham marriages: Immigration and Asylum Act 1999, s 24. For a successful challenge Art 12 to a different provision aimed at sham

Scots law allows couples the choice between a civil or a religious ceremony, with the preceding formalities being the same for each. These formalities (lodging notice and the relevant documents, paying a fee, publicity and, usually, waiting for at least 14 days before the marriage schedule – a licence to marry – is issued) have remained substantially unaltered since the 1977 Act was passed with a few – largely minor and one more significant – exceptions. The wonders of modern technology have been embraced and documents can now be completed and lodged online.[153] Publicity is now effected locally and nationally, via the Internet.[154] Previously, while a religious ceremony could take place anywhere that was acceptable to the parties and the celebrant, civil ceremonies were largely confined to registration offices, save in exceptional circumstances, like infirmity or illness.[155] The Marriage (Scotland) Act 2002 amended the 1977 Act to extend greatly the range of possible civil wedding venues and marriages may now take place at an 'approved location' or, in Scottish waters, on an 'approved vessel',[156] resulting in weddings taking place in hotels and castles, as well as more singular locations.[157]

(b) Irregular marriage

Irregular marriage[158] has a long and colourful history, in Scotland, making it a rich source of academic debate, of much-publicised case-law and of popular fiction. The only remaining form of irregular marriage, marriage by cohabitation with habit and repute, was discussed in a recent International Survey.[159] Suffice to say here that only a handful of such marriages were declared each year, in part, because the modern tendency to be open about the fact that the parties were simply living together limited the scope for its

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marriages and confined to England and Wales, see, *R (on the application of Baiai) v Secretary of State for the Home Department (Nos 1 and 2)* [2008] UKHL 53. Nationals of non-European Economic Area countries (except Swiss nationals) are required to obtain a special 'visa for marriage' if they wish to come to the UK to get married, even if they plan to return home soon after the wedding. See the Home Office, *Guidance – Visitors (INF 2)* (03/04/06), available at: www.ukvisas.gov.uk/en/howtoapply/infs/inf2visitors.

153 Marriage (Scotland) Act 1977, s 24A, as added by the Local Electoral Administration and Registration Services (Scotland) Act 2006, s 50.

154 The 'district list' is 'displayed in a conspicuous place at the [local] registration office', while the 'Scottish list' is available on the Internet: Marriage (Scotland) Act 1977, s 4, as amended by the Local Electoral Administration and Registration Services (Scotland) Act 2006, s 49.

155 Marriage (Scotland) Act 1977, s 18(1).

156 Marriage (Scotland) Act 1977, s 18A, as amended by the Marriage (Scotland) Act 2002 (asp 8) and the Local Electoral Administration and Registration Services (Scotland) Act 2006, s 48.

157 It appears that the first such wedding took place, appropriately enough, at Gretna Green: 'Wedding history made in Gretna', BBC website, 6 August 2002. See also, S Halstead and G Edwards 'A nice day for a witch wedding' *The Scotsman*, 16 September 2004 (reporting on the first Wicca wedding which took place in a vault below Edinburgh's Old Town).

158 The terms 'common law marriage' or 'marriage without formalities' are sometimes used but the former risks confusion with simple cohabitation and the latter is not wholly appropriate, since some irregular marriages were surrounded by some (albeit unofficial) formalities.

159 See, EE Sutherland 'Scotland: Some Dreams Realised, Some Disappointments', in A Bainham (ed), *International Survey of Family Law: 2003 Edition* (Jordan Publishing Ltd, 2003), at pp 393–395 and, further, EE Sutherland *Child and Family Law*, above n 17, paras 12.095–12.102.

application.[160] The Scottish Law Commission had long since recommended abolition on the basis that it rewarded deception and created a possible threat to the validity of subsequent formal marriages.[161] After further consultation on the matter,[162] the Scottish Executive (as it then was) took the view, initially, that marriage by cohabitation with habit and repute should be retained.[163] It was only while the Family Law (Scotland) Act 2006 was making its way through the Scottish Parliament that abolition resurfaced and became reality. Two caveats to the statutory abolition of the concept should be noted. First, abolition was of prospective effect only, so the issue of such marriages will arise for many years to come.[164] Secondly, the concept lingers on as a cure for defective foreign marriages where one of the parties has died, provided that the parties 'purported to enter a marriage' outwith the United Kingdom before the cohabitation with habit and repute began, the deceased died domiciled in Scotland and the surviving partner is so domiciled.[165]

(c) Civil partnership

The Netherlands led the world in extending marriage to same-sex couples, in 2001, and numerous other jurisdictions have followed. Sadly, Scotland is not one of them. The Scottish Law Commission had expressly excluded same-sex relationships from its review of adult relationships in 1992.[166] Sections of the public and many academics had long sought to end the discrimination against same-sex couples by providing for formal recognition of their relationships, with some calling for the introduction of same-sex marriage. The European Court of Human Rights was showing itself to be increasingly impatient with discrimination based on sexual orientation.[167] European Union law played its part, since the Employment Directive expressly prohibits discrimination on the

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160 In *S v S* 2006 SLT 471, eg, the parties appear not to have discussed marriage after they became free to embark upon it because, in the pursuer's words (quoted at p 475), 'we did not see the need – it would not change anything'. Lord Clarke, at p 476, interpreted this as confirming the defender's evidence that they were content to continue living together 'as a modern cohabiting couple'.

161 *Report on Family Law* (Scot Law Com No 135, 1992), rec 42.

162 *Improving Scottish Family Law* (Scottish Office, Edinburgh, 1999) and *Parents and Children: A White Paper on Scottish Family Law* (Scottish Executive, Edinburgh, 2000), paras 10.4–10.5.

163 *Parents and Children*, ibid para 10.5.

164 Family Law (Scotland) Act 2006, s 3(1). For a marriage by cohabitation by habit and repute to be protected against the concept's prospective abolition, 'the cohabitation with habit and repute' must have ended before s 3(1) came into force (4 May 2006) or begun before, but ended after, s 3(1) came into force, or begun before s 3(1) came into force and continue thereafter: s 3(2).

165 Family Law (Scotland) Act 2006, s 3(3) and (4).

166 *Report on Family Law* above n 161, para 8.5, noting that 'Few of our respondents questioned' the assumption that public policy on the issue of same-sex marriage had not changed since the Marriage (Scotland) Act 1977, albeit 'one or two' respondents advocated change and 'one or two others' thought the issue might be re-examined.

167 See, eg, *Da Silva Mouta v Portugal* (2001) 31 EHRR 47, where the Court struck down discrimination on the basis of sexual orientation as infringing Arts 8 and 14 of the ECHR in a custody dispute. In the context of adoption, see, *EB v France*, Application No 43546/02, 22 January 2008.

basis of sexual orientation in employment and training.[168] The Scottish Parliament was already including both same-sex and different-sex couples in legislation on specific issues[169] and case-law was increasingly recognising same-sex relationships.[170] Eventually, and after some prompting from the Department of Trade and Industry,[171] the (then) Scottish Executive accepted that this issue could no longer be ignored. It published its consultation paper, *Civil Partnership Registration: A Legal Status for Committed Same-Sex Couples in Scotland*,[172] in September 2003. Having received substantially positive responses to the idea,[173] it was decided to introduce civil partnerships for same-sex couples in Scotland – and to do so by means of legislation passed at Westminster and applying throughout the United Kingdom.[174]

The Civil Partnership Act 2004 created civil partnerships as a marriage-equivalent for same-sex couples. To a large extent, the legal formalities for registering a civil partnership parallel those for marriage.[175] However, such was the controversy, in some quarters, surrounding legal recognition of same-sex relationships that legislators felt the need to sanction some significant – and, sometimes, wholly unnecessary[176] – differences. Some, like the need to create a statutory bigamy equivalent, are the inevitable result of civil partnership as a

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168 2000/78/EC. Denying same-sex partners access to pensions and other benefits resulting from employment would have been in breach of the Directive.

169 See, eg, the Adults with Incapacity (Scotland) Act 2000, the Protection from Abuse (Scotland) Act 2001, the Housing (Scotland) Act 2001, the Mortgage Rights (Scotland) Act 2001, the Agricultural Holdings (Scotland) Act 2003 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

170 See, eg, *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

171 The Department of Trade and Industry (DTI) published its consultation document in June 2003: DTI Women and Equality Unit, *Civil Partnership: A framework for the legal recognition of same-sex couples* (DTI, London, 2003), available at: www.womenandequalityunit.gov.uk. The analysis of responses to that consultation were published: see, *Responses to Civil Partnership: A framework for the legal recognition of same-sex couples* (DTI, London, 2003) at: www.dti.gov.uk/publications.

172 Scottish Executive, Edinburgh, 2003, available at: www.scotland.gov.uk/consultations/justice/cprs.pdf.

173 See, V Strachan, P Spicker, S Morris and T Damjanovic *The Consultation on Civil Partnership Registration: analysis of the responses* (2004). This analysis was published by Scottish Executive Social Research and is available at: www.scotland.gov.uk/socialresearch. Of the 323 responses received (222 from individuals and 101 from organisations), 86% supported civil partnership registration, in principle, and 75% supported the more detailed proposals on registration and dissolution. 40% of respondents believed that civil partnership would undermine marriage, but at least some of them did not see that as a reason to oppose it.

174 See, *Civil Partnership Registration: A Legal Status for Committed Same-Sex Couples in Scotland* (Scottish Executive, Edinburgh, 2003) section 4, available at: www.scotland.gov.uk/consultations/justice/cprs-00.asp [accessed 22 June 2009]. For a discussion of the Legislative Consent Motion (formerly a 'Sewel Motion'), see above n 11.

175 As a result, the requirements in terms of capacity (age, forbidden degrees, single status) and consent (understanding and capacity to consent, no duress or relevant error) mirror those for marriage, allowing for necessary adaptations (e g the parties must be of the same sex): Civil Partnership Act 2004, s 128. There is no provision in respect of tacit withholding of consent in the civil partnership context.

176 The witnesses to a civil partnership must 'have attained the age of 16', not simply 'profess' that this is the case, as with marriage: 2004 Act, s 85(1)(b).

statutory creation.[177] Others are designed to signal that civil partnership 'is not marriage'. So, for example, a civil partnership may only be created through the civil registration procedure and there is no possibility of a religious ceremony.[178] Yet others flow from the legislature's consistent resistance to acknowledging any sexual dimension to same-sex relationships. So, while a civil partnership may be void for much the same reasons as a marriage may be void,[179] there is no provision in the 2004 Act for a voidable Scottish civil partnership, although the concept is relevant to civil partnerships from other jurisdictions.[180]

(d) Protection from domestic abuse

Despite the fact that the Matrimonial Homes (Family Protection) (Scotland) Act 1981, giving a spouse the right to occupy the family home and to have the abusive partner excluded,[181] has been in operation for over a quarter of a century, domestic abuse remains a problem in Scotland.[182] While parallel provisions were extended to civil partners in 2004,[183] there were problems with the 1981 Act itself. It was directed at the use, rather than the ownership, of the home. The protection it offered terminated on divorce, while abusers often continue their conduct after that event. It offered no protection to persons other than the victim, and abusers often direct their conduct at other family members or friends.

Almost from its inception, the new Scottish Government sought to address domestic abuse by developing a national strategy; establishing a national domestic abuse helpline, funding an advertising campaign designed to highlight the issues; funding projects aimed at tackling abuse, and commissioning research on various aspects of the problem. Scotland's first specialist domestic abuse court began operating, in Glasgow, in October 2004. In addition to fast-tracking domestic abuse prosecutions, the court offers a comprehensive support network for victims (ASSIST) from the time the case is referred, through the court process, and for 12 weeks after disposal. A diversion programme for offenders (CHANGE) was also established. The first 2 years of

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[177] Since bigamy is a common law offence, the civil partnership equivalent is a statutory creation, it being an offence to register a civil partnership while married or in a civil partnership: 2004 Act, s 100.

[178] 2004 Act, s 85. As for marriage, various venues may be approved for the purpose but, in the case of approval for the registration of a civil partnership, 'the place must not be in religious premises': 2004 Act, s 93(3). Similarly, specific registrars are designated 'authorised registrars' for the purpose of registering a civil partnership: 2004 Act, s 87.

[179] 2004 Act, ss 86 and 123.

[180] 2004 Act, s 204. It will be remembered that the only ground on which a marriage is voidable (as opposed to void), in Scotland, is incurable impotency at the time of the marriage.

[181] A cohabitant must apply to a court to gain the benefit of occupying the home and, if this is granted, may then move to exclude an abusive partner: Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 18.

[182] See further, EE Sutherland *Child and Family Law*, above n 17, paras 13.135–13.163 and ch 14.

[183] Civil Partnership Act 2004, ss 101–116.

the project's operation were evaluated and adjudged to be a success overall[184] and additional funding has been provided to extend the service to a larger part of the city. It is likely that other such courts will be established around the country.

On the legislative front, the Protection from Abuse (Scotland) Act 2001 was passed by the Scottish Parliament. The Act defines 'abuse' widely, being 'violence, harassment, threatened conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress'.[185] It uses the mechanism of interdict (injunction), backed up by a power of arrest without a warrant, to secure protection against abuse. There are protections of the alleged abuser's rights through the right to a hearing and legal representation, but breach of the interdict will lead to penalties in itself or to criminal proceedings. The enormous strength of this Act lies in the fact that its provisions are available to anyone who has, or is seeking, an interdict. Not only can it be used to protect former spouses in the post-divorce context, but its provisions are available to their future partners or to other family members, should the aggressor turn his or her attentions to them. With this reform, the range of remedies began to present a rather complicated picture and the Family Law (Scotland) Act 2006 instituted further reforms designed to streamline matters on that score as well as refining the provisions of the 1981 Act. While domestic abuse is far from eradicated, attempts to tackle it continue in the hope that effective protection will be secured.

(e) Divorce and civil partnership dissolution

Much of the system in place for dealing with divorce predates the birth of the Scottish Parliament but a brief outline is provided here, along with more recent developments, by way of background. When the law was reformed in 1976, the fault system was replaced by a mixed system, making divorce available on both fault and no-fault grounds. Under the guise of 'irretrievable breakdown', divorce became available on proof of adultery; desertion, without reasonable cause, for 2 years; behaviour by the defender making it unreasonable to expect the pursuer to continue the marriage; 2 years separation coupled with the defender's consent; and non-cohabitation for 5 years.[186] With the creation of civil partnerships, parallel grounds were put in place for civil partnership dissolution – with one notable difference.[187] There is no civil partnership equivalent of the adultery ground for divorce. This can be explained on the basis of the, very specific, Scottish definition of adultery, being full sexual intercourse of the male-female variety.[188] However, there is no escaping the

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184 Reid Howie Associates, *Evaluation of The Pilot Domestic Abuse Court* (2007), web only, available at: www.scotland.gov.uk/Publications/2007/03/28153424/15.

185 2001 Act, s 7.

186 Divorce (Scotland) Act 1976, s 1(1).

187 Civil Partnership Act 2004, s 117(1).

188 Adultery is voluntary sexual intercourse with a person of the opposite sex who is not one's spouse and requires 'the introduction of the male organ into the female': *MacLennan* v *MacLennan* 1958 SC 105, per Lord Wheatley, at p 112.

suspicion that this is yet another example of the legislature's desire to avoid all recognition of the sexual dimension in same-sex relationships. In any event, it is of no real practical significance since sexual infidelity by a civil partner would almost certainly qualify under the behaviour ground for dissolution. The final piece of the puzzle resulted from reform of the law that made it possible to have a change of gender recognised by the legal system.[189] Since Scots law does not recognise same-sex marriage, nor different-sex civil partnership, recognising a change of gender presented a problem if the individual was in either type of relationship. The solution was to delay full recognition of gender change until he or she had terminated the existing relationship. Thus, obtaining an interim gender recognition certificate is, in and of itself, a ground for divorce or civil partnership dissolution.[190] The court granting a decree dissolving the relationship also grants a full gender recognition certificate.

As long ago as 1989, the Scottish Law Commission had recommended modest reform of the grounds for divorce, essentially, shortening the periods of non-cohabitation required for the no-fault grounds from 2 and 5 years to one and 2, respectively, abolishing desertion as a ground for divorce and removing certain, rather obsolete, defences.[191] After the now-familiar pre- and post-Devolution revisiting of the matter,[192] these recommendations were finally implemented by the Family Law (Scotland) Act 2006, amending the Divorce (Scotland) Act 1976. Parallel reforms were implemented in respect of civil partnership dissolution. The result is that, in either case (and aside the issue of gender recognition), spouses and civil partners may agree to terminate their relationship and the whole process can be based on one year's non-cohabitation. Failing that, one of them may effect termination immediately, by founding on the other party's adultery (marriage only) or other conduct, or simply by leaving and waiting for 2 years to elapse. The hope is that relationships may be brought to a dignified end without the need to rake over past misconduct and the statistical trend suggests that this is happening.[193] The immediate result was that a number of spouses who would have had to wait for 5 years in order to divorce became eligible immediately and this explains the recent spike in the divorce statistics. It is anticipated that, once the backlog clears, numbers will settle back down.

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189 See part II(b), above.

190 Divorce (Scotland) Act 1976, s 1(1)(b) and Civil Partnership Act 2004, s 117(2)(b).

191 *Report on Reform of the Grounds of Divorce* (Scot Law Com No 116, 1989, Edinburgh), repeated in the *Report on Family Law* (Scot Law Com No 135, 1992, Edinburgh).

192 See, *Improving Scottish Family Law*, above n 162, and *Parents and Children: A White Paper on Scottish Family Law*, above n 162.

193 In 2007, the two non-cohabitation grounds accounted for 92% of divorces, whereas they accounted for only 39% in 1981. During that period, 'behaviour' fell as the stated ground from 42% to 7%, while 'adultery' fell from 17% to 1%. See, *Scotland's Population 2007*, above n 25, p 51.

(f) The consequences of divorce and civil partner dissolution

Again, thanks largely to the work of the Scottish Law Commission,[194] the Family Law (Scotland) Act 1985 has long provided a system for financial provision on divorce based on clear principles and empowering the courts to make a wide range of orders so that it can apply these principles to the wide variety of situations that present themselves.[195] The Act itself has been amended, for example, in 1995, to provide a more precise regime to deal with the sharing and division of pensions.[196] Most significantly, perhaps, the whole scheme was amended by the Civil Partnership Act 2004 so that it now extends to civil partners as well as spouses. Further details of the Act, some outstanding problems and the reform proposals designed to address them were discussed in detail by Professor Bissett-Johnson in his chapter for the 2006 edition of the *International Survey* and there is no need to repeat them here.[197] Suffice to say that the reform proposals discussed by him have now been implemented by the Family Law (Scotland) Act 2006. Of course, in a significant number of cases, the problem remains that there is insufficient property to enable the parties, living separately, to maintain the same standard of living as they had when they were together. The pie is just not big enough and it would not matter what system was devised for its division, the problem would remain.

(g) Cohabitation

The legal system already attached certain, very limited, consequences to different-sex cohabitation[198] when the Scottish Law Commission's 1992 proposals for reform of the law were revisited pre- and post-Devolution. The Commission may have been stating the obvious when it observed that, 'this is a subject on which widely differing views are held'.[199] In any event, it recommended only modest reform of the law, taking the view that the law:[200]

> '. . . should neither undermine marriage, nor undermine the freedom of those who have deliberately opted out of marriage . . . [and] . . . should be confined to

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194 The Act adopts the recommendation made by the Commission in its *Report on Financial Provision* (Scot Law Com No 67, 1981) and the lead commissioner on the project was Professor Eric M Clive, a founder-member of the International Society on Family Law.

195 See further, EE Sutherland, *Child and Family Law*, above n 17, ch 16.

196 Pensions Act 1995. See also, the Family Law (Scotland) Act 2006, s 17.

197 A Bissett-Johnson 'Cases from the Trenches But Only Modest Legislative Responses' in A Bainham (ed) *International Survey of Family Law: 2006 Edition* (Jordan Publishing Ltd, 2006), p 329, at pp 334–339.

198 Relationships founded on different-sex cohabitation were recognised in the context of recovering damages for the loss of a partner: Damages (Scotland) Act 1976, as amended by the Administration of Justice Act 1982, s 13. Similarly, different-sex cohabitants had (and still have) certain limited rights in respect of occupation of, and exclusion from, the family home, albeit these are not identical to those of spouses or civil partners: Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 13.

199 *Report on Family Law,* above n 161, para 16.1.

200 Ibid.

> the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair.'

For the most part, the Commission's recommendations were taken up in the Family Law (Scotland) Act 2006.

A key element of the 2006 Act was its extension of rights, previously held only by different-sex cohabitants, to same-sex cohabitants. So, for example, the right to recover damages for the death of a partner is now available to the surviving same-sex partner.[201] Similarly, the limited rights to apply to live in the family home and to have an abusive partner excluded from it, previously afforded only to different-sex cohabitants, now extend to same-sex cohabitants.[202]

In addition, the 2006 Act established new, very limited, rights for cohabitants during the relationship and on dissolution by either breakdown or death. In order to benefit from these new provisions the couple must be (or must have been) 'cohabitants', defined by the 2006 Act meaning that they lived together as if they were spouses or civil partners.[203] In assessing whether a particular couple qualifies, the court is directed to have regard to the length of the cohabitation, the nature of the relationship and the nature and extent of any financial arrangements during that time.[204] Unlike the provisions in some other legal systems,[205] no minimum period of cohabitation is required. Qualifying cohabitants benefit from a rebuttable presumption that they have equal shares in household goods and money and property derived from a housekeeping allowance.[206] However, unlike spouses and civil partners, cohabitants owe each other no obligation of aliment.

What of financial provision on the breakdown of the relationship? In the past, the legal system treated former cohabitants as strangers when their relationship ended. Occasionally, a former cohabitant might recover using other legal concepts, like unjustified enrichment,[207] but there was no comprehensive legal provision. The Family Law (Scotland) Act 2006 now provides for a former

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[201] Family Law (Scotland) Act 2006, Sch 2, para 3. Sadly, this reform came too late for the surviving partner in *Telfer v Kellock* 2004 SLT 1290. There, two women had lived together in what the court described as 'a loving, caring household of two adults and two children'. Denying recovery to the surviving partner as a 'relative' of the deceased, the court accepted that 'a different result might be produced' had events occurred after the Human Rights Act 1998 came into force.

[202] Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 13, as amended by the Family Law (Scotland) Act 2006, s 34.

[203] Family Law (Scotland) Act 2006, s 25(1).

[204] Family Law (Scotland) Act 2006, s 25(2).

[205] In New Zealand, eg, under the Property (Relationships) Amendment Act 2001, while as a general rule the cohabitation must have endured for at least 3 years before legal consequences attach, the court has discretion to attach consequences prior to this lapse of time.

[206] Family Law (Scotland) Act 2006, ss 26 and 27. These parallel the presumptions that apply to spouses and civil partners: Family Law (Scotland) Act 1985, s 26. In all cases, property acquired by gift or succession from a third party is excluded. 'Household goods' does not include money, securities, motor vehicles or domestic animals.

[207] *Shilliday v Smith* 1998 SC 725.

cohabitant claiming financial provision after the cohabitation ends, but only in certain limited circumstances. Not only must the aggrieved former partner have been a 'cohabitant', but the action must be raised 'not later than one year after the day on which the cohabitants ceased to cohabit'.[208] The court has no discretion to extend this period of time. In addition, the court is more limited in terms of what it can order and why it may do so than in the case of marital or civil partnership breakdown.[209] First, it may order the payment (on a specified date or by instalments) of a capital sum,[210] in order to balance economic advantages and disadvantages sustained by one party in the interests of the other or a relevant child.[211] Secondly, it may make an order in respect of any economic burden of caring for the couple's child after the cohabitation has ended.[212] The order here is not limited to payment of a capital sum and the court may order periodic payments. However, only a child under the age of 16 'of whom the cohabitants are parents' is covered and not an 'accepted' child. Finally, the court may make 'such interim award as it thinks fit'.[213] Cohabitants may opt out of claims for financial provision under s 28, subject to the ordinary rules on the validity of contracts.[214] Where a person has both a qualifying cohabitant and a spouse or civil partner, he or she may face parallel claims for financial provision, with neither claimant having automatic priority.

It is clear that the courts have nothing like the range of options open to them when dealing with financial provision on divorce or civil partnership dissolution. This did not deter sections of the popular press from referring to the first successful case under the 2006 Act, quite erroneously, as, 'Palimony first for woman'.[215] 'Palimony', in the sense of an 'alimony' equivalent for former cohabitants, is one of the things the Scottish courts cannot award,[216] albeit payment by instalments of a capital sum awarded to balance advantages and disadvantages might look a bit like it, at least to the lay eye. In any event, in that first successful case, *M v S*,[217] the court was faced with a couple who had lived together for some 8 years and had two children, aged 9½ and almost 6

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[208] Family Law (Scotland) Act 2006, s 28(8).

[209] It should be noted that the court has no power to transfer property from one former cohabitant to the other, nor to make any of the orders relating to pensions that are available to spouses and civil partners.

[210] Family Law (Scotland) Act 2006, s 28(2)(a) and (7).

[211] Family Law (Scotland) Act 2006, s 28(3)–(6). A 'relevant child' here includes both a child of whom the cohabitants are parents and a child, under the age of 16, 'accepted' as a member of the family: s 28(10).

[212] Family Law (Scotland) Act 2006, s 28(2)(b).

[213] Family Law (Scotland) Act 2006, s 28(2)(c).

[214] However, such contracts are not open to the sort of challenge open to spouses and civil partners under the Family Law (Scotland) Act 1985, s 8 or 16.

[215] *The Daily Record*, 5 September 2008. See also 'Palimony cash award', *The Daily Express*, 5 September 2008, which at least featured the word 'palimony' in quotation marks in the body of the story. *The Scotsman* was more muted and accurate when it reported the case under the headline, 'Unmarried woman wins childcare payout', *The Scotsman*, 5 September 2008.

[216] 'Alimony' is not a Scottish legal term at all, 'aliment' being the payments owed during a relationship and 'periodical allowance' being the ongoing, post-dissolution payments made by a former spouse or civil partner. Such is the power of Hollywood that members of the public, in Scotland and elsewhere, often use the term 'alimony' for one or both.

[217] 2008 SLT 871. An earlier case, *Fairley v Fairley* [2008] CSOH 104; 2008 GWD 25-397, had

years old, by the time of the decision. The woman, a legal secretary, claimed to have suffered a diminution in earning while she stayed home to take care of the children, foregone career advancement and lost past and future earnings and pension entitlement. She had since returned to work and had a more valuable home than she had started out with, albeit the property was mortgaged. Taking account of the fact that the man had supported the family while the woman was not working and left the relationship with no heritable property, the court found that the respective advantages and disadvantages balanced each other out and made only a small award (just under £1,500) to take account of two small endowment policies and a tax credit liability.[218] Considerably more, (£13,000 payable at £500 per month) was awarded in respect of the claim for future support of the couple's two children, largely to defray the cost of alternative care for them while their mother was at work. 'Palimony' did not feature at all.

At common law, a cohabitant had no right to succeed to his or her partner's estate on intestacy. The deceased may have made provision for the survivor in a will, but this did not (and still does not) displace the prior and legal rights of a surviving spouse, civil partner or children. The Family Law (Scotland) Act 2006 now provides that a surviving cohabitant may apply to a court for financial provision out of the estate of his or her deceased partner, but only in certain limited circumstances. As we have seen, a former cohabitant cannot afford to let the grass grow under his or her feet when contemplating a claim for financial provisions on relationship breakdown. For a bereaved cohabitant who wishes to claim something from the estate of a deceased partner, urgency is even more the order of the day. In such cases, the new provision under the 2006 Act requires the claim to be made 'before the expiry of the period of 6 months beginning with the day on which the deceased died'.[219] The court has no discretion to extend the period of time 'for cause shown', nor can it award anything on the basis of the survivor's 'reasonable expectations', as had been proposed by the Scottish Law Commission.

For the new provisions to apply, the couple must have been cohabiting immediately before the deceased's death and the survivor may only apply if the deceased died intestate (or partially intestate) and domiciled in Scotland.[220] Nor is testacy the surviving cohabitant's only hurdle, since any award may only be made to him or her out of the deceased's 'net intestate estate', being what is left after the following have been met: inheritance tax, liabilities that take priority over legal rights and the prior rights, and legal rights and the prior

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turned on whether the parties were still cohabiting when the 2006 Act came into force on 4 May 2006. While the court found that they had been, other matters were carried over for proof.

218 Each had taken out an endowment policy having different surrender values and there was an outstanding liability in respect of overpaid tax credits. Balancing these factors out, the court awarded the woman £1,460.31 (€1,854.53 or US$2,673.39).

219 Family Law (Scotland) Act 2006, s 29(6).

220 Family Law (Scotland) Act 2006, s 29(1) and (10). The claimant failed in the first reported case under the provision, *Chebotareva v King's Executrix* 2008 Fam LR 66, where the court found that, while couple had been cohabitants, the deceased was not domiciled in Scotland at the time of his death.

rights of a surviving spouse or civil partner.[221] After these claims have been met and if there is anything left, the claim of a surviving cohabitant may be considered. Two points should be noted here. First, the survivor's claim takes precedence over those of other relatives, including the legal rights of the deceased's children and any surviving spouse's or civil partner's claim in respect of the free estate. Secondly, the free estate aside, priority is given to a surviving spouse or civil partner regardless of how short that relationship was and how long the cohabitation.

For the fortunate surviving cohabitant who makes it this far, the court may make a discretionary award to him or her, not exceeding what he or she would have been entitled to had he or she been a spouse or civil partner, by ordering the payment of a capital sum and/or transferring specific property.[222] In exercising its discretion, the court must have regard to the size and nature of the deceased's net intestate estate; any benefit received (or to be received) by the survivor on, or in consequence of, the deceased's death and from somewhere other than the deceased's net estate; the nature and extent of any other rights against, or claims on, the deceased's net estate; any other matters the court considers appropriate.[223]

Given the tremendous limitations placed on the opportunity for a surviving cohabitant to recover anything under the 2006 Act, where the deceased cohabitant also left a surviving spouse or civil partner, a practical, if cynical, observation may be made. In such circumstances, the healthy cohabitant might be well-advised to end the relationship with the terminally ill partner and seek financial provision while the partner remains alive, rather than await his or her death. It may be that few cohabitants will weigh up the respective legal positions and that even fewer would make a decision based on such considerations.

V CONCLUSIONS

While the Scottish Government has generated very significant recent family law reform, its achievements cannot be judged in isolation from the activities of the Westminster Parliament where it has handed legislative authority on devolved matters over to that body to address in UK-wide legislation. In addition, it plays an active role when legislation on a reserved matter will affect Scotland. Thus, in judging its record, the whole package must be assessed.

There is no doubt that significant steps have been taken in respecting diversity and towards achieving equality for previously disadvantaged and disrespected groups. The status of illegitimacy has been all but eradicated and most non-marital fathers can now benefit from equal acknowledgement of their role

[221] Family Law (Scotland) Act 2006, s 29(2) and (10).
[222] Family Law (Scotland) Act 2006, s 29(4) and (5). There is also provision for the court to make an interim award.
[223] Family Law (Scotland) Act 2006, s 29(3).

as parents. Respect for diversity has been served by the creation of civil partnerships, albeit full equality will not be achieved until same-sex marriage is made available. Couples are now able to solemnise their marriages and civil partnerships in a wide variety of venues, although same-sex couples are still denied the opportunity to conclude their relationship by means of a religious ceremony. Same-sex couples (and their children) again benefit from respect for diversity through reform of the law dealing with adoption and donor children. The diversity of family arrangements is respected by providing increased support for kinship care. Diversity and empowerment are served further for adults with gender dysphoria who can now have their acquired gender recognised and respected by the legal system. Individuals are empowered to resolve their own disputes through increased support for mediation, in the family context, and parenting plans. While strenuous efforts have been made by the legal system to protect both children and adults from abuse, the system still fails on far too many occasions.

It is when the criteria being used here to judge progress are themselves capable of conflicting that any verdict is, of necessity, more mixed. It may be empowering the party who wants to leave a marriage or civil partnership to ease that process by making divorce and dissolution more readily accessible. However, it is hardly protecting the (possibly no longer reasonable) expectations of a person who does not want the relationship to end, nor is he or she likely to feel particularly empowered. Attaching such limited automatic consequences to cohabitation may respect diversity in relationship types, but it offers only limited protection to the economically weaker partner. That said, such protection as is afforded to the economically weaker party is gained at the price of disempowering the stronger party unless he or she had the foresight to secure the diverse relationship he or she sought to enter by means of a written agreement. Encouraging couples to reach their own agreement on child support serves to empower some, but may fail to protect the ignorant and those in the weaker bargaining position.

So what is missing? As we have seen, there are exceptions to – one might argue, gaps in – some of the reforms and weakness in others. It makes little sense to abolish the status of illegitimacy for most while retaining it for the aristocracy but, perhaps, that simply reflects the anachronistic nature of having an aristocracy at all in a modern democracy. Protecting children from secondary abuse is unlikely to be achieved by a lacklustre provision that tells judges to pay attention to something they had always considered relevant and a rebuttable presumption against contact with abusers would provide far greater protection. There are glaring inequalities, most notably in denying access to marriage to same-sex couples. There is a suspicion that a government desire to save money lies behind the trend towards 'empowering' individuals by encouraging them to reach their own solutions on such matters as future care arrangements for children and child support. Perhaps the most pervasive challenge to equality, empowerment and protection lies in access to legal services since a legal system

is of little value if one cannot understand and use it. That is a matter that is currently under review and to which we will return in a future *International Survey*.

Serbia

MAINTENANCE OBLIGATIONS UNDER THE FAMILY ACT OF SERBIA

*Olga Cvejić Jančić**

Résumé

L'auteure traite de l'obligation alimentaire réciproque, tant entre parents et enfants, parents par le sang, alliés, adoptants et adoptés, époux, qu'entre conjoints de fait hétérosexuels. La conjugalité entre personnes de même sexe ne crée aucun effet juridique en droit familial serbe.

Ce texte présente une analyse des conditions de l'obligation alimentaire et des facteurs à considérer dans l'établissement des montants. Il fait également état des propositions de la Commission sur le Code civil de Serbie («la Commission») visant à créer le «Fond alimentaire» et à apporter d'autres changements dans ce domaine du droit. L'idée de ce Fond est de faciliter l'exécution des ordonnances alimentaires qui ne sont pas exécutée volontairement.

Si l'objectif de l'actuelle Loi sur la famille de 2005 est de favoriser les ententes entre les parents, surtout par le biais de la médiation, l'ineffectivité des ordonnances alimentaires est un problème endémique pour les parents qui assument le droit de garde. Le Fond alimentaire entend répondre à ces difficultés. L'intérêt des enfants dicte que les budgets adéquats lui soient alloués.

I PERSONS AND LEGAL CONDITIONS INVOLVED IN THE REALISATION OF MAINTENANCE

Under the Serbian Family Act (FA), the legal obligation of mutual maintenance is established between parents and children, spouses, ex-spouses, heterosexual cohabiting partners and ex-ones, as well as between blood and adoptive relatives in direct line (grandmother, grandfather and grandchildren, great-grandparents and great-grandchildren) and stepmother, stepfather and stepchildren. The purpose of the legal maintenance obligation is to provide for the existential needs of the creditor of this obligation from the person who is legally considered the debtor.

General and special conditions for all persons who claim the maintenance (hereafter the creditors) and for all persons who are under our law obliged to

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pay for the maintenance of the other person (hereafter the debtors) are prescribed by the law, except for the children. They have, until the age of majority (18 years old), an unconditional right to maintenance from their parents.

The first general condition for the person who claims the maintenance is that she or he does not have enough means to meet her or his existential needs.[1] The second general condition is that she or he is not capable of work, ie is not capable of earning the means necessary for subsistence by working. Alternatively, if she or he is capable of work, the condition is that she or he cannot find a job, ie is unemployed against her or his will. The only condition for the debtor is that she or he has enough means to provide support to the creditor, except if the creditor is an underage child, for the parents are obliged to support their children even to the detriment of personal existential needs.

In addition to the general conditions, in some cases the Family Act prescribes special ones for the claimant of the maintenance. For example, the right to maintenance has not been granted to a spouse, ex-spouse, cohabiting partner, or a former one, whose requests for support would represent obvious injustice for the other spouse or cohabiting partner (art 151/2 and 152/2 of the FA), although she or he fulfils all the general conditions for maintenance. After the annulment of marriage, the right to maintenance is lost by the spouse who, at the time of the wedding, knew about the reasons of the invalidity of their marriage, ie who was unconscionable (unscrupulous). The right of marital or non-marital partners or ex-ones does not depend on whether they have children or not. The right to maintenance is a personal property right of marital or non-marital partners or ex-ones, which depends only on fulfilling the above-mentioned general and special conditions prescribed by law.

A child who reaches the age of majority (18 years old) has the right to maintenance by parents in two cases only:

(a) if she or he is still incapable of work and does not have enough means for self-support (disabled child). This right lasts as long as such a state exists (art 155/1 of the FA); or

(b) if a major child continues her or his education, she or he has the right to maintenance from parents commensurate to their capacities. This right lasts until the age of 26 at the latest (art 155/2 of the FA).

A major child in the above-mentioned cases also has the right to maintenance from blood relatives in straight line (ancestors) commensurate to their capacities only if the child's parents are not alive or do not have enough means for maintenance. Another additional condition for the major child to get

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[1] Art 151/1, 152/1, 156/1, 157, 159/3 of the FA.

support from parents or ancestors is that the request for maintenance would not represent obvious injustice for parents or other relatives in straight line (art 155/3, 4 of the FA).

Regarding the right of parents to claim support from their children or other descendants, a special condition is that the parent–claimant is incapable of work, and does not have enough means for self-support. They can claim maintenance from a major child or another descendant, or from the minor child who gains income or has income from property, commensurate to their capacities. Obvious injustice towards the child or other descendants is also a relevant circumstance for depriving parents of the right to maintenance from children and descendants (art 156/2 of the FA). That would, for instance, be if a parent or a grandparent did not comply with their legal duty to support the child or grandchild while they were underage, or parents have been deprived of parental rights (custody), or did not take care of their child when it was needed, and so on.

A minor brother or sister has the right to maintenance from their major siblings as well as from the minor ones who gain income or have income from property, if the parents are not alive or do not have enough means of support. The minor child has the right to be employed (with the permission of her or his parents) when she or he reaches the age of 15. She or he can also earn money in another way, for example through a temporary job, music or film production, or by succession or bestowal of the property that yields income. It is only important that the minor sibling is capable of maintaining her or himself and has enough means to support other siblings. Major siblings have no right to support from the other siblings, irrespective of their age and assets.

Provisions governing the maintenance of children, parents and other blood relatives apply accordingly to the support of adoptive relatives. Our family law recognises only one type of adoption, ie the full, unbreakable adoption, which is equalised with blood kinship.

An underage stepchild has the right to maintenance from her or his stepmother or stepfather if the marriage between a parent and stepmother or stepfather has not ceased by divorce or annulment. If the marriage ceased due to the death of the child's parent, the right to maintenance from the step-parent subsists. Although the Family Act does not provide it expressly, it is to be understood that the child and step-parent shall live together until the death of the child's parent.

The stepmother or stepfather who are incapable of work, and do not have enough means for maintenance, have the right to maintenance from the major stepchild according to the stepchild's assets. This does not apply if the request for support of the stepmother or stepfather would represent obvious injustice for the stepchild (art 159 of the FA).

II DETERMINATION OF THE MAINTENANCE AMOUNT

Maintenance shall be determined in accordance with the existential needs of the person who has a legal right of maintenance and the capacities for support of the person who has a legal obligation to maintain that other person, whereby the minimal sum of maintenance shall be taken into account. The needs of the claimant depend on many circumstances, such as her or his age, health, education, property, income, the possibility of employment and earning income, and others significant for the determination of maintenance. The debtor's capacity to support depends on her or his income, the possibility of employment and earning income, the obligation to support other persons, and others significant for the determination of support (art 160 of the FA).

The minimal sum of maintenance is a sum that is periodically determined by the ministry responsible for family protection for persons in foster care. Actually, it is a sum paid from the State budget for children in foster care and it should be taken into consideration only as a direction for the judge in order to decide the amount of support.

As a rule, support shall be determined in money, but it may also be determined in another manner, if the creditor of maintenance and debtor so agree (eg leaving a flat or part of real estate to the creditor). If such an agreement cannot be reached, the judge may decide only the amount of money that should be paid to the creditor. In this case, the creditor is free to request that the amount of maintenance be determined in a fixed monthly amount or as a percentage of the monthly pecuniary income of the support debtor. If the support is to be determined as a percentage of the debtor's regular monthly income (salary, compensation of salary, pension, royalties), the amount of income shall be determined as a percentage no less than 15% and not exceeding 50% of regular net monthly income of the debtor (art 162 of the FA). If the debtor has no regular monthly income because he or she performs agriculture, handcrafts, or another vocation without regular income, the maintenance is to be determined as a fixed amount of money and not as a percentage.

If the creditor is a child, the amount of maintenance should enable at least the same living standards for the child as enjoyed by the parent debtor of maintenance. That means that the child may get more than just enough to cover existential needs, if the living standards of his or her parent debtor enables it. The child shall feel the least possible repercussions of the dissolution of the family ties.

III AGREEMENTS ON MAINTENANCE

The creditor and debtor may, in principle, agree about the amount of maintenance and the manner of enforcement (eg in money, leaving a part of her or his real estate to the creditor and so on). Actually, the Family Act does not lay down any general rules on maintenance agreements, but does contain

provisions that imply agreement on maintenance. Such are the provisions on divorce. Spouses may reach an agreement on divorce (art 40 of the FA), which shall include a written agreement on exercise of parental rights (custody) and a written agreement on the division of joint property. The agreement on exercise of parental rights may take the form of an agreement on joint or on independent exercise of parental rights. The agreement on independent exercise of parental rights shall include the parents' agreement on, among other things,[2] the amount of contribution for child maintenance from the other parent. The courts are empowered to assess whether the parental agreement on child maintenance is in the best interest of the child. If so, the court will include the maintenance agreement in the holding of the judgment (art 225/1 of the FA).

The position is similar in the case of divorce upon the action of one spouse on the ground of serious and durable disturbance of marital relations, or if cohabitation of the spouses cannot be objectively realised (art 41 of the FA). In that case, the spouses may accept mediation as a manner of dissolving their mutual disturbed relations without conflict after the annulment or divorce of their marriage (art 241 of the FA). The court or the institution entrusted with mediation shall endeavour to reach agreement on the exercise of parental rights between the spouses and on the division of joint property. However, the parents may also agree upon parental rights during divorce proceedings, which also refer, as was said above, to maintenance agreements for the children.

As regards maintenance of the spouse after dissolution of their marriage, the Family Act does not provide that an agreement of spouses upon mutual maintenance is a condition for a divorce by mutual agreement. Spouses may agree about that, but if they fail to make an agreement, the spouse in need will be deprived of the maintenance, since there is no right for a former spouse to sue her or his ex-spouse for maintenance, as it is laid down for the ex-spouse when they divorce on the ground of disturbance of mutual marital relations. So a spouse may bring an action for support against the other spouse until the conclusion of the trial of the matrimonial dispute at the latest. Exceptionally, the former spouse who, for justified reasons, failed to bring an action for support in the matrimonial dispute may file it at the latest within one year from the date of the termination of the marriage or the day when the last actual allowance for support was given. The above-mentioned action for support may be brought only if the conditions on which the right to maintenance depends had existed at the moment of the termination of the marriage and still exists at the conclusion of the trial of the maintenance dispute (art 279 of the FA). With regard to the fact that there is no trial in the case of an uncontested divorce, since the judge has to assess only if the parental agreement on child maintenance is in their best interest, it is obvious that there is no possibility to claim maintenance after divorce.

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[2] The parental agreement on parental rights shall include agreement about the parent whom the child is to live with, then agreement on the amount of contribution for child support from the non-resident parent, and agreement on the manner of personal contact between them (art 78/1 of the FA).

On the other hand, spousal agreement on mutual maintenance is not the subject of mediation proceedings and the spouses are not supposed to agree upon that matter. The mediation procedure shall include a procedure for an attempt at reconciliation and the procedure for an attempt at consensual termination of the dispute, ie to reach settlement (art 229 of the FA). If the reconciliation was unsuccessful, the settlement shall be reached in the matrimonial proceedings that are initiated by the action for annulment of marriage or action for divorce (art 240 of the FA). It shall be considered that the settlement was successful if the spouses reach agreement on the exercise of parental rights and agreement on the division of joint property (art 243 of the FA). If through the mediation spouses only reach agreement on the exercise of parental rights or only agreement on the division of joint property, it shall be considered that settlement was partially successful.

Our legislator was not at all concerned about spousal maintenance and deemed marriage and post-marital maintenance as entirely private matters of the spouses. We may even say that, in that respect, cohabiting partners are in a better position than married ones. Why? Because of the fact that a cohabiting partner may bring an action for maintenance within one year from the day of termination of cohabitation or the day when the last actual allowance for support was given (art 279/5 of the FA). There is no difference whether their cohabitation ended by mutual consent or it happened due to the decision of one of them. The Commission for the Serbian Civil Code suggested that changes be made in order to improve the position of spouses after divorce. It may be made by introducing, on the one hand, one more condition for divorce upon mutual consent – namely that the spouses have to agree upon all consequences of divorce, including agreement on post-divorce maintenance, or, on the other hand, by introducing a duty on the judge to warn spouses that it is advised that they reach the agreement on support since they would not be able to claim maintenance after divorce.

IV TERMINATION OF MAINTENANCE DUTY

Regarding the duration of maintenance, it may last for a definite or an indefinite period of time, except for the spouse after the termination of marriage, in which case the maintenance obligation may last only for a certain period of time, not exceeding 5 years. Exceptionally, maintenance of the ex-spouse may be extended for a certain period of time, if the ex-spouse furnishes particularly justified reasons that still prevent her or him from working. The same is the case with a non-marital partner after cohabitation comes to an end. The reasons for such a provision, ie in the sense that the maintenance after the cessation of marriage shall be temporary assistance until the ex-spouse does need maintenance for herself or himself, ie consolidates her or his property situation, or that after the marriage comes to an end each spouse shall independently look after her or his own existence.[3]

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[3] Z Ponjavic *Porodično pravo* (Family Law, Kragujevac, 2005) 340, M Draškić *Porodično pravo i*

This reasoning is correct and justified, and in line with the modern trend in European countries, but it should take into account that such a solution is only adequate for the countries with a stable economic situation, which is not the case with Serbia. We are now, and it will still last for a longer period, a country in transition with an ongoing process of privatisation. As a result, there are a lot of unemployed people, with very slim chances of finding a job. It is mostly women who are in such a situation. For that reason the Commission for the new Serbian Civil Code[4] considers that an opposite rule should be introduced as a general principle, ie that maintenance shall be determined for an indefinite period, and, as an exception, the judge can decide otherwise if justified reasons exist for such decision.[5] For example, if a marriage lasted for only a short period and they had no children together, or, if there are chances for spouses in need to get a job shortly after divorce or to inherit some property, the claim for maintenance can be waived or granted for a definite period of time, but no longer than 3 years. This solution certainly has advantages, but also disadvantages.

The clear advantage of this solution is that the spouse in need would not be forced to initiate judicial proceedings for the extension of maintenance from the ex-spouse time and again, as is the case under our currently applicable law. The Commission is offering an alternative to this rule, suggesting that, if the creditor does not fulfil the legal condition for maintenance any more, it shall be up to the debtor to start court proceedings in order to prove that the creditor no longer needs maintenance. In this way, the pressure for the court to extend the duration of support would be much less, and the court's workload would decrease. Basically, the result would be a better position for the creditor, since the burden to initiate legal action would not any more rest with the creditor, but with the debtor, who in turn is in a better pecuniary situation than the spouse creditor, on the one hand, and, what is very important, the courts would be unburdened of frequent proceedings in order to extend the duration of support, which is necessary under current law, on the other.

We should be confident that the courts are able to assess whether the creditor will, in the (near) future, have the possibility of caring independently for her or his needs,[6] and therefore limit the time necessary to get maintenance from the ex-spouse; and if there are justified reasons for a decision on support without a time-limit (if the creditor is too old to find employment or is not in good health, etc).

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prava deteta (Family Law and the Rights of the Child, Belgrade, 2006) 332, G Kovacek Stanic *Porodično pravo* (Family Law, Novi Sad, 2007) 106.

4 The author of this paper is a member of said Commission.

5 See more in: 'Aktuelan rad na izradi Gradjanskog zakonika' *Pravni zivot* no 11 – Tome III, 2007, 103–108 ('Current Work on Drafting the Civil Code' *Legal Life* no 11 – Tome III, 2007, 103–108).

6 For example, if there is reasonable expectation that she or he will inherit enough assets or will be able to find a job soon, or receive a gift, etc.

Not such a good side to this solution is that the creditor may be less interested in finding a job and resolving her or his existential problems on her or his own. However, it may be true only if the judge did not assess the real position of the ex-spouse-creditor well enough and had instead decided on maintenance without a time-limit when it was not justified enough.

The amount of maintenance is subject to change, ie it may be reduced or increased, if circumstances relating to the grounds on which the previous decision has been made change (art 164 of the FA). First, it would be so if the debtor is not capable any more of supporting the creditor since she or he was fired, and has no means to meet her or his own existential needs. The debtor will also be interested to claim the end of her or his obligation to maintain creditor if the creditor's pecuniary situation has been improved due, for example, to inheritance or employment, or there are other legally recognised grounds for the termination of maintenance (eg the creditor concludes a new marriage or enters into cohabitation). Secondly, the creditor may also claim a change in the amount of support in order to increase it, if her or his existential needs expand (the child is getting older, the creditor needs extra money for medical treatment, and so on).

A person, who provided maintenance without being legally obliged to do so, has the right to compensation from the person who, pursuant to the Family Act, was under the obligation to give maintenance. If more persons were under the obligation to give maintenance at the same time, their obligation shall be joint and solidary (art 165 of the FA). For example, if parents leave a child in hospital after medical treatment has finished, and they have been warned that they have to take the child away, or if the centre for social work maintained the child for a while instead of the parents, the centre has the right to compensation from the parents.

There is an interesting decision of the District Court of Novi Sad regarding maintenance of a child born out of wedlock.[7] The child was born in August 1991, and paternity was established by judicial decision in September 2005. The mother of the child claimed maintenance for the child from the father from the moment of his birth, ie compensation for maintenance for the past period that she had been paying for the child, invoking the above-mentioned art 165 of the Family Act and art 218 of the Obligations Act.[8] The Municipal Court as the court of first instance found that the father had neither the obligation to maintain the child before the court legally established that he is the father, nor to pay the compensation for the maintenance that the mother had been paying until that moment, for he was conscientious. However, the District Court in Novi Sad quashed the decision of the Municipal Court and recognised the right to compensation of part of the expenses that the mother incurred during

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7 Decision of the District Court of Novi Sad, Gz 3607/2006 of 13 February 2008, published in *Bilten sudske prakse* (*Bulletin of Judicial Practice*) no 13/2008, 74–75, case no 38.

8 Art 218 of the Obligations Act reads: 'Who incurs any expense for someone else or does anything else that she or he was not obliged to, shall have the right to claim recovery from that person.'

the past period of 10 years before the establishment of the child's fatherhood.[9] It is questionable whether such a solution is in the best interest of the child or in the interest of the mother.

The right to maintenance for a past period does not exist under Serbian law. The maintenance shall be paid for the future and not for the past. In the past maintenance had already been covered somehow. The interest of the child is that her or his fatherhood be established as soon as possible, and if the father does not want to recognise his paternity, it is up to the mother, as the child's legal representative, to bring legal action to the court as soon as possible. If she does not do so shortly thereafter, it will be to the detriment of the child's best interests, and it cannot be replaced by compensation given to the mother, because the child may not get better food, education, housing, etc for the past period. According to prevailing opinions of scholars, maintenance may be awarded from the moment that the action for the maintenance was brought before the court. But it is different for the right to compensation for the cost of maintenance that was given for the past. Under our Obligations Act, the mother has the right in this case to receive compensation for the maintenance that she has given to the child. This right is regulated not by the Family Act but by the Obligations Act.

The revised Croatian Family Act (CFA) prescribes such a rule expressly. Under the revised Croatian Family Act (art 209), a non-resident parent who has not maintained her or his child, albeit she or he was obliged to do so, owes compensation to the child for the maintenance that was not provided. The maintenance is owed for the past period from the moment of creation of this right until the action was brought before the court. The right of the child to claim the maintenance expires after 5 years from the start of the obligation.[10]

The order in which the support is to be given depends on who is the creditor and who is the debtor. A spouse shall claim support primarily from the other spouse, whereas her or his blood relatives shall realise their mutual rights to support following the order in which they would inherit. Children and other descendants are in the same line of inheritance as the spouse of the deceased person. The second inheritance line includes also the spouse (if the deceased spouse did not have any descendants in the first line, or they did not want to inherit, or did not deserve it), the parents and siblings of the deceased. In the order for maintenance, in-law relatives come after the blood relatives (art 169/3 of the FA). If there is more than one creditor of the maintenance obligation, the right of the minor child to maintenance has priority.[11] If more than one person is under the obligation to give maintenance, their obligation shall be divided between all of them.

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[9] The general term of prescription of the obligation under the Obligation Act is 10 years.

[10] It is not at all clear what the legislator deems as 'the moment of creation of this right (to maintenance)'. Is this moment the birth of a child born out of wedlock or the moment when the court's decision on support comes into effect, or some other moment?

[11] The case-law has also gone in that direction. In the decision of the District Court in Novi Sad, Gz 176/08 of 16 January 2008, published in *Bilten sudske prakse* (*Bulletin of Judicial Practice*)

Support shall be terminated in the following cases:[12]

(1) when the time-limit of maintenance expires;

(2) where the circumstances of the concrete case change significantly, so that the legal conditions for further maintenance do not exist any more; for example when the creditor acquires enough assets for maintenance, unless the creditor is not a minor child;

(3) when the debtor loses the capacity to give maintenance or giving maintenance becomes manifestly unjust for her or him, unless the maintenance creditor is an underage child;

(4) death of the maintenance creditor or debtor has as a consequence the termination of the right to maintenance. There is no possibility of transferring this right to the inheritors;

(5) the maintenance of a spouse shall also be terminated when the support creditor concludes a new marriage or heterosexual cohabitation, because the new spouse or cohabiting partner is obliged to contribute to her or his maintenance. Homosexual partners do not have any rights under Serbian law.

The spouse whose right to maintenance had once been terminated may not re-affect her or his right to maintenance from the same spouse.

V REALISATION OF THE CHILD'S RIGHT TO MAINTENANCE

This issue is a very important one for family law, ie for the efficiency of the rules regulating maintenance. It is not enough only to have good rules about an issue as important as maintenance. More important is the efficiency of its realisation, since the creditor is the person without sufficient means to meet her or his own existential needs, and if possible, the needs beyond existential ones.

It happens, unfortunately not so rarely, that the debtor avoids payment of maintenance and if the creditor is an underage child the consequences for her

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no 13/2008, 76–77, case no 40, the court found that the parents could not choose which child they want to support, although an agreement between the mother and the father about support is allowed (which was not the case here), but priority in support goes to minor children. The father accepted to support only the child who lived with him (and who had reached the age of majority but was younger than 26, and still in the schooling process), but refused to support the other two underage children who lived with the mother. The court found that the primary obligation of the parents is to support their minor children, and only if they (parents) have enough means, and proportionately to these means, are they obliged also to support their major children.

[12] These cases are prescribed by law (art 170 of the FA).

or his life, health, development, education, and other things are not negligible. On the other hand, an inefficient system of maintenance may also have an important influence on the decision on how many children one family will have. If a single-parent family, which in most of the cases consists of a mother and one or more children, is confronted with difficulties regarding the realisation of the right to maintenance after the cessation of marriage or cohabitation, and with difficulties in solving existential needs related to the survival of the family, upbringing and education of the children, it is obvious that modern parents, especially mothers, would not opt for a family with many children. Besides, it is well known that our legislation is among the most liberal in the world as regards divorce, and that actually the system of repudiation has been introduced, ie unilateral severance whenever one spouse or partner wants it, and for whatever reason, if any. Having in mind that it is relatively easy to dissolve marriage or cohabitation, which is a sign of privatisation of Serbian family law,[13] one very important issue is whether spouses or partners (especially women) will opt for more children, since the burden of maintenance, upbringing and education of children mostly passes on to the mother.

Therefore, the establishment of the Alimentation Fund seems indispensable and reasonable. The purpose of an Alimentation Fund would be to ensure regular payment of maintenance for the child, if the debtor does not comply with her or his legal obligation to provide maintenance, although such an obligation was established by a legally binding decision. The creditor shall prove that she or he tried to get maintenance from the debtor, on the basis of the legally binding decision, and that forced performance of the obligation to provide maintenance was not successful. In this manner (by establishment of the state fund), the property situation of single-parent families would be improved, as well as legal certainty and stability in such an important and existential element of family life, as maintenance is.

Accordingly, the creditor would be freed from the burden and difficulties of multiple attempts of forced execution of the judicial decision. The proceeding of forced execution towards the debtor would be within the competence of the Fund, after the payment of maintenance to the child-creditor.

Such a solution would improve the pecuniary status of the child entitled to maintenance, and could have other long-term consequences for the existential security and better protection of the family, which protection is guaranteed by our Constitution.[14]

However, the point is whether the establishment of the above-mentioned Fund is now realistic bearing in mind that our general economic situation is not so favourable. The establishment of the Alimentation Fund obviously demands a

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[13] The State does not interfere with the personal decision on divorce or cessation of cohabitation, but only in determining whether the best interest of the child is protected.

[14] Article 66 of the Serbian Constitution: 'Families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law.'

certain amount of money, and it is questionable whether at this moment our government (State) would be willing and able to set some money aside for this purpose. Since this issue is of undeniable priority, it seems that it should be taken into consideration very seriously. The principle, set forth in the UN Convention on the Rights of the Child (Art 3, para 1 of the UNCRC) which our country ratified in 1990 among the first Member States, is that the best interests of the child shall be a primary consideration. Under our Constitution the generally accepted rules of international law and ratified international treaties are an integral part of the legal system in the Republic of Serbia and are applied directly (Art 16 of the UNCRC). Beside that, the said Convention also provides that:[15]

> 'The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. *States Parties*, in accordance with national conditions and within their means, *shall take appropriate measures to assist parents and others responsible for the child* to implement this right and shall in case of need *provide material assistance and support programmes*, particularly with regard to nutrition, clothing and housing.' (emphasis added)

As well as stipulating:[16]

> 'States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.'

We also would like to emphasise that the Recommendation of the Council of Europe[17] heads in the same direction and provides that:

> '. . . recognizing the advantage of adopting common rules to enable states progressively to improve the rights of children [in the field of payment by the state of advances on child maintenance], *recommends governments of member states to adopt*, taking as a guide the principles contained in the appendix to this recommendation, *a system of advance payment of maintenance to children when the debtor fails to comply with his obligation*, if they already have a system aiming at the same objective, to adapt it, if necessary, to the above mentioned principles.' (emphasis added)

Having all those international instruments, as well as our Constitution in mind, the establishment of the Alimentation Fund should be of primary importance for the better protection of children in our country.

Furthermore, the future of the family is also secured by assuring stable sources of child maintenance. In this respect, it should be emphasised that most of the

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15 Article 27, paras 2 and 3 of the UNCRC.
16 Article 27, para 4 of the UNCRC.
17 Recommendation No R (82) 2 on Payment by the State of Advances on Child Maintenance, adopted on 4 February 1982.

Fund's money paid for the child shall be compensated from the debtor, except for the small percentage that will probably stay uncovered. That part will be the definite expenses of the Fund.

The second open question very relevant for this issue is whether the right to payment from the Fund (if it would be validly established) should be granted only to underage children, or also to the major children until the end of their education but not exceeding the age of 26, and disabled children during their disability; or any creditor who cannot realise her or his right that is recognised by a judicial decision issued due to the failure of the debtor to voluntarily perform her or his obligation.

The latter situation would, at any rate, be better, but it is not at all realistic at this moment. It would be a great advance towards better protection of the child if maintenance would be paid only for underage children. The Commission for the Serbian Civil Code proposes a solution similar to the French law.[18] Under this law, the creditor who could not obtain maintenance from the debtor for a period longer than 6 months (although her or his right to maintenance had been established by a maintenance order) has the right to maintenance from the State treasury. It is up to the creditor to prove that her or his attempt to get maintenance from the debtor was unsuccessful. If the treasury finds that all legal conditions are met, the maintenance from the treasury will be allowed. After that, the right to compensation passes on to the treasury, but the amount of maintenance is increased by 10% to the benefit of the treasury, as a fee for compensation (art 7 of the French Law no 75-618). In this way, the debtor is discouraged from failing to carry out her or his maintenance obligation, since he will be forced to pay an increased amount. The creditor and the debtor could ask jointly that the payment from the treasury ends (art 11 of the French Law). The treasury could also end the payment if the creditor dies or the compensation becomes impossible (art 10 of the French Law). It should be underlined that French law grants the right to compensation from the State treasury to every creditor, and not only the children or underage children.

The Family Act of Montenegro (2006)[19] prescribes that, if the parent who owes child maintenance does not fulfil this obligation regularly, the centre for social work shall undertake, acting upon a claim by the other parent or of its own motion, the measures for provisional child maintenance in accordance with the rules on social and child protection, until the parent begins to fulfil her or his obligation.[20] This is an improvement of the financial status of the child, but since it can be applied only under social and child protection rules, it means that it is available only to very poor families, and it may not be deemed as a genuine improvement of the rules on the realisation of maintenance. Every physical person who or legal person who has incurred expenses for someone else may claim compensation from the person who owes maintenance, if these

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18 Law no 75-618 (11 July 1975).

19 The Family Act of Montenegro was adopted in December 2006, and has been in force since 1 January 2007.

20 Article 282 of the Family Act of Montenegro.

expenses were necessary (art 283/1 of the Family Act of Montenegro). That means that the centre for social work may claim compensation for maintenance from the parents.

The same rules existed in the previous Serbian Act on Marriage and Family Relations (1980),[21] but they were not retained in new Family Act of Serbia, nor does the Commission for the Serbian Civil Code consider that it is good enough to be retained. The realisation of maintenance must be significantly improved and facilitated for every child as creditor, which could be effected by establishing the Alimentation Fund.

A meaningful improvement of child protection regarding maintenance has been made in Croatian law. The Act amending and supplementing the Family Act of Croatia[22] provides for the right to provisional support of the child if the parent-debtor does not pay the maintenance for a period longer than 6 months without interruption or 7 months with interruption. The proceedings for provisional support before the centre for social work may be initiated by the other parent or the centre for social work ex officio. The preconditions for provisional support are as follows:

(a) that the right to maintenance is established by a judicial decision, a provisional measure for support or that settlement is concluded before the court or centre for social work; and

(b) that the other parent did not fulfil her or his obligation within the prescribed time frame, ie for a period longer than 6 months without interruption or 7 months with interruption (art 352 of the CFA amended in 2007).

The payment of provisional support starts from the day when the proceedings were initiated by the action of the other parent or by the centre for social work ex officio. The amount of provisional support is set at 50% of the maintenance debt. The right to provisional support from the centre for social work lasts until the parent debtor begins to fulfil her or his maintenance obligation, but no longer than 3 years. The public attorney has the right to sue for compensation of the costs of maintenance (amended art 237/3 of the CFA).

VI CONCLUDING REMARKS

The legal obligation of maintenance among members of the family and close relatives is a very important part of family solidarity, but it should become more and more part of social solidarity, especially regarding maintenance of children. Child welfare is firstly the concern of parents, but it cannot remain

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[21] Article 318 of the Act on Marriage and Family Relations (not in force).

[22] The law was adopted by the National Assembly on 3 October 2007, as has been in force since 1 January 2008.

only theirs, especially not of only one of them, to meet all needs of children. The State too shall assume responsibility for the facilitation of the upbringing and education of children. This is also set out in Art 27 para 4 of the UNCRC (1989), as cited above[23] and by the Recommendation of the Council of Europe on Payment by the State of Advances on Child Maintenance. The establishment of the Alimentation Fund in order to facilitate the realisation of the maintenance obligation from the non-resident parent in cases when she or he does not regularly pay the amount due is a minimal step towards providing relief to the child and the parent with care of the child. Therefore, the Commission for the Serbian Civil Code deems it a necessary step towards better protection of the child's financial status and proposes its establishment.

For the sake of improvement of the position of the spouse after divorce, the Commission also suggests that maintenance after dissolution of marriage or cohabitation, as a general rule, is to be determined for an indefinite period of time, with the right of the court to decide otherwise when justified. Hence, a limited period of maintenance is to be an exception, for example if marriage or cohabitation lasted for only a short period of time and the spouses or cohabiting partners do not have common children, or there are reasonable chances for employment in the near future or for otherwise getting the means for maintenance otherwise (e g inheritance, bestowal).

Therefore, the reform is to be made in order to promote spouses' or cohabiting partners' mutual agreements on maintenance. Such agreements should be required as an additional condition for divorce by mutual agreement.

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[23] See text accompanying n 16.

Slovenia

DISCRIMINATION OF ROMANI CHILDREN IN SLOVENIA – POSITIVE OR NEGATIVE?

*Suzana Kraljić and Tjaša Ivanc**

Résumé

Dans ce texte, l'auteure analyse la question du statut des Roms en Slovénie. La communauté des Roms est mentionnée dans la Constitution de la République slovène et ses members sont régis par plusieurs lois particulières. L'auteure est d'avis que les Roms se trouvent pourtant encore et toujours dans une situation désavantageuse par rapport à la majorité des Slovènes, particulièrement pour ce qui est des conditions de vie. Aujourd'hui, les enfants Roms sont intégrés dans les classes régulières au niveau de l'école primaire et ils bénéficient d'un encadrement professionnel visant à faciliter et à améliorer leur intégration. L'auteure critique cependant le statut actuel des enfants Roms dans le domaine de l'éducation, tout en reconnaissant que le système scolaire slovène favorise les liens de ces enfants avec leur langue, leur culture et leur tradition.

I INTRODUCTION

Today, in Europe, there are between 10 and 12 million Roma. Most of them, 8 million, live mainly in South and East Europe,[1] but they can also be found in non-European countries, for example in the Near East, Western Asia, in the south of the United States and Latin America. An essential common characteristic of all Roma is their common identity and common cultural heritage. In the past and even today, the expression 'Gypsy'[2] that is frequently a synonym for something horrible is widespread.[3] In the past, Gypsies were

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1 According to estimations of international organisations and expert circles, e g Minority Rights Group, countries with the largest number of Roma in Europe are: Bulgaria (700,000 to 800,000); Czech Republic (250,000 to 300,000); France (280,000 to 340,000); Hungary (550,000 to 600,000); Macedonia (220,000 to 260,000); Romania (1,800,000 to 2,500,000); Russia (220,000 to 400,000); Slovakia (480,000 to 520,000); Spain (650,000 to 800,000) – taken from www.inv.si/DocDir/projekti/porocilo_romi_v_procesih_evropske_integracije.doc (15 June 2009) p 9.

2 German Zigeuner, Italian zingaro, Spanish cingaro, Hungarian czigány, Russian cygany, etc.

3 See also Šiftar Vanek, *Cigani – minulost v sedanjost* (Pomurska založba, Murska Sobota, 1970) 9.

connected to natural catastrophes, diseases (eg the plague) and also personal accidents of people. Due to their negative position in society, they shared systematic destruction (eg in Nazi Germany),[4] assimilation, deportation, ethnic cleansing (eg 1999 in Kosovo) and repression (eg forced sterilisation of Roma women). Countries wished to stop and destroy their nomad way of living, limit their movement and cut the roots of their Roma language and culture. In the past few decades, in international and national fields of law, many things have been done to improve their position. An important turning point is represented by the first Roma World Congress that took place on 8 April 1971 in London. There, it was agreed that the expression 'Roma', which means human beings living the way of Roma, should be used.[5] Today, legal protection of Roma commands attention in the framework of the United Nations Organisation (UNO),[6] the Council of Europe (CE),[7] the Organisation for Security and Co-operation in Europe (OSCE)[8] and the European Union (EU), as well as other international institutions (eg the Central European Initiative for Protection of Minority Rights)[9] dealing with human rights protection. This has been shown as necessary, as Roma frequently live on the edge of social life and, due to their (different) way of living, frequently differ essentially from the majority of the population. This is why they share violent assimilation, exclusion, inequity and racial discrimination in different fields of social life.[10]

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4 A negative position against Roma was expressed by the Vatican in the past, since in 1563 it prohibited spiritual profession for Roma, and 5 years later, Pope Pius V even excluded them from the Roman Catholic Church.

5 At the congress, the Roma anthem *Gjelem, Gjelem* was adopted and Roma flag was created also.

6 Under the patronage of the UNO, a list of international documents prohibiting discrimination based on race was adopted, which also relate to Roma, of course.

7 Eg the European Charter for Regional or Minority languages determines that the protection of regional and minority languages shall be appropriately adapted also for the protection of non-territorial languages (art 1, point c). In the Explanatory Report to the European Charter for Regional or Minority languages it is expressly written that this term relates to the Romani language (point 36 of the Explanatory Report to the European Charter for Regional or Minority languages).

8 Roma as a community were mentioned for the first time in art 40 (Ch III) of the Concluding Document of the Conference on Security and Co-operation in Europe (CSCE) – from Copenhagen (1990): 'The participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies).'

9 In art 7 of the Instrument of the Central European Initiative for the Protection of Minority Rights (1994) it is written: 'States recognise the particular problems of Roma (gypsies). They undertake to adopt all the legal administrative or educational measures as foreseen in the present Instrument in order to preserve and to develop the identity of Roma, to facilitate by specific measures the social integration of persons belonging to Roma (gypsies) and to eliminate all forms of intolerance against such persons.'

10 Teachers at Macinec primary school in Croatia used the following arguments in a court submission to explain their decision to segregate Romani children: 'Romani parents are frequently alcoholics, their children are prone to stealing, cursing and fighting and as soon as the teachers turn their backs things go missing, usually insignificant and useless objects, but the important thing is to steal.' See Amnesty International *Roma: Discrimination starts with primary education* (Press Release, AI index: EUR 05/004/2006, November 2006) 2. About the

II SHORT HISTORICAL BACKGROUND OF ROMA IN SLOVENIA

Roma are settled in Slovenian territory in smaller groups, in the shape of related families. The first written sources about the presence of Roma in Slovenia reach back to the fourteenth century, deriving from the Judicial Chronicles of the Diocese of Zagreb, which mentions a gypsy from Ljubljana.[11] Today, most Roma are in Dolenjska, Bela Krajina and Prekmurje. They frequently live separated from the rest of the population. In the past two decades, migrations of Roma from former Yugoslav republics to Slovenia have also occurred. Individuals migrate for economic, political and also military reasons. Later, close and/or more distantly related relatives follow them. Today, they settle mainly in larger towns (Ljubljana, Maribor, Celje, Velenje, Jesenice). It is significant for them that they have not traditionally settled in Slovenia.[12]

According to the registration of the population for 2002, in Slovenia in 2002 there were 3,246 Roma. We believe that the official statistical data differs strongly from the actual data. Another picture is shown from the data of the Community Centres for Social Work, since in the region of Dolenjska 2,246 Roma receiving social support are registered.[13] According to unofficial data, an estimated 8,000 to 10,000 Roma are supposed to live in Slovenia.

III PRESENT STATE AND POSITION OF THE ROMA COMMUNITY IN SLOVENIA

(a) Constitutional regulation

The start of legal regulation of the position of Roma in Slovenia goes back to 1989, when the rights of Roma as a nationwide community were codified by the constitutional amendment LXVII for the first time.[14] Then, the Constitution of the Republic of Slovenia (URS) regulated the position of the Roma community in art 65: 'The position and special rights of the Roma community living in Slovenia are regulated by law.'

Slovenia is one of the few countries that already dedicates attention to the Roma community in its constitution. The URS does not, however, grant the

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stereotypes see also Erjavec Karmen, Hrvatin B Sandra and Kelbl, Barbara *We about the Roma, Discriminatory Discourse in the Media in Slovenia* (Ljubljana: Open Society Institute, 2000) 20.

11 Štrukelj, Pavla *Romi na Slovenskem, Cankarjeva založba* (Ljubljana, 1980) 25.

12 Obreza, Janez *Romi v slovenskem pravnem redu in njihova politična participacija na lokalni ravni v luči predvidenih zakonskih sprememb, Evropa, Slovenija in Romi: zbornik referatov na mednarodni konferenci v Ljubljani*, 15 February 2002 (Ljubljana: Inštitut za narodnostna vprašanja, 2002) 48.

13 Klopčič, Vera *Demografske značilnosti položaja Romov v Sloveniji – tradicionalna poseljenost in regionalne razlike, Romski zbornik V, Zveza Romov Slovenije* (Murska Sobota, 2005) 44.

14 Lavtar, Roman 'Romi in enakost pred zakonom' *Pravna praksa z dne* 13 January 2005, 20.

status of national community to Roma, as it has to Italian and Hungarian minorities in Slovenia. The URS contains only the instruction that the position and special rights of Roma living in Slovenia are to be regulated by law. Constitutional legislation enabled the Roma community, due to its weaker position (eg its economic and social position in society, especially regarding health, work, etc), to avoid art 14 of the URS (principle of equality) and guarantees positive protection (so-called positive discrimination). With such a constitutional definition, implementation of art 1, s 4 of the International Convention on the Elimination of All Forms of Racial Discrimination has occurred,[15] enabling the realisation of measures, by which members of the Roma community are guaranteed special rights. Thus, their position differs from the Hungarian and Italian minorities who are guaranteed the status of constitutionally recognised national communities within art 64 of the URS. In spite of the fact that the URS determines that the Roma community has to be guaranteed special rights, these cannot be interpreted to be special constitutional rights. Instead, these special rights are realised through individual Acts. The basis for the adoption of these Acts lies in art 65 of the URS.[16]

Therefore, the Roma community does not have the status of a minority in the Republic of Slovenia (RS), but it is a special ethnic community. Nevertheless, the Roma community and its characteristics fall within the definition of 'minority' formed by Capotorti in 1979:[17]

> 'A group numerically smaller to the rest of the population of the State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'

We can also establish that the Roma community in RS fulfils all the fundamental propositions of a minority:

(a) the Roma community in RS has a smaller number than the rest of the population (in 2002, according to official data, there were 3,246 Roma in RS: see above);

(b) the Roma community is in a subordinated position;

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[15] See art 1, s 4 of the International Convention on the Elimination of All Forms of Racial Discrimination**:** 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

[16] Lavtar, Roman 'Romi in enakost pred zakonom' *Pravna praksa z dne* 13 January 2005, 20.

[17] Hailbronner, in Vitzhum, Graf Wolfgang (Hrsg), *Völkerrecht,* 4 Auflage*,* De Gruyter Recht, Berlin, 2007, 260.

(c) members of the Roma community differ from the rest of the population ethically, as well as by language;

(d) today, among Slovenian Roma, a strong sense of solidarity is present; and

(e) efforts of the Roma community in RS are directed to the preservation of its own Roma culture, tradition and language.

(b) Legal regulation

The legal framework already foreshadowed by the Slovene Constitution in 1991 was only adopted on 30 March 2007, ie the Roma Community Act (RCA). Slovene Roma are the first in Europe with a special Act which is devoted to Roma issues.

The RCA regulates the position and special rights of the Roma community in RS, the competencies of state bodies and of self-governing local bodies and the competencies of Roma community in realising their rights and duties as determined by the law. The RCA draws on the following principles:

- principle of democracy;
- principle of equality, equal treatment or principle of equal chances, respectively;
- principle of respect for diversity and identity;
- principle of prohibition of discrimination;
- principle of the right to expression of national identity;
- principle of the right to the use of own language and writing;
- principle of personal dignity;
- principle of the right to social protection;
- principle of the right to appropriate accommodation;
- principle of the right to economic development;
- principle of the right to health;
- principle of positive discrimination;
- principle of the right to preservation and respect for the Roma language;
- principle of the right to upbringing and education;

- principle of the right to own cultural development and information;
- principle of the right to free association; and
- principle of the right to political participation.

The RCA applies the prohibition of discrimination to any field of social living, and especially in the fields of employment, upbringing and education, social security, and similar, disregarding personal circumstances, where it is based on nationality, race[18] or ethnic origin, sex, health status, disability, language, religious or other belief, age, sexual orientation, education, property status or any other personal circumstances. It stresses that members of the Roma community have, besides the rights that all citizens of RS have for successful integration into Slovenian society and the taking over of responsibilities, special rights determined by delegated acts, executive acts and acts of self-governing local communities, ie in the field of education, improvement of living conditions, regulation of land and protection of the environment, employment, information, culture, health and social protection and the right to participation in public matters that relate to Roma.

The RCA does not regulate all the specific rights in detail, and this is why they are to be regulated by delegated Acts, to be widened and completed in time. The RCA is the basis for delegated Acts, and this is why in the RCA the rights to be enjoyed by the Roma community in RS are determined and formed only in general terms, leading to the regulation of specific rights in delegated legislation. In this way, in the RCA the fields of upbringing and education are included. Thus, delegated legislation has concretely regulated the field of preschool education, elementary school education, the Roma assistant, the special subject 'Roma language and literature', Roma culture and history, scholarships, subsidies for food, greater integration in secondary and tertiary education, etc.

The field of living conditions and the regulation of land shall also be regulated by a special Act encompassing the theme of land regulation, infrastructure, protection of the environment, etc. The RCA also determines that land problems of Roma settlements are to be regulated by the planning of appropriate land regulations. The possibility is foreseen that, in spite of the fact that land regulations are local matters, they may be dealt with by the State. The State may do this only when the lack of legal regulation of Roma settlements

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[18] It has to be stressed that in the case of discrimination based on race it may amount to a violation of article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Court for Human Rights stressed in the case of *East African Asians v United Kingdom* (report by the Commission from 14 December 1973) that discrimination based on race also automatically means humiliating behaviour in the sense of Art 3 of the ECHR – taken from Zidar, Katarina 'Nasilje večinskega prebivalstva nad Romi' *Pravna praksa z dne 7 December 2006*, p 23.

by a self-governing local community leads to severe danger to health, longer lasting disturbance of public order and peace, or permanent danger to the environment.

A very important field defined and included in a general way by the RCA is that of employment. The RCA also regulates cultural and informational activities and determines that RS must enhance the preservation and development of the Roma language, as well as the cultural, informational and publishing activities of the Roma community.

Further, the RCA determines that the government, in co-operation with self-governing local communities and the Council of the Roma Community in RS, adopts a special programme of measures to guarantee the coordinated activity of individual competent ministries, other state organs and organs of self-governing local communities in the realisation of the special rights of the members of the Roma community. The government also nominates a special body after the governmental programme just outlined is realised. A working body already exists with a similar structure, ie the Commission of the Government of RS for the protection of the Roma ethnic community.

Legal sources concretely regulating certain special rights of Roma, even today, are low in number. They can be found in following Acts:

(a) Local Self-Government Act;

(b) Local Elections Act;

(c) Voting Rights Register Act;

(d) Act on Enforcing Public Interest in the Field of Culture;

(e) Organisation and Financing of Education Act;

(f) Elementary School Act;

(g) Kindergarten Act;

(h) Public Media Act;

(i) Librarianship Act;

(j) Promotion of Balanced Regional Development Act; and

(k) Radiotelevizija Slovenija Act.

IV PROBLEMS OF THE LEGAL AND ACTUAL POSITION OF ROMA CHILDREN IN SLOVENIA

(a) Kindergarten

The Ministry of Education, 10 years ago, formed a special programme for working with Roma children in schools and kindergartens. Kindergartens for Roma children were formed, and this was positively accepted especially in Prekmurje in the village of Pušča. The inclusion of Roma children into kindergartens improved the situation in the field of preschool education. Children exclusively speaking the Roma language learned fundamental Slovenian language at least, which is still a precondition for successful entry into elementary school. There were more problems in Dolenjska, where it was established that parents sent their children to kindergarten irregularly.[19]

Today most of the Roma children are integrated into regular groups and this is mainly due to the fact that in a single kindergarten they do not meet the norms set by the state for an independent classroom for Roma. Fewer are included in separate classrooms and kindergartens for Roma (in RS we have just one Roma kindergarten group). One of the arguments for the formation of separate classrooms for Roma is that the parents of Roma children express the wish for them, because they do not wish their children to be targets of ignorance and prejudice towards Roma. There is no easy way to solve the problem of discrimination against Roma, and the formation of separate classrooms certainly does not help to make the learning of the Slovenian language any easier, since it is generally known that children learn the most from their own generation by learning through experience.

The inclusion of Roma children into kindergartens has needed special attention, since for many this is their first contact with education. If they witness rejection at this phase as members of a marginal ethnic group, they will reject education throughout their lives.[20]

(b) Education

In 2000, *Recommendation No R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe* (Recommendation (2000) 4) was adopted. It was recognised that there is an urgent need to build new foundations for future educational strategies toward the Roma/Gypsy people in Europe, particularly in view of the high rates of illiteracy or semi-literacy among them, their high drop-out rate, the low percentage of students completing primary education and the persistence of features such as low school attendance. The problems faced by Roma/Gypsies in the field of schooling are largely the result of long-standing educational

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[19] Zavrtnik Zimic, Simona 'Koncept "družbene izključenosti" v analizi marginalnih etničnih skupin' *Teorija in praksa let 35,* p 843.

[20] Ibid.

policies of the past, which led either to assimilation or to segregation of Roma/Gypsy children at school on the grounds that they were 'socially and culturally handicapped'.

Recommendation (2000) 4 also relies on the curriculum and the teaching material being designed to take into account the cultural identity of Roma/Gypsy children. Romani history and culture should be introduced into the teaching material in order to reflect the cultural identity of Roma/Gypsy children. The participation of representatives of the Roma/Gypsy community should be encouraged in the development of teaching material on the history, culture or language of the Roma/Gypsies (point 9 of the Recommendation (2000) 4).

Special problems in RS are faced in connection with Roma children in schools. A decrease in Roma pupils in the higher classes of elementary school is evident. Children of Roma on average also have less success at school. The reason for such a state lies mainly in the insufficient knowledge of the Slovenian language, since in Roma families Roma language is mainly spoken. Children of Roma most frequently meet the Slovenian language only in school, as Roma families live in Roma communities or villages respectively. Children of preschool age rarely visit kindergartens. The problems arising from elementary school are essentially continued into the next phase, ie employment.

In accordance with point 13 of Recommendation (2000) 4, more attention was paid to employment and education of teachers, who should be provided with specific knowledge and training to help them better understand their Roma/Gypsy pupils. The education of Roma/Gypsy pupils should however remain an integral part of the general education system. So, in 2007 the following activities were carried out:

(a) a selective subject 'Roma culture' was prepared and adopted;

(b) a professional standard for Roma assistants was prepared and adopted;

(c) programmes of intercultural cohabitation were prepared and realised; and

(d) teacher training commenced.

The Ministry of Education also guarantees additional financial means and forms more appropriate for Roma classrooms. In particular, it finances nutrition, textbooks,[21] excursions, and the like. It finances development of research tasks connected to the problems of the successful inclusion of Roma

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[21] The former Yugoslav Republic of Macedonia has failed in its obligation under the International Covenant on Economic, Social and Cultural Rights to ensure that primary education is both compulsory and free and accessible to all without discrimination. While under the Macedonian law primary education is said to be free, in practice Roma Children may be excluded from education because their parents cannot afford books or because transportation to school is unavailable: Amnesty International *Former Yugoslav Republic of*

and the standardisation of the Roma language as a basis for studying the Roma language. According to data by the Office for Nationalities, in the academic year 2007/2008, 1,658 Roma children were included in elementary education.[22] It has to be stressed that in RS there are no homogeneous classrooms with just Roma children.[23]

Frequently it is forgotten that what has been mentioned is not enough. Roma live mainly in villages separated from the major Slovenian inhabitants. Roma villages are significantly far from other villages, and therefore the arrival of Roma children at school has frequently been difficult. We must not forget that Roma live in poor living conditions (some are living in huts). So, just getting to school can be impossible when the school is too far to reach on foot and their clothes are not warm enough to cope with the cold winter. Romani children are often unable to study or to do homework in their cold, overcrowded homes.[24]

(c) Living conditions

Young Roma families meet problems in the field of residential conditions, since in RS the breaking up of estates and the planning of Roma settlements is occurring. In regard to the residential conditions in Slovenia, Roma can be divided into three groups:

(1) Roma reaching a high degree of accommodation. These are Roma who live in an urban settlement, in living complexes or in rented apartments and in their own houses outside Roma settlements or developed Roma settlements.

(2) Roma with a lower degree of living standards. These are the ones living in dense Roma settlements. They are settlements of complex built houses consisting of one or two rooms, usually houses of steel or wood.

Macedonia, Submission to the UN Universal Periodic Review, Fifth session of the UPR Working Group of the Human Rights Council, AI index: EUR 65/001/2008, November 2008, p 5.

22 Urad za narodnosti *Romi – zakonodaja, programi, ukrepi*, p 3.

23 Slovakia was the subject of great criticism regarding the inclusion of Romani children into special schools in Pavlovce nad Uhom. Two-thirds of children were included in a special school originally meant for children with mental disabilities. Due to the large proportion of Romani children in this special school, in the district this school was named 'Gypsy School'. In order to achieve an improvement, Amnesty International formed proposals, where it advised Slovakia, among others, on the case of Pavlovce nad Uhom. Roma children were enabled through a special school to be included in elementary school education and guaranteed all possible support (e g financial, professional, legislative, etc): Amnesty International *A Tale of Two Schools, Segregating Roma into Special Education in Slovakia* AI index: EUR 72/007/2008, July 2008, p 30.

24 Amnesty International *Roma: Discrimination starts with primary education,* Press Release, AI index: EUR 05/004/2006, November 2006, p 1.

(3) Roma with the lowest living standards. They live in isolation located in peripheral village communities. Their living rooms are dark, wet and hygienically neglected, without regulated sanitation.[25]

(d) Access to public services

Children of Roma, in all respects, are one of the most vulnerable and at risk groups of children in RS. A high degree of discrimination is present in their social environment, as well as among government officials and professionals.[26] The result of this is a discriminatory, restrictive and repressive relationship with the everyday practice of public services. The most frequent is the limited access to public services, since special contact hours are introduced in some social and health services intended only for Roma.

Different methods of punishment are also applied against Roma, most frequently justified as educational measures (eg revocation of child support for children not attending school), and numerous examples of penal measures not used for other children (eg psychological violence). A very obvious example is the following: a 29-year-old Roma woman (A), a single mother, lost her status of residency due to being erased from the register of residents (RR) in 1992. The local health centre denied medical treatment for her seriously sick child, since they did not have a regulated legal status in RS. A and her child had a limited residence permit, as a result of which they were not entitled to social security. Therefore, A, in spite of her low income and the fact that she was a single mother, could not enforce subsidised school nutrition for her child. Social support is conditional on citizenship or is available for foreigners with residence in RS, this obviously contradicts Art 26 of the Convention on the Rights of the Child (CRC) that demands recognition of the right to social security for every child from Member States. The majority of Roma, affected because their status was not regulated, were illegally deprived of their residency by the Ministry of Internal Affairs by their erasure from the RR in 1992. In 2003 the Constitutional Court of the RS ruled that it was against the constitution and that residency had to be returned to all persons affected by the erasure, from the day of the erasure.[27]

(e) Health

Different research shows that Roma, especially women and children, more frequently become ill with diseases like tuberculosis, asthma, diabetes and

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[25] Horvat, Muc Jožek, Romi na Slovenskem, Romski zbornik V, Zveza Romov Slovenije, Murska Sobota, 2005, str 13–31, pp 21–22.

[26] The European Court of Human Rights in the case of *Moldovan and others v Romania (41138/98 and 64320/01)* established that Romanian courts of justice discriminated on the basis of race against Roma complainants in proceedings before them, as claims for property damage were rejected permanently. By this, rights in Arts 6 (right to fair trial) and 8 (right to respect for private and family life) of the ECHR were violated.

[27] Ruling by Constitutional Court no U-I-246/02 from 3 April 2003.

anaemia, than the rest of the population.[28] Since many Roma live in poverty connected to a very high degree of unemployment,[29] this has a destructive effect on their health (e g they have to cover the costs of medicine, placement in the hospital, etc themselves).

In order to improve the health status of Roma, especially children, certain measures were taken. Thus, in 2006 a Roma was employed in a public health team within the national programme for health protection in regard to the problem of the health of Roma. Activities to improve women's health are now up and running, including programmes on reproductive health and healthy lifestyles.[30]

(f) Language

Children of Roma should have the right to communicate in their own language and preserve their own culture, but this has not been made possible. Children of Roma do not have hours set aside for learning the Roma language or for learning about their culture. Individual programmes for each pupil would have to be developed, for which separate classrooms are not necessary.[31]

(g) Employment

Children of Roma, whether or not they complete secondary school, have great problems with integration into the working environment. Roma are mainly employed as non-qualified workers or as seasonal workers, and some of them even look for seasonal work abroad. Roma are also included in public employment programmes. Some establish their own craft, but have to invest more efforts in seeking customers and have to be much better than craftsmen who are not Roma, in order to succeed.[32]

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[28] Minority Protection of Slovenia, *Monitoring the EU Accession Process: Minority Protection, (Volume 1), An Assessment of Selected Policies in Candidate States 2002* (Budapest: Open Society Institute, 2002) p 622.

[29] Commission of the European Communities, *2002 Regular Report on Slovenia's Progress towards Accession* (COM(2002) 700 final), Brussels, 9 October 2002 SEC(2002) 1411, p 28.

[30] Urad za narodnosti *Romi – zakonodaja, programi, ukrepi* p 5.

[31] In the past, Roma children were frequently included in special schools with adopted programmes due to a lack of knowledge of the Slovenian language. Today, as mentioned, they are included in regular school programmes that try to guarantee immediate individual support. The European Court of Human Rights dealt with problems of the inclusion of Roma children in special schools in the case of *D H and others v Czech Republic (57325/2000)*. The complainants, Roma children, claimed that enrolment into special schools led to racial segregation. The European Court of Human Rights decided that there was no discrimination in education, as the enrolment of Roma children in special schools was based on legitimate grounds (professionally conducted tests) and not on racial and ethic origin – taken from Zidar Katarina '(Posredna) diskriminacija pri usmerjanju romskih otrok v posebne šole' *Pravna praksa z dne 6 April 2006*, p 26.

[32] At the end of December 2007 in an overview of unemployed people, there were 2,069 Roma (among them 1,060 women). 1,891 Roma were included in the measures of the *Active*

(h) Relationship with the majority Slovenian population

In Slovenia, as well as elsewhere, we find a negative attitude from the majority of the Slovenian population towards Roma. Such a negative point of view was clearly apparent in the proposal for a special Roma Act made by a well-known Slovenian politician. The supporters of this proposal took the point of view that members of the Roma community should not have special rights or a special position in RS. This proposal was not adopted, as it was in obvious contradiction to the many international conventions and other documents ratified by RS and to all past attempts to regulate the position of the Roma community in RS.[33]

V CONCLUSION

Because of the negative attitude of the majority of the Slovenian population towards Roma intensive work in integrating Roma into Slovenia is still necessary. Roma and especially Roma children are a vulnerable group. Even in the field of work with Roma children and the enhancement of their integration, a lot of things can be done, since children can be important bearers of future relationships. A positive relationship can be built between the majority of the population and the minority Roma. Roma are more and more conscious of their position and are included and adapted through their representatives, newspapers, radio broadcasts, literature and similar. This integration has to start with the youngest, which means in kindergartens. The State has to guarantee financial means and also other measures, as a result of which Roma will not be exposed to discrimination in different fields of everyday life.

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employment policy (some even in several measures), through which 320 were employed – taken from Urad za narodnosti *Romi – zakonodaja, programi, ukrepi*, p 5.

[33] Lavtar Roman 'Romi in enakost pred zakonom' *Pravna praksa z dne 13 January 2005*, p 20.

South Africa

POVERTY, WELFARE AND THE FAMILY: SOUTH AFRICA'S MIRACLE TRANSITION AT RISK

*June Sinclair and Trynie Davel**

Résumé

Le présent article traite de l'impact qu'on eu sur l'obligation alimentaire en général tant la Constitution que la Charte des droits, adoptée au milieu des années 1990. Il commence par un bref exposé sur la common law et sur la législation concernant l'obligation alimentaire. Celle-ci se fondre essentiellement sur le mariage et sur la parenté biologique. Le texte poursuit avec le thème du mariage entre personnes de même sexe qui fut reconnu dans la foulée de l'adoption de la Loi sur l'union civile de 2006, pour s'intéresser ensuite à l'élargissement jurisprudentiel de l'obligation alimentaire. Les décisions rapportées ici portent sur des sujets variés: l'obligation alimentaire des beaux-parents à l'égard de leurs beaux-enfants et celle qui lie les époux au sein du mariage musulman; le droit de l'épouse dans un mariage musulman polygame de réclamer une compensation pour la perte du droit au soutien par le biais du recours au titre de «personne dépendante» et le droit de cette épouse de prétendre au statut de conjointe survivante en matière successorale; le droit qu'avait le conjoint de même sexe, avant l'adoption de la Loi sur l'union civile, d'intenter un recours au titre de «personne dépendante» en vue de compenser la perte de son droit au soutien. Cette jurisprudence s'appuie sur le principe d'égalité, garanti par la Charte des droits et elle est le fruit d'une démarche prétorienne visant à répondre, au cas par cas, à des situations de discrimination inacceptable.

Cet article identifie deux domaines dans lesquels l'intervention du législateur n'a déjà que trop tardé, soit la pleine reconnaissance du mariage musulman et l'encadrement de l'union de fait hétérosexuelle. Nous présentons les arguments en faveur d'une réforme en la matière.

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I INTRODUCTION

Fourteen years have elapsed since the African National Congress (ANC) came to power in 1994 and assumed responsibility for turning its mantra of 'a better life for all' into a reality. Steady progress has been made to alleviate the grinding poverty that impacts so severely upon families. But these efforts notwithstanding, South Africa is witnessing increasing social disruption and turmoil arising out of persistent widespread poverty that breeds crime and abuse, particularly of women and children. It is also experiencing unprecedented inbound migration of refugees from political persecution and poverty following the collapse of Zimbabwe. This provoked murderous xenophobia during 2008, as citizens and migrants competed for scarce resources in circumstances of extreme poverty. Escalations in crime committed by citizens and unregulated migrants further undermine already low levels of safety and security. The flood of refugees has also culminated in overcrowded temporary shelters and camps, even in cities like Johannesburg, and cholera outbreaks in areas adjacent to the Zimbabwe border. Over 3,000 Zimbabweans have died from this easily preventable water-borne disease and over 60,000 are infected.

An agreement to form a unity government in Zimbabwe has been accepted by the opposing parties in Zimbabwe, but unless international humanitarian aid now flows quickly into that country, its woes will continue to be exerted on South Africa as millions of Zimbabweans face starvation this winter.

South Africa tenaciously clings to its goal, set in 2002, to reduce poverty and unemployment by half, by 2014. A few examples of socio-economic achievements[1] demonstrate that 2.6 million subsidised houses have been built, providing shelter to 8.8 million people. Access to running water has increased to cover 87.2% of the population, and the number of households with electricity has doubled since 1994, to 8.8 million.[2] Social grants have been substantially improved, in scope, and in terms of benefits. By March 2008, 12.4 million people were receiving social grants, on which 3.1% of GDP is spent.[3] Broad, unofficial rates of unemployment stand at 34.3% in 2007, compared to 41.6% in 2002, while the narrower (official) rate fell from 30.4% in 2002 to 23% in 2007.[4] The global financial crisis that shook the world in 2008, however, has heralded a serious downturn in the economy and the shedding of a disturbing number of jobs.

Despite the progressive improvements, therefore, South African families still experience the consequences of massive structural poverty and unemployment. There is concern that the gap between rich and poor is widening. It seems clear now that the economic growth-rate target of 6% per year will not be reached by

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1 Set out in the Development Indicators Report 2008, issued by the office of the President.
2 Ibid, at 31–34.
3 Ibid, at 28.
4 Ibid, at 21.

2014. In short, the unmet expectations raised by the promise of a better life for all are exciting discontent among the poorest of the poor.

In addition to these economic realities, South Africa stands on the brink of a new age in politics. The monolithically powerful ANC has split. A new party fiercely competed for power but failed in the 2009 elections to make enormous inroads into the ruling party's majority. In the run-up to the elections, political intolerance, the growing propensity of workers to resort to violent protest, to make unrealistic demands for drastically lower food and fuel prices and the recent attacks on the institutions of democracy, such as the judiciary, for every judgment that is not to popular liking are, singly and collectively, all worrying signs. These signs are exacerbated by threats of rebellion made by populist union and youth leaders adamant that their chosen leader is the only candidate who will be permitted to become the next President.

II POVERTY

While these national issues play themselves out in a troubled society, poor families, marginalised and excluded from the labour market by their lack of education/skills, must eke out an existence. They lack income, capacity and assets. The huge growth in the informal sector is a lifesaver for some, but it does not adequately feed, house, clothe or educate the destitute. Using a paltry R367 per month (approximately US$50) as a poverty line, we find 41% of the roughly 48 million South Africans still living below it in 2007. That is a lot of people, very, very poor people, with little chance of escaping their poverty by entering the labour market, as the economy shrinks and jobs are lost.[5]

III LEGISLATIVE PROVISION FOR SOCIAL ASSISTANCE

Inevitably, the poorest of the poor turn to welfare – to social assistance provided by the State. South Africa's legislative track record on this front is not unimpressive. The benefits contained in the Social Assistance Act[6] have been substantially reviewed and enhanced since 1994. Those chosen as examples for this discussion are the Child Support Grant (CSG) and the Foster Child Grant (FCG), but there are others. Children in need up to the age of 14 years are eligible for the CSG, and 8.1 million children received the grant in 2008. The FCG currently reaches just over 450,000 children. Expenditure on all welfare grants has increased by nearly 70%, and from 2.9% of GDP to 3.1% since 2003.[7] These grants focus on giving the primary caregiver the means to provide basic subsistence to the children in their care.

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5 The rate of job creation improved in several sectors between 2004 and 2007 but the current economic downturn has reversed that trend and retrenchments in the mining and (motor) manufacturing sectors has begun.

6 Act 13 of 2004, which came into operation on 1 April 2006.

7 Development Indicators Report 2008, above n 1, at 28.

But there are severe problems. They range from targeting mechanisms to means tests to poor and corrupt administration. A comprehensive Report on these issues was commissioned by the Department of Social Development. Its findings are important and revealing.[8]

The main reason for the introduction of means tests is to target poor households when resources are limited, so that the welfare programme meets its objectives at the lowest possible cost. But targeting is imperfect and always associated with substantial administrative costs (in implementing and complying with the targeting mechanisms, by government and the beneficiaries) and other costs. The question therefore arises whether, given a cost-benefit analysis, South Africa should abandon targeting and provide social assistance on a universal basis. The report referred to above concludes that South Africa's means testing is costly in terms of inclusion and exclusion errors.[9] The means test for the CSG focuses on the means of the primary caregiver. It is complex to administer, requiring detailed information that applicants are often not in a position to provide. It challenges the capacity of the institutions charged with implementing it[10] and corruption is rife. The Report offered this trenchant criticism:[11]

> 'The major shortcoming of the means test for the Child Support Grant is that the income thresholds [to determine eligibility] have not been adjusted since the programme's inception [in 1998]. The threshold for rural (and some urban) households is R1100 per month, while that for urban households in formal dwellings is R800. Since 1998 the cost of living for poor households has risen approximately 72%.'

It concluded that, were the thresholds to be adjusted for inflation, and were the rural/urban distinction to be abandoned, more than three out of four children in South Africa would qualify for the CSG. This fact would bring sharply into question whether there is any merit in retaining targeting, with its associated costs, to save less than 25% of the cost of the grant, compared to the cost of a universal programme.[12]

The Report has borne fruit. On 22 August 2008, new regulations were published under the Act.[13] The Minister announced that the income threshold for the CSG would no longer carry a rural/urban divide, and would be R2,100 per month (almost a doubling of the rural threshold) for everyone. But the new Regulations retain the complex and detailed criteria for establishing eligibility. They demonstrate that government is not prepared to accept a non-targeted, universal child support grant.

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8 Final Report of the Economic Policy Research Institute 4 July 2007 Project SD 13/2005 of the Department of Social Development.

9 That is, including persons not eligible, in error, and excluding persons who are eligible, in error.

10 Above n 8, at 9.

11 Above n 8, at 10.

12 Ibid.

13 Government Gazette 31356 *Regulation Gazette* 8948 of 22 August 2008.

The next question is the level of the child support benefit itself. Adjustments have been made to the initial level, set in 1998, and the salutary effect of these has been to maintain the purchasing power of the benefit above the initial level, in real terms.[14]

Means testing does not apply to FCGs. Adjustments for inflation have maintained the initial benefit level measured by the consumer price index (CPI), but spending patterns of the poorest 20% of the population have changed and there has been an erosion of the real value of foster care benefits since 1998.[15] Given the effects of the AIDS pandemic, discussed below, this is a serious problem.

The considerations alluded to above, supported by the micro-simulation evidence proffered in the Report relied upon, reinforce the recommendation, made persistently and powerfully also by lobby groups since the 1990s, that South Africa should eliminate means testing and move to a universal basic income grant coupled with universal child support and foster care grants. Moreover, the economic simulations suggest that to do so would be affordable. Further, the Report recommends that all social grant benefits be indexed to the CPI for the poorest 20% of the population.[16]

In the sections below, dealing with constitutionally entrenched socio-economic rights, and access, further arguments favouring universal social grants for South Africa are offered. They are based on the obstacles confronting deserving applicants and the weak, often corrupt, administration of the grant system.

IV CONSTITUTIONAL RIGHTS TO SOCIAL ASSISTANCE

Within the context alluded to above, how will the country achieve compliance with the noble inclusion of socio-economic rights in its Constitution? Interpretation of the constitutional right proclaiming that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance' has, unsurprisingly, proved to be difficult.[17] The Constitution mandates the State to enact legislation and to develop measures to achieve the 'progressive realisation of this right'.[18] It is clear that an individual may attack legislation or a measure introduced by the state that is unreasonable, inimical to the achievement of the right. However the Constitutional Court has shown reluctance to impose a

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14 Ibid, above n 8 at 10.
15 Ibid, above n 8 at 12.
16 Ibid, above n 8 at 15.
17 Section 27(1) of the Constitution of the Republic of South Africa, 1996. The interpretative issues apply also to the rights contained in s 26 (the right of access to adequate housing).
18 Section 27(2). See the important contribution of Beth Goldblatt and Sandra Liebenberg 'Giving Money to Children: The State's Constitutional Obligation to Provide Child Support Grants to Child Headed Households' (2004) 20 SAJHR 151 at 156ff.

minimum core standard that Parliament must meet; nor has it translated the right into one that is an individually enforceable substantive right.[19]

There are cogent criticisms offered of the judicial deference displayed in the case-law. The deference derives first from the demands of the separation of powers, preventing the subversion of democracy and the will of the elected representatives of the people by the courts. The second explanation of the deference pertains to the argument from scarcity of resources, or fiscal constraint. While respecting the importance of both of these points, one author's incisive and insightful analysis is that the courts are foregoing potential opportunities to develop socio-economic constitutional rights in ways that could alleviate poverty.[20] Lucy Williams points out that fiscal constraint is not a simple fact of nature, but must be seen through a lens reflecting corruption, misallocation of funds, and tax policies that favour the wealthy.[21] She laments the conservative approach of the South African courts and draws important parallels with the situation in the United States. Sandra Liebenberg and Beth Goldblatt[22] add another important dimension to the debate, by cogently pointing out that the jurisprudence on equality and dignity should be developed to be more responsive to the values protected by socio-economic rights. This piece does not permit of a detailed examination of the arguments of these authors, but the widespread administrative failure being experienced in the dispensing of welfare in South Africa strengthens their case. It demands a discussion of the administration of social grants.

V ADMINISTRATION OF SOCIAL ASSISTANCE GRANTS: ACCESS DENIED

Having a legal right to social assistance is obviously necessary, but insufficient to put food on the table. Even if the jurisprudence of Constitutional Court were to develop individually enforceable legal rights, questions would remain about their enforceability and realisation. The legal processes for determining

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[19] An exception is the case of *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), which held that non-citizens who are permanent residents are entitled to social security benefits contained in the Social Assistance Act 59 of 1992. Two cases elucidating the demands for progressive realisation are *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC). Both reflect an examination by the court confined to whether the actions being taken by the State were 'reasonable'. But individual suffering is rarely palliated by such pronouncements. While the *Grootboom* decision, on the right to housing, was hailed as a breakthrough, Mrs Grootboom died in July 2008, 7 years after her court victory, but still living in squalor and deprivation, in a shack in an informal settlement. There are cases subsequent to *Grootboom* and the *TAC* case that build on the idea of a minimum core obligation for the State.

[20] The author is Lucy Williams and the article relied upon extensively here to portray the state of welfare law in South Africa is entitled 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis' (2005) 21 SAJHR 436. Indebtedness to this author is here recorded.

[21] Ibid, at 438.

[22] 'The Interrelationship Between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 SAJHR 335.

eligibility and then for compelling an often unfriendly and incompetent, and sometimes even corrupt, administration to deliver the entitlement to the individual are critical issues. There is a veritable mountain of evidence demonstrating the failure of the benefits formally conferred by legislation (the Social Assistance Act) to reach women and children in desperate need. One author describes this problem as the difference between the 'law on the books' and the 'law in practice'.[23] She lists as factors that determine the ability of an individual actually to experience the benefits, abusive discretionary implementation, access to administrators and the courts, the resources and ability to litigate, and the dissemination of information.[24]

Summary termination of entitlement without notice or an opportunity for a hearing prior to the termination was the basis of the dispute in the case of *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*.[25] It is cited to illustrate the point being made here. The Supreme Court of Appeal mandated notice and hearings for approximately 100,000 recipients of social grants whose benefits had been arbitrarily terminated. But the court order did not prevent provincial governments from continuing to thwart the rights of poor people in no position to challenge the denial to them of benefits. Those who over the years have tried have often been confronted by vigorously defended court actions that cost the taxpayer millions of rand to sustain. There is also widespread evidence of demands by abusive administrators demanding documentation that is not legally required, making discretionary exclusionary rules themselves and sending applicants from pillar to post until they abandon the quest for welfare because they cannot afford the transport costs to appear at multiple sites to complete the paperwork.[26]

Birth certificates and identity documents are required to prove eligibility, but the parlous state of the Department of Home Affairs renders it virtually impossible for poor people with low literacy levels and no resources, often concentrated in remote rural areas, to obtain these documents. They are frequently mothers, caregivers of children desperately in need of assistance:[27]

> 'The social grant system . . . ironically . . . [exacerbates the gap between haves and have-nots] by supporting those who have relatively better education, more access to government services or who live in and around urban areas.'

The Constitutional Court has declared the Presidential proclamation that had assigned the administration of social assistance grants to the provinces invalid.[28] A national body, the South African Social Security Agency, has

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23 Williams, above n 20, at 439 and 452.
24 Above n 20, at 439.
25 2001 (4) SA 1184 (SCA).
26 Williams, above n 20, at 453–456, and the works cited by her.
27 Rejane Woodroffe 'Give the Poorest Proper Access' *Mail and Guardian* 9–15 May 2008.
28 *Mashavha v President of the Republic of South Africa* 2005 (2) SA 476 (CC).

therefore been set up and a Social Grants Appeal Tribunal established. At the date it commenced work, only on 8 April 2008, there was a backlog of 45,000 cases.[29]

The delays in setting up the tribunal prompted the Minister to apologise to the public. To which public, we might ask? For the thousands of poverty stricken people who should be able to access their assistance without any complications, the appeals tribunal provokes the remark that 'justice is open to all, like the Ritz hotel'. The expense of setting up a special appeals tribunal and running it, coupled with the costs associated with administering complex targeted grants, to say nothing of the difficulties poor people have in litigating, reveal again that the South African Government has not chosen the correct path to alleviate poverty. A universal basic income grant, argued for below, is an urgently needed addition to the current social grants system, but it seems that there is ideological opposition to this route within government.

VI AIDS AND CHILD-HEADED HOUSEHOLDS[30]

South Africa has made important strides towards recognising new family forms based on how groups of people function as a family. Duties of support have been recognised on the basis of family function, rather than on the traditional grounds of biology or marriage. The tragic effects of AIDS have produced family forms that no one would wish to see continue or grow but which, for want of better solutions, must be recognised and protected. Child-headed households are increasing as the number of orphans increases. It is estimated that, in 2005, 118,500 children were living in 66,500 child-headed households.[31] We have seen that the legislative and constitutional rights to social assistance focus on providing the primary caregiver of children the means to provide them with basic subsistence. A new challenge is the provision of grants to children who are looking after children, in the absence of an adult. How does the child head of a household obtain an identity document and birth certificates for himself/herself and siblings or other orphaned dependants in order to access the only route, apart from crime or prostitution, to obtaining food?

The obstacles confronting these children, including rules made arbitrarily by administrators who in some cases have deemed children not to be eligible caregivers if they are under the age of majority (now 18 years), are discussed by Beth Goldblatt and Sandra Liebenberg.[32] These authors offer a host of cogent

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[29] Press release of the Minister of Social Development, Dr Zola Skweyiya, 8 April 2008.

[30] For a wide-ranging, detailed and important contribution, see CJ Davel and U Mungar 'Aids Orphans and Children's Rights' (2007) 70 THRHR 65.

[31] General Household Survey 2005, done by the Children's Institute and referred to in the Centre for Applied Legal Studies release of 8 June 2008.

[32] 'Giving Money to Children: The State's Constitutional Obligation to Provide Child Support Grants to Child Headed Households' (2004) 20 SAJHR 151. Indebtedness to these authors for this section is acknowledged.

reasons why the denial by the State of social assistance to children who are looking after children is a violation of their and their dependants' Constitutional rights.

One of the defining features of the governing legislation[33] is that the right to the CSG is based on the need of the person assuming responsibility for the child. The grant also follows the child, recognising that a child in poverty may have successive caregivers. But the rules governing the Social Assistance Act also require that the caregiver seeking a grant must have express or implied consent of a parent, guardian or custodian to claim it, and that the grant may not be claimed for more than six children who are not the biological or adopted children of the caregiver.[34] This conditionality effectively prevents many children in dire straits, because of the death of their parents, from accessing their grants. They have no adult caregiver. And social services to place these vulnerable children in foster or institutional care are simply inadequate.[35]

The profound effect of AIDS deaths on family life entails the loss of emotional, financial and parental protection. It also results in children looking after children not attending school. They are trapped in a vicious circle of poverty and destitution. They are the most vulnerable of all children, and yet they cannot access their grants. Whether the newly enacted administrative provisions that, inter alia, create a National Agency for the administration of grants will change the current evaluation of children who are caregivers remains to be seen. Goldblatt and Liebenberg correctly stress that what is needed is an official acceptance and implementation of the notion that although child-headed families are widely regarded as anomalous household forms, children living without adults are a reality, must be viewed within the context of their current living arrangements, and properly supported. The new Children's Amendment Act provides for a designated organ of state to collect and administer grants on behalf of child-headed households. And it declares that the child taking decisions about the family can collect and administer grants as a supervising adult may do. But it is limiting in its scope because it insists that a child may be recognised as a head of a household only if he or she is over the age of 16 years.[36]

Sexual exploitation of young girls and increasing teenage crime among boys in these circumstances[37] are by-products of a tragic situation that is not being viewed urgently enough. For AIDS orphans, '[t]heir wellbeing, their health, their moral development and their very existence are put at risk'.[38] Something more must be done, quickly.

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33 The Social Assistance Act 13 of 2004, discussed above.

34 This is in terms of regulations promulgated under the Act. Full references to them are contained in Goldblatt and Liebenberg (2004) 23 SAJHR 151. New Regulations were published on 22 August 2008. See Government Gazette 31356 *Regulation Gazette* 8948 of that date.

35 Davel and Mungar, above n 30, at 68.

36 Section 137 of the Children's Amendment Act 41 of 2007.

37 Davel and Mungar, above n 30, at 67.

38 Davel and Mungar, above n 30, at 68.

VII THE CASE FOR A BASIC INCOME GRANT

Thabo Mbeki was removed as President of South Africa in September 2008. In his last months in office he committed to renewing his government's efforts to deal with poverty. The details of the strategy are not known, and commentators have queried whether there is anything new in his announcement of a 'war on poverty'.[39] It is also known that the government is working on the implementation of a national social security system that will compel those in the workforce to contribute a fixed percentage of their income to retirement savings.[40]

The big question is whether the direction being pursued is sufficient and appropriate to the circumstances of a developing country like South Africa. The notion prevalent in several western jurisdictions that social grants are residual forms of assistance, safety nets, when private savings and or social insurance schemes fail, is not an appropriate one here. It is flawed because it proceeds from the assumption that everyone is able to gain paid work; that children at school need to be assisted to enter the world of work. No one would quarrel with the goal of putting as many people into paid work as possible, but to use this aspiration as the assumption underpinning reform of welfare law does not take into account the fact that 'systemic poverty and inequality combined with high levels of unemployment'[41] accurately describe the South African scene. Compulsory saving from wages and salaries will be of no help to the destitute, to work-seekers now described as 'discouraged', or orphaned children in desperate need.[42] This is not to say that every effort should not be made to create new jobs and cater for retirement. But attention must be given to the millions of unemployed people living in abject poverty who do not have access to the basic necessities of life that the government has the obligation to provide.

How could it do so? An important Report commissioned by government recommended a Basic Income Grant (BIG), to be provided to every South African, regardless of need or employment, and funded through a wealth tax system.[43] This grant would reduce the dependence of the very poor on the working poor and enhance educational opportunities that promote the acquisition of employment. But the government has not accepted these recommendations. Over the years, a stalemate has developed. Government has either raised obstacles not proven to be insurmountable, such as affordability

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39 *The Star* 28 July 2008; *Business Day* 29 July 2008.

40 *The Star* 7 July 2008 and *The Financial Mail* 30 January 2009 at 20. Commentators believe that the system will take years to implement, and that its primary aim is to 'incentivise' low-income earners to save. It is not of importance to the unemployed.

41 Goldblatt and Liebenberg (2004) 20 SAJHR 151 at 156.

42 Address by the Deputy Minister of Social Development at an international conference on basic income, 20–21 June 2008, Dublin, Ireland, revealed that there are 3.5 million structurally unemployed, discouraged work-seekers.

43 The Taylor Report 'Transforming the Present – Protecting the Future: Report of the Committee of Enquiry into a Comprehensive System of Social Security for South Africa' (2002).

and capacity constraints, or simply procrastinated on giving cogent responses to calls for the adoption of the Report's recommendations. Instead, it has created a public works programme to provide temporary work for some 200,000 individuals per year. This is an important tool in reducing poverty, but it is only part of the solution. And it has limitations. No thought is given to the fact that the programme takes mothers away from their children while they clear alien vegetation or fence roads or care for the aged or disabled. The jobs last for six months. They do not provide ongoing employment that would take people out of poverty or lessen the need for social grants. The Deputy Minister of Social Development spoke recently of the move to a BIG, but her definition of this grant is not the one that advocates of it rely upon. She insists that 'conditionalities' can be built into the grant without detracting from its meaning:[44]

> 'I must point out that in our government "nobody disputes the call for a Basic Income Grant in South Africa". The African National Congress . . . recommended that "a comprehensive social security net provides a targeted and impeccable approach in eradicating poverty and unemployment" . . . We are committed to a universal and comprehensive coverage but we are also mindful of the resource constraints . . . [W]e should . . . target the most vulnerable groups in our society.'

The Deputy Minister went on to describe the benefits of increasing the eligibility age for the child support grant and targeting caregivers of children in poverty. In other words a tinkering with the current system is what the Department is committed to for the foreseeable future. The Deputy Minister stressed that State interventions should focus on education, job training and skills to facilitate job search and job mobility. The emphasis is primarily on job creation whilst providing some assistance to those who cannot enter the labour market.[45] Nothing has changed. The free market must eradicate poverty. But will it?

Lucy Williams[46] rightly and roundly rejects reliance in the cases and in the debates about reform on wage work and on primary family responsibility for the support of children and the poor. She does not reject the importance of market restructuring and increased access to jobs; her concern though is for the roughly 40% unemployed South Africans who have no prospect of seeing employment opportunities, and for their dependent children:[47]

> '[B]y failing to enact inclusive social assistance programmes, while instead relying on markets, public works and the family economy as the primary modes of poverty reduction, the South African government is disabling itself from addressing profound problems of structural inequality and is operating contrary to the African ethic of collective responsibility . . . Privatising poverty solutions transfers many welfare functions to a domestic economy that cannot

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44 Above n 42, at 5 of the Deputy Minister's address.
45 Above n 42, at 6 of the address.
46 Above n 20, at 456–463.
47 Above n 20, at 463.

accommodate this responsibility and results in demonising parents who are unable within the reality of today's markets to provide for their families.'

VIII CONCLUSION

The developments in the law and in policy analysed above demonstrate a willingness on the part of the government to get its house in order but, as time elapses, large numbers of South Africans, especially vulnerable women and children, remain destitute and uncared for. There is a natural pre-occupation with assisting South African citizens and, because of judicial pronouncements and new regulations, also permanent residents. But the high incidence of unregulated migration of people seeking refuge from persecution and poverty in other African states presents the government with the stark reality that both large numbers of South Africans and hundreds of thousands of illegal immigrants are competing for scarce resources in circumstances of extreme poverty. Xenophobic attacks in these circumstances are likely to recur. Crime levels are driving the country's human capital to overseas markets. It seems not to be realised that, although substantial increases in policing are desirable and doubtless necessary, they will not be enough to address rampant destructive crime. Social upliftment is surely the key to alleviating poverty and reducing crime.

This paper presses for a reassessment by government of the BIG as a critical addition to the complement of social security measures needed in South Africa. Set at a level of R150 per month, say, and indexed annually for inflation, the BIG would be a crucial element in driving down poverty, in giving everyone at least some income with which to start seeking to uplift themselves. It would certainly help the destitute. There is ample academic writing and evidence in other jurisdictions of the potential for upliftment of non-targeted grants. At low levels they do not produce dependency or a dole mentality; they avoid the poverty trap associated with means-tested grants; they act as a stimulus for development through basic education and training. The BIG for South Africa has been shown to be affordable if the increase in tax revenue that must accompany the introduction of it is taken into account. And it surely is not beyond the wit of South Africa to develop a technologically driven system for the administration and payment of these grants. The country has a highly sophisticated banking sector and an extremely efficient Revenue Service. The relationship of the BIG to other social grants will need debate. The BIG amount could form the first R150, say, of the CSG or FCG. These should also be universal rather than targeted, and the cost also recouped via more progressive taxation that will address the growing inequality in the society.

A comprehensive social protection system entails one with several elements. South Africa lacks one critical one and must improve the reach of those it does have. Time is of the essence. When food riots and social upheaval are upon us it will be too late. Our nascent democracy is at risk. We cannot contemplate

losing it, or attempting to preserve law and order through force. We do not want to travel any road that may lead in the direction of Zimbabwe.

South Pacific

‘IS IT WELL WITH THE CHILD?’: CUSTODY OF CHILDREN IN SMALL SOUTH PACIFIC STATES

By Dr Jennifer Corrin[*]

Résumé

La tension entre le droit étatique et le droit coutumier dans les États des Îles du Pacifique s’exprime clairement dans le domaine du droit familial, particulièrement dans le contentieux du droit de garde. Dans bien des cas, ces conflits sont réglés au sein même de la communauté, sans référence au droit formel. Par contre, lorsqu’une partie saisit un tribunal officiel, la législation et le droit commun s’appliquent. Dans ce contexte, les valeurs qui sous-tendent le droit étatique et le droit coutumier sont souvent irréconciliables. Après un exposé sommaire sur le droit et sur les juridictions compétentes en matière de droit de garde, tant étatique que coutumier, ce texte fera état de certaines décisions jurisprudentielles pour illustrer les conflits qui peuvent exister entre les deux systèmes. L’exposé se concentre sur la situation des îles Fiji, Samoa, Solomon, Tonga et Vanuatu, mais il fait également référence à la situation qui prévaut dans quelques plus petites îles de la région, comme Kiribati, Nauru et Tuvalu.[1]

I INTRODUCTION

Like many other former colonies and dependencies, South Pacific Island States have inherited legal regimes bedevilled by legal pluralism.[2] The tension between state law and customary law is vividly highlighted in the area of family law, particularly in disputes over custody of children. In this context, the values that underlie the two systems are often at odds. State law emphasises individual rights and responsibilities and regards the welfare of the child as the paramount consideration. In customary society, family networks extend well beyond the nuclear family. Marriage and arrangements relating to children are part of broader arrangements involving the extended family, kin groups and

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1 ‘Is it well with the child?’: II Kings 4:26.

2 See further P Sack and EJ Minchin (eds) *Legal Pluralism* (Law Department, Research School of Social Sciences, Australian National University, 1986).

wider alliances. Whilst the wishes of individuals and the welfare of children are relevant factors, the harmony of the community as a whole takes precedence.

On the breakdown of a marriage or domestic relationship, or the death or illness of one or both parents, disputes may arise as to the future care and living arrangements for their children.[3] In many instances these matters are decided within the community, without any reference to the formal law. However, where a parent, relative or other interested party makes any application to a formal court, legislation and the common law come into play. By and large, South Pacific countries have been slow to legislate in the family arena. In some countries, this may be partly due to the view that family matters are best dealt with under customary law. However, it is also the result of the same forces that inhibit reform in other areas of law, including lack of resources and lack of political will.[4] The only comprehensive, modern Act governing family law in the region is Fiji's Family Law Act 2003.[5] In Tonga the Guardianship Act was enacted in 2004 to regulate guardianship, access, custody and customary adoption. However, this is not an innovative piece of legislation. Rather it is based on the law introduced from the United Kingdom during the colonial era.[6] The result of this legislative inaction is that in countries other than Fiji and, to some extent Tonga, many areas of family law are governed by outdated British statutes. These statutes were part of the law introduced during the colonial era and were 'saved' at the time of independence.[7] The application of these transplanted laws often produces anomalous results, some of which are discussed in this chapter. Similarly, regional courts have generally failed to develop a regional jurisprudence on family law, despite the fact that in some regional countries, such as Kiribati,[8] Nauru,[9] Solomon Islands,[10] and Tuvalu,[11] customary law is superior to the common law.[12]

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3 Although financial arrangements for such children are also important, these are outside the scope of this chapter.

4 See further, J Corrin and D Paterson *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd edn, 2007) at 8.

5 Solomon Islands has passed the Adoption Act 2004, which was brought into force by Notice of Commencement in Gazette Edition No 46 Thursday 15 May 2008, 145/2008, but this does not govern guardianship or custody.

6 Although Tonga was never a colony, United Kingdom legislation applied, and governed family law, there until 2003, when the Civil Law Amendment Act 2003 (Tonga) put an end to the application of United Kingdom Acts of general application.

7 See further J Corrin and D Paterson *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd edn, 2007) at 13–26.

8 Laws of Kiribati Act 1989, Sch 1, para 4.

9 Custom and Adopted Laws Act 1971 (Nauru), s 3. This is only the case where all parties are Nauruans.

10 *K v K* [1985/6] SILR 49 at 52.

11 Laws of Tuvalu Act 1987, Sch 1, para 4.

12 In all countries of the region customary law ranks below locally made legislation, but in Solomon Islands it is superior to legislation introduced from the United Kingdom: Constitution of Solomon Islands 1978, Sch 3; *K v K* [1985/6] SILR 49 at 52–53.

This chapter looks at the law, both formal and customary, governing custody arrangements in the South Pacific. It concentrates mostly on five of the larger island states of the region: Fiji, Samoa, Solomon Islands, Tonga and Vanuatu. However, it also makes reference to the laws in other small islands states of the region, such as Kiribati, Nauru and Tuvalu, where these are of particular interest. Papua New Guinea is not discussed in detail, although there is some reference to the valuable work of Jessop and Luluaki.[13] After a summary of the laws that govern custody disputes, a selection of cases is used to demonstrate the conflicts that can arise between state and customary law.

(a) Terminology

There are four principal terms that are used within the region's formal legal sector to describe children's living arrangements: guardianship, custody, care and control and access.[14] The term 'guardianship' is used to describe broad parental responsibility. There is not always a clear distinction between 'guardianship' and 'custody', but the latter is less broad and normally involves the right to make decisions on matters such as education, religious upbringing and medical treatment and the right to day–to-day care and control of children. In the Vanuatu case of *Molu v Molu*,[15] the term 'custody' was defined as meaning 'the parental rights and duties as related to the person of the child (including the place and manner in which the child's time spent)'. In the same case, 'care and control' was defined as 'the right to the child's physical possession'.[16] The term 'access' is generally used to describe the arrangements for a non-custodial parent to see a child. Access is a right of the child to maintain contact with a parent, rather than a right of the parent. In Fiji these terms have been replaced by more modern terminology, taken from the Family Law Act of Australia, on which it is based,[17] that is, 'parenting', 'residence' and 'contact'.[18]

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13 O Jessep and J Luluaki *Principles of Family Law in Papua New Guinea* (Waigani: University of Papua New Guinea Press, 1985).

14 This is the terminology used in Samoa: Infants Ordinance Act 1961, s 4(2); Tonga: Guardianship Act 2004 and in other countries of the region relying on introduced legislation and/or common law.

15 (Unreported, Supreme Court, Vanuatu, Lunabek ACJ, 15 May 1998), accessible via www.paclii.org at [1998] VUSC 15.

16 (Unreported, Supreme Court, Vanuatu, Lunabek ACJ, 15 May 1998), accessible via www.paclii.org at [1998] VUSC 15, 3.

17 The Act was drafted by a Deputy Chief Justice of the Australian Family Court.

18 Family Law Act 2003 (Fiji), s 63. For an example of the use of this terminology outside the region see, eg, Family Law Act 1975 (Cth), s 64B.

II STATE LAW

(a) Custody orders

On the breakdown of marriage, legislation in most countries gives natural parents equal rights to legal guardianship of their children.[19] In Tonga, however, the position is ambiguous as the Guardianship Act provides that 'the father or mother of a child shall be a guardian of the child'.[20] The use of the word 'or' suggests that until the court has made an order neither party is the legal guardian. However, it seems likely that this is a drafting error and that, in practice, parents married to each other at the time of birth would be regarded as joint guardians, unless the court ordered otherwise. If the child's parents are not married to each other, the mother is the sole guardian.[21] In the event of the death of one parent, custody normally rests with the surviving parent.[22] Either party may appoint a testamentary guardian to act jointly with the surviving parent after the testator's death, provided the survivor does not object.[23]

Where agreement cannot be reached as to arrangements for a child, the court will have to decide on custody and access. The courts are usually empowered to make such order as they think fit and this includes the power to make a joint custody order,[24] under which the children spend some (often equal) time residing with each parent. This type of order may be appropriate when the parties are on good terms or are able to put aside their differences for the sake of the children. However, it is more common for the courts in the region to make a sole custody order, with access to the non-custodial parent.

Regional courts also have jurisdiction to make interim custody orders, pending the final outcome of the proceedings relating to the marriage.[25] If the interim order has been in place for some time, the court may be reluctant to change the children's living arrangements,[26] but, in theory, the interim arrangements may

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19 See, eg, Family Law Act 2003 (Fiji), s 46(1); Infants Ordinance 1961 (Samoa), s 3; Solomon Islands: Guardianship of Infants Act 1925 (UK), s 1; Vanuatu: Guardianship of Minors Act 1971 (UK), s 1. At common law the father had the exclusive right to custody: *Re Agar-Ellis, Agar-Ellis v Lascelles* (1883) 24 Ch D 317. For a review of the nineteenth-century case-law see *J v C* [1970] AC 668.

20 Guardianship Act 2004 (Tonga), s 4(1).

21 Guardianship Act 2004 (Tonga), s 4(2)(a) and (b).

22 See, eg, Solomon Islands: Guardianship of Infants Act 1925 (UK), s 4; *K v K* [1985/6] SILR 49 at 53–54; Guardianship Act 2004 (Tonga), s 4(4).

23 See, eg, Solomon Islands: Guardianship of Minors Act 1925 (UK), s 4; Guardianship of Minors Act 1971 (Vanuatu), s 3; Guardianship Act 2004 (Tonga), s 5(1); Fiji: Family Law Act 2003 (Fiji), s 46(1).

24 See, eg, Family Law Act 2003 (Fiji), s 63(6); Guardianship Act 2003 (Tonga), s 10(2), Divorce and Matrimonial Causes Act (Samoa), s 24; Solomon Islands: Guardianship of Minors Act 1886 (UK), s 5; Vanuatu: Guardianship of Minors Act 1925 (UK), s 9(1); see for example *Michell v Michell & Togase* (Unreported, Supreme Court, Vanuatu, Lunabek, ACJ, 11 July 2001), accessible via www.paclii.org at [2001] VUSC 71.

25 See, eg, Guardianship Act 2004 (Tonga), s 10(1); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), s 24.

26 See, eg, *Elisara v Elisara* (Unreported, Supreme Court, Samoa, Sapolu CJ, 22 November 1994),

be changed by the main order. Custody orders are never final and may be varied whenever there is a material change in the circumstances of the parents or children.

In Fiji, the Family Law Act 2003 encourages parents to agree on custody rather than applying to the court.[27] They are directed to record their agreement in the form of a 'parenting plan'.[28] Parenting plans may be registered at the court.[29] The court may vary or set aside the plans to reflect the best interests of the child.[30] If the parents cannot reach agreement, the court may make a parenting order in favour of a parent[31] or third person regarding each of these matters,[32] dealing with any aspect of parental responsibility for a child.[33] Where a court is considering whether or not to make one or more orders with respect to a child, it must not make the order or any of the orders unless it considers doing so would be better for the child than making no order at all.[34] The Act provides for counselling for the child as a result of orders made with respect to the parenting plan.[35]

(b) Jurisdiction of State courts

All superior regional courts are empowered to make custody orders ancillary to their jurisdiction in proceedings for separation, termination of the marriage and maintenance.[36] In Solomon Islands, jurisdiction depends on which legislation the principal relief is sought under. Where an application is brought for divorce, nullity or judicial separation under the Islanders' Divorce Act, the court has jurisdiction to make orders of custody of any children of the parties to the proceedings.[37] Section 21 empowers the court to 'make such order as appears just and necessary with regard to the custody . . . of children, the marriage of whose parents is the subject of proceedings'. The jurisdiction extends only to the natural children of both parties to the matrimonial proceedings.[38] Parties applying for relief under the Matrimonial Causes Act 1950 (UK) may apply for a custody order under that Act.[39] The

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accessible via www.paclii.org at [1994] WSSC 14. See further I Jalal *Law for Pacific Women – A Legal Rights Handbook* (Fiji, Fiji Women's Rights Movement, 1998) at 302–304.

27 Family Law Act 2003, s 56(a).

28 Family Law Act 2003, s 57(1).

29 Family Law Act 2003, s 59(4). Parenting plans may only be registered if the court considers this appropriate, having regard to the best interests of the child.

30 Family Law Act 2003, s 60(2); except to the extent that they deal with maintenance: Family Law Act 2003, ss 60, 57(4) and s 62(1)(c).

31 Family Law Act 2003, s 63(2).

32 Family Law Act 2003, s 66(1).

33 Family Law Act 2003, s 57(2).

34 Family Law Act 2003, s 66(3).

35 Family Law Act 2003, s 51. Division 3 outlines sections concerning counselling.

36 See, Divorce Act Cap 29 (Tonga), s 19; Matrimonial Causes Act Cap 192 (Vanuatu), s 15(1); Divorce and Matrimonial Causes Ordinance 1961 (Samoa), ss 4 and 24.

37 Section 21.

38 Islanders' Divorce Act Cap 170 (SI), s 21. *T v T and A* [1982] SILR 50 at 52.

39 Section 26.

jurisdiction is extended by the Matrimonial Proceedings (Children) Act 1958 (UK) from children of both parties to children of one party who are accepted as children of the family.[40]

The position where there are no matrimonial proceedings afoot is less clear. In Fiji doubts were removed by the High Court in *Lakhan v The Director of Social Welfare, the Attorney General and Others,*[41] where it was held that a court always has jurisdiction to make a decision regarding children. The position is now governed by the Family Law Act, which transferred custody jurisdiction to the Family Division of the High Court,[42] and makes it clear that a custody application is not required to be ancillary to an application for other, principal relief.

This is also the case in the Supreme Courts of Tonga,[43] Samoa[44] and Vanuatu.[45] In Solomon Islands, where there is no specific jurisdiction to make a custody order as principal relief, this would appear to be a consequence of the High Court's unlimited jurisdiction bestowed by the Constitution.[46] Superior courts in the region also have inherent jurisdiction, inherited from the Crown, to make wardship orders act as parens patriae (guardian of all children).[47]

Most inferior courts in the region have jurisdiction to make a custody order in proceedings for separation or maintenance.[48] For example, in Solomon Islands, Magistrates Courts may have jurisdiction in custody matters based on a matrimonial complaint under the Affiliation Separation and Maintenance Act 1971.[49] However, the Magistrates' Courts of Tonga do not appear to have such power.[50] In some countries application may be made to inferior courts for a custody order as the principal relief. For example, in Samoa either parent can

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40 Section 1(1). See *Mahlon v Mahlon* [1984] SILR 86 at 89.

41 (Unreported, High Court, Fiji, Fatiaki J, 22 March 1994), accessible via www.paclii.org at [1993] FJHC 26. See also *Nai v Cava* (Unreported, High Court, Fiji, Phillips J, 6 February 2008), accessible via www.paclii.org at [2008] FJHC 274.

42 Family law Act 2003, s 17.

43 Guardianship Act 2003, s 3(1).

44 The Infants Ordinance 1961 (Samoa), s 4.

45 Matrimonial Causes Act Cap 192 (Vanuatu), s 15(1).

46 Constitution of Solomon Islands 1978 (UK), s 77; Constitution of Vanuatu 1978 (UK), s 77.

47 See, eg, *Nai v Cava* (Unreported, High Court, Fiji, Phillips J, 6 February 2008), accessible via www.paclii.org at [2008] FJHC 274; *Mermer v Mermer* (Unreported, Supreme Court, Vanuatu, Thorp ACJ, 19 August 1996), accessible via www.paclii.org at [1996] VUSC 13; Matrimonial Case 010 of 1996 (19 August 1996); *In re Tevita* (Unreported, Supreme Court of Tonga, 9 June 2000), accessible via www.paclii.org at [2000] TOSC 22. See also *Sook Choi v Board of Trustees of Peace Chapel Christian Fellowship* (Unreported, Court of Appeal, Samoa, Baragwanath, Salmon and Paterson JJA, 14 September 2007), accessible via www.paclii.org at [2007] WSCA 6 (dealing with parens patriae in the context of a charitable trust).

48 See, eg, Vanuatu: Magistrates' Court, Matrimonial Causes Act Cap 192 (Vanuatu), s 15; Tuvalu: Magistrates' Court, Matrimonial Proceedings Act Cap 21 (Tuvalu), s 6.

49 Section 13(1)(b). As amended by the Affiliation Separation and Maintenance (Amendment) Act 1992, Act 13 of 92 (Solomon Islands).

50 Jurisdiction to make an order for maintenance against a husband, but not a wife, is contained in the Magistrates' Court Act Cap 11, s 8, but this does not carry with it a power to make a custody order. Nor does this appear to be within the civil jurisdiction conferred by Part V.

apply to the District Court for an order regarding the custody, upbringing or right of access to a child.[51] Similarly, in Fiji, the Family Division of the Magistrate's Court has jurisdiction to deal with custody matters.[52] In some other countries of the region, the position is not so clear. In Solomon Islands, such jurisdiction appears to exist under s 19(c) of the Magistrates Court Act,[53] which provides the court with power 'to appoint guardians of infants and to make orders for the custody of infants'. This provision may be restricted to legitimate children.[54] In Vanuatu, the jurisdiction of the Magistrates Courts is even more obscure.[55] Brown describes it as a 'jurisdictional black hole'.[56] Neither the Courts Act nor the Magistrate's Courts (Civil Jurisdiction) Act specifically excludes custody matters. However, the restrictions on jurisdiction set out in the latter include 'wardship, guardianship of minors' and 'adoption'. Applying the noscitur a sociis rule, it seems likely that guardianship is intended to be read widely to include custody, and the Magistrates' Court is not permitted to exercise jurisdiction in child-related matters.[57]

In Kiribati and Tuvalu there is legislation dealing specifically with custody. The Custody of Children Ordinances[58] are in practically identical terms and they both empower all courts within the country to make such custody orders as they think fit on an application by any person.[59]

In some countries, 'customary courts' established by statute to deal with customary disputes are empowered to make custody orders. These are dealt with below.

III CUSTOMARY LAW

(a) Customary principles

The approach of customary law to child custody is very different to the notions encapsulated in State law. Although the welfare of the child may be a relevant factor under customary law, it will not be the paramount consideration. Further the assumptions underlying decisions as to what is in a child's interests may not apply in the customary system, where values and practices relating to raising a child may be very different.[60] That is not to say that the outcome of a

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51 The Infants Ordinance 1961 (Samoa), s 2.

52 Family Law Act 2003 (Fiji), s 19(1).

53 Cap 20.

54 See further, K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 160–161.

55 Ibid, at 171.

56 Ibid.

57 Ibid, at 174–175.

58 Cap 21 (Kiribati); Cap 20 (Tuvalu).

59 Cap 21 (Kiribati), s 3; Cap 20 (Tuvalu), s 3.

60 See the similar views expressed in relation to Papua New Guinea in O Jessep and J Luluaki *Principles of Family Law* (Waigani: University of Papua New Guinea Press, 1985) at 122–124.

custody dispute made in the customary arena will necessarily differ from the decision that would have been made in a State court. As noted by Daly CJ in *Sukutaona v Houanihou*,[61] 'custom rules may well be designed to protect the children from an unsatisfactory family life'. In practice, however, custody is an area where conflicts between customary and State law often do arise.

Whilst it is difficult to generalise about the applicable principles of customary law, as they differ from place to place within the region, some shared themes can be discerned. For example, given the patriarchal underpinning of customary law, the husband and his relatives are generally more likely to be entitled to custody.[62] According to *fa'a Samoa,*[63] the father's family may claim custody of the eldest son. Other children may be claimed by family members of high status and there is a customary obligation to grant such requests. In Melanesia the husband's family has a particularly strong claim if he and his group have paid bride price to the mother's line.[64] In relation to Papua New Guinea, Jessep and Luluaki state:[65]

> 'Under custom, a dispute about custody may be influenced by matters such as the age and sex and sometimes the names of the child, the behaviour of the parents, the claims of other relatives, the child's current residence and kin group affiliations, and the payment or non-payment of bride price, specific child payments and the like.'

Examples of the type of principles that apply in some parts of Melanesia can be found in the *Custom Policy of the Malvatumauri* (National Council of Chiefs) of Vanuatu, which includes the following provision relating to illegitimate children in art 14:[66]

> 'Section 8: Policy also declares that if an unwed mother wants to keep a daughter, this is appropriate because when the girl marries she will go live somewhere else. But if the child is a boy, policy demands that the father must take him because, if the mother kept him, he would not be able to acquire land at his mother's place. If he receives land at his mother's place, his father must settle this by custom before the boy can take the land.'

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61 [1982] SILR 12.

62 K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 153; K Brown 'Post-independence custody cases in Solomon Islands and Vanuatu' (1997) 21 *Journal of Pacific Studies* at 83.

63 Loosely translated this means the 'Samoan way'. For a more detailed explanation of the term see Malama Meleisea *Change and Adaptation in Western Samoa* (Macmillan Brown Centre, Christchurch, 1992) at 23–24.

64 See further *Re B* [1983] SILR 33, which sets out the basic position in Melanesian custom. Even on the death of the husband the children were to remain with his family: *Sasango v Beliga* [1987] SILR 91.

65 O Jessep and J Luluaki *Principles of Family Law in Papua New Guinea* (Waigani: University of Papua New Guinea Press, 1985) at 124.

66 Reproduced in L Lindstrom and G White (eds) *Culture, Kastom, Tradition* (Suva: IPS, USP, 1994).

In addition to the rules of customary law on the issue of custody itself, custom may be relevant to a decision on where a child's interests lie in a number of other ways. For instance, it may be relevant that members of the extended family will be available to assist with the care of the child. Inheritance rights, particularly to customary land, may also be relevant.[67] An obvious example is the need to preserve a child's land rights, which will obviously be in their interests.[68]

(b) Forums administering customary law

Family disputes that cannot be resolved by the parties are often dealt with by customary leaders. The forum and process differs considerably between different parts of the region. An example of such a forum is the village courts in Vanuatu[69] and the village chiefs in some parts of Solomon Islands.[70] This method of dispute resolution may have no statutory basis; its authority rests on respect for customary authority. In Samoa, the traditional forum for dealing with disputes is the village *fono* (council). The village *fono's* 'power and authority' to deal with 'the affairs of its village . . . in accordance with the custom and usage of that village' has been 'validated and empowered' by statute.[71]

In addition to customary forums, some countries of the region have special courts, established by statute to deal with some customary matters. These courts stand outside the common law court hierarchy, although they may be linked to it by the appeal or review process. They are commonly referred to as 'customary courts', but they are only customary in the sense that they purport to apply customary law. In some cases these special courts have been given jurisdiction to deal with custody disputes. For example, the Island Courts in Tuvalu are authorised to make child custody orders.[72] In Solomon Islands there is some confusion about whether local courts have jurisdiction in custody matters.[73] Jurisdiction is set out in their warrants, which are expressed in wide terms to include certain criminal cases, customary land cases, and 'any other civil case', subject only to a monetary limit (SBD1,000), and geographical

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67 See further *Tepulolo v Pou* (Unreported, High Court, Tuvalu, Ward CJ, 24 January 2005), accessible via www.paclii.org at [2005] TVHC 1.

68 See *Tongole v Tongole* (Unreported, National Court of PNG, Narakobi J, 9 September 1980), accessible via www.paclii.org at [1980] PGNC 28, where the significance of land rights was discussed in relation to custody and access.

69 K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 171.

70 G White and L Lindstrom *Chiefs Today: Traditional Pacific Leadership and the Postcolonial State* (Stanford: Stanford University Press, 1997) at 231.

71 Village Fono Act 1990, s 3(3).

72 Island Courts Act Cap 3 (Tuvalu) and Matrimonial Proceedings Act Cap 21 (Tuvalu), s 5.

73 K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 159–160.

conditions set out in the Local Courts Act.[74] There is nothing in the wording or in the Act[75] establishing the courts to suggest that custody is excluded from this jurisdiction. This view is supported by Jalal, who notes complaints by rural women about local courts interfering in custody matters and that the Public Solicitor's Office advises women not to seek satisfaction in the local tribunals where custom would favour men.[76]

The jurisdiction of the Vanuatu Island Courts with respect to custody is also obscure.[77] In a badly drafted section, the Island Courts Act provides that:[78]

> 'Every island court shall have full jurisdiction to the extent set forth in its warrant and subject to the provisions of this Act, over causes and matters in which all the parties are resident or being within the territorial jurisdiction of the court.'

Section 8, which deals more specifically with civil jurisdiction, goes on to say:

> 'The civil jurisdiction of an island court shall extend, subject to the provisions of this Act, to the hearing, trial and determination of all civil matters in which the defendant is ordinarily resident within the territorial jurisdiction of the court or within which the cause of action shall have arisen provided that civil proceedings relating to land shall be taken in the island court within the territorial jurisdiction of which the land is situated.'

The Island Court warrants do not specifically mention custody jurisdiction. Therefore, the existence of jurisdiction depends on whether ss 6 and/or 8 are conferring broad civil jurisdiction, or whether they are imposing geographical conditions on the jurisdiction set out in a court's warrant. Brown suggests that the Act does not confer custody jurisdiction, referring to this as a 'jurisdictional black hole'.[79]

In Fiji there are no 'customary' courts established by statute despite the fact that the 1990 Constitution provided for the establishment of Fijian Courts.[80] Women in Fiji resisted the introduction of such courts, on the grounds that women's experience of traditional courts in other Pacific countries was that

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74 Local Courts Act Cap 19, s 6; Warrants Establishing Local Courts, 1 July 1986.

75 Local Courts Act Cap 19.

76 I Jalal *Law for Pacific Women – A Legal Rights Handbook* (Fiji: Fiji Women's Rights Movement, 1998) at 315.

77 K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 171.

78 Island Courts Act Cap 167 (Vanuatu), s 6.

79 K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 172–173.

80 Constitution of Fiji 1990, s 122. Tikina and Provincial Courts were established by the Fijian Affairs Act 120, ss 16 and 19; Fijian Affairs (Courts) Regulations 1948 (revoked 1967). These courts had not operated since 1967: V Nadakuitavuki 'Fijian magistrates – an historical perspective' in G Powles and M Pulea (eds) *Pacific Courts and Legal Systems (*Suva: USP, 1988) at 78–84. In any event, they did not apply customary law.

they had worked against them.[81] Although the Beattie Report[82] recommended their establishment, this did not transpire. The 1997 Constitution[83] suggested instead a new system of voluntary dispute resolution but, again, this has not transpired.[84]

IV THE WELFARE PRINCIPLE AND ITS RELATIONSHIP WITH CUSTOMARY PRINCIPLES

The guiding principle in custody and access cases[85] is the welfare principle, which applies throughout the common law world. This requires courts to act in the best interests of the child and to treat their welfare as of paramount importance. In Fiji, Samoa and Tonga, the principle is enshrined in local legislation.[86] In Solomon Islands[87] and Vanuatu[88] the welfare principle applies as part of the introduced law.[89] Whether contained in local or introduced legislation, the concept is a legal transplant.[90] This factor is significant in cases where there is conflict between the legislative principle and the norms of customary law, as the foreign origins of the former could be said to undermine its legitimacy.[91] In Solomon Islands,[92] and arguably Vanuatu,[93] the introduced

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81 Submission by the Fiji Women's Rights Movement and the Crisis Centre: *Report of the Commission of Inquiry on the Courts* (Fiji, 1984) at 172. Fijian Courts did exist up until 1967 and purported to exercise jurisdiction based on custom and tradition. See further, R Knox-Mawer 'Native Courts and Customs in Fiji' (1961) 10 *International and Comparative Law Quarterly* at 642–647.

82 D Beattie *Report of the Commission of Inquiry on the Courts* (Suva, Government of Fiji, 1984).

83 Section 186(1).

84 See further, J Corrin Care 'The Status of Customary Law in Fiji after the Constitutional Amendment Act 1997' (2000) 7 *Journal of South Pacific Law* (online publication).

85 The application of the principle is not limited to custody cases, but applies to other disputes where the child's welfare is at issue, eg, wardship proceedings.

86 Family Law Act 2003 (Fiji), s 46(1); Infants Ordinance 1961 (Samoa), s 3; Guardianship Act 2004 (Tonga), s 15(1). See also Custody of Children Ordinance Cap 21 (Kiribati), s 3(1) and (3); Custody of Children Ordinance Cap 20 (Tuvalu), s 3(1) and (3).

87 The Guardianship of Infants Act 1925 (UK), s 1.

88 The Guardianship of Minors Act 1971 (UK), s 1.

89 The 'welfare principle', is enshrined in s 1 of the Guardianship of Infants Act 1925 (UK), which has been held to be in force in Solomon Islands and many other countries of the region. Compare *Krishnan v Kumari* (1955) 28 Law Reports of Kenya 32, where the court held that the Guardianship of Infants Act 1925 (UK) was not an Act of general application in Kenya. For further discussion of the meaning of 'Acts of general application', see J Corrin and D Paterson *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd edn, 2007) at 30–32.

90 See further on the meaning of legal transplants, E Stein 'Uses, Misuses and Non-uses of Comparative Law' (1977) 72 NULR 198, at 202; A Watson 'Legal Transplants and Law Reform' (1976) 92 LQR 79.

91 L Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900 (*Cambridge: Cambridge University Press, 2002).

92 See further *K v T* [1985/6] SILR 49, discussed in J Corrin Care 'Colonial Legacies?' (1997) 21 *Journal of Pacific Studies* 33.

93 Constitution of Vanuatu 1980, art 95(2), discussed in K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 178.

status takes on further significance as customary law is theoretically of equal standing to statutes introduced from the United Kingdom.

In practice, in all countries of the region, in cases of conflict, the welfare principle has prevailed over customary law.[94] This is highlighted by a line of Solomon Island cases ably explored by Brown.[95] The most recent of these cases, *Sasango v Beliga*,[96] serves as a good example. After the death of her husband the plaintiff lived with his family in their home village in Malaita. About 2 years after her husband's death she was banished from the village for having an affair with another man. Her late husband's brother refused to allow her to take the children with her on the basis that Malaitan customary law dictated that, as the paternal family had paid bride price, the right to custody of the children passed to them on the death of the father. The plaintiff sought custody in the Magistrates Court, contending that the welfare of the children dictated that an order be made in her favour. In awarding custody to the mother, Lodge PM held himself bound by the High Court's decision in *Sukutaona v Houanihou*[97] to apply the welfare principle, and referred to the oft-quoted words of Daly CJ from that case:[98]

> '[I]t remains open to question to what extent Rules of custom law of the kind discussed in this case should be firmly applied to cases where the welfare of children is at stake. The courts have always regarded the interest of the children to be of paramount importance and should continue to do so. Due regard for the custom background may well be an important factor in deciding where that interest lies in the sense that custom Rules may well be designed to protect the children from an unsatisfactory family life where, for example, a husband or a wife has gone off with another partner and the custom Rule says that that parent should not have custody.'

In countries other than Fiji, the legislation expresses the welfare principle in very general terms. This generality has the advantage of flexibility, allowing scope for the accommodation of local culture and values in its application. However, the courts have not taken advantage of this opportunity. As observed by Brown, the cases in Solomon Islands and Vanuatu display 'a judicial tendency to assume that the tenets of custom and received law are antithetical . . . this ignores the actuality that the ideology of both may be directed to the same goal of promoting the child's welfare but from a different cultural point of embarkation'.[99] There are exceptions to this, as for example in the case of *Sukutaona v Houanihou,* where Daly CJ acknowledged that:[100]

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[94] This is also the case in other parts of the world, see, eg, S Ralph 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) 12(2) *Australian Journal of Family Law* 140.

[95] *Re B* [1983] SILR 223; *K v T* [1985/86] SILR 49; *Sukutaona v Houanihou* [1982] SILR 12; *Sasango v Beliga* [1987] SILR 91, discussed in K Brown 'Post-independence Custody Cases in Solomon Islands and Vanuatu' (1997) 21 *Journal of Pacific Studies* 83.

[96] [1987] SILR 91. See also *Sukutaona v Houanihou* [1982] SILR 12 and *Re B* [1983] SILR 223.

[97] [1982] SILR 12.

[98] [1982] SILR 12, at 53.

[99] K Brown, above n 93, at 167.

[100] [1982] SILR 12, at 53. See also *Re B* [1983] SILR 223 and *Molu v Molu No 2.*

> 'A thorough consideration of the custom rules will often reveal that they too are founded on the sort of common sense that all courts look for in their laws and the application of them.'

Rather than investigating and weighing the customary factors, regional courts have largely taken into account the same type of factors as courts in more developed countries. For example, in *Elisara v Elisara*[101] the Supreme Court of Samoa considered what was in the best interests of children aged 13, 9 and 7. Chief Justice Sapolu took into account that the children were currently living with the mother; the fact that the children loved their parents and were used to their company; the fact that they looked at the former matrimonial home as their home; and the employment situation of each parent. In the light of these circumstances the Chief Justice made an order that the children remain living with the mother, with reasonable, staying access to the father. Similarly, in *Choi v Choi*[102] the High Court of Solomon Islands took into account the relative maturity of the parents, whether or not they were living in their own home, and whether they were living in a family unit.

In theory, the starting point in disputed cases is that both parties have an equal right to custody; there is no presumption that the welfare of the children is best served by giving custody to the mother. However, in practice, within the region as elsewhere, it is often the mother who is providing the day-to-day care for the children and superior courts are loath to deprive the primary carer of custody without good reason.[103]

The strength of this factor is illustrated by two cases, the first from Vanuatu and the second from Solomon Islands, where the mother intended to move overseas with her new husband. In *G v L*[104] the children's mother intended to move to France. The Malvatumauri had been consulted by the parties and they endorsed the child having access to both parents, but added 'that custom dictates that the child should stay under the control of its father'. Whilst stating that he respected the Malvatumauri's view, Goldsborough ACJ stated that he was obliged by law to apply different principles. Applying the welfare principle, His Lordship concluded that custody should be awarded to the mother. Brown queries Goldsborough ACJ's assertion that he was obliged to disregard customary law, pointing out that, although it was not entirely clear what law

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[101] *Elisara v Elisara* (Unreported, Supreme Court, Samoa, Sapolu CJ, 22 November 1994), accessible via www.paclii.org at [1994] WSSC 14.

[102] (Unreported, High Court, Solomon Islands, Palmer J, 4 March 1993), accessible via www.paclii.org at [1993] SBHC 1.

[103] K Brown, above n 93, at 168.

[104] (Unreported, Supreme Court, Vanuatu, Goldsborough ACJ, 18 December 1990), accessible via www.paclii.org at [1990] VUSC 4.

was being applied, if it was the introduced law, in the form of the Guardianship of Infants Act 1925 (UK),[105] the Constitution[106] suggests that custom should have prevailed.[107]

Similarly, in *Kuper v Kuper*[108] Ward CJ had to decide whether two small boys from a dissolved marriage should move with their mother to England with her fiancé or remain with their father (a senior police officer) and their grandmother in Solomon Islands. The Chief Justice stated that in 'deciding the matter, the paramount consideration must be the welfare of the children as has been stated in many previous cases'. Both parents were regarded by the judge as capable and loving and able to provide education to the sons, thus the decision was clearly difficult for the judge. Ward CJ noted that the mother had spent more time with the children due to the nature of the father's work, in particular the younger son, and had taken keen interest in the older son's schooling. His Lordship was also of the impression that although the older child expressed no preference to go with either parent, the mother had not pressured the older child to make a decision either way, but the father had. The judge acknowledged the difficulties arising due to a drastic change in environment and stated:

> '. . . [t]hese two boys are Solomon Islanders. They belong to a community in which custom is important and where they have many relatives forming a large and supportive family.'

However, he went on to note that 'they did not appear to be brought up in a very customary way' and concluded that the younger child needed to remain with the mother. Regarding the older boy, whilst the factors weighed equally in favour of each parent, the Chief Justice believed that it was important for the boys to be kept together on the basis of the older child's affection for the younger. Accordingly, the mother was given custody of both children.

The assumption that it is in the interests of young children to remain with the mother was also a deciding factor in the recent Samoan case of *Arp v Arp.*[109] In that case, the Supreme Court's main reason for awarding custody of a 10-year-old girl to the mother was, 'the young age of this child and the fact that she spends most time with her mother'.

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[105] K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 178.

[106] Article 95(2).

[107] K Brown *Reconciling Customary Law and Received Law in Melanesia; the Post-Independence Experience in Solomon Islands and Vanuatu* (Darwin, Charles Darwin University Press, 2005) at 178.

[108] (Unreported, High Court, Solomon Islands, Ward CJ, 29 August 1991), accessible via www.paclii.org at [1991] SBHC 50. See also *Re B* [1983] SILR 223

[109] (Unreported, Supreme Court, Samoa, Sapolu CJ, 13 June 2008), accessible via www.paclii.org at [2008] WSSC 35.

This should not be taken to indicate that regional courts always award custody to the mother. In lower courts, there are instances suggesting the influence of patriarchal culture on local magistrates. For example, in *Tonga v Tonga*,[110] the Tonga Magistrates' Court awarded custody to the father, based in the United States, because the mother had had an illegitimate child after separating from her husband. Even in superior courts, the assumption that it is in the interests of young children to remain with the mother has on occasion been outweighed by other factors. However, those factors are not generally of customary origin but are, again, based on Western assumptions. For example in *Choi v Choi*[111] Palmer J was influenced by the living circumstances of the parties, with only a cursory reference to custom, stating:

> 'The respondent does not own the house she lives in. She is not the boss. She can be chased out if something happens. She is no longer a little girl attached to her mother as a single, young and unmarried daughter may be seen, accepted and considered. In a home, there are all sorts of pressures and forces, good and bad, kind and selfish, mean or loving at work and her living in her mother's house is so dependent on all these. It may be that her mother and others in the house do not find any problems in having her and her children and looking after them for her whilst she is away, also bearing in mind the culture and customs of the respondent. Despite this, the applicant's situation in my view outweighs her on this. He has a home that the child can call home and be secure and confident about it. No one else can turn her or her father out from that home apart from the normal circumstances of moving house or being asked to leave by the landlord of the employer etc.'

This was all in spite of the fact that the father was Korean and might leave the country. The emphasis on economic independence is a serious impediment for Solomon Islands women who are rarely in a financial position to run their own separate household. His Lordship also took into consideration the relative maturity of the parties (the father being 40 and the mother in her twenties) and the fact that the father had remarried, whereas the mother was single.

In cases where a young child has older siblings, the assumption favouring the mother is often coupled with another Western assumption in favour of keeping children together. This factor was given the status of a rule in the Solomon Islands case of *Taylor v Teika,*[112] where Palmer J held that where 'there is more than one child in the marriage . . . normally the court would decline to have them separated unless there are good reasons for that'. Similarly, and it weighed heavily in *Sasango v Beliga*[113] which is discussed above, where, having decided that the young children should stay with the mother, it was held that it was in the elder children's interest to stay with their siblings.

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[110] (Unreported, Magistrates Court, Vava'u, Tonga, 1991), referred to in *Tonga v Tonga* (Unreported, Supreme Court, Tonga, Webster J, 19 April 1991), accessible via www.paclii.org at [1991] TOSC 2.

[111] *Choi v Choi* (Unreported, High Court, Solomon Islands, Palmer J, 4 March 1993), accessible via www.paclii.org at [1993] SBHC 1.

[112] (Unreported, High Court, Solomon Islands, Palmer J, 17 March 2005), accessible via www.paclii.org at [2005] SBHC 174.

[113] [1987] SILR 91.

A very different approach, abandoning both these Western assumptions, was taken in *Molu v Molu No 2*[114] a case which arose in Vanuatu. That case was notable for the fact that the youngest of three children of divorced parents was taken forcibly from his mother by the paternal relatives who claimed that they had the right to all the children in custom as bride price (in this case, 80,000 vatu, one cow and one pig) had been paid to the petitioner's family. Lunabek ACJ awarded joint custody of the eldest, male child to the parents, with care and control to the mother and her relatives; and custody, care and control of the second, female child to the mother. However, despite the policy issue of the need to deter child snatching,[115] His Lordship granted custody of the youngest child to the father, with care and control to him and his family. This decision was justified, not by reference to custom, but on the basis of the welfare principle and the finding that it would not be in the child's interests to disrupt his life again.

In Tuvalu, the Custody of Children Act[116] sets up an interesting dilemma. Section 3(3) of the Act enshrines the welfare principle,[117] but subsection (5) makes s 3 subject to the Native Lands Ordinance.[118] Section 20 of the Ordinance governs illegitimate children, and provides that where the father accepts a child as his:

> '(2) Subject to anything to the contrary in the native customary law, the court may make an order regarding the paternity of the child and its future support in one of the following ways –
>
> (i) If the father being a native accepts the child as being his, such child shall after reaching the age of 2 reside with the father or his relations and shall in accordance with native customary law inherit land and property from his father in the same way as the father's legitimate children . . .'

In *Tepulolo v Pou*[119] it was argued that this led to a conflict as the terms of s 20(2) would require a court to make an order which was not necessarily in the best interests of the child. However, the High Court, exercising family appellate jurisdiction, held that the word 'may' in the first clause of s 20(2) made it clear that it was not mandatory for the court to make the order specified in s 20(2)(i). Further the power to make such an order was subject to 'anything to the contrary in the native customary law'. Accordingly, it was open to the court to make an order other than one provided in the subsection. In fact, it was obliged to do so if such order was not in the interests of the child.[120] Although not

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[114] (Unreported, Supreme Court, Vanuatu, Lunabek ACJ, 15 May 1998), accessible via www.paclii.org at [1998] VUSC 15.

[115] See further, Brown, above n 93, 179.

[116] Cap 20.

[117] *Lalaia v Lotonu* (Unreported, High Court, Tuvalu, Ward CJ, 7 April 2004), accessible via www.paclii.org at [2004] TVHC 3 confirms the application of the welfare principle.

[118] Cap 22.

[119] (Unreported, High Court, Tuvalu, Ward CJ, 24 January 2005), accessible via www.paclii.org at [2005] TVHC 1.

[120] For a more detailed discussion of *Tepulolo v Pou* (Unreported, High Court, Tuvalu, Ward CJ,

discussed in *Tepulolo v Pou,*[121] there is arguably a further conflict between the Custody of Children Act and the Laws of Tuvalu Act,[122] which provides that custom must be taken into account in determining custody disputes. However these provisions are reconcilable if a court considers customary factors in determining the best interests of the child.

In Fiji, the Family Law Act 2003 has added substance to the welfare principle by providing the court with a non-exhaustive list of factors to be taken into account when deciding what is in the best interests of the child.[123] It is not entirely clear whether consideration of these factors is mandatory as s 121(1) says, 'in determining what is in the child's best interests, the court *may* consider the matters set out in subsection(2)'(emphasis added). However, s 121(2) begins 'The court *must* consider' before listing the relevant factors (emphasis added). Read in the context of s 121(3), which provides that, when considering whether to make a consent order, 'the court may, but is not required to, have regard to all or any of the matters set out in subsection (2)' it would appear that the court is mandated to consider the factors in s 121(2). Most of these factors resemble those that the courts have considered under the common law, such as the wishes of the child,[124] the likely effect of separation from either parent,[125] and ability to provide for the child's needs.[126] However, s 121(2)(f) makes special provision for consideration of the 'need to maintain a connection with the lifestyle, culture and traditions of the child' when considering 'the child's maturity, sex and background'. This paragraph gives express authority for the welfare principle to be applied by reference to customary law and the values of customary society. To date, there do not appear to be any reported cases where this paragraph has been specifically relied upon. One initiative that might be considered is provision for a judge to request an expert's report on cultural influences affecting the child in cases where this might assist in determining the child's best interests. This is already provided for in New Zealand.[127]

It is worth noting that the welfare principle is not the only consideration to be taken into account when making a decision on custody; the fact that it is the paramount consideration indicates that other considerations may also be relevant and this has been confirmed by the courts.[128] Thus there is ample authority for taking into account other matters, such as the benefits of living in customary society with the support of the extended family and access to customary land.

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24 January 2005), accessible via www.paclii.org at [2005] TVHC 1. See further S Farran 'A Mother's Care or Land, But Not Both –*Tepulolo v Pou*' (2005) 9(2) JSPL, Case Review.

121 (Unreported, High Court, Tuvalu, Ward CJ, 24 January 2005), accessible via www.paclii.org at [2005] TVHC 1.

122 1987, s 4(g).

123 Section 121(2).

124 Section 121(2)(a).

125 Section 121(2)(c).

126 Section 121(2)(e).

127 Care of Children Act 2004 (NZ) and Children, Young Persons, and Their Families Act 1989 (NZ). See further, Ministry of Justice, *Cultural Reports in the Family Court* (July 2007).

128 *J v C* [1970] AC 668.

In Fiji, the new family law regime places the welfare principle third in a list of five principles that the court must take into account when exercising jurisdiction under the Family Law Act. These are:[129]

> '(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while the family is responsible for the care and education of dependent children;
> (c) the need to protect the rights of children and to promote their welfare;
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage;
> (e) the Convention on the Rights of the Child (1989) and the Convention on the Elimination of all Forms of Discrimination against Women (1979).'

These principles must presumably be balanced where necessary in the decision-making process. Part VI of the Family Law Act makes more explicit provision about the principles to be applied in cases relating to children and custody. The objects of Part VI are to ensure that children receive proper parenting to help them achieve their potential;[130] and that parents fulfil their responsibilities concerning the care, welfare and development of their children.[131] These objects are fleshed out by a statement of underlying principles. Except when it would be contrary to a child's best interests, these principles dictate that:[132]

> '(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
> (d) parents should agree about the future parenting of their children.'

More specifically, the Act states that: 'In deciding whether to make a parenting order . . . a court must regard the best interests of the child as the paramount consideration.'[133] This subsection is ambiguous, as it could be construed as limiting the paramountcy of the child's welfare to the decision as to whether an order should be made, as opposed to a decision on the terms of the order. However, when read with the statement of principles underlying Part VI,[134] referred to above, which apply subject to the best interests of the child, the broader interpretation is to be preferred. It is interesting to note that in spite of

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[129] Family Law Act 2003, s 26.
[130] Family Law Act 2003, s 41.
[131] Family Law Act 2003, s 41.
[132] Family Law Act 2003, s 41(2).
[133] Family Law Act 2003, s 66(1)(4).
[134] Family Law Act 2003, s 41(2).

the detailed principles set out in the Act, in *Hardeo v Lata*[135] the Fiji High Court felt it necessary to refer to the principles set out in Joske's *Family Law*,[136] including the following extract:[137]

> 'Where the mother of a girl of tender years openly lives in adultery and has no immediate prospects of marriage, while the father is well able to look after the child and was not the party responsible for the break up of the marriage, he has been granted custody. The mother has been given custody of a young boy where she intends, as soon as she is free, to marry the man with whom she is living, but it may be made a condition of giving her custody that she does not live in the same house as her paramour prior to their marriage.'

In other countries of the region, where there are no legislative guidelines to restrict the generality of the welfare principle the courts have sometimes specified the factors that should be taken into account. For example, in *Michell v Michell & Togase*[138] Lunabek CJ set out the following list of factors for the Vanuatu courts to consider when determining custody disputes:

> '(i) Which parent will best look after the child or children?
> (ii) Which parent will best be able to make the child happy in a difficult situation?
> (iii) Which parent will cope best with running a single parent family?
> (iv) Which parent will provide access without conflict?'

In addition, His Lordship said that the Court should consider:[139]

> '(i) the age and sex of the children,
> (ii) the children's feelings and wishes,
> (iii) the financial means of the parties,
> (iv) the conduct and behaviour of the parties, and
> (v) the hostility of the parties.'

The welfare principle is endorsed by international law. The United Nations Convention on the Rights of the Child,[140] to which all countries under consideration are parties, provides that in all actions concerning children, 'the

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135 (Unreported, High Court, Fiji, Pathik J, 4 November 2005), accessible via ww.paclii.org at [2005] FJHC 41.

136 PE Joske *Family Law* (Sydney: Law Book Company, 1976) at 66.

137 Ibid, at 73.

138 (Unreported, Supreme Court, Vanuatu, Lunabek CJ, 11 July 2001), accessible via www.paclii.org at [2001] VUSC 71.

139 (Unreported, Supreme Court, Vanuatu, Lunabek CJ, 11 July 2001), accessible via www.paclii.org at [2001] VUSC 71.

140 Adopted by the General Assembly of the United Nations on 20 November 1989. The Convention came into force 2 September 1990. Solomon Islands acceded 10 April 1995; Tonga acceded 6 November 1995; Vanuatu ratified 7 July 1993; Kiribati acceded 11 December 1995; Fiji ratified 13 August 1993; Nauru acceded 27 July 1994; Niue acceded 20 December 1995; Tuvalu acceded 22 September 1995; Samoa ratified 29 November 1994; New Zealand (Cook Islands) acceded 6 April 1993.

best interests of the child shall be a primary consideration'.[141] However, this has not been incorporated into domestic law, except in Fiji[142] and Vanuatu.[143]

The attitude of regional courts to conventions that have not been legislatively endorsed was summarised by Ward CJ in *Tepulolo v Pou:*[144]

> 'The act of accession to an international treaty is carried out by the Executive and, unless and until Parliament passes laws to bring these treaty obligations into effect the mere act of accession does not change the laws of Tuvalu. To find otherwise would be to give the Executive a power to make laws that it does not have. However, I accept that the aims of an international convention may be relevant in the interpretation of existing laws of Tuvalu and, in that manner, the Court may be able to alter the way in which the existing laws are applied.'

V CONCLUSION

The tension between State law and customary law is acutely highlighted in custody disputes, where the values underlying the two systems often conflict. As mentioned above, the welfare principle is a very general one. Consequently it is capable of being interpreted in the context of the society in which it is operating. However, the case-law discussed above suggests that courts have not taken advantage of the generality of the welfare principle to apply it in a way that accommodates local culture and values. Rather, regional courts take into account the same type of factors as courts in more developed countries. For example, they are being driven by standards of living and education rather than kinship and customary land entitlements.

In customary forums and 'customary' courts established by legislation, such as the local courts in Solomon Islands and Island Courts in Vanuatu, custody disputes are more likely to be decided in accordance with customary law. In State courts, however, the welfare principle will prevail. That does not mean that customary law is necessarily ignored in State courts; it may be taken into account in deciding where the welfare of the child lies. However, the investigation of this question has been undertaken in a limited way, with, at best, a cursory exploration of the benefits of being part of customary society.

The Fijian Family Law Act 2003 contrasts starkly with the provisions of the other more outdated custody regimes in the region. The emphasis in that Act is not only the welfare principle, but also on co-operation between parents, offering the opportunity for them to adopt their own solutions through parenting plans. It also makes provision for counselling, which is not available

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141 Article 3.1.

142 Family Law Act 2003 (Fiji), s 26.

143 Ratification Act 1992 (Vanuatu).

144 (Unreported, High Court, Tuvalu, Ward CJ, 24 January 2005), accessible via www.paclii.org at [2005] TVHC 1. In relation to Tonga see *Y v Y* (Unreported, High Court, Webster CJ, 27 June 2005), accessible via ww.paclii.org at [2005] TOSC 24 where it was held that the Convention did not apply domestically.

in other jurisdictions, at least in a formal way. In theory, the Fiji Act allows space for the implications of custom to be explored. However, there is no real evidence that the Act has led to a full scale change of approach. In fact, the case of *Hardeo v Lata*[145] seems to suggest the contrary. Provision for a judge to request an expert's report on cultural influences affecting a child in relevant cases is one possibility that might be considered in Fiji and the rest of the region. More radically, some form of alternative dispute resolution might provide a far better option for resolving custody disputes than either the formal court process or a customary forum. Obviously, this would have to be approached cautiously, due to the power imbalance that often results from a mother's lack of financial security and status in society. In any event, reform of family law is overdue in most countries of the region. However, if this consists solely of amendments based on Western models and the assumptions that underlie them conflicts will continue to occur.

[145] (Unreported, High Court, Fiji, Pathik J, 4 November 2005), accessible via ww.paclii.org at [2005] FJHC 41.

United States of America

CHILD PROTECTION IN A PLURALIST SOCIETY: CHALLENGES AND OPPORTUNITIES

Barbara Atwood[*]

Résumé

Ce chapitre analyse quelques récents développements dans le domaine de la protection de la jeunesse aux Etats-Unis qui mettent en lumière les défis auxquels font face les systèmes de protection des enfants dans une société multiculturelle et pluraliste. Le chapitre commence par un survol des principes constitutionnels applicables et des obligations légales imposées par le pouvoir fédéral aux États comme condition d'obtention des subsides fédéraux. Il décrit brièvement la loi de 2008 intitulée *Fostering Connections to Success and Increasing Adoptions Act* of 2008, qui devrait améliorer les systèmes étatiques et autochtones de protection de la jeunesse, notamment en facilitant l'exercice de la responsabilité parentale par des membres de la famille et en assurant le financement direct de programmes de placement d'enfants en milieu autochtone. En même temps, cette loi continue à donner la priorité à l'adoption en tant que plan de vie permanent pour des enfants placés au sein de familles d'accueil, même si cette politique ne sert pas toujours le meilleur intérêt des enfants.

La deuxième partie s'intéresse au cas très médiatisé du retrait, en 2008, de plusieurs centaines d'enfants qui vivaient au sein de la communauté fondamentaliste «Yearning for Zion Ranch» au Texas. Après un rappel de la chronologie des faits, cette deuxième partie fait état des décisions des tribunaux d'appel texans qui ont ordonné le retour des enfants et elle s'interroge sur les défis pratiques que représente, pour un système de protection de la jeunesse, des procédures visant de larges groupes d'enfants. Même s'il est apparu que plusieurs adolescentes étaient victimes d'abus sexuels, le retrait massif des garçons et des filles étaient plutôt motivé par la crainte d'un préjudice futur occasionné par le «système de croyance imposée» qui régnait au sein du Ranch. En tant que tel, le retrait collectif des enfants était une opération hasardeuse et toute cette histoire a incité les agences de protection de l'enfance à la prudence. La présente analyse discute des effets traumatisants d'un tel retrait sur les enfants, des difficultés rencontrées par les avocats d'enfants, ainsi que de l'importance de fonder toute intervention étatique de protection sur la démonstration d'un danger pour un enfant bien précis.

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Ce texte conclut par un exposé sommaire des dispositions-clé du *Indian Child Welfare Act* et l'analyse d'une récente affaire judiciaire dans laquelle la position défendue par l'agence publique de protection et celle défendue par la communauté autochtone de l'enfant reflètent l'existence de normes culturelles contradictoires. Cet arrêt, *In re AA* (Cal App 2008), confirme la décision d'un premier juge qui avait ordonné la déchéance des droits parentaux et approuvé le projet d'adoption de deux enfants indiens-américains. En mettant l'emphase sur le besoin de stabilité psychologique des enfants, la cour d'appel a rejeté l'argument de la Tribu qui avançait que l'intérêt culturel des enfants dicte que ceux-ci soient confiés à des membres de la famille. Cette affaire nous rappelle qu'une approche plus souple en matière de protection des enfants indiens pourrait aider à apaiser les conflits, particulièrement en permettant des contacts post-adoption entre les enfants indiens adoptés et leur communauté d'origine.

I INTRODUCTION

The increasing ethnic and cultural diversity of the American population poses significant challenges for the child welfare system at both the federal and state levels.[1] The exercise of judgment required of state child protection agencies and state courts in cases of alleged abuse or neglect is rarely easy. Those judgment calls – whether to remove a child from the home, whether to maintain a child in foster care, whether to terminate parental rights – are even more difficult in a pluralist society when the decision maker is confronted with markedly different lifestyles, cultural beliefs, and religious practices. This chapter focuses on recent developments in child welfare law in the United States that highlight the law's operation within the multicultural reality of American family life.[2] Using the Texas child welfare case against the occupants of the Yearning for Zion Ranch as a vehicle, the chapter explores contemporary responses within the child welfare system to religious and cultural practices that impact upon children. Because of the unique status of indigenous children in the United States, the

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1 The US Census Bureau projects that minorities, now roughly one-third of the US population, will become the majority in 2042, with the nation projected to be 54% minority in 2040. See US Census Bureau 'An Older and More Diverse Nation by Midcentury' (14 August 2008), available at www.census.gov/Press-Release/www/releases/archives/population/012496.html. Moreover, the United States is the most religiously diverse country in the world today, with immigrants over the last several decades having expended the variation in religious life exponentially. See Diana L Eck 'Keeping the Promise of Religious Freedom' in *Freedom of Faith*, US Dept of State eJournal USA (August 2008), available at www.america.gov/publications/ejournalusa.html. Among the many immigrant groups are Buddhists from Thailand, Vietnam, Cambodia, China, and Korea; Hindus from India; Muslims from Indonesia, Bangladesh, Pakistan, the Middle East, and Nigeria; and Sikhs and Jains from India.

2 Helpful sources on this theme include J Myers 'Neglect of Children's Health: Too Many Irons in the Fire' (2006) 8 J L Fam Stud 317; W Chin 'Blue Spots, Coining, and Cupping: How Ethnic Minority Parents Can be Misreported as Child Abusers' (2005) 7 J L Soc'y 88. For a more general discussion of pluralism in American family law, see A Estin 'Embracing Tradition: Pluralism in American Family Law' (2004) 63 Md L Rev 540 (exploring the tension between cultural and religious freedom and norms embraced by a larger political community, in a range of family law contexts).

discussion includes a recent child welfare proceeding involving American Indian children in which the state's position and that of the tribe reflect competing cultural norms.

The constitutional protection for parental autonomy is rooted in the liberty guarantee of the Due Process Clause, augmented by First Amendment protections when claims of religious or expressive freedom are involved. The principle of parental autonomy is put to the test when child welfare systems encounter subcultures whose traditions and practices are inconsistent with norms of the dominant culture, particularly norms governing child-rearing, preparation for adulthood, and family structure. In those contexts, the risk of bias against minority cultures is well known.[3] In addition, the child's perspective may be eclipsed by the debate between parent and state. In cases involving American Indian children, moreover, state child welfare agencies and state courts may not fully appreciate the child's inchoate interest in tribal identity or the tribe's interest in self-determination and survival.[4] The Texas litigation and other cases discussed here involving cultural minorities illustrate the tension between the child protection responsibilities of the state as parens patriae and the American commitment to parental liberty, family privacy, religious freedom, and cultural diversity.

By most accounts, the American child welfare system is deeply flawed.[5] The foster care population in the United States is the largest in the world, in both actual numbers and per capita rates, and certain racial minorities continue to

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[3] See R Krotoszynski Jr 'If Judges were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith' (2008) 102 Nw U L Rev 1189 (discussing judicial bias toward unpopular, non-traditional religious movements in cases involving Free Exercise claims). For an argument that parental decisions within minority cultures are scrutinised to a greater degree than decisions of parents from the dominant culture, see E Chiu 'The Culture Differential in Parental Autonomy' (2008) 41 US Davis L Rev 101 (contending that certain practices among the dominant culture, such as breast implants for underage girls or the administration of growth hormones to children, are analogous to female genital cutting but are severely under-regulated). Allegations of cultural bias, of course, may be unsubstantiated. See, eg, *In the Matter of Hend I Al-Manasir*, 2008 WL 2262169 (Mich App 2008) (unpublished decision) (Muslim father of 13-year-old girl alleged that proceedings to place child in temporary custody were 'infected with anti-Islamic bias', but the court found no support in the record and affirmed a trial court order based on evidence of the father's physical abuse of the child, the child's fear of her father, and her refusal to visit her father).

[4] *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989) (holding that state court adoption of Choctaw infants was void because tribal court had exclusive jurisdiction since children were domiciled on the reservation).

[5] M Guggenheim 'Child Protection, Foster Care, and Termination of Parental Rights' in *What's Wrong with Children's Rights* at 174–212 (Harvard U Press, Cambridge, Massachusetts, London, 2005) (noting that children are more likely to be placed in foster care because of poverty than abuse and criticising the failure of the child welfare system to focus on family preservation and reunification); S Gendell 'In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation' (2001) 39 Fam Ct Rev 25; and S Coupet 'Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence"' (2005) 34 Cap U L Rev 405 (contending that excessive focus on adoption harms children by disregarding the value of long-term kinship care).

be over-represented within that population.[6] This chapter, however, focuses not on the general failings of the child welfare system or the problem of racial bias but on recent court cases involving cultural minorities.[7] The chapter first presents an overview of the constitutional and federal statutory framework governing American child welfare systems. Section II includes a discussion of new federal legislation that may add needed flexibility to the standards governing permanency in child welfare, in particular by endorsing forms of extended family caregiving that are more common in minority communities. The chapter then examines the Texas proceeding in detail and explores lessons that may be gleaned from it. Finally, the chapter reports on recent litigation under the Indian Child Welfare Act[8] that illustrates the competing policies at stake when American Indian children are the subject of state court dependency proceedings.

II THE FEDERAL CONSTITUTIONAL AND STATUTORY FRAMEWORK

(a) Key constitutional doctrines

Child welfare law in the United States is an amalgam of federal and state regulation.[9] Although each state develops and enforces its own child protection system, federal law powerfully shapes state legislation, first, through constitutional constraints on state action, and, second, through the conditional spending power of the federal government. From a constitutional perspective, the right of parents to control the upbringing of their children has long been recognised as an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment, but the limits of parental liberty remain blurred. The

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6 According to the most recent data from the US Department of Health and Human Services, 510,000 children were in foster care on 30 September 2006, and of that group, 2% were identified as American Indian/Alaska Native, 32% as Black, 19% as Hispanic, and 40% as White-Non Hispanic. See The AFCARS Report No 14, Preliminary FY 2006 Estimates as of January 2008, US Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, available at www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm ('AFCARS 2006 Report'). Dorothy Roberts, *Shattered Bonds* (Basic Civitas Books, New York, 2002) (describing biased decision making at crucial stages in case processing, leading to over-representation of African American children in foster care nationwide).

7 Racial bias and cultural bias are overlapping categories that often go hand in hand, but this chapter focuses on cultural biases rather than the operation of racism per se. See generally M Freeman 'Cultural Pluralism and the Rights of the Child', in J Eekelar and T Nhlapo (eds) *The Changing Family* (Hart Publishing, 1998); C Weisbrod *Emblems of Pluralism: Cultural Differences and the State* (Princeton U Press, Princeton, Oxford, 2002) (exploring impact of state-centered hierarchical model in which cultural subgroups are subordinated to dominate cultural norms).

8 See 25 USC §§ 1901–1934 (2006).

9 For a useful overview of federal and state child protection law, see SN Katz 'Protecting Children Through State and Federal Laws' in B Atkin (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2007) at 309.

early case of *Pierce v Society of Sisters*[10] extended constitutional protection to a parent's choices regarding children's education, holding that the state's requirement that children attend public rather than private school unreasonably interfered with the parents' constitutional liberty to direct their children's education.[11] The Supreme Court reaffirmed the constitutional protection of parental liberty under the Due Process Clause in *Troxel v Granville*[12] but failed to produce a majority opinion as to the nature of that liberty interest. In striking down a Washington visitation law as unconstitutional as applied, all but one justice[13] agreed that the Due Process Clause protects parents' rights to make decisions concerning the upbringing and control of their children. Writing for a plurality, Justice O'Connor emphasised the well-established liberty interest of parents 'in the care, custody, and control of their children' but stopped short of deciding what showing a state must make in order to override parental authority in the context of a visitation dispute.[14] For state-initiated child protective proceedings, however, most courts agree that the state must demonstrate a compelling state interest – protection of the child's welfare – and a showing that less intrusive alternatives are not available before removing the child from the home.[15] The constitutional safeguards surrounding emergency, pre-hearing seizures of children, such as the emergency removal of children in the Texas case, are less clearly defined.[16]

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10 268 US 510 (1925). *Pierce* built on the earlier decision in *Meyer v Nebraska*, 262 US 390 (1923), in which the Court held unconstitutional a Nebraska law that outlawed teaching in a language other than English. Professor Woodhouse has explored the historical origins of these cases while more broadly criticising the Court's due process theory as resting on a view of children as property owned by their parents. See B Woodhouse 'Who Owns the Child?': Meyer and Pierce and the Child as Property' (1992) 33 Wm and Mary L Rev 995.

11 The right of parents to manage the education of their children has resurfaced today in litigation exploring the growing phenomenon of home schooling, a practice particularly popular among fundamental Christian groups. See generally K Yuracko 'Education Off the Grid: Constitutional Constraints on Homeschooling' (2008) 96 Cal L Rev 123. Although states vary in the control exercised over educational standards for home schooling, the unique aspect of home schooling that has troubled some courts is that the home-schooled child is not monitored by any disinterested third party. In *Jonathan L v Superior Court*, 165 Cal App 4th 1074 (Cal App 2008), eg, the court held that a parent's statutory right to home school her child was subordinate to the state's duty to protect the dependent child's safety. Although state law entitled the mother to home school her child, the appeals court ruled that the dependency court could constitutionally determine that the child's safety was better served by having regular contact with a traditional school system's mandatory reporters of abuse and neglect.

12 530 US 57 (2002).

13 See 530 US 91–93 (Scalia J dissenting). Justice Scalia refused to embrace the doctrine of 'unenumerated parental rights' and made clear that he was opposed to the '[j]udicial vindication of "parental rights" under a Constitution that does not even mention them'.

14 Ibid at 66. Because of the 'sweeping breadth' of the Washington law, the plurality opinion found it unnecessary to address the question of whether the Due Process Clause requires a showing of harm to the child before the state may override parental authority. Ibid at 73.

15 See, eg, *Nicholson v Scoppetta*, 203 F Supp 2d 153 (EDNY 2002).

16 See T Liebmann 'What's Missing From Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards' (2006) 28 Hamline J Pub L and Pol'y 141 (noting wide variation in state standards, ranging from requirement of imminent or serious harm to showing that removal is in the child's best interests).

In cases involving parents' rights and religious minorities, the Supreme Court has sent mixed signals. On the one hand, when addressing the application of child labour laws to Jehovah's witnesses, the Court held that the state's authority to protect children from the dangers of employment trumped the First Amendment rights of parents and children to exercise their religious freedom.[17] As the Court put it, 'neither rights of religion nor rights of parenthood are beyond limitation'.[18] On the other hand, the Court was far more deferential to parental autonomy in *Wisconsin v Yoder.*[19] There the Court barred Wisconsin from enforcing its compulsory school attendance law against Amish children beyond the eighth grade, finding that the state's asserted interest in preparing children for adulthood and protecting them from ignorance did not justify application of the law to the Amish. In *Yoder,* the Court noted that the Amish community was 'a highly successful social unit', due in part to the tradition of training teenagers in agriculture and 'habits of industry and self-reliance'.[20] Significantly, the case did not present claims by the Amish children to continue their formal schooling in opposition to their parents' wishes.[21] Instead, the Court characterised the case as involving 'the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children'.[22] Although the Supreme Court later backed off from a heightened scrutiny standard for general challenges to laws impinging on religious freedom,[23] *Yoder* remains good law. According to the Court, *Yoder*'s heightened scrutiny approach was justified because the free exercise claim was combined with 'the right of parents . . . to direct the education of their children'.[24] Thus, when a state takes action that

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17 See *Prince v Massachusetts,* 321 US 158 (1944) (enforcing child labour laws against Jehovah's witness guardian whose young niece was distributing religious pamphlets on public street).

18 Ibid at 166.

19 406 US 205 (1972).

20 Ibid at 222, 224.

21 Chief Justice Burger's majority opinion noted that the children were not parties to the litigation and that the state had at no point argued that the parents were preventing their children from attending school against the children's expressed wishes. Ibid at 231.

22 Ibid at 232. Disagreeing with the majority, Justice Douglas argued that the Amish children were entitled to be heard on remand. In his view, '[i]t is the future of the student, not the future of the parents, that is imperiled by today's decision'. Ibid at 245 (Douglas J, dissenting in part). For an exploration of the child's potential rights in Yoder, see E Buss 'What Does Frieda Yoder Believe?' (1999) 2 U Pa J Const L 53 .

23 *Employment Division v Smith*, 494 US 872 (1990) (holding that Oregon was not required by First Amendment to create religious exemption to generally applicable drug statute and that the state therefore could deny unemployment compensation to persons fired after religious use of peyote). Smith's holding that a neutral law of general applicability does not offend the First Amendment solely because it has the incidental effect of barring the exercise of religion has been the target of sustained scholarly criticism. See, eg, K Greenawalt 'Religion and the Rehnquist Court' (2004) 99 Nw U L Rev 145, 149–151; M McConnell 'Free Exercise Revisionism and the Smith Decision' (1990) 57 U Chi L Rev 1109.

24 Ibid at 881. More recently, the Court rejected on standing grounds an atheist father's constitutional challenge to a school district policy requiring his daughter to recite the Pledge of Allegiance with its phrase 'under God'. In *Elk Grove Unified School District v Newdow*, 542 US 1 (2004), the Court determined on the basis of state law that the non-custodial father lacked the right to litigate the question on behalf of his daughter, particularly where the custodial mother had no objection to the Pledge recitation. In rejecting his challenge, the Court rested on prudential concerns and seemed to welcome a resolution that permitted it to avoid

simultaneously constrains religious freedom and parental liberty, current constitutional law requires some form of elevated scrutiny – an identification of significant state interests and a showing that less intrusive measures are not available.[25]

With respect to procedural due process rights in the child welfare context, the Supreme Court has applied the balancing framework of *Mathews v Eldridge*[26] in addressing right to counsel and burden of proof, among other questions. In *Lassiter v Department of Social Services,*[27] a closely divided Court held that the Due Process Clause does not require appointment of counsel for indigent parents in every parental status termination proceeding. Rather than announce a rule of general application, the Court concluded that trial courts, subject to appellate review, should determine the need for counsel on a case-by-case basis.[28] Nevertheless, most states provide a right to appointed counsel for indigent parents in child protection proceedings as a matter of statutory entitlement.[29] Although the Supreme Court has not addressed the child's right to representation under the Due Process Clause, child advocates have long pressed for a child's right to counsel in dependency proceedings, and at least one federal court has held that foster children have a due process right to counsel in child protection proceedings.[30]

In *Santosky v Kramer,*[31] the Supreme Court considered the question of the state's burden of proof in a parental rights termination proceeding. Emphasising that '[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents', the Court recognised that even after a child has been removed, 'parents retain a vital interest in preventing the irretrievable destruction of their family life'.[32] In light of the parents' and

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grappling with the sensitive constitutional issue. The majority explained: 'When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law', 542 US at 17.

25 Constitutional law scholars have debated whether strict scrutiny or some intermediate standard of review is required for Free Exercise claims. See McConnell, n 23 above at 1127–1128; Krotoszynski, n 3 above at 1262–1272 (proposing intermediate scrutiny for Free Exercise claims based on non-discrimination theory).

26 424 US 319, 335 (1976) (requiring balancing of private interests affected by proceeding; risk of error created by state's chosen procedure; and countervailing governmental interest supporting use of challenged procedure).

27 452 US 18 (1981).

28 Ibid at 31–32 (suggesting that need for counsel will vary depending on whether case involves evidentiary disputes or other issues as to which presence of counsel might affect outcome).

29 See, eg, NY Fam Ct Act § 262(a) (providing the right to counsel for parent in any child protection proceeding); Vernons's Tex Stat and Code Ann § 107.013 (providing the right to appointed counsel for indigent parent in governmental proceedings for temporary custody of a child or for termination of parental rights).

30 *Kenny A v Perdue,* 356 F supp 1353 (ND Ga 2005) (applying due process clause of state constitution to require appointed counsel for foster children in abuse and neglect proceedings and proceedings to terminate parental rights).

31 455 US 745 (1982).

32 Ibid at 753.

child's private interests at stake, the substantial risk of error in a lower burden of proof, and a comparatively slight governmental interest, the Court determined that the clear and convincing evidence standard of proof is constitutionally required in proceedings to permanently sever parental rights.[33] In contrast, most courts hold that a temporary removal of a child, where the state purportedly acts to protect the child's immediate safety without irrevocably affecting the parent-child relationship, requires proof only by a preponderance of the evidence as a matter of constitutional law.[34] As others have noted, this lesser burden of proof gives little weight to the harm inevitably suffered by children from temporary placement in state custody.[35] As with other procedural rights in this area, some states have gone further and imposed the clear and convincing standard for all child protection proceedings as a matter of statutory law.[36]

(b) Overview of federal child welfare legislation

Since the mid-1970s, the federal government has shaped child welfare law through requirements imposed on the states as a condition of receiving federal funding.[37] The Child Abuse Prevention and Treatment Act (CAPTA)[38] is an important example. As a condition of receiving federal funding for child abuse prevention and treatment programmes, CAPTA requires, inter alia, that states provide a 'guardian ad litem' for every child is who is the subject of an abuse

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[33] Ibid at 769–770 (reasoning that clear and convincing evidence standard strikes fair balance between rights of parents and state's legitimate concerns). That heightened standard for parental rights terminations may not govern all stages of a severance proceeding; in states where the proceeding is bifurcated between grounds for severance and best interests of the child, a lesser standard may govern as to the latter. See, eg, *Kent K v Bobby M,* 110 P3d 1013 (Ariz 2005) (holding that state must prove statutory ground for termination of parental rights by clear and convincing evidence but need only meet preponderance of evidence standard for required best interests determination).

[34] See, eg, *Wright v Arlington County Dept of Social Serv's,* 388 SE2d 477 (Va App 1900). In the unique context of American Indian children, the Indian Child Welfare Act, discussed in Section IV, imposes heightened burdens of proof: clear and convincing evidence for the temporary removal of the child from the home, and proof beyond a reasonable doubt for the termination of parental rights. See 25 USC 1912.

[35] See generally P Chill 'Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings' (2004) 42 Fam Ct Rev 540 (emergency child removals become self-reinforcing and should be more carefully scrutinised by courts); Liebmann, n 16 above (courts frequently disregard harm to children from temporary removals).

[36] See, eg, Ga Code Ann 15-11-54(c); NM Stat Ann 32A-3B-14(B).

[37] Significant federal acts include the Child Abuse Prevention and Treatment Act (CAPTA), Pub L No 93-247 88 Stat 4 (codified as amended at 42 USC §§ 5101–5116); the Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub L No 96-272, 94 Stat 500 (1980) (codified in scattered sections of 42 USC); the Adoption and Safe Families Act, Pub L No at 105–189, 111 Stat 2115 (codified at scattered sections of 42 USC); and the Promoting Safe and Stable Families Amendments of 2001, Pub L No 107–133, 115 Stat 2414 (codified at 42 USC §§ 629–677).

[38] Pub L No 93-247, 88 Stat 4 (codified as amended at 42 USC §§ 5101–5116).

and neglect proceeding.[39] States vary in the ways they comply with this mandate; many states routinely appoint lawyers as guardians ad litem without careful delineation of the distinctions between the two roles.[40] Significantly, Texas law requires the state to provide an 'attorney ad litem' and a 'guardian ad litem' for all children in child protection proceedings but permits a single representative to fulfil both roles.[41]

In other legislation, Congress has had a far-reaching impact on child welfare policy at the state level. After two decades of emphasis on family preservation and reunification,[42] federal policy in the 1990s began to move toward an emphasis on achieving permanency for children in foster care. Through the Adoption and Safe Families Act (ASFA), Congress amended existing federal child welfare legislation to focus on children's safety at every stage, to reduce children's length of stay in foster care, and to promote adoption or other permanency options for those children unable to return home.[43] As a condition of receiving federal funds for foster care and child protective services, states must comply with ASFA's new standards designed to shorten children's stay in foster care and to give priority to children's need for permanency over other values.[44] Permanency under ASFA typically means reunification or, alternatively, termination of parental rights and adoption, and the Act imposes strict time-limits on efforts to achieve reunification in order to move children more quickly toward permanency.[45]

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[39] See 42 USC § 5106a(b)(2)(A)(xiii) (requiring states to appoint trained guardian ad litem, who may be attorney, to represent child and make recommendations concerning child's best interests).

[40] I have explored the role of children's representatives elsewhere. See Barbara Atwood 'The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism' (2008) 42 Fam L Q 63. For an opposing perspective, see Katherine Hunt Federle 'Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act' (2008) 42 Fam L Q 103.

[41] Vernon's Tex Stat and Codes Ann, Family Code § 107.1025 (appointment of attorney in dual role).

[42] The AACWA mandated that states make 'reasonable efforts' to avoid unnecessary removals and to achieve family reunification. See 42 USC § 671(a)(15)(B). In general, Congress hoped through AACWA to bar removals of children except where necessary for the child's safety and to require states to reunite the family whenever possible. According to one scholar, full implementation of AACWA was undermined by lax enforcement efforts at the federal level and an inadequate and distorted funding structure that effectively rewarded states for placing children in foster care. See S Ramsey 'Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate' (2005) 66 Mont L Rev 21, 28–29.

[43] See generally, B Woodhouse 'The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy', in A Bainham (ed) *The International Survey of Family Law* (Jordan Publishing Ltd, 2000) at 375, 380–384. Paralleling other provisions of federal law, ASFA also bars any state receiving federal funds from denying or delaying adoptive or foster placements on the basis of 'race, color, or national origin' of an adoptive or foster parent or child. See 42 USC § 671(a)(18).

[44] Ibid at 381–382.

[45] ASFA, eg, generally requires that states file for termination of parental rights with respect to any child who remains in foster care for 15 out of 22 consecutive months. See 42 USC § 675(5)(E).

The change in policy of ASFA was based on the perception that too many children were languishing in foster care while state agencies made futile efforts to reunify the children with their birth families, and it was seen as a shift in emphasis from parents' rights to children's best interests.[46] Critics have noted that ASFA's timelines and other mandates set unrealistic standards for parents who are making good faith efforts to comply and might achieve rehabilitation if given more time.[47] Children, in turn, often lose all connection with their birth families after a termination but may still face long-term foster care if no other permanency option becomes available.[48]

Federal legislation that became effective in late 2008 may signal greater acceptance of diverse family forms and alternative conceptions of permanency. The new Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA),[49] according to its proponents, 'marks the most significant reform of America's child welfare system in more than a decade'.[50] The Act, which had the support of a broad range of child advocacy groups, reflects a recognition that dependent children can often be better served by placement with suitable relatives rather than in traditional foster homes or institutions. Through funding mechanisms and otherwise, the new law encourages financial assistance for relative guardians, facilitates foster care by relatives, establishes grants to connect foster children with family members, and increases incentives for special needs and older child adoptions.[51] Significantly, FCSIAA also allows Indian tribes to have the same direct access as states to pivotal federal funding for foster care, adoption assistance, and relative guardianship.[52] In addition, the Act authorises matching grants to state and tribal child welfare

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46 As stated in the House Report on ASFA, '[t]here seems to be a growing belief that Federal statutes, the social work profession, and the courts sometimes err on the side of protecting the rights of parents. As a result, too many children are subject to long spells of foster care or are returned to families that reabuse them'; HR Rep 105–177, reprinted at 1997 USCCAN 2739, 2740. See also Ramsey, n 42 above, at 29.

47 See, eg, MJ Hannet 'Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights' (2007) 45 Fam Ct Rev 524 (noting that ASFA's incentives for parental rights termination and adoption impedes effective rehabilitation efforts).

48 See C Huntington 'Rights Myopia in Child Welfare' (2006) 53 UCLA L Rev 637, 660–663 (describing traumatic impact of foster care on children and noting that among foster children who are not reunited with families, fewer than 20% are adopted).

49 Pub L 110–351, 110th Cong, 2d Sess (2008).

50 'Rep McDermott's Foster Care Legislation Signed Into Law', *US Federal News*, 8 October 2008, available at 2008 WLNR 19160745.

51 Under the structure of the new law, states that choose to provide financial assistance to relatives who become legal guardians of children eligible for foster care can seek reimbursement from the federal government. FCSIAA § 101, amending 42 USC § 673. In other measures that favour extended family care, FCSIAA permits states to waive non-safety foster care standards on a case-by-case basis for foster care in relatives' homes, § 104(a)(2), amending 42 USC § 671(a)(10), and requires states to make efforts to identify and notify adult relatives of children who are removed from their parents to apprise them of the removal and the options available for kinship care assistance, § 103, amending 42 USC § 671(a). For provisions extending financial support for special needs and older child adoption, see § 401–403, amending 42 USC § 673b.

52 Ibid, § 301, amending Part IV-E of Social Security Act, 42 USC §§ 670 et seq. Congress appropriated $3m to help tribes with start-up costs. Ibid, § 302.

agencies for family preservation services targeting families where the children have been removed or are at risk of being removed, including services for kinship caregiver families and the use of family group decision making.[53]

The availability of kinship guardianship assistance, while still optional with the states, is an important change that recognises the important benefits of that particular permanency model as an alternative to adoption. Also, the support for family-preservation programmes and family-group conferencing will encourage states to develop culturally sensitive methods of strengthening families. In addition, improved funding structures for tribal foster care should enable many tribes to recruit and license more Native foster homes. On the other hand, FCSIAA did not change the prioritised role that adoption holds under ASFA and still incentivises adoption as the preferred permanency option. As explored in Section IV below, the structured and accelerated permanency planning that began a decade ago and the continued prioritisation of adoption can have a particularly harsh impact on American Indian children. Unless the new law heralds a sea change in federal child welfare policy, the continued emphasis on termination of parental rights and adoption may work against the placement of minority children in culturally appropriate families and communities.[54]

III THE TEXAS CASE

The widely publicised Texas child welfare proceeding is one of many recent governmental responses to the practice of polygamy by followers of fundamentalist sects, most prominently the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS).[55] Although the Supreme Court upheld the criminal prohibition of polygamy more than a century ago in *Reynolds v United*

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[53] Ibid, § 102, amending 42 USC §§ 620–629i. Family group decision making is a process growing in popularity in juvenile courts that engages family members in developing plans to nurture at-risk children and protect them from family violence. It is particularly well-suited for addressing the needs of American Indian children in foster care, since the process of involving family members in case planning comports with the care giving role of extended family in most tribes.

[54] Coupet, n 5 above (broadly criticising ASFA's adoption incentives and arguing that kinship permanency can provide children with psychological permanence and sense of belonging); S Mapp and C Steinberg 'Birth families as Permanency Resources for Children in Long-Term Foster Care' (2007) 86 *Child Welfare* 29 (reporting study showing that renewed contact with birth families and relatives after severance may provide sense of permanency, resulting in mental health benefits to children); E Patten 'The Subordination of Subsidized Guardianship in Child Welfare Proceedings' (2004) 29 NYU Rev L and Soc Change 237 (criticising ASFA for its continued emphasis on adoption as preferred permanency option and its failure to accord subsidised guardianship equal status).

[55] While occasionally referred to as 'fundamentalist Mormons', the FLDS has no formal affiliation with the Mormon Church, which disavowed polygamy in 1890 under pressure from the United States Government. Members of the FLDS, in contrast, believe that the practice of plural marriage is essential for entry to Heaven. See J Krakauer, *Under the Banner of Heaven* (Doubleday, New York, London, Toronto, Sydney, Auckland, 2003) 6–7.

States and flatly rejected the defendant's claim of religious freedom,[56] polygamous communities have continued to exist in the United States, most predominantly in the southwestern region.[57] In 1953, the Arizona state government conducted a mass raid on Short Creek (later called Colorado City), a fundamentalist community near the Utah border.[58] State officials arrested over 100 adults and placed several hundred children in foster care. The action was widely condemned as religious persecution by overly zealous governmental agencies, and photographs of crying children filled national newspapers, much like the recent coverage of the Texas case. By 1956, all the polygamists were out of jail and had been reunited with their families.[59] For the next half-century, state governments avoided similarly heavy-handed raids against polygamist communities. In recent years, however, several high-profile prosecutions of polygamists for bigamy and sexual offences against minors once again returned polygamy to the national news.[60] At the same time, the Supreme Court's decision in *Lawrence v Texas*[61] has fuelled arguments that the practice of polygamy among consenting adults is beyond the reach of state criminal law as a matter of substantive due process.[62]

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56 98 US 145 (1879). The Court later upheld Mann Act convictions for transporting a plural wife across state lines to cohabit with her or to aid another person to do so and again rejected a Free Exercise challenge. See *Cleveland v United States*, 329 US 14 (1946). The Supreme Court's opinion in *Reynolds* famously characterised the practice of polygamy as 'odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church . . . almost exclusively a feature of the life of Asiatic and of African people' 98 US at 164. Harbouring no doubt about Congress's authority to proscribe polygamy, the Court reasoned that '[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices'; ibid at 166. For a history of the criminalisation of polygamy that associates the anti–polygamy ideology with racist and xenophobic thought in the nineteenth century, see M Ertman '"They Ain't Whites, They're Mormons": An Illustrated History of Polygamy as Race Treason' University of Maryland School of Law Legal Studies Research Paper No 2008–37.

57 See I Altman and J Ginat *Polygamous Families in Contemporary Society* (Cambridge University Press, Cambridge, England, New York, 1996).

58 See M Bradley *Kidnapped from that Land: The Government Raids on the Short Creek Polygamists* (University of Utah Press, Salt Lake City, 1996).

59 See Krakauer, n 55 above, at 16–18.

60 The prosecution of Warren Jeffs, a former spiritual leader of FLDS, has dominated headlines in the past year. In 2007, Jeffs was convicted of 'accomplice rape' and incest in Utah after he arranged the marriage of a 14-year-old girl to her 19-year-old cousin. Now in prison for the Utah conviction, he is facing new charges in Arizona for sexual offences against a minor and incest, and he has been indicted in Texas in connection with his alleged marriage to a 12-year-old girl residing at the Yearning for Zion Ranch. See S Andrew 'Danger to the Nation?' 137 *New Statesman* 22 (11 August 2008); B Adams 'More indicted FLDS members surrender in Texas', *The Salt Lake Tribune*, 25 November 2008. See also *Utah v Holm,* 137 P3d 726 (Utah 2006) (affirming conviction of Holm for bigamy and sexual contact with minor and rejecting constitutional challenges based on First Amendment and substantive Due Process); *Utah v Green*, 99 P3d 820 (Utah 2002) (affirming conviction of Tom Green for bigamy).

61 539 US 558 (US 2003) (recognising individual's liberty to engage in consensual intimate conduct with another adult and striking down Texas's criminal sodomy statute as unconstitutional under Due Process Clause).

62 These arguments have not succeeded, but the two key prosecutions in which the arguments were raised involved plural marriages with underage women. See *State v Holm*, 137 P3d 726 (Utah 2006); *State v Green*, 99 P3d 820 (Utah 2002). Significantly, the chief justice of the Utah Supreme Court wrote separately in *Holm* to express her view that polygamy among consenting

Lower courts have wrestled with the degree to which civil benefits can be denied to polygamists,[63] and modern cases question whether the practice of polygamy alone justifies the state's intrusion into the family. In a pair of decisions, for example, the Utah Supreme Court has made it clear that the practice of polygamy does not by itself mean that a person is unfit to be a parent.[64] Recent child welfare cases involving polygamists in which courts have terminated parental rights have involved sexual abuse of underage girls or other evidence of parental unfitness rather than the practice of polygamy alone.[65] The trend seems to be for courts to require a showing of direct individualised harm to the child, apart from the perceived moral harm engendered by the practice of polygamy, to justify state intrusions to protect children.

The Texas child welfare proceeding that dominated the news in the spring and summer of 2008 is a cautionary tale for child welfare agencies. The first paragraph of the Texas Supreme Court opinion tells the story vividly:

> 'The Yearning for Zion Ranch is a 1,700-acre complex near Eldorado, Texas, that is home to a large community associated with the Fundamentalist Church of Jesus Christ of Latter Day Saints. On March 29, 2008, the Texas Department of Family Protective Services received a telephone call reporting that a sixteen-year-old girl named Sarah was being physically and sexually abused at the Ranch. On April 3, about 9:00 p.m., Department investigators and law enforcement officials entered the Ranch, and throughout the night they interviewed adults and children and searched for documents. Concerned that the community had a culture of polygamy and of directing girls younger than eighteen to enter spiritual unions with older men and have children, the Department took possession of all 468 children at the Ranch without a court order.'[66]

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adults is within the constitutional liberty interests recognised in *Lawrence*. See *Utah v Holm*, 137 P3d 726, 776–779 (Utah 2006) (Durham, CJ, concurring and dissenting).

63 See, eg, *Potter v Murray City*, 760 F2d 1065 (10th Cir 1985) (rejecting police officer's civil rights claim challenging his termination from employment because of his practice of polygamy); *Bronson v Swensen*, 500 F3d 1099 (10th Cir 2007) (rejecting on procedural grounds plaintiffs' constitutional challenge to Utah's civil prohibition of polygamous marriages).

64 See *In the Matter of WAT*, 808 P2d 1083 (Utah 1991) (holding that petitioners' practice of plural marriage did not justify blanket dismissal of petition to adopt); *Sanderson v Tryon*, 739 P2d 623 (Utah 1987) (holding that parent's bid for child custody at divorce should not have been rejected solely on basis of parent's practice of polygamy). In Sanderson, the court explained that an earlier decision, *In re Black*, 283 P2d 887 (Utah 1955), in which the court had upheld the termination of parental rights of polygamist parents, was no longer good law in light of the legislature's deletion of references to morality from the state's termination of parental rights statute, 739 P2d at 627.

65 See, eg, *Department of Children and Families v BB*, 824 So2d 1000 (Fla App 2002) (upholding termination of parental rights where the father had two wives and had 'married' two underage daughters, and evidence showed domestic violence, drug abuse, medical neglect, and mental illness of the parents). See also *Utah v Holm*, 137 P3d 726, 758, 766-778 (Utah 2006) (Durham CJ, concurring and dissenting) (emphasising strong constitutional protection for parental autonomy, privacy, and religious freedom, and noting lack of evidence of harm to children solely from being raised in polygamous families).

66 *In re Texas Dept of Family Protective Services*, 255 SW3d 613, 613-614 (Tex 2008). The exact number of children seized was the subject of some dispute. In its final report on the investigation, the Department noted that 465 individuals believed to be children were initially taken into temporary custody ('conservatorship' in Texas terminology). While they were in

Although the Department's primary concern was the alleged sexual abuse of pubescent girls, the removal, called 'the largest child welfare protection case documented in the history of the United States',[67] included many younger girls as well as boys. According to one news report, 'hundreds of children on the ranch were . . . wrenched forcibly from their parents' and driven by busloads to a holding facility.[68] After the raid, the seized children and the FLDS women who were permitted to accompany them were housed at a civic centre in nearby San Angelo, Texas.[69]

Pursuant to Texas law, the Department was required to file a formal child protection proceeding immediately after the children's removal[70] and to participate in a full adversary hearing 2 weeks after the seizure.[71] Texas permits emergency removals only where there is a danger to the physical health and safety of the child and the need for protection is urgent and warrants immediate removal.[72] Moreover, child protection officials can remove a child on an emergency basis without a court order only on personal knowledge, or information from another corroborated by personal knowledge, of facts showing an immediate danger to the child or evidence that the child is a victim of sexual abuse.[73]

By the time of the hearing, nearly 300 attorneys across Texas had volunteered to represent the children in the case, some of them with little experience in child welfare law. The mothers and fathers retained separate counsel. As the Department put it:[74]

> 'The sheer number of attorneys involved and their location throughout the state created unique challenges in ensuring appropriate involvement and communication among all the parties to these suits.'

At the hearing, overflow seating was provided for the parties and their lawyers at an auditorium with teleconferencing. Significantly, the Department never located the girl called Sarah who was the source of the information leading to the raid.[75] Instead, the evidence at the hearing was based largely on

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care, the Department determined that 26 of the individuals believed to be minors were adults. These people were 'nonsuited' and discharged from care. See Texas Dept Family and Protective Services, *Eldorado Investigation*, 22 December 2008, at 13.

67 Ibid at 614.

68 See A Stephen 'Danger to the nation?' 137 *New Statesman* 22 (11 August 2008), available at 2008 WLNR 15892553 (reporting that children 'were driven away under armed escort to . . . a military facility with inadequate food, lavatories or bathing facilities, and little privacy for people to whom modesty was a basic dignity').

69 *Eldorado Investigation*, n 66 above, at 6–7.

70 Tex Fam Code § 262.105(a) (imposing duty to file suit affecting the parent–child relationship after removal).

71 Tex Fam Code § 262.201(a).

72 Tex Fam Code § 262.201(b).

73 Tex Fam Code § 262.104(a).

74 *Eldorado Investigation*, n 66 above, at 13.

75 Later investigations by defence counsel revealed that 'Sarah' was probably an imposter living in Colorado at the time who was known for making false allegations. See A Stephen 'Danger to

information gleaned from the Department's interviews, about half of which were with girls aged 17 or under. The Department's fact gathering was hampered by a lack of birth certificates and by what appeared to be 'a pattern of organized deception' on the part of parents and children.[76]

According to the Department, many polygamist families lived at the Ranch, and a number of girls under the age of 18 were pregnant or had given birth. Community members considered no age too young for a girl to marry, and the Ranch's spiritual leader had the power to decide when members should marry and whom they should marry. Records seized from the Ranch indicated that several minor women had become spiritual wives of older men, including a 13-year-old who had conceived a child.[77] Attorneys for the children and parents argued to the court that the Department's evidence was not individually tailored to their particular client. Indeed, the lawyers expressed general concerns about the mass hearing and the difficulty they had in participating. In addition, the attorneys contended that the Department had not shown that the boys or younger girls were in immediate danger.[78]

At the close of the hearing, the trial judge announced to a packed court room that the state had met its burden in showing a danger to the physical health or safety of all of the children at the Yearning for Zion Ranch. Pointing to the culture of sexual and emotional abuse at the Ranch, the judge held that the state's temporary custody should be continued[79] and that visitation by parents could occur only with the Department's agreement.[80]

After the trial judge's ruling, the Department had to find foster placements for the FLDS children,[81] a difficult task under any circumstance and especially challenging for the overburdened Texas child welfare system.[82] The Department also tried to develop guidelines for caretakers to ensure the children's safety and to reduce the culture shock that the children might experience in their new surroundings.[83] A month and a half later, a mandamus

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the nation?' 137 *New Statesman* 22 (11 August 2008), available at 2008 WLNR 15892553 (reporting that calls were made by 33-year-old disturbed woman who distrusted residents of Yearning for Zion Ranch).

76 *Eldorado Investigation*, n 66 above, at 11.

77 255 SW3d 613, 616-617 (2008).

78 *Eldorado Investigation*, n 66 above, at 7.

79 K Brooks 'Children not going home', *Dallas Morning News*, 19 April 2008 1A (reporting that the judge relied on evidence of child brides and boys being groomed to be abusers).

80 255 SW3d at 615.

81 *Eldorado Investigation*, n 66 above, at 10-11; M Roberts 'Cultural Adjustment an Issue for Texas Sect's Children' 27 Education Week 18, 30 April 2008 (reporting that children were being moved from crowded San Angelo Coliseum into numerous temporary facilities around the state).

82 The Texas Child Protective Services underwent a comprehensive reform in 2005 after a statewide investigation, but employee turnover still remains high, children in Texas still die at a rate almost double that of the national average, and a chronic foster placement shortage still plagues the system. See P Knight 'Child Protective Services: Problems, Reforms and More Problems', *Houston Press*, 8 November 2007, available at 2007 WLNR 22601347.

83 Terry Langford 'Sect youths arrive with instructions', *Houston Chronicle*, 26 April 2008 A1,

action challenging the children's removal was filed in the Texas court of appeals on behalf of 38 mothers.[84] In that proceeding, the Department defended its actions by pointing to evidence of pregnancies of several girls at the Ranch between the ages of 13 and 17, but the Department had little evidence about the circumstances of their pregnancies or their marital status. Furthermore, there was no evidence that any of the children of the women who had filed for mandamus was pregnant or otherwise at risk of physical harm.[85] Significantly, the Department advanced a broad argument that all children at the Ranch were in danger because of the 'pervasive belief system' within the FLDS that condones underage marriage and underage pregnancy.[86] The Department contended that according to the FLDS belief system, the male children are groomed to be perpetrators of sexual abuse, the girls are raised to submit to sexual abuse after puberty, and that all children, regardless of age or gender, are therefore at risk.[87]

On 22 May 2008, the court of appeals directed the trial court to vacate its temporary orders, finding that the Department had failed to meet its burden of proof.[88] The appeals court emphasised that '[r]emoving children from their homes and parents on an emergency basis before fully litigating the issues of whether the parents should continue to have custody of the children is an extreme measure'.[89] Finding that the Department had failed to show imminent danger to the children as required by Texas law or even that all FLDS families at the Ranch were polygamous, the court criticised the Department's 'broad-brush' approach to the case.[90] Not only was the collective approach problematic, but the court also concluded that the Department failed to take the necessary legal steps to protect the children before removing them from their homes. Texas law, under the mandate of federal law, requires state child protection agencies to demonstrate that 'reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal',[91] and that 'reasonable efforts have been made to

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available at 2008 WLNR 7882632 (foster parents were told that Yearning for Zion children should not be exposed to television, video games, or internet, and that red clothing was prohibited since FLDS church members believe red is reserved for Jesus Christ).

84 The mothers, who were represented by local legal aid lawyers, had to proceed by mandamus since a trial court's temporary orders in a suit affecting a parent-child relationship are not subject to interlocutory appeal under the Texas Family Code. See *In re Steed*, 2008 WL 2132014 n3 (Tex App-Austin 2008).

85 The court found that, while five teenage girls at the Ranch might have been the victims of sexual or other physical abuse, the evidence did not show any immediate or urgent risk to the hundreds of other children who were removed. *In re Steed*, 2008 WL 2132014 (Tex App-Austin 2008).

86 Ibid.

87 Ibid. In support of its case, the Department contended that 'there is a mindset that even the young girls report that they will marry at whatever age, and that it's the highest blessing they can have to have children'.

88 *In re Steed*, 2008 WL 2132014 (Tex App-Austin 2008).

89 Ibid.

90 Ibid, at 11.

91 Tex Fam Code § 262.201(b)(2).

enable the child to return home'.[92] The court sided with the mothers in holding that the Department did not adequately justify its failure to seek less intrusive alternatives, such as obtaining restraining orders directed against the alleged perpetrators, before resorting to the extreme measure of removal.

One week later, on the Department's own petition for mandamus before the Texas Supreme Court, the high court affirmed the court of appeals holding by a six to three vote. In a brief per curiam opinion, the Supreme Court agreed that the trial court had abused its discretion in granting emergency custody. 'On the record before us', the court stated, 'removal of the children was not warranted.'[93] Nevertheless, the court ruled that the trial court need not vacate the temporary custody orders without granting appropriate relief to protect the children. In a separate opinion, three justices concurred with the holding as to the prepubescent girls and the few boys involved in the seizure, reasoning that the threat of harm was remote as to those children. As to pubescent girls, however, the justices dissented and would have upheld the trial court's order of temporary conservatorship.[94]

In the aftermath of the state high court ruling, the trial judge ordered the return of all the children to their mothers but allowed the investigation to continue. Ultimately, the Department determined that 12 girls at the Ranch had been 'spiritually' married at ages ranging from 12 to 15, and seven of these girls had given birth to one or more children. The Department found that these girls were the victims of sexual abuse, and they and 262 other children were subject to neglect due to their parents' failure to remove them from a family or household where sexual abuse occurred.[95] Many of the families participated in safety plans that included parenting classes and training to protect girls from underage marriage. By December 2008, the court had dismissed all but six of the cases, affecting 15 children.[96] Of that group, only one child had been returned to foster care – a 14-year-old girl believed to have been married at age 12 to the jailed polygamist leader, Warren Jeffs.[97] The court based its order to place the child in state custody on 'uncontroverted evidence of the under-age marriage' and its finding that the girl's mother had refused to guarantee her

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92 Ibid at § 262.201(b)(3).

93 255 SW3d at 615.

94 In the dissenting justices' view, the resistant behaviour by the women and children during the investigation effectively precluded the Department from utilising less intrusive alternatives. Because the Department was unable to determine the identities of family members or perpetrators, the dissenting justices argued that restraining orders against the alleged offending males were effectively unobtainable. Moreover, the evidence suggested that some of the mothers themselves did not view the practices of spiritual marriage and underage childbearing as harmful, rendering a return of custody to the mothers an inadequate alternative. Thus, those justices would have upheld the trial court's order as to the removal of the pubescent girls on the rationale that the trial realistically had no other way of protecting them. See 255 SW3d 613, 617-618 (O'Neill J, Johnson J, Willett J, concurring in part and dissenting in part).

95 *Eldorado Investigation*, n 66 above, at 4.

96 *Eldorado Investigation*, n 66 above, at 14.

97 'Judge Orders Girl in Sect to Foster Care', *The New York Times*, 20 August 2008 A14.

safety.[98] Meanwhile, the criminal investigation continued apace. As of late 2008, 12 men had been indicted for child sexual assault and bigamy-related offences.[99]

The Texas raid and massive removal of children gave rise to a storm of controversy in the United States and elsewhere.[100] Some critics argued that the Department's actions were just one more indication of persecution of fundamentalist religious groups in general and FLDS adherents in particular.[101] Others worried about the drastic intrusion on parental liberty, religious freedom, and family privacy.[102] Many expressed deep concern for the children whose lives were violently disrupted by the proceeding.[103] At the same time, some people decried the rulings by the Texas appellate courts that returned the children to their parents, arguing that FLDS members will be encouraged to continue their practice of polygamy and underage marriage and will continue to victimise vulnerable girls.[104]

The Texas case has multiple lessons. The forced removal of over 400 children from the Yearning for Zion Ranch based on uncorroborated phone calls was 'unwarranted', as the Texas Supreme Court found, but the Texas Department of Family and Protective Services surely acted out of genuine concern for the welfare of the children at the Ranch. Assuming the truth of the Department's contentions – that all of the children were 'living under an umbrella of belief that having children at a young age is a blessing'[105] – the Department reasonably feared that the FLDS belief system itself was harming children, either now or in the future. In describing its motives for the investigation, the Department stated that 'the Yearning for Zion case is about sexual abuse of girls and children who were taught that underage marriages are a way of life. It is about parents who condoned illegal underage marriages and adults who failed to protect young girls – it has never been about religion'.[106] The

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98 Ibid.

99 'After court fight, FLDS baby's DNA taken for paternity test', *Houston Chronicle*, 9 December 2008 B4.

100 D Fahrenthold 'In Texas, An Unusual Prosecution of a Way of Life', *The Washington Post*, 26 April 2008, available at 2008 WLNR 7787600 (reporting critical reactions to the raid and characterising prosecution as aimed at 'the culture of the sect'); 'Court wrestles with welfare of "19th century" children', *New Zealand Herald*, 26 April 2008 B10.

101 J Hyde 'Polygamy and Me', D*allas Observer*, 30 October 2008, available at 2008 WLNR 21042020 (describing parallels between the raid on Yearning for Zion Ranch and early persecutions of Mormons); T Burr and B Adams 'Senate panel has polygamy in cross hairs', *The Salt Lake Tribune*, 24 July 2008 A-1 (describing accusations of discrimination and persecution communicated to US Senate Judiciary Committee convened to consider whether federal criminal investigation of FLDS was warranted).

102 See B Adams 'Public overwhelmingly wanted FLDS children back with parents', *Salt Lake Tribune*, 10 June 2008, available at 2008 SLNR 10918143.

103 D Cooper 'Abuse is real, but so are family ties', *Detroit Free Press*, 30 April 2008, available at 2008 WLNR 7993819 (suggesting that remedy of removal 'might emotionally devastate' children).

104 R Blumenthal 'Texas Loses Court Ruling Over Taking Of Children', *The New York Times*, 30 May 2008 A13, available at 2008 WLNR 10219615.

105 *In re Steed*, 2008 WL 2132014 (Tex App-Austin 2008), at n 8.

106 *Eldorado Investigation*, n 66 above, at 5.

Department's good faith, however, was not a substitute for evidence of *imminent* risk of *physical* harm to individual children required under Texas law. Moreover, a mass seizure aimed at saving children from a 'pervasive belief system', however well-intentioned, was at odds with due process protections of individual liberty and religious freedom.

Importantly, the Department seemed to discount the real trauma to children that is inflicted whenever a child is removed from his or her parents and placed in foster care. Because of their immaturity and inability to understand the proceedings, children are likely to suffer even more deeply from a temporary removal than do their parents.[107] In general, a child's placement in state custody means not only the loss of the child's primary caregiver but also the loss of the child's familiar surroundings, daily routine, and freedom of movement – disruptions that are compounded by the child's sense of time. In the Texas case, the trauma to the children was likely exacerbated by the marked contrast between life in their foster placements and their insular life at the Yearning for Zion Ranch. The attorneys for the seized children, operating under Texas's detailed guidelines for children's advocates, tried to represent their young clients' individual perspectives but were frustrated by the collective nature of the proceedings.[108] Moreover, attorneys in a case such as this might face a tension between their young clients' expressed desires to return to their families and their own view of the children's best interests.[109]

In one sense, however, the FLDS children were lucky: their stay in foster care was limited to a period of weeks rather than years, unlike most foster children in the United States.[110] Ironically, the media attention to the Texas seizure probably increased the probability that the Texas appeals court would grant mandamus relief. For the routine child protection removals of individual children that occur on a daily basis throughout the United States, such interlocutory review is rare. The case underscores the need for juvenile courts to take seriously the potential harm to children caused by any removal, however temporary, in deciding whether the state's intrusion is warranted.[111]

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[107] See E Pitchal 'Children's Constitutional Right to Counsel in Dependency Cases' (2006) 15 Temp Pol and Civ Rts L Rev 663, 676-678 (describing emotional trauma to child during temporary stay in foster care).

[108] See K Brooks 'Children not going home', *Dallas Morning News*, 19 April 2008 (describing efforts by attorneys to represent children and reporting varying viewpoints among attorneys about children's best interests).

[109] Under Texas law, an attorney ad litem must represent the child's expressed objectives of representation unless the attorney finds that the child cannot meaningfully formulate such objectives. In that event, the attorney may present a position that the attorney determines will serve the child's best interests. See Tex Family Code § 107.008.

[110] Once removed, most children remain in foster care for a significant duration while their parents attempt to comply with requirements imposed by the child protection agency, typically without the benefit of interlocutory appellate review. According to the latest government data, the average length of stay in foster care in 2006 was 28.3 months, and approximately 129,000 children were 'waiting to be adopted,' meaning children 'who have a goal of adoption and/or whose parental rights have been terminated'. AFCARS 2006 Report, n 6 above at 5.

[111] See, eg, Liebmann, n 16 above (proposing more comprehensive assessments for temporary removals that would consider risks of harm to children from removal itself).

Finally, the case is a stark reminder that unjustified child welfare removals may be more likely when the target is an unpopular religious sect or subculture. The Department's actions were surely fuelled in part by recent reports within the United States of polygamous marriages between FLDS leaders and underage girls. When a minority culture endorses practices that the dominant culture views as seriously detrimental to children, state officials often are poised to intervene. Nevertheless, constitutional protections for parental autonomy, family privacy, and religious freedom stand as a shield against unjustified interventions. The Texas seizure provoked widespread condemnation of the Department's actions and broad support for the children and parents. As with the 1953 raid in Arizona, the Texas effort to 'save' the children may ultimately strengthen the FLDS community in the eyes of the nation, notwithstanding the findings of multiple underage marriages in the Department's final report.

IV TRIBAL-STATE CLASHES UNDER THE INDIAN CHILD WELFARE ACT

When indigenous children are the subject of state child welfare proceedings, the tensions inherent in a pluralist society are writ large.[112] The Indian Child Welfare Act (ICWA)[113] was a response to the destructive history within the United States of child welfare, adoption, and residential schooling practices that resulted in the separation of large numbers of Indian children from their families and tribes.[114] Although the Act has been on the books for 30 years, Indian children are still removed from their homes in disproportionately higher numbers than non-Indian children.[115] Among the more than 560 self-governing tribes today, enormous diversity exists as to economic resources, political organisation, membership criteria, language, and cultural traditions.[116] Still, many Indian tribes have common socio-economic problems that often go

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[112] As of the 2000 Census, 1.4 million children in the United States were identified as American Indian or Alaska Native, either alone or in combination with other races. C Matthew Snipp *Population Reference Bureau, American Indian and Alaska Native Children: Results from the 2000 Census 7* (2005) available at www.prb.org/pdf05/AmericanIndianAlaskaChildren.pdf.

[113] 25 USC § 1901–1934.

[114] See *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 109 (1989) (citing evidence that 25-35% of all Indian children had been separated from their families and placed in adoptive homes, foster care, or institutions). See also 25 USC § 1901 (2000) (findings by congress that 'alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions').

[115] See US Gov't Accountability Office *Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target guidance and Assistance to States* 1 (2005) (reporting that in 2003, American Indian and Alaska Native children represented about 3% of total number of children in foster care but only 1.5% of total population under 18). The GAO Study also revealed that in five states at least one-quarter of the foster care population was American Indian. Ibid at 13 tbl 3.

[116] *The Harvard Project on American Indian Economic Development, The State of the Native Nations* 1 (New York, Oxford, Oxford University Press, 2008).

hand-in-hand with accusations of child neglect: deep poverty, widespread unemployment, inadequate health care, and high rates of crime and substance abuse.[117]

Congress provided jurisdictional and procedural requirements in ICWA designed to strengthen the role of tribal courts in child welfare matters and to protect the rights of Indian parents, tribes, and children in state court proceedings.[118] Although the Act recognises exclusive tribal jurisdiction over child welfare proceedings involving children domiciled or residing on the tribal reservation,[119] a majority of Indian children today do not live on reservation or trust lands.[120] For these children with their more attenuated reservation contacts, ICWA gives state courts concurrent jurisdiction with tribes.[121] The Act's key substantive provisions spell out placement preferences for foster care and adoption – generally favouring family members and tribal members over others – that state courts must follow absent good cause to the contrary.[122]

State child welfare agencies and tribal representatives often clash in their views about child rearing, cultural identity, the goals of child protection, and the understanding of permanency.[123] In particular, many tribes have voiced a preference for extended family caregiving rather than termination of parental rights and adoption.[124] Advocates for Indian tribes maintain that the Anglo-American permanency model of parental rights termination and

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117 Ibid at 220–222 (describing pervasive socio-economic problems among American Indian populations, including high rates of domestic violence, infant mortality, suicide, alcoholism, homicide, and deep poverty).

118 The Act gives a range of procedural protections for tribes, parents and Indian custodians, including a right to notice, 25 USC 1912(a); a right to intervene, 25 USC 1911(c); and a right to counsel, 25 USC 1912(b). In order to curb state court abuses, ICWA elevates the burden of proof for child protection. See 25 USC § 1912(e) (requiring that foster care placements be based on 'clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in emotional or physical damage to the child'); 25 USC § 1912(f) (requiring that parental rights termination be based on some showing of harm to child by proof beyond reasonable doubt).

119 The Act provides for exclusive tribal jurisdiction over child welfare and adoption proceedings involving Indian children domiciled or residing on their tribal reservation or who are wards of tribal court. See 25 USC 1911(a). The application of this provision was the subject of the only Supreme Court ICWA case. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30 (1989) (holding that state court adoption of twin infants born off reservation to mother domiciled on reservation was void under exclusive tribal jurisdiction provision of ICWA).

120 Snipp, n 112 above, at 7.

121 See 25 USC § 1911(b) (providing concurrent state and tribal jurisdiction, with right of parent or tribe in state court proceeding to request transfer to tribe and requiring court to grant request absent good cause to contrary, unless parent opposes request).

122 See 25 USC § 1915 (a) (requiring state courts to give preference to child's extended family, members of child's tribe, and other Indian families for adoption); 25 USC § 1915(b) (requiring state courts to give preference to similar but slightly different set of placements for foster care).

123 I have explored this theme at length elsewhere. See 'Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance' 51 Emory LJ 587 (2002).

124 See, eg, *In re Adoption of Sara*, 123 P3d 1017 (Alaska 2005) (Yup'ik tribe unsuccessfully argued for placement of children with extended family rather than adoption by non-Indian woman); *In re Custody of SEG*, 521 NW2d 357 (Minn 1994), cert denied sub nom *Campbell v Leech*

adoption are inconsistent with tribal understandings of the parent-child relationship.[125] Some tribes reject the concept of an irrevocable termination of parental rights, preferring instead a 'suspension' of rights that has no impact on the child's relations with extended family or the tribe.[126] As explained by the Navajo Supreme Court:

> 'The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child . . . children are adopted by family members for care which may be temporary or permanent dependent upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief.[127] The parent-child relationship is not extinguished prior to such caregiving arrangements, and the child's continued contact with extended family is a central tenet of the practice.'[128]

As noted in Section II, federal law through a variety of mechanisms favours severance of parental rights and adoption as a permanency goal when children cannot be returned to their families. A recent case from California reflects this tension in cultural values. In *Re A A*,[129] the state agency sought to terminate

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Lake Band of Chippewa Indians, 513 US 1127 (1995) (Chippewa tribe successfully argued for foster placement of children with tribal members instead of adoptive placement of children with non-Indian couple).

125 The maintenance of family and tribal connections is central to many tribes' child welfare systems: 'Permanency planning in Indian child welfare . . . has as much to do maintaining a child's connection and sense of belonging to the extended family, clan, or tribe as it does with maintaining ties to the biological parents. Termination of parental rights is valued as the method of choice to insure permanence in the mainstream child welfare system. However, in Indian child welfare, it has the potential of severing the child's connection to an extended family or tribe'; Terry L Cross and Kathleen Fox 'Customary Adoption as a Resource for American Indian and Alaska Native Children', in Gerald P Malon and Peg McCartt Hess (eds) *Child Welfare for the Twenty-First Century* (Columbia University Press, New York, 2005) at 423, 427.

126 Numerous tribes favour open adoption instead of the Anglo-American standard of closed adoption, and tribal codes often provide for a 'suspension' of parental rights and the survival of some residual portion of parental rights after an adoption. See, eg, Salish and Kootenai Children Codified 3-2-406(10)(h) (authorising residual parental rights after open adoption, such as rights to visitation, contact, and spiritual training); Sisseton-Wahpeton Sioux Juvenile Code 38-03-37 (authorising open adoption to insure continuation of child's relationship with birth parents); White Earth Band of Chippewa Child/Family Protection Code Tit 4, Ch XXVII, § 1 (preferring open adoption so that child maintains connection with family and tribal heritage).

127 *In re JJS*, 4 Navajo Rep 192 (Navajo Supreme Ct 1983) (quoting Opinion of Solicitor to Courts of Navajo Nation, No 83-10, 9 September 1983).

128 See generally J Red Horse 'Traditional American Indian Family Systems' (1997) 15 *Families, Systems, and Health* 243.

129 84 Cal Rptr3d 841 (Cal App 2008). The children's mother, who had lost custody of four children due to drug addiction, was homeless and had failed to comply with drug treatment programmes. The children's father was incarcerated in state prison on murder charges; ibid at 853.

the parental rights of a Tule River Tribe[130] member and to permit the adoption of her young children by foster parents, one of whom was Cherokee. The children had been born drug-exposed and had been removed from their mother's care at infancy. By the final permanency hearing, the children were in their fifth placement and suffered from significant developmental delays and attachment disorders.[131] The tribe strenuously opposed the adoptive placement and advocated instead for guardianship with relatives who already had custody of a sibling.[132] The proposed adoptive couple, while meeting one of ICWA's preferred placement categories, were not family members or members of the children's tribe and therefore ranked below the relatives in ICWA's placement priorities. Moreover, the tribe argued that the process of severance and adoption was inconsistent with tribal culture. The tribe's representative explained during the proceedings, '[i]n our way and custom, you can't terminate parental rights ever'.[133] Termination of parental rights and adoption by the foster parents, according to the tribe, would interfere with the children's connection with their tribal community.[134]

Emphasising the extraordinary needs of the children for stability, the trial court terminated the mother's parental rights and ordered a permanency plan of adoption by the foster parents. On appeal, the court likewise focused on the children's emotional needs and found no abuse of discretion.[135] Concluding that the tribe failed to show that the adoption would be detrimental to the children by interfering with their tribal connections, the court emphasised the children's extraordinary emotional needs and the expert opinions that another change in placement would cause them substantial harm.[136] As the court put it, the tribe's preferred placement of guardianship might have served the tribe's interests but would not meet the children's need for stability and permanency.[137]

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130 The Tule River Tribe Reservation is located in a rural area of California in the Sierra Nevada Mountains.

131 84 Cal Rptr3d at 851-852.

132 The relatives had cared for the children temporarily but had voluntarily relinquished custody. Moreover, they had vacillated in their desire to be a long-term placement, but, by the final hearing, stated that they would consider adoption. 84 Cal Rptr3d at 854-855.

133 84 Cal Rptr3d 841, 867. The tribe took somewhat inconsistent positions on this point during the proceedings, in part because of the relatives' own vacillation about the possibility of adoption.

134 The tribe relied on an important new California law for Indian child welfare cases; ibid at 866. See West's Ann Cal Welf and Inst Code § 366.26(c)(1)(B)(vi) (2007) (excluding an Indian child from mandatory termination of parental rights if there is compelling reason for finding that termination is not in a child's best interests, including where termination would interfere with child's connection to tribal community or tribal membership rights, or where tribe has identified kinship guardianship, long-term foster care, or other planned permanent living arrangement for child).

135 The tribe also challenged, unsuccessfully, the trial court's finding that the state agency had made active efforts to maintain the children in their home, as required by ICWA, and that the children were 'adoptable' under state law. See 84 Cal Rptr3d 841, 857-864.

136 84 Cal Rptr3d at 872.

137 As the court put it: 'Indian children or not, the children had a fundamental interest in stability and permanency. Adoption gives a child the best chance at a full emotional commitment from

The appellate court thus agreed with the trial court that there was substantial evidence of good cause to depart from the tribe's preferred placement at the permanency hearing.[138]

The *Re A A* case reveals a clash in perspectives about the value of tribal connection and the meaning of permanency. In the view of the Tule Tribe, the children were at risk of losing contact with their family members and tribal community because of the termination of parental rights and adoption by their foster parents. The tribe viewed the relative guardianship as in the children's best interests because it would keep them within their extended family, would allow them to build a bond with their sibling, and would maintain their cultural heritage as Tule children. Moreover, the tribe argued that parental rights termination was inconsistent with tribal tradition. The state agency, in contrast, focused on the children's need for permanency and stability, a need that was extraordinary in light of the children's history of multiple placements. The foster parents' willingness to commit to the children, to provide them with mental health and educational services, and to work on the bonding process convinced the agency that termination and adoption was in the children's best interests. The agency, moreover, might have believed that the children's Indian heritage would be maintained through their Cherokee foster parent. In short, each viewpoint rested on a competing set of cultural norms.

One lesson of the case is that more fluid approaches to adoption might better serve the interests of Indian children and tribes without forfeiting the benefits of family stability. In *Re A A,* the court had to choose between the mutually exclusive alternatives of adoption and guardianship. If the proposed adoption had included an agreement that the adoptive parents would facilitate the children's ties to relatives and tribal members, the Tule Tribe might have been less resistant. More importantly, such an understanding would have protected the young Indian children's inchoate interests in maintaining their tribal identity.

V CONCLUSION

When acting in their parens patriae role to protect children, states within the United States always navigate between the duty to protect vulnerable children from harm and the need to avoid the countervailing harm of unwarranted interventions. That governmental responsibility is all the more complicated when child welfare agencies face minority religious or cultural practices affecting child rearing and family life. The new Fostering Connections to Success and Increasing Adoptions Act of 2008 is a welcome step toward greater flexibility in devising permanency plans for children in foster care, particularly

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a responsible caretaker. Guardianship, while a more stable placement than foster care, is not irrevocable and falls short of the secure and permanent future the legislature had in mind for a dependent child'; 84 Cal Rptr3d at 868.

138 84 Cal Rptr3d at 871-73.

with respect to the option of kinship care so valued among many Indian communities as well as other minority groups.

The child protection seizure in Texas and the Indian child welfare proceeding from California both reveal the challenges facing state agencies in a multicultural society. The clear disapproval by the Texas appellate courts of the mass emergency removal of FLDS children reminds us that a subculture's belief system, however unpopular and potentially harmful, is an inadequate basis for removal if there are other less intrusive alternatives to ensure a child's safety. Although the Texas investigation did ultimately bring to light the underage spiritual marriages of a dozen girls, the initial seizure of several hundred children was a costly mistake. The individuals who paid most dearly for that mistake were the FLDS children themselves. The *Re A A* case, in contrast, addresses the permanency planning stage of a child protection proceeding and the competing policies implicated in Indian child welfare litigation. The divergent perspectives of the Tule River Tribe and the California child protection agency highlight the need for state courts to find ways of accommodating Indian children's multiple interests in developing appropriate permanency plans. Both proceedings remind us of the challenges inherent in protecting children – and respecting children's perspectives – across cultural divides.

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