The International Survey of Family Law 2010 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 were conferences in Tel Aviv (Israel), Porto (Portugal) and Sao Paolo (Brazil), and in 2010 Kansas City (USA), Tsukuba University (Japan) and the University of Ulster (Northern Ireland) host regional conferences. A World Conference will take place in Lyon (France) in July 2011.

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 2009 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

I have just recently finished a course lecturing to family law students. Like many who contribute to the *International Survey*, lecturing is part of our regular diet. My students enthuse over family law because it is about the human condition. It is where law, social control, family groups and individuals can all meet. It often involves intimate stories at the heart of people's lives. Students who want to make a real difference at the human level are drawn to family law.

However, whatever we do, whether as teachers, practitioners or judges of the law, we can so easily become absorbed in our own legal world, the current issues of the day and the latest task that has arrived on our desk. It is nevertheless the privilege, especially of academics, to sit back and try to make wider sense of what is happening. How does the latest judgment fit in? How will recent legislation change things? What legal theories drive the law?

One of the beauties of the *International Survey* is that we have the opportunity to study family law in the context of what is happening all around the globe. Reading what is happening in another jurisdiction takes us out of our own corner and exposes us to the thinking and developments in other places. It helps us to examine our own country's laws from a broader perspective and to see what different pressures and solutions apply elsewhere.

This year's *Survey* again covers a wide range of topics and nations. I thank those who have expended so much time and effort in producing their pieces and enabling the *Survey* to achieve its goal. Without willing authors with ideas and expertise, the *Survey* could simply not be produced. As in the past, there is representation from African, Asian and Latin American countries, common law and European ones, as well as the distinctive coverage of international and European Community law developments. Third World and Asian countries face tensions resulting from their multicultural nature or because their legal systems are still in a stage of development, in some instances clashing with inherited Western norms. Balancing custom and national laws arises not infrequently. For the West, there are other issues, for example the continuing saga of how to treat same-sex couples and unmarried cohabitants, including co-residing sisters. We also learn about living wills, the use of tort to resolve family disputes, medical treatment for minors, and where to bury a child.

Special thanks to my former secretary, Tracy Warbrick, and to Denise Blackett who has taken over the secretarial role. My research assistant, Redmond Kirwan-Jones, also deserves my appreciation for the work that he did on some

of the chapters. Dominique Goubau and Hugues Fulchiron were responsible for the French abstracts. As ever, much gratitude also goes to the Jordans staff and to their editor, Cheryl Prophett.

Bill Atkin
General Editor
June 2010

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

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ANNUAL REVIEW OF INTERNATIONAL FAMILY LAW 2008

Elaine O'Callaghan[*]

Résumé

Beaucoup d'événements significatifs ont eu lieu en 2008 dans le domaine du droit international de la famille. La Conférence de La Haye de droit international privé a publié deux guides importants : le premier concerne les Contacts transfrontières relatifs aux enfants / Principes généraux et Guide de bonnes pratiques, et le second La mise en œuvre et fonctionnement de la Convention sur l'adoption internationale de 1993 : Guide de bonnes pratiques. La Conférence de La Haye a également progressé dans la mise en œuvre de ses mesures électroniques à l'occasion de la première e-Apostille européenne, émise en Espagne. Le Comité onusien des droits de l'enfant a organisé une journée de débat sur « Le droit de l'enfant à l'éducation dans les situations d'urgence ». En Europe, une directive sur la médiation a été adoptée afin d'encourager son utilisation pour résoudre les différends, y compris ceux portant sur des questions relatives à la famille.

Au cours de ses nombreuses visites d'Etats, le Commissaire aux droits de l'homme du Conseil de l'Europe, M. Thomas Hammarberg, s'est dit préoccupé par un large éventail de difficultés concernant la famille et chacun de ses membres. Les questions fondamentales de la justice des mineurs, du regroupement familial et des droits des personnes handicapées bénéficient dans ce chapitre d'une attention particulière. En outre, un certain nombre d'arrêts importants ont été rendus par la Cour européenne des Droits de l'Homme concernant le droit à la vie familiale consacré par l'article 8 de la Convention européenne des droits de l'homme. La discussion de cette année s'intéresse à trois cas individuels relatifs au respect du droit des prisonniers à la vie familiale, aux mesures d'assistance éducative et au placement des enfants en vue de leur adoption.

I THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The year 2008 marked the 115th anniversary of the Hague Conference on Private International Law.[1] The success of the Hague Conference undoubtedly stems from its continuing innovation and 2008 proved to be no exception in this

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1 See further, www.hcch.net/index_en.php?act=events.details&year=2008&varevent=151.

regard. The Conference is currently developing its electronic measures and 2008 saw further advancements including, for example, an acknowledgement of the value of its Apostille Convention, and in particular, its electronic Apostille. The first e-Apostille in Europe was issued by the Superior Court of Murcia, Spain, in the context of an international adoption procedure in 2008.[2] The Apostille Convention 'facilitates the circulation of public documents executed in one State party to the Convention and to be produced in another State party to the Convention' and in short, replaces the 'cumbersome and often costly formalities of a full legalisation process with the mere issuance of an Apostille'.[3] The electronic Apostille Pilot Programme was launched in 2006 and it 'modernises the operation of the Apostille Convention by extending it into the electronic medium without changing its nature and without having to change its content'.[4] It is, reportedly, more effective, secure and available at no cost to any Competent Authority.[5]

The year 2008 also witnessed the publication of two important guides to Hague instruments which are discussed in the following section: the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* was published along with the *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice*.[6] Both guides offer some much needed clarity in these two highly technical areas of child law.

(a) General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children

This guide outlines a number of principles and general advice for states and their authorities when formulating policies and conducting cases in respect of international access/contact. It is aimed, in particular, at judges as well as at Central Authorities and governments.[7] It provides a model for constructing an international system of co-operation designed to secure effective respect for rights of contact and is aimed at all states, not only those signatory to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction or the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The guide examines the importance of contact for children as well as more specific

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2 See further, www.hcch.net/index_en.php?act=text.display&tid=37 and www.hcch.net/index_en.php?act=events.listing&year=2008.

3 See 'Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents', available at www.hcch.net/upload/outline12e.pdf.

4 Ibid.

5 Ibid.

6 Hague Conference on Private International Law, *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Family Law, Bristol, 2008); Hague Conference on Private International Law, *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice* (Family Law, Bristol, 2008).

7 See Hague Conference on Private International Law, *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Family Law, Bristol, 2008) p 9.

issues such as mediation and parental agreement, inter-state administrative co-operation, the processing of international applications concerning contact by the competent authorities, making, modifying and enforcing cross-border contact orders, relocation and contact with the left-behind parent and finally, the interpretation of Art 21 of the 1980 Hague Convention.

One of the most important principles discussed in the guide concerns the promotion of agreement among disputing parties. The guide outlines the value of establishing agreement in relation to arrangements for contact, particularly because it is in the interests of the child and it places an emphasis on utilising the processes of mediation, conciliation, negotiation and other such processes.[8] Crucially, the guide also details that states must ensure fairness in the negotiating process and ensure that the views of the child are included in the process.[9]

The guide also refers to the important issue of time and delay in such cases and establishes that all stages of the administrative and judicial proceedings must be dealt with speedily. Specific reference is made to the role of the judiciary, at both the trial and appellate levels, in managing the progress of cross-frontier contact cases.[10] More specifically, courts are required to set and adhere to timetables which ensure that cases are dealt with in a timely manner.[11]

The guide also requires states to have a broad range of measures available to safeguard and guarantee stipulated contact arrangements.[12] Examples of safeguards and guarantees include the surrender of passports and travel documents, requiring the requesting parent to regularly report to the police or some other authority during a period of contact, the deposit of a monetary bond or surety, supervision of contact by a professional or a family member and various other restrictions attached to contact such as forbidding overnight visits or extended visits and restricting the locations where visitations may occur.[13]

The guide also provides great detail in relation to the issue of enforcement which is possibly one of the most difficult aspects involved in such cases.[14] States are required to develop a legal framework which will give effect to any agreements made between parents concerning contact.[15] It stipulates that effective mechanisms should be available for enforcing a contact order, including effective coercive measures and further, that, separate challenges

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8 Ibid, p 6.
9 Ibid, pp 7–8.
10 Ibid, p 30.
11 Ibid, p 30.
12 Ibid, p 31.
13 Ibid, p 31.
14 Ibid, p 34.
15 Ibid, p 11.

allowed against the order of specific enforcement measures and/or decisions on additional formality requirements for enforcement should be limited or avoided altogether.[16]

(b) Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice

This guide is the first guide to good practice for the 1993 Hague Intercountry Adoption Convention and it identifies a range of issues concerning the planning, establishment and operation of the legal and administrative framework. It is directed at policy makers involved in short-term and long-term planning to implement the Convention in their country, as well as at judges, lawyers, administrators, caseworkers, accredited bodies and other professionals needing guidance on some practical or legal aspects of implementing the Convention. The guide emphasises the shared responsibility of receiving states and states of origin to develop and maintain ethical intercountry adoption practices, which includes, in particular, the child's best interests as the cornerstone.

Overall, the guide requires individual states to assess and reflect on the current legal and policy framework surrounding adoption and to develop concrete plans for implementing the Convention. It also discusses the national child care context and national adoptions.[17] In this regard, the guide outlines that formal criteria for entry into care are needed to help prevent inappropriate intervention including the abduction, sale or trafficking of children. The guide also details that the collection of statistics is vital to identify trends in abandonment, for example, in order to determine why it occurs and how to address the issue.[18] The voluntary relinquishment of rights in relation to children must be formalised in order to ensure that consent has been freely given and has not been induced by compensation.[19] Family preservation and reunification are recognised as core principles which must be considered in every case concerning children in the context of adoption and temporary care is recognised as one way of achieving this.[20]

In relation to intercountry adoption, once it has been established that a child is adoptable and that possibilities for the placement of the child within the state of origin have been given due consideration, the Central Authority or other competent body may determine that intercountry adoption is in the child's best interests.[21] The guide sets out a number of key operating principles including progressive implementation, allocating sufficient resources and powers,

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16 Ibid, p 34.
17 Hague Conference on Private International Law, *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice* (Family Law, Bristol, 2008) p 69.
18 Ibid, p 71.
19 Ibid, pp 71–72.
20 Ibid, pp 72–76.
21 Ibid, p 79.

co-operation and communication among all of the parties concerned, expeditious procedures, transparency and observing minimum standards in line with the best interests of the child. These principles apply to all authorities, bodies and persons involved with intercountry adoptions under the Convention.[22] States are required to provide details of all of these authorities, bodies and persons involved with intercountry adoptions to the Organigram on the Hague Conference website as well as to their individual country profile.[23]

The Convention aims to prevent improper financial gain and corruption in the context of adoption and the guide further details this by outlining that states must regulate all financial aspects of the adoption process. In particular, the practice of some states in permitting prospective adoptive parents to go directly to orphanages to adopt independently, after being approved to adopt by the receiving country, or to adopt privately, is not recommended due to the lack of effective regulation.[24] Apart from seeking to prohibit these private and independent adoptions, the guide also requires transparency in costs, effective regulation and supervision of bodies and persons, legally enforceable penalties, regulation of fees and a post-adoption survey of adoptive parents.[25] The combination of these measures will help to prevent improper financial gain and corruption which has become associated with intercountry adoption.

The guide also discusses post-adoption matters and details states' requirements in relation to the provision of counselling, post-adoption reports as well as the collation of statistics.[26] In particular, the guide emphasises the increasing importance of preserving all information in relation to adoptions,[27] including non-identifiable information concerning the birth parents which adopted children and adoptive parents have a right of access to.[28]

II UNITED NATIONS

In 2008, there were no further ratifications of the Convention on the Rights of the Child, 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 acceded by Albania, Iraq and Uzbekistan and ratified by Burundi, China, the Russian Federation and Singapore.[29] There are now (November 2009) 130 parties to the Protocol. In relation to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, this instrument was acceded by Albania, Iraq and Uzbekistan and ratified by

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22 Ibid, p 40.
23 Ibid, p 45.
24 Ibid, pp 37 and 60–66.
25 Ibid, p 131.
26 Ibid, pp 123–130.
27 Ibid, p 124.
28 Ibid, p 124.
29 See further, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

Greece, Israel and Monaco.[30] This brings the total number of State Parties to 135 as at November 2009. The Committee on the Rights of the Child convened a Day of General Discussion concerning 'The Right of the Child to Education in Emergency Situations'.[31] No General Comments were published by the Committee.

Day of General Discussion on the Right of the Child to Education in Emergency Situations

In 2008, the Committee on the Rights of the Child held its annual Day of General Discussion on **'**The Right of the Child to Education in Emergency Situations', thereby focusing on the implementation of Arts 28 and 29 of the Convention on the Rights of the Child (CRC) in order to provide states and other actors with more comprehensive guidance as to their obligations to promote and protect the right to education.[32] The right to education is a well-established right within the international legal framework, being enshrined in the 1948 Universal Declaration of Human Rights as well as in the

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[30] See further, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

[31] Available at www2.ohchr.org/english/bodies/crc/discussion2008.htm.

[32] Article 28 of the CRC sets out as follows: '1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.' Meanwhile, Art 29 of the CRC establishes that: '1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

International Covenant on Economic, Social and Cultural Rights. Further, the Millennium Development Goals of the United Nations General Assembly as well as the 'World Fit for Children' Outcome Document of the United Nations General Assembly Special Session on Children in 2002 detail that all children have a right to primary education.[33]

The Committee clarified the meaning of 'emergency situations' to include all situations in which man-made or natural disasters destroy, within a short period of time, the usual conditions of life, care and education facilities for children and therefore disrupt, deny, hinder progress or delay the realisation of the right to education. Such situations can be caused by, inter alia, armed conflicts – both international, including military occupation, and non international – post-conflict situations, and all types of natural disasters.[34]

The Committee on the Rights of the Child outlined that the right to education is a priority and an integral component of humanitarian relief response in emergency situations.[35] In particular, the Committee noted that, in emergency situations, the right to education is a 'protection measure, as well as a relief measure and a life saving measure that provides physical, psychosocial and cognitive protection'.[36] Education can give children 'a sense of normalcy, stability, structure and hope for the future'.[37] In this regard, states and other actors are urged to fully ensure the right to education for every child within their jurisdiction, without any discrimination, throughout all stages of emergency situations, including the emergency preparedness phase and the reconstruction and the post-emergency phases.[38]

Last year's *International Survey* discussed the Recommendations of the 2007 Day of General Discussion on 'Resources for the Rights of the Child – Responsibility of States', including a discussion of the term 'progressive realisation' in relation to economic, social and cultural rights.[39] In 2007, the Committee recommended that 'progressive realisation' 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'.[40] In 2008, the Committee expressly reiterated that education falls within this category and in this regard merits immediate and targeted measures to ensure its realisation in practice.[41]

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33 Committee on the Rights of the Child, Day of General Discussion on 'The Right of the Child to Education in Emergency Situations', 19 September 2008, unedited version, paras 3 and 4.
34 Ibid, para 2.
35 Ibid, para 23.
36 Ibid, para 29. See further, para 42 concerning the importance of quality education.
37 Ibid, para 29.
38 Ibid, para 29.
39 See 'Annual Review of International Family Law 2007' in B Atkin (ed) *International Survey of Family Law 2009* (Jordan Publishing Limited, 2009) PP 7ff.
40 Ibid, p 8.
41 Committee on the Rights of the Child, Day of General Discussion on 'The Right of the Child to Education in Emergency Situations', 19 September 2008, unedited version, para 30.

The Committee details that, where states lack the capacity and/or requisite resources to ensure the full realisation of the right to education, the international community including other states, donor organisations and UN agencies should ensure that this right is implemented.[42] The implementation of the right to education must take account of the four general principles of the Convention: the right to non-discrimination (Art 2); best interests of the child (Art 3); the right to life, survival and development (Art 6); and the right to be heard (Art 12).[43] Further, drawing on Art 4 of the CRC which concerns implementation, the Committee urges states, and in particular those which are prone to natural disasters or in areas likely to be affected by armed conflict, to increase their ability to withstand emergencies by strengthening national systems of education, the legal framework for protection, and health and basic social services.[44]

The Committee highlights a number of organisations who may be of benefit to states, relief agencies and the donor community in terms of resources for education in emergency situations, including INEE, and in particular, the INEE Minimum Standards for Education in Emergencies, Chronic Crisis and Early Reconstruction, the Interagency Standing Committee, the IASC Education Cluster and the Transition Fund of the Education for All – Fast Track Initiative.[45]

The Committee advocates the need for quality education to ensure long-term benefits for states. For example, it details that education can increase social cohesion and support conflict resolution and peace building as well as mitigate state fragility and help to achieve social, economic and political stability of societies. It can also help to prevent exploitation and harm, for example, in relation to landmine safety and HIV/AIDS prevention.[46] Education must also cater for the psychological or mental state of the child and assist the child to cope with the emergency.[47] The importance of training for teachers to respond to children's needs was also emphasised by the Committee.[48]

Conclusions

In order to strengthen the recommendations made on the Day of General Discussion, the Committee outlined that states should include, when reporting to the Committee on the implementation of CRC as set out in Art 44 of the Convention, progress achieved towards the implementation of these

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42 Ibid, para 31.

43 Ibid, para 32. See further, paras 36, 37 and 40 in relation to the principle of non-discrimination; paras 48 and 49 in relation to the child's right to participation.

44 Ibid, paras 33 and 34.

45 See further ibid, paras 51 and 52.

46 Ibid, para 42. See further, United Nations Committee on the Rights of the Child, *General Comment No 1 The Aims of Education*, UN Doc CRC/GC/2001/1.

47 Committee on the Rights of the Child, Day of General Discussion on 'The Right of the Child to Education in Emergency Situations', 19 September 2008, unedited version, paras 45 and 46.

48 Ibid, para 47.

recommendations.[49] Further, states are asked to share lessons learned about minimising the negative impact of emergency situations on children's right to education.[50] The combination of these measures will help to ensure reflection on as well as assessment of the status of children's rights to education in emergency situations.

III EUROPEAN UNION

The role which mediation can play in resolving disputes has been recognised by the European Union through its 'Mediation Directive' which aims to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.[51] The European Union has described mediation as a faster and cheaper alternative to going to court. The Directive applies to processes where two or more parties to a cross-border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement to their dispute with the assistance of a mediator. The Directive only applies to cross-border disputes, although it does not prevent Member States from applying the provisions of the Directive to internal mediation processes. Given the broad definition of 'cross-border disputes', the Directive's provisions on confidentiality and on limitation and prescription periods also apply in situations which are purely internal at the time of mediation but become international at the judicial proceedings stage, that is, if one party moves abroad after mediation fails.[52]

The Directive contains five core rules which broadly concern civil procedure to ensure a good working relationship between mediation and judicial procedure.[53] First, the Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms concerning the provision of mediation services which aim to preserve the flexibility of the mediation process and the autonomy of the parties and to ensure that mediation is conducted in an effective, impartial and competent way. Secondly, the Directive gives every judge in the Community, at any stage of the procedure, the right to invite the parties to have recourse to mediation if he

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49 Ibid, para 54.

50 Ibid, paras 55 and 56.

51 Once the Directive has entered into force, EU Member States will be given 36 months to convert the new rules into national law. During this time, Member States must also decide whether they want to limit their implementing legislation to cross-border cases or whether they also want to apply the provisions of the Directive to internal cases. See further, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Europa Press Release: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/263&format=HTML&aged=0&language=EN&guiLanguage=en (30/03/2010).

52 See Europa Press Release: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/263&format=HTML&aged=0&language=EN&guiLanguage=en (25/07/09).

53 Ibid.

considers it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation.

Thirdly, the Directive obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary. The choice of mechanism is left to the Member States. This provision will enable parties to give an agreement resulting from mediation a status similar to that of a judgment without having to commence judicial proceedings. This possibility, which currently does not exist in all Member States, can provide an incentive for parties to resort to mediation rather than go to court. Although parties will in most cases voluntarily comply with the terms of an agreement reached in mediation, the possibility of obtaining an enforceable title can be desirable for obligations, such as child maintenance, which require regular payments over a fairly long period, in the course of which the willingness of the debtor to fulfil his obligations voluntarily may deteriorate.

Fourthly, the Directive also ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. To this end, the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties. Finally, the Directive contains a rule on limitation and prescription periods which ensures that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation. Like the rule on confidentiality, this provision also indirectly promotes the use of mediation by ensuring that parties' access to justice is preserved should mediation not succeed.

Conclusions

The 4th World Congress on Family Law and Children's Rights in 2005 recommended that mediation and ADR be made the primary forum for dispute resolution concerning children and families.[54] While the European Union Mediation Directive clearly demonstrates a strong commitment to such processes, arguments have been made, for example, as regards the value of adopting an alternative dispute resolution protocol as part of international conventions in order to facilitate the amicable resolution of disputes internationally.[55] Such a development would help to establish clear guidance as

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[54] See Resolution 25, as outlined in the Communiqué in 2005, available at www.lawrights.asn.au/index.php?option=com_content&view=article&id=61 (25/07/09).

[55] See R Pawlowskiee 'Student Note: Alternative Dispute Resolution For Abduction Convention Child Custody Disputes' (2007) 45 *Family Court Review* 302 where the recommendation concerning the adoption of an alternative dispute resolution protocol was made specifically

regards the use of alternative dispute resolution processes and encourage their use in cases concerning children and their families in practice.

IV COUNCIL OF EUROPE

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 will be discussed in this section. This section also details case-law of the European Court of Human Rights in relation to Art 8 of the European Convention on Human Rights and focuses on three individual cases concerning respect for prisoners' rights to family life, the placement of children in care and the placement of children for adoption.

(a) Country Reports of the Commissioner for Human Rights

The Council of Europe Commissioner for Human Rights, currently Mr Thomas Hammarberg who took office on 1 April 2006, conducts regular country visits throughout the Member States, 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 of human rights, both nationally and internationally.

In 2008, the Commissioner published reports and memoranda concerning his country visits to Albania, Armenia, Azerbaijan, Cyprus, the Former Yugoslav Republic of Macedonia, France, Ireland, Italy, Montenegro, San Marino and the United Kingdom as well as Special Missions to the areas affected by the South Ossetia Conflict. While the reports, memoranda and missions addressed a wide range of human rights issues, this section will focus on the areas of juvenile justice, family reunification and rights for persons with disabilities.

(i) Juvenile justice

The Commissioner expressed concern at the growing trend of increasingly harsh penalties for acts committed by minors in Europe and noted that criminalisation and the use of detention can be minimised.[56] He recommended, for example, that states carefully consider the United Nations Committee on the Rights of the Child General Comment, *Children's Rights in Juvenile Justice*,

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concerning the Hague Convention on the Civil Aspects of International Child Abduction to facilitate the amicable resolution of cross-border child custody disputes.

[56] See *Memorandum to the French Government* commDH(2008)34 Strasbourg 20 November 2008, para 64.

which outlines the specialised nature of the criminal justice system for minors and the fact that educational measures should prevail over punishment.[57] Indeed, the approach of the Commissioner in relation to juvenile justice in all cases is to 'emphasise education rather than punishment'.[58] In this regard, the Commissioner took particular issue with French legislation which introduced minimum penalties in some circumstances.[59] This measure, according to the Commissioner, aims to prevent reoffending rather than preventing first offences.[60] The Commissioner recommends that efforts should instead be made to reduce the length of time it takes for minors to be dealt with by specialised social services and for judgments to be handed down, as excessive delays may give some children a sense of impunity.[61] Overall, the approach which the Commissioner advocates in relation to juvenile justice is to concentrate on ensuring that educational and reparation measures are available.[62]

In relation to juvenile justice, one of the core issues which demands attention is the age of criminal responsibility. The Commissioner discussed this in the context of a number of Country Reports and took particular exception with countries where he deemed the age to be too low. The Commissioner has observed that the average age of criminal responsibility across Europe is between 14 and 16, and in some states it is 18.[63] Indeed, the Commissioner has expressed the view that the age at which criminal penalties may be imposed should be raised to bring it closer to full age.[64] This view is based on the expert opinion of academics who have observed that in jurisdictions where the age of criminal responsibility is higher no negative consequences ensue in terms of juvenile crime rates.[65]

In this regard, the Commissioner has taken particular issue with the current age of criminal responsibility in the United Kingdom which is 10 years of age in England, Wales and Northern Ireland and 8 years of age in Scotland.[66] To strengthen his views, the Commissioner draws on reports by the Committee on the Rights of the Child and by the European Social Rights Committee in 2005 which declared the United Kingdom to be in breach of Art 17 of the European Social Charter because the age of criminal responsibility in the United Kingdom is 'manifestly too low'.[67] The Commissioner, therefore, recommended that the Government considerably increase the age of criminal responsibility to

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57 Ibid, para 74.
58 Ibid, para 71.
59 Ibid, para 71.
60 Ibid, para 71.
61 Ibid, para 71.
62 Ibid, para 76.
63 See *Memorandum to the United Kingdom Government* commDH(2008) Strasbourg 17 October 2008, para 8.
64 *Memorandum to the French Government* commDH(2008)34 Strasbourg 20 November 2008, para 76.
65 *Memorandum to the United Kingdom Government* commDH(2008) Strasbourg 17 October 2008, para 8.
66 Ibid, para 8.
67 Ibid, para 8.

bring it in line with the rest of Europe, to the age of 14 or 15.[68] In relation to Ireland, for example, where the general age of criminal responsibility is 12 years, with an exception for 10 and 11-year-old children charged with the most serious offences such as murder, manslaughter, rape or aggravated sexual assault, the Commissioner expressed distaste as to the possibility of charging a very young child with the most severe crimes in an ordinary criminal court not specially equipped to deal with children.[69] In particular, the Commissioner recommended the establishment of guidance and specific training for the judiciary.[70]

In relation to the conditions of the detention itself, the Commissioner has recommended that children be detained in facilities which are designed specifically for minors.[71] In relation to Ireland, for example, the Commissioner urged the Irish authorities to discontinue the imprisonment of children, making the detention school model available whenever detention is deemed necessary.[72]

(ii) Family reunification

Last year's Annual Review discussed the issue of family reunification and highlighted it as a much guarded issue within the Council of Europe. To date, the Commissioner for Human Rights has been increasingly keen to draw attention to the issue while fulfilling his mandate. One of the core issues which must be addressed when considering the legal framework surrounding the issue of family reunification in domestic states is the interpretation of the concept of 'family life'.[73] For example, in relation to Ireland, the Commissioner has called on the authorities to consider the introduction of broader provisions, in line with the approach of the European Court of Human Rights, allowing family reunification to include less traditional types of family life.[74] The Commissioner also advocates ensuring that the 'best interests of the child' principle is considered in any decision relating to family reunification involving children.[75]

More specifically in relation to family reunification measures, the Commissioner has called for clarity, the speedy resolution of cases and for an end to discrimination in a number of States, including France and Ireland.[76] The

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68 See section I, *Memorandum to the United Kingdom Government* commDH(2008) Strasbourg 17 October 2008.

69 See *Memorandum to the Irish Government* commDH(2008)9 Strasbourg 30 April 2008, para 62.

70 Ibid.

71 See *Memorandum to the French Government* commDH(2008)34 Strasbourg 20 November 2008, paras 90 and 91.

72 See *Memorandum to the Irish Government* commDH(2008)9 Strasbourg 30 April 2008, para 72.

73 Ibid.

74 Ibid.

75 Ibid.

76 See *Memorandum to the French Government* commDH(2008)34 Strasbourg 20 November 2008, paras 112 and 113; *Memorandum to the Irish Government* commDH(2008)9 Strasbourg 30 April 2008, paras 109–111.

Commissioner expressed great concern in relation to the lack of statutory regulations regarding family reunification for groups other than holders of protection permits and EU citizens in Ireland and recommended the introduction of statutory provisions for all groups of people.[77]

Overall, the Commissioner has concentrated on overseeing the implementation of Art 8 of the European Convention on Human Rights, that is, the right to respect for family life, on a national level. Similarly to last year's conclusions in the Annual Review, the importance of procedural rights has been repeatedly emphasised by the Commissioner, particularly as regards administrative delays which can ultimately result in long periods of separation for family members and infringe their right to respect for family life.

(iii) Rights for persons with disabilities

The Commissioner has emphasised the importance of respecting the rights of persons with disabilities in contrast with the traditional approach of providing care for them.[78] This is in line with international legal obligations as outlined in the UN Convention on the Rights of Persons with Disabilities as well as the UN Convention on the Rights of the Child. The Council of Europe Committee of Ministers adopted an Action Plan (2006–2015) to promote the rights and full participation of people with disabilities in society in 2006.[79] This plan aims to develop a European policy framework on disability which incorporates respect for human rights, equal opportunities, full citizenship and participation of people with disabilities.[80] The Commissioner for Human Rights has equally endeavoured to ensure a commitment to these core principles among Member States. For example, he has explicitly recommended that states co-operate with and consult persons with disabilities and any disability movements during the process of law reform which directly affects their lives.[81]

The Commissioner has also strongly recommended the ratification of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol and has urged the domestic implementation of its standards. He has also urged states to consider best practices in other Council of Europe States when building a strategy concerning persons with disabilities.[82] In this sense, the Commissioner has especially commended the approach adopted in the Republic of San Marino which has signed and ratified the United Nations

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77 See *Memorandum to the Irish Government* commDH(2008)9 Strasbourg 30 April 2008, para 110.

78 See *Memorandum to the Montenegren Government* commDH(2008)25 Strasbourg 2–6 June 2008, paras 74 and 75.

79 www.coe.int/t/e/social_cohesion/soc-sp/integration/02_council_of_europe_disability_action_plan/Council_of_Europe_Disability_Action_Plan.asp.

80 Ibid.

81 See, eg, *Memorandum to The Former Yugoslav Republic of Macedonia Government*, commDH(2008)21 Strasbourg 11 September 2008, para 113; *Memorandum to the Montenegren Government* commDH(2008)25 Strasbourg 2–6 June 2008, para 86.

82 *Memorandum to the Montenegren Government* commDH(2008)25 Strasbourg 2–6 June 2008, para 87.

Convention on People with Disabilities and introduced 12 laws which aim to integrate children in schools and to introduce adults to the labour market, both of which have helped to overcome the social stigma attached to people with disabilities.[83] By way of contrast, the Commissioner was somewhat critical of Albania's and Montenegro's reluctance to ratify the UN Convention and has urged immediate action in this regard.[84] According to the Commissioner, such ratification can assist in developing a comprehensive and modern social policy.[85]

The Commissioner has also acknowledged that developing alternative care, such as foster care, community services and individual living requires funds, skilled staff and individual training.[86] In order to implement such change, core organisational reforms are necessary and this involves co-operation between a wide variety of stakeholders including those in health, social care, housing, education, employment, transport, leisure, criminal justice and social security.[87] The Commissioner has also recommended an independent monitoring system such as an Ombudsman to review the current and developing progress.[88]

Conclusions

The Country Visits, Reports and Memoranda of the Council of Europe Commissioner for Human Rights provide a clear assessment of human rights protection within individual Council of Europe States and mark the significant developments which have taken place, as well as the lack of action on the part of states to implement human rights. The Commissioner draws on a wide range of international human rights treaties and obligations in his assessment of individual countries' progress and relies on research reports conducted by bodies such as UNESCO and UNICEF to help to bring a context to the human rights issue under inspection.

The Reports and Memoranda are extremely useful sources of research for individual states as regards providing an insight into the measures adopted in other Council of Europe States and in particular in relation to drawing up best practice. Last year's *Survey* drew attention to the main criticisms which must be highlighted as regards these reports, namely, the Commissioner's limited powers to ensure the implementation of human rights. It is clear overall, however, that the realisation of human rights on a domestic level very much depends on the willingness of individual states to act in this regard.[89]

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[83] *Memorandum to the San Marino Government* commDH(2008)12 Strasbourg 30 April 2008, para 31.

[84] *Memorandum to the Albanian Government* commDH(2008)8 Strasbourg 18 June 2008, paras 80, 74 and 86; *Memorandum to the Montenegren Government* commDH(2008)25 Strasbourg 2–6 June 2008.

[85] *Memorandum to the Montenegren Government* commDH(2008)25 Strasbourg 2–6 June 2008, para 86.

[86] Ibid, para 88.

[87] Ibid.

[88] Ibid, para 89.

[89] The Commissioner's follow-up visits and reports offer a good insight as regards whether

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

This year's discussion of the case-law of the European Court of Human Rights focuses on three individual cases which respectively concern respecting prisoners' rights to family life, the placement of children in care and the placement of a child for adoption. Article 8 of the European Convention on Human Rights, which concerns the right to respect for family life, is the focal point of all three cases and the European Court discusses the extent to which the Member States realise this right in practice. Two of these cases serve to provide further insight as to the European Court's increasing tendency to draw on other international instruments in order to wholly examine international thinking in relation to the distinct issues in question. In particular, the Court has drawn on the UN Convention on the Rights of the Child.

(i) Respecting prisoners' rights to family life

Every year sees a significant number of applications by prisoners to the European Court of Human Rights concerning the right to respect for family life, and more specifically, the right to contact with family members for the duration of the prison sentence. The right to contact is a well-established and guarded right within the jurisprudence of the European Court of Human Rights. 2008 saw a number of particularly interesting cases in this regard and the case of *Ferla v Poland* is a strong example.[90] This case concerned restrictions on contact before trial between a remand prisoner and his wife on the grounds that she might be called as a prosecution witness. The European Court of Human Rights held that there had been a violation of Art 8 of the Convention as the applicant's right to family life was not respected.[91]

As to the facts of this case, the applicant's wife was a witness in the criminal proceedings against the applicant. She gave a number of statements to the police outlining that she had no information to offer regarding the applicant's crime and refused to testify during the investigation and once the trial started. Both the applicant and the applicant's wife applied to the Sopot District Prosecutor (Prokurator Rejonowy) and the Gdańsk District Court for permission to visit the applicant in prison but this was refused on the grounds that the applicant's wife had been called as a witness by the prosecution. Between December 1998 and November 1999 the applicant's wife was allowed to visit the applicant once and this communication took place via an internal telephone.

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previous recommendations have been implemented. All of the reports are available at www.coe.int/t/commissioner/Activities/visits_en.asp.

90 *Ferla v Poland* no 55470/00, 20 May 2008.

91 Article 8 of the European Convention on Human Rights: '(1) Everyone has the right to respect for his . . . family life . . . (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

In deciding whether the applicant's right to respect for family life had been respected in this case, the European Court of Human Rights reiterated that detention entails inherent limitations on private and family life but outlined that the authorities must enable or, if need be, assist in maintaining contact with close family in order to respect the right to family life.[92] According to the Court, restrictions such as limitations on the number of family visits, supervision of those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special arrangements for visits constitute an interference with his rights under Art 8 but are not, by themselves, in breach of that provision.[93] The Court outlined that any restriction of that kind must be 'in accordance with the law', must pursue one or more legitimate aims and must be justified as being 'necessary in a democratic society'.[94]

The Court held that the restrictions on the applicant's personal contact with his family constituted an 'interference' with his family life.[95] This interference was, however, 'in accordance with the law'[96] and pursued a legitimate aim, namely 'the prevention of disorder and crime'.[97] As to whether the interference was 'necessary in a democratic society', the Court considered whether the authorities struck a fair balance between the need to secure the process of obtaining evidence in the applicant's case and his right to respect for his family life while in detention.[98] While the Court noted that, initially, to resort to that measure could be considered necessary and reasonable from the point of view of the aims sought by the authorities even though it inevitably resulted in harsh consequences for the applicant's family life, the continued application of these measures was not compatible with the requirement of respect for the rights guaranteed by Art 8 of the Convention.[99]

Overall, the Court noted that the domestic authorities did not consider any alternative means of ensuring that the applicant's contact with his wife would not lead to collusion or otherwise obstruct the process of taking evidence such as, for example, subjection of their contact to supervision by a prison officer or by imposing other restrictions on the nature, frequency and duration of contact.[100] Further, the applicant's wife was permitted to visit the applicant in

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92 See *Messina v Italy* (no 2) no 25498/94, 28 September 2000, para 61.

93 *Ferla v Poland* no 55470/00, 20 May 2008. See *Messina v Italy* (no 2) no 25498/94, 28 September 2000, para 38. See also, *Kucera v Slovakia* no 48666/99, 17 July 2007, paras 127–128.

94 See *Messina v Italy* (no 2) no 25498/94, 28 September 2000, para 39. The Court cited the following cases: *McLeod v the United Kingdom*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p 2791, para 52; *Płoski v Poland* no 26761/95, 12 November 2002, para 35; and *Baginski v Poland* no 37444/97, 11 October 2005, para 89.

95 See *Ferla v Poland* no 55470/00, 20 May 2008, para 40.

96 Article 217 of the Code of Execution of Criminal Sentences. See further, *Ferla v Poland* no 55470/00, 20 May 2008, para 41.

97 The Court held that a legitimate aim was being pursued as the applicant's wife had been a witness in the proceedings against the applicant. See further, paras 42 and 43.

98 See *Ferla v Poland* no 55470/00, 20 May 2008, para 44.

99 Ibid, para 45.

100 *Klamecki (no 2) v Poland*, no 31583/96, 3 April 2003, para 151.

prison on one occasion despite the reasoning that such contact could not be facilitated because of the forthcoming case.[101] In consequence, the Court held that the authorities went beyond what was necessary in a democratic society 'to prevent disorder and crime'.[102]

(ii) Children in care

The case of *Saviny v Ukraine* concerned the placement of children in public care on the ground that their blind parents had failed to provide adequate care and housing to the extent that the children's life, health and moral upbringing was endangered.[103] More specifically, the authorities in Ukraine imposed a removal order, which restricted the parents' ability to take their children home outside school hours, such as for vacations and weekends because the parents concerned were deemed to have insufficient finances and personal qualities to provide their children with proper nutrition, clothing, sanitary environment and health care, as well as to ensure their social and educational adaptation.[104] The children were separated from their parents and each other as they were placed in different institutions.[105]

The Court has established that, where children are removed from their parents' care, a variety of factors may be pertinent, such as whether by virtue of remaining in the care of parents the child would suffer abuse or neglect, educational deficiencies and lack of emotional support, or whether the child's placement in public care is necessitated by the state of the child's physical or mental health.[106] The Court has equally established, however, that the mere fact that a child could be placed in a more beneficial environment for his or her upbringing does not on its own justify a compulsory measure of removal.[107] States are required to consider alternatives to removing children from the care of their parents such as delivering targeted financial assistance and social counselling.[108]

In reaching a decision in this case, the European Court of Human Rights discussed whether placing the children in care was in accordance with the law, pursued a legitimate aim of protecting the interests of the children and

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[101] See *Ferla v Poland* no 55470/00, 20 May 2008, para 47.
[102] Ibid.
[103] *Saviny v Ukraine* no 39948/06, 18 December 2008, para 55.
[104] Ibid, paras 54 and 55.
[105] Ibid, para 59.
[106] See *Wallová and Walla v the Czech Republic* no 23848/04, 26 October 2006, para 72 and *Havelka and Others v the Czech Republic* no 23499/06, 21 June 2007, para 57.
[107] *KA v Finland* no 27751/95, ECHR 2003-I, para 92.
[108] *Moser v Austria* no 12643/02, 21 September 2006, para 68; *Wallová and Walla*, paras 73–76; and *Havelka and others*, para 61. The European Court referred to the UN Convention on the Rights of the Child and in particular, Art 9 concerning the child's right to contact with both parents as well as Recommendation Rec(2005)5 of the Committee of Ministers on the rights of children living in residential institutions, adopted on 16 March 2005; see *Saviny v Ukraine* no 39948/06, 18 December 2008, paras 33 and 35.

'necessary in a democratic society'.[109] In determining whether a particular interference was 'necessary in a democratic society', the Court considers whether, in the light of the case as a whole, the reasons adduced to justify it were relevant and sufficient for the purposes of Art 8(2) of the Convention and whether the decision-making process was fair and such as to afford due respect to the interests safeguarded by Art 8.[110] In particular, the Court drew on the evidence invoked by the authorities in making a decision to remove the children from the care of their parents and considered to whether it was sufficient to justify such a serious interference with the family's life. The Court observed, for example, that the municipal authorities reached conclusions in relation to the children's neglect on the basis of their occasional inspections of the parents' home rather than by examining the children's own views, their medical files, opinions by their paediatricians or statements by neighbours.[111] The Court also made a specific reference to the views of the children, and in particular, the 13-year-old, and noted that they were not heard by the domestic judges at any stage in the proceedings.[112] Indeed, the authorities relied on only one inconclusive medical certificate concerning the children which was dated a year earlier and which detailed that the children had first-stage anaemia.[113] No evidence was put forward by the authorities in support of the claims in relation to the educational and social adaptation of the children.[114] Equally, no independent evidence, such as an assessment by a psychologist, was sought to evaluate the emotional or mental maturity of the parents.[115]

Interestingly, the Court also raised the point in relation to the role of the domestic public authorities and domestic court to discuss the possible ways in which the family could have been supported by the state in order to overcome the financial and personal difficulties of the parents concerned in an effort to preserve family unity.[116] For example, no analysis was made of the applicants' attempts to improve their situation, such as requests to equip their flat with

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[109] See *Saviny v Ukraine* no 39948/06, 18 December 2008, para 53. See also para 47 which refers to the case of *McMichael v the United Kingdom*, 24 February 1995, Series A no 307-B, para 86. In this case, the Court established that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the rights protected by Art 8. Such interference constitutes a violation of this provision unless it is 'in accordance with the law', pursues one of the legitimate aims enumerated in Art 8(2) and can be regarded as 'necessary in a democratic society' (see *McMichael*, para 87). See also, *Gnahoré v France* no 40031/98, ECHR 2000-IX, para 59; *Scozzari and Giunta v Italy [GC]* nos 39221/98 and 41963/98, ECHR 2000-VIII, para 148.

[110] See *Saviny v Ukraine* no 39948/06, 18 December 2008, para 48. See also the cases of *Kutzner v Germany* no 46544/99, ECHR 2002-I, para 65; *Sommerfeld v Germany [GC]* no 31871/96, ECHR 2003-VIII, para 66.

[111] See *Saviny v Ukraine* no 39948/06, 18 December 2008, para 56. See also *Schultz v Poland (dec)* no 50510/99, 8 January 2002; *Remmo and Uzunkaya v Germany (dec)* no 5496/04, 20 March 2007; and *Polášek v Czech Republic (dec)* no 31885/05, 8 January 2007.

[112] See *Saviny v Ukraine*, para 59. See also, *Havelka and Others v the Czech Republic* no 23499/06, 21 June 2007, para 57.

[113] See *Saviny v Ukraine* no 39948/06, 18 December 2008, para 56.

[114] Ibid, para 56.

[115] Ibid, para 58.

[116] Ibid, para 57.

access to natural gas, recoup salary arrears or request employment assistance.[117] While the Court was quick to denounce its own role in making a decision in relation to public expenditure, it nevertheless seized the opportunity to raise the point as to the options open to the domestic state in relation to supporting families in such a situation with targeted financial and social assistance and effective counselling.[118]

Overall, the Court ruled that insufficient evidence was invoked in this case to support the authorities' views in relation to the parents' capacity to care for their children and subsequently violated the parents' and children's right to family life.[119] Further, the domestic authorities and court failed to adequately explore alternatives to separating the children from their parents, which is in clear violation of Art 8 of the European Convention on Human Rights.[120]

(iii) Placing a child for adoption: time-limits and information

The case of *Kearns v France* concerned a statutory 2-month time-limit for requesting the return of a child placed in the care of the state by the mother.[121] The applicant in this case requested the anonymous registration of her child from an extramarital relationship one week in advance of the child's birth in the Seclin Hospital, in France, with her mother and a French lawyer. Two days following the birth, the applicant was interviewed for half a day by the social services, in the presence of her mother and a nurse who had been asked to act as an interpreter by the hospital. She then signed a record of the child's placement in state care in accordance with the Social Action and Families Code in which she indicated that she wished to have the child taken into state care, requested secrecy and gave her consent to adoption under the Civil Code. The applicant was informed of the time-limits and conditions for the return of the child, including that she was afforded a period of 2 months in which she could claim back the child if she so wished and that beyond 2 months, 'if the child has been placed for adoption, any application to have the child returned will be inadmissible (Article 352 of the Civil Code)'. The following day, the applicant had a further interview lasting half a day with the social services, in the presence of a doctor acting as an interpreter, during which, at her request, various matters relating to the record signed the previous day were discussed. The child was subsequently placed in the care of Mr and Mrs L-B with a view to her full adoption.

The applicant sought the return of the child a number of months after the 2-month time-limit had expired. She gave two reasons for seeking the child's return: first, the biological father had learned of the child's birth and had

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117 Ibid, para 58.

118 See *Saviny v Ukraine* no 39948/06, 18 December 2008, para 57. The European Court outlined the Concluding Observations of the Committee on the Rights of the Child in relation to Ukraine and its record in relation to financial assistance to families. See further, para 34.

119 See *Saviny v Ukraine* no 39948/06, 18 December 2008, paras 60–61.

120 Ibid.

121 *Kearns v France* no 35991/04, 10 January 2008.

brought an action in Ireland seeking recognition of his rights over the child, and secondly, she had managed to persuade her husband to recognise the child. Her request was refused because the 2-month time-limit for withdrawing consent had expired. She then applied to the Lille tribunal de grande instance, seeking the annulment of the decision to give the child up and an order for her return. She submitted that the consent she had given was invalid on account of the family pressure exerted on her and because she had not realised the consequences of registering the birth anonymously as the process was explained to her without an interpreter being present.

The European Court of Human Rights, in considering this case, observed that the authorities' refusal of the request for the child's return had a basis in law, namely the Civil Code and the Social Action and Families Code, and pursued the legitimate aim of protecting the rights and freedoms of others, in this instance the child.[122] The Court considered the length of the period allowed for withdrawing consent and noted that there is no common ground in member states' legislation and practice in this regard. In weighing the competing interests, that is those of the biological mother, the child and the adoptive family, it noted that the child's best interests should be paramount.[123] In this regard, the Court drew on studies by child welfare professionals, which have stressed that it is in the child's interests to enjoy stable emotional relations within a new family as quickly as possible.[124] In the Court's view, the 2-month time-limit appeared 'sufficient to allow the biological mother time to reflect and to reconsider her decision to give the child up'.[125] It was further noted by the Court that the applicant was 36 years old at the time, she was accompanied by her mother and she had two lengthy interviews with the social services after giving birth.[126] Referring to the margin of appreciation for states in this area, the Court highlighted the cases of *Odièvre v France* and *Evans v United Kingdom*, and concluded that the time-limit prescribed by the French legislation strikes a balance and ensures sufficient proportion between the competing interests.[127] The application brought by the child's father in the Irish courts had no effect on the Court's decision in this regard.[128]

The Court also considered the information provided to the applicant in relation to placing the child for adoption. The Court noted that the applicant, an Irish national, chose to give birth in France in order to take advantage of the possibility of registering the birth anonymously, which does not exist in Irish law.[129] Further, she visited the maternity ward in the week prior to the birth, assisted by a lawyer and her mother, which implies that she had legal

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122 Ibid, para 74.
123 Ibid, para 79. See also the case of *Odievre v France* no 42326/98, 13 February 2003, para 44.
124 See *Kearns v France* no 35991/04, 10 January 2008, para 80.
125 Ibid, para 81.
126 Ibid.
127 *Odievre v France*, no 42326/98, 13 February 2003, para 49; *Evans v The United Kingdom* no 6339/05, 10 April 2007, para 77.
128 See *Kearns v France* no 35991/04, 10 January 2008, para 84.
129 Ibid, para 86.

information in relation to the adoption prior to the child's birth.[130] The applicant, accompanied by her mother, had two lengthy interviews, each lasting half a day, with the social services, in the presence of, a nurse and a doctor with knowledge of English, who had been made available by the hospital to act as interpreters, on the 2 days following the birth.[131] The Court outlined that Art 8 cannot be construed as requiring the authorities to ensure the presence of a qualified interpreter in such cases. The form of consent to adoption signed by the applicant on the same day expressly stated it would become final after a period of 2 months which, in the Court's view, allowed for no ambiguity.[132] Further, the applicant was given a notice outlining the time-limits and conditions for the return of the child, and a model letter for withdrawal of consent.[133] Overall, the Court held that the French authorities provided the applicant with sufficient and detailed information, as well as linguistic assistance in relation to her consent to the adoption process and concluded that the state had not breached its positive obligations under Art 8 of the Convention in relation to the applicant.[134]

V CONCLUSIONS

This year's S*urvey* has highlighted the many developments which have taken place in the field of international family law. The issue of family reunification, for example, was a frequently discussed issue on both the international and regional level, by the Hague Conference on Private International Law as well as by the Council of Europe Commissioner for Human Rights. It was also a frequently litigated issue in the European Court of Human Rights. At the same time, support for using mediation as a process to resolve familial disputes has been illustrated by the Hague Conference on Private International Law as well as by the European Union. In this regard, the possibility of resolving family reunification disputes through mediation must be considered given the frequency with which it arises as an irreconcilable issue.

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130 Ibid.
131 Ibid, para 87.
132 Ibid, paras 88 and 89.
133 Ibid, para 90.
134 Ibid, paras 91 and 92.

Australia

NOTIONS OF PARENTING EMERGE AT LAST – AUSTRALIAN FAMILY LAW IN 2008

*Frank Bates**

Résumé

C'est en 2008 que les effets concrets de la Loi de 2006 portant réforme du droit de la famille (concernant la responsabilité parentale conjointe) se sont fait sentir. Mais les nouveaux développements en droit de la famille ne se sont pas limités aux seuls effets de cet amendement controversé apporté à la Loi sur le droit familial de 1975. Ainsi, on a assisté en 2008 à des développements intéressants à propos des liens entre d'une part les différentes notions de parentalité telles que dégagées par la jurisprudence issue de la réforme de 2006 et d'autre part certains aspects de la pratique et de la procédure. La jurisprudence s'est intéressée au processus relatifs à la conduite de procès moins conflictuels. On a également assisté à des développements intéressants dans le domaine du droit patrimonial et financier, notamment à propos de la question récurrente des conséquences qu'il convient de rattacher aux apports faits par les époux au cours du mariage. La question des ententes financières, négociées dans la foulée des amendements apportés en 2000 à la Loi sur le droit familial, a également apporté son lot de confusion, comme cela était prévisible. Plus étonnant peut-être est le fait que des demandes d'aliments entre conjoints sont encore et toujours introduites devant les tribunaux, malgré tous les efforts déployés visant à faire en sorte que de telles revendications soient plutôt réglées dans le cadre du partage des biens.

Finalement, le mouvement de rétrécissement de la discrétion judiciaire, qui marque toute l'évolution de la loi de 1975 depuis son entrée en vigueur, est devenu palpable en 2008. Mais en même temps – et fort heureusement – certains aspects fondamentaux de la loi, tels qu'établis il y a maintenant plus de trente ans, demeurent intacts.

In the 2008 edition of the *International Survey*, I wrote that:[1]

> '… 2006 developments may very well add still more imponderables into an already obscure miasma. In other words, we can look forward to intriguing developments in the future.'

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1 F Bates 'Blunting the Sword of Solomon – Australian Family Law in 2006' in B Atkin (ed) *International Survey of Family Law* (Jordan Publishing Limited, 2008) p 21 at 59.

After a relatively quiescent 2007, those intriguing developments, notably in the area of parenting as presaged by the Family Law Amendment (Shared Parental Responsibility) Act 2006,[2] are beginning to come to pass.

I THE LAW OF PARENTING ITSELF

In addition to developments in the law relating to shared parental responsibility as such, many of the major developments in practice and procedure have necessarily occurred, though, for reasons of pretending an absent orderliness, developments in that regard will be separately treated.

A useful starting point is the decision of Warnick J of the Family Court of Australia in *Childers and Leslie*.[3] This case concerned an appeal by the father against the order of a federal magistrate dismissing a contravention order brought to him. It did, in Warnick J's ipsissima verba, involve:[4]

> ' . . . features typical of a great many applications that assert contravention of an order that a child spend time with a parent: the complaint, even if correct, seems a heavy-handed, even obsessive reaction – yet, if the incident is the latest in a series (about which there will commonly be mainly subjective comment, irrelevant to any particular proceeding) perhaps any exasperation of the complainant is at least understandable; secondly, the "excuse" offered by the respondent will seem "fair enough", at least not to be behaviour that ought to attract punishment; and, finally, whatever the outcome, it will seem unlikely to contribute to any real diminution in the particular family's conflict.'

In *Childers and Leslie*, pursuant to orders, the father was permitted to spend time with the child but, in the session in question, the mother had not permitted this to occur. The Federal Magistrate found that the mother did have a reasonable excuse for contravention and dismissed the father's application. The major point in the father's appeal was that the Federal Magistrate ought not to have found that the mother's excuse had been made out because her evidence did not meet the criteria set out in s 70NAE(5) of the Family Law Act 1975, as amended,[5] which deals with excuses for the contravention of an order regarding with whom a child is to spend time. Further, the father argued that, having regard to the evidence, the child had remained unwell in the week following the alleged contravention, though being cared for by someone other

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2 Ibid at pp 22ff.

3 (2008) FLC 93–356.

4 Ibid at 82, 239.

5 This provides that: 'A person (the respondent) is taken to have had a reasonable excuse for contravening a parenting order to the extent to which it deals with whom a child is to spend time with in a way that resulted in a person and a child not spending time together as provided for the order if: (a) the respondent believed on reasonable grounds that not allowing the child and the person to spend time together was necessary to protect the health or safety of a person (including the respondent or the child); and (b) the period during which, because of the contravention, the child and the person did not spend time together was not longer than was necessary to protect the health or safety of the person referred to in paragraph (a).'

than the mother, the magistrate ought to have been satisfied that the child need not have been kept from the father. Warnick J upheld the father's appeal.

First, the judge considered[6] that the initial approach of the magistrate was unclear; in the judge's view, the correct approach would have been, at least, to attempt to measure the excuse of the mother against the terms of the provision[7] and to explain why it did not apply, if that were the case. In addition, prima facie, she had adopted a wrong test – namely, the provisions of s 70NAE(2)(b), which deals with the satisfaction of the court as to the excuse being reasonable. 'While,' Warnick J stated, 'it is not impossible that a reference to that subsection is some sort of misprint, nothing in the reasons leads me to that conclusion.'

Secondly, Warnick J was of the view[8] that the Federal Magistrate might have fallen into error by applying too 'loose' a test of *reasonableness* as found in the legislation. The issue is not, he said, simply whether, viewed from some standard, necessarily ill-defined, of fairness or reasonableness, the mother's actions were excusable. The position, he thought, was analogous to terms such as, for example, 'any just cause' as used elsewhere in the Act. Of that, Lindenmayer J had said, in *In the Marriage of Lutzke*:[9]

> '… those words must be interpreted in the context of the Act as a whole and in particular with regard to the other specific provisions of the Act … Thus a "cause" for the discharge of an existing maintenance order will be a "just cause" only, if, having regard to the other provisions of the Act, particularly those relating to maintenance, it can be said that it is "right" or "proper" that the order should be discharged.'

As regards the situation in *Childers and Leslie*, the context includes the provisions of s 70NAE and s 65N, which places important obligations on persons in the mother's position as well as s 60B which sets out the objects of, and principles underlying, Part VII of the legislation as amended in 2006. Still more fundamentally, Warnick referred to the comment of Evatt CJ, Watson SJ and Goldstein J in *In the Marriage of Gaunt*, where it was said that:[10]

> 'To allow a party to arrogate to himself a supervening power to make an independent decision on that matter and to rely on that decision to escape from compliance with the Court's order or from the consequences of non-compliance would undermine the purposes and intentions of the Act … A party's subjective view of the rights and wrongs of a decision cannot be relied on as "just cause or excuse" or "reasonable cause".'

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6 (2008) FLC 93–356 at 82, 332.
7 Above n 5.
8 (2008) FLC 93–356 at 82, 333.
9 (1979) 5 Fam LR 553 at 559.
10 (1978) FLC 90–468 at 77, 398.

In *Childers and Leslie*, Warnick J emphatically stated[11] that it was not open to the Magistrate to, in circumstances as she found them to be, find a *reasonable excuse* for the order's contravention.

Thirdly, the father had argued that particular ex post facto events were relevant and, while the Federal Magistrate had indicated her awareness of those contentions, she had not dealt with their significance as bearing directly on the notion of *reasonable excuse*. In Warnick J's own words,[12] 'she had merely expressed satisfaction that the mother had made appropriate arrangements for the child's care in the following week'. That failure to address those arguments advanced by the father constituted an appealable error.

In toto, the judge found, having regard to the terms of s 70NAE(5), that there was no finding – and nor was he taken to evidence which might support a finding – that to have taken the child to the father's home would, in any way, have been deleterious to the child's health. Again, there was no finding as to what the mother believed on the matter. Hence, it followed that there was no finding as to *reasonable grounds*, even though there were references to the medical evidence, the wishes of the child and an overall finding that the mother had a reasonable excuse. Thus, Warnick J was not satisfied that the mother held such a belief at all, or if she did, that it was on reasonable grounds that refusal of the time which the child was to spend with the father was necessary to protect the health of the child. Hence, he was not satisfied that the mother had a reasonable excuse for the contravention which occurred.

Childers and Leslie is of considerable and immediate interest as it demonstrates some of the difficulties to which this novel and intricate legislation is giving rise at a fundamental level. In an Act which seeks to ensure that children have continuing contact with both parents, the legislation does not seem to have made the task of either party easier. Indeed, Warnick J noted that it had almost been a year since the events giving rise to the litigation. The legislation itself seems to have confused the federal magistrate at first instance over what ought to have been a straightforward matter going directly to the Act's heart.

Another matter which was potentially always likely to be productive of problems was that of supervised time, particularly when the intricacy of the legislation is taken properly into account. Thus, in *Guinness and Guinness*,[13] which also tends to show that it is not easy to dissociate the substantive law from processes which seek to activate it, there was an appeal by a husband against parenting orders, including supervised contact, which had been made the day before the Family Law Amendment (Shared Parental Responsibility) Act 2006 came into effect. The trial had taken place in October 2005. The trial judge did not give reasons for his decision at the time he made the orders. Those reasons were ultimately given in January 2007.

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11 (2008) FLC 93–356 at 82, 334.
12 Ibid at 82, 335.
13 (2008) FLC 93–358.

The husband submitted on appeal, first, that the trial judge had erred in failing to take into account the provisions of the Family Law Amendment (Shared Parenting) Act 2006. A problem which the father faced in that regard was the decision of the Full Court of the Family Court in *Vanderhum v Doriemus*[14] where the court had held that the provisions of the Act were to apply prospectively, rather than retrospectively, at least *having* regard to the original jurisdiction under Part VII of the Act.[15] However, the husband had conceded that, were special leave to appeal to the High Court of Australia in *Vanderhum v Doriemus* refused, which ultimately it was, he would accept that it was correctly decided.

Secondly, the husband argued that it was unsafe to rely on the trial judge's finding of fact in view of the delay in the delivery of the judgment. In considering that ground, the court[16] noted the comment which had been made in *Monie v The Commonwealth*.[17] However, the court in *Guinness* noted[18] that the delay in the delivery of orders and the greater delay in the delivery of reasons was especially unfortunate as the proceedings involved the welfare of young children. At the same time, despite the comment in *Monie* that 'long delay may give rise to a reasonable apprehension by the losing party that the judge delayed giving judgment because he or she had been unable to grapple adequately with the issues and, in the end, had become attracted to the decision which was the easiest to make', the trial judge had ultimately delivered a lengthy judgment in which he had made a thorough review of the evidence and had provided a carefully considered analysis of the likely impact of the proposed orders on the children's welfare. There might, the court suggested, have been more merit in that ground had the submissions made on the husband's behalf been directed to any significant misstatement of the evidence. Further, there was no error made when the trial judge regarded the wife as having more credit than the husband. Hence, the court found there to be no merit in that ground.

Thirdly, the husband argued that the trial judge had erred in the exercise of his discretion in ordering that the supervised contact be subject to four orders. These were, first, that the husband attend for regular drug screening tests; secondly, that he should provide to the wife and the independent children's lawyer the results of those tests; thirdly, to attend a psychiatrist at least once each week and, finally, to provide to the wife and the independent children's lawyer, evidence of that attendance. The problem faced by the husband in making that application was that the wife's counsel, without objection, had advised that those were conditions that the husband had proposed.

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14 (2007) FLC 93–324.

15 Possible contrary authority did exist in the shape of the High Court's decision in *CDJ v VAJ* (1998) 197 CLR 172.

16 Coleman, Boland and Thackray JJ.

17 (2005) 63 NSWLR 729 at 743 per Hunt A-JA.

18 (2007) FLC 93–358 at 82, 348.

The court responded[19] by saying that the husband could not now be heard to complain about orders which he himself had proposed at trial. In any event, the orders which were proposed were clearly open to the trial judge on the evidence and included the expert evidence of a psychiatrist who had been asked to provide a report on the family.[20] Finally, the husband argued that the trial judge had erred in his discretion in ordering that the father have *supervised*[21] contact with the children for a period of 12 months. That was not further pressed by the father's counsel.

One's instant reaction to the *Guinness* decision is that, first, dissociating the law and practice of parenting from more legalistic issues under the 2006 amendments is apparently, at the least, very difficult. Secondly, the addition of conditions to orders – and this should have been known for some time – may very well be productive of litigation. This is important in the context of the 2006 amendments as one issue frequently raised to this commentator by members of the practising profession who were likely to have daily contact with the Family Law Amendment (Shared Parental Responsibility) Act 2006 has been that, effectively, every case involving children might be litigated.

In 2008, there was another case of interest regarding supervised time. *Moose and Moose*[22] involved an appeal by a father against orders which provided for the two children of the marriage to live with the mother, who should have sole parental responsibility for the children, and that the father spend supervised time with the children for 2 hours once a month in a children's contact centre.

On appeal, the father submitted, first, that the trial judge had failed to give adequate reasons for the orders, with particular reference to his consideration, or otherwise, of the children having a meaningful relationship with their father[23] and being protected from abuse.[24] Secondly, the judge had failed properly to assess the father's proposals, especially with regard to children's changed circumstances[25] and to the practicality of the making of orders.[26] Thirdly, the trial judge had further erred in his application of *Russell and Close*.[27] Fourthly, the judge had failed to treat the case as one to which the rule in *Rice and Asplund*[28] ought to apply, its being asserted that there had been no significant change since the original orders had been made. Finally, the trial

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19 Ibid at 82, 349.

20 She had said that she would want to be 'absolutely positive' that the husband was not ingesting drugs before making any recommendations regarding contract's taking place for any longer than one day at a time.

21 Author's emphasis.

22 (2008) FLC 93–375. A pseudonym.

23 Family Law Act 1975, s 60CC(2)(a).

24 Ibid, s 60CC(2)(b).

25 Ibid, s 60CC(3)(d).

26 Ibid, s 60CC(3)(e).

27 Unreported, [1993] FCA 62.

28 (1979) FLC 90–725.

judge had erred in making the order for supervised time in a contact centre. The Full Court of the Family Court of Australia[29] allowed the father's appeal.

Boland J found[30] that the judge had fallen into appealable error in his consideration of s 60CC(2)(a) by reason of his not taking into account evidence relating to the *quality*[31] of the relationship between the father and the children. Secondly, the trial judge, having found no unacceptable risk of physical abuse by the father (even though he had found that the children themselves believed that they had been the victims of sexual abuse), the judge had failed to consider whether it was, 'possible or appropriate to make orders to promote a meaningful relationship for the children with the father both in the shorter and more significantly the longer term'.

Boland J then turned her attention to the failure of the judge properly to assess the competing proposals or give adequate reasons for accepting or rejecting those proposals. In particular, Boland J noted[32] that the trial judge had failed to consider the willingness of the father to facilitate a close and continuing relationship with the mother, even in the event that he had acceded to the father's proposal that the children should live with him.[33] Nor, apparently, did the trial judge consider any other proposal which might have been in the children's best interests.[34]

More especially, Boland J specified[35] that the trial judge had failed to consider and to assess the children's belief that they had been the subjects of sexual abuse. If that belief was, she stated, 'erroneous, their beliefs were incapable of reversal'. That failure, Boland J thought, was rendered the more graphic as the judge had found that there was no unacceptable risk of sexual abuse by the father. Although he had made a finding of inappropriate behaviour by the father, he did not make a finding that the father posed a risk of emotional abuse to the children by reason of the behaviour.

Hence, the failure to assess and make findings about those issues, which were fundamental to any consideration of children's best interests, constituted appealable error.

As regards *Russell and Close*, Boland J was of the view that it significantly overlapped with the complaints regarding the failure of the trial judge to consider the father's proposals that the children should live with him and as to his asserted capacity to provide for their needs, including their emotional needs.

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29 May, Boland and O'Reilly JJ.
30 (2008) FLC 93–375 at 82, 635.
31 Author's emphasis.
32 (2008) FLC 93–375 at 82, 635.
33 Boland J had referred, ibid, to the trial judge's comment that, 'there is little chance of the mother facilitating and encouraging close and continuing relationship [sic] between the child and the other parent'.
34 See, for example, *Bolitho and Cohen* (2005) FLC 93–224.
35 (2008) FLC 93–375 at 82, 637.

Russell and Close was a decision of a strong Full Court of the Family Court of Australia[36] which sought to uphold children's right to protection from sexual, psychological and emotional damage. In so doing, the court had stated that 'the Court must take into account any anxiety on the part of the primary caregiver concerning the child's exposure to potential harm where such anxiety is likely to impact adversely on that parent's care-giving ability'. However, it must be shown that such belief on the part of the custodial parent is genuinely held. Where it appears on the whole of the evidence that such belief is entirely irrational and baseless, the genuineness of the subjective belief of the custodial parent will clearly be open to doubt.

In *Moose*, Boland J noted[37] that the mother's belief seemed genuine and that, in consequence, the trial judge had concluded that there was 'little chance' that she would encourage a close and continuing relationship between the father and the children. At the same time, Boland J, because of the lack of reasons[38] so provided, was unable to say what caused her belief and what had caused the trial judge to say that the mother's belief and the effect of those beliefs on her parenting capacity was 'not necessary' for this original decision.

Nonetheless, Boland J accepted that the trial judge, admittedly in an abbreviated manner, had referred to the principles set out in *Russell and Close*,[39] even though he was ultimately to determine that the principles there enunciated were irrelevant to his decision, and so the argument advanced on appeal by the father became itself irrelevant to the instant question. At the same time, Boland J, because of the lack of reasons given at trial, could not discern 'what caused him to say that the mother's belief, and the effect of those beliefs, if any, on [the mother's] capacity to parent the children as their primary caregiver was "not necessary" for his decision'. Similarly, it was impossible to determine the weight which the trial judge gave to the matters, after his apparent rejection of them, because of the inadequate reasons which he had given. At the same time, Boland J did not feel that it was unnecessary to discuss the effect of the 2006 amendments on the *Russell and Close* decision's application because substantial argument had not been presented on the issue.

It had then been asserted that the trial judge had failed to consider the effect of the decision in *Rice and Asplund*,[40] which was still relevant after the 2006 amendments.[41] In essence, *Rice and Asplund* states that, when seeking to vary a parenting order, the court must make an assessment about whether circumstances have changed or whether it had been shown, at the time of the earlier hearing, that a material factor was not disclosed to the court.[42]

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36 Fogarty, Baker and Lindenmayer JJ.
37 (2008) FLC 93–375 at 82, 639.
38 Above text at n 13.
39 Above text at n 36.
40 (1979) FLC 90–725.
41 See *SPS and PLS* (2008) FLC 93–363; *Hungerford and Tank* [2007] Fam CA 637.
42 See B Fehlberg and J Behrens *Australian Family Law: The Contemporary Context* (Oxford

In *Moose*, Boland J noted[43] that the trial judge had referred to the long history of litigation, but had not considered whether there had been any significant or substantial change since consent orders which were made in 2005. Although, she continued, that omission might be justified by the manner in which the proceedings were conducted, that did not mean that the trial judge ought not to have considered whether these circumstances had changed and whether he should depart from them. This was especially the case where, as had happened at an early stage, allegations of sexual abuse had been made, and consent orders following had provided for unsupervised contact. Boland J then emphasised that the trial judge had failed to give any reason to explain which he should depart from those earlier orders, especially in view of his finding of no 'unacceptable risk' in relation to allegations of sexual abuse. That, again, constituted appealable error.

Finally, Boland J went on to consider the issue of error in making orders for indefinite time spent at the children's contact centre. It was argued that such an order was, in effect, for permanent supervision and was either impractical or would become so. Boland J then referred[44] to the case of *Fitzpatrick and Fitzpatrick*[45] where May J had commented that,[46] 'Whilst supervised contact in this case will protect the children from any potential physical harm, the effect on their emotional well-being cannot be ignored'.

In *Moose*, Boland J commented that such reasons as the trial judge had given omitted evidence from the family consultant, the recommendations of the independent children's lawyer or, indeed, any discussion of the practical long-term effects on the children of an indefinite order for supervised contact in a children's contact centre. The orders did not, further, reflect the trial judge's findings that the children should spend more time with the father as they became older. Thus, that argument had merit.

By the way of general conclusion, Boland J was of the view[47] that there had been an error of law on the part of the trial judge. However, it was ordered that the discharge of the orders should be stayed until the mother's application was relisted before a judge of first instance who could determine appropriate orders.

O'Reilly and May JJ agreed with the orders proposed by Boland J. O'Reilly J referred[48] to the failure of the trial judge to take properly into account the father's capacity to provide for the needs of the children. That, she considered, amounted to an inadequate examination of the subject matter amounting to a material error. In addition, O'Reilly J regarded the trial judge as having

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University Press, Sydney, 2008) at 314. For more detailed comment, see S Middleton 'Time for a Change? Shared Parenting, Variation of Orders and the Rule in *Rice and Asplund*' (2006) 34 Federal LR 397.

43 (2008) FLC 93–375 at 82, 640.

44 Ibid at 82, 641.

45 (2005) FLC 93–227.

46 Ibid at 75, 755.

47 (2008) FLC 93–375 at 82, 642.

48 Ibid at 82, 644.

foreclosed the question as to whether the children's best interests would be served by living with the father, before he had considered all the evidence, in determining that very question.

May J laid emphasis on the indeterminate nature of the order for supervised contact and stated that, in her view:[49]

> ' . . . where an order is made that the time a parent spends with a child be under supervision indeterminately, there would need to be cogent reasons to support such orders. Apart from expressing, quite properly, a concern about the mother's emotional reaction to the children seeing their father . . . his Honour did not provide reasons to support these orders.'

The judge should, she thought, have made orders which would allow for some review of the situation in the future (as had been suggested by a family consultant).

Moose is another example of the difficulties which can attach to the imposition of conditions on orders, as well as the difficulties which attach to a judicial failure to give appropriate reasons. This latter matter now seems to have assumed considerable proportion and will be further considered[50] and may also be connected with the form of trial presently sought.

Given the importance now,[51] *Moose* apart, to conditions attaching to parenting orders, the issue of the possibility of shared parenting time has arisen during 2008 and also in connection with the application of the decision in *Rice v Asplund*.[52]

Thus, in *SPS and PLS*,[53] there was an appeal by the father against an order made by a federal magistrate dismissing his application that he and the mother share the care of the children equally and, if equal care were not ordered, that his time with the children be increased. The father's grounds for appeal were as follows: first, that the magistrate had incorrectly applied *Rice v Asplund*. Secondly, the magistrate had failed to admit a court-ordered family report into evidence and, in consequence, had failed to give any weight to the wishes of the children and the recommendations of the family reporter. Thirdly, it was argued that there had been a failure to accord the father natural justice, both in respect of the refusal to admit the family report and an asserted failure sufficiently to explain the *Rice v Asplund* decision to the father who was self-represented. Warnick J allowed the appeal.

As regards *Rice and Asplund*, Warnick J took the view[54] that, had the federal magistrate recognised the correct position with regard to the wishes of the

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49 Ibid at 82, 628.
50 Below text at n 103.
51 Above text at n 21.
52 Above nn 40, 42.
53 (2008) FLC 93–363.
54 Ibid at 82, 452.

children, which had not been in issue in earlier proceedings, in applying *Rice and Asplund* he ought to have taken into account the fact that a further hearing had already occurred and that the children had therein been involved and had expressed their wishes.[55] In that context, the father, at one end, at least, of the parameters specified in his application, had only sought a small increase in the time to be spent with the children.[56] All of that meant that the ends to be served by the application of the rule in *Rice and Asplund* were diminished. In addition, it meant that a more extensive and sophisticated explanation of the rule was required than that which had been given by the federal magistrate.[57]

In addition, Warnick J regarded the federal magistrate as having, first, fallen into appealable error because he had misunderstood the parameters in an earlier contested hearing and the result measured against those parameters. Secondly, he had failed to recognise that the wishes of the children had not been an issue in the earlier proceedings and, thirdly, he failed to discuss those wishes when they were on the evidence before him and, finally, had incorrectly treated the recommendations of the family reporters.

In *SPS*, Warnick J had commented that:

> ' . . . the position that the rule in *Rice and Asplund* is merely a manifestation of the best interests principle, established that the rule survives. However, its application must recognise the new legislative context in which the question is now posited and answered. This includes the objects (and underlying principles) of the Part, set out in s 60B and s 61DA which provides that, when making a parenting order in relation to a child, the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.'

In *Miller and Harrington*[58] there had been an appeal by a mother against orders dismissing her application for final orders and an application seeking parenting orders. Eight months prior to her application, there had been a final hearing as to parenting matters and judgment had been given. The central thrust of the mother's case related to the application of the *Rice and Asplund* principle. She claimed that the trial judge had misconstrued the nature of the application in that he had gone beyond *Rice and Asplund*, had taken into account matters which he ought not to have done and had impermissibly determined matters of substance in a summary manner. Further, in attempting to apply the rule in *Rice and Asplund* to the case at hand, when considering any change in circumstances or fresh circumstances, which made it necessary to re-litigate the parenting issue, the trial judge had made findings of fact regarding the mother's conduct without having given her the opportunity to be heard as to either of

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55 Ibid at 82, 455.
56 Ibid at 82, 456.
57 Ibid at 57.
58 (2008) FLC 93–383.

those findings themselves or their relevance. Also, he had made his decision to dismiss the application upon those facts without proper regard for the best interests principle.

The Full Court of the Family Court of Australia[59] re-exercised its discretion, but dismissed the mother's appeal. After having examined the evidence, the court considered that,[60] 'the evidence of the mother, the psychologist, and the social worker in fact illustrates that there has been no material change in the circumstances of the children and the central issues of the children remain the same'.[61] The court had earlier noted[62] that the qualitative question of whether a change which has occurred is or is not sufficiently great to warrant a further hearing of a parenting issue may be difficult to answer. The court concluded that, at whatever stage *Rice and Asplund* was applied, the court was required to take into account the best interests principle because specific requirements, including legislative requirements, apply. Hence, it is clear, if nothing else, from both *SPS and PLS* and *Miller and Harrington* that the *Rice and Asplund* rule must be contextualised, especially in the light of the 2006 amendment to the Family Law Act.

In the passage from *SPS* quoted earlier,[63] Warnick J referred to the possibility of equally shared parental responsibility. In *Chappell and Chappell*,[64] there was an appeal by the husband against parenting orders made in the Magistrates' Court of Western Australian which provided for parenting arrangements and that the parents should have equal shared parenting responsibility. The order also specified that the wife should have parental responsibility for the child's health and education issues.

In support of his appeal, the husband claimed that the magistrate was in error, first, in making an order in which shared parental responsibility was subject to an order that the wife have management of health and education issues in respect of the child; secondly, in failing to make an order that the wife be restrained from changing the child's school; thirdly, in making orders about the time the child spent with each parent during school terms because the orders failed to provide for an appropriate amount of time with the husband, had not given effect to the reasons given, failed accurately to specify times with each parent and reduced the time the child spent with the husband from that spent earlier, which was pursuant to interim orders when such was not the magistrate's intention, as stated by him; fourthly, that there was a failure to make specific orders for special occasional time with each parent; fifthly, in failing to make an order which provided for parental agreement for changing

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59 Warnick, Boland and Murphy JJ.

60 (2008) FLC 93–383 at 82, 861.

61 The court noted, ibid, that it was 'powerfully' in the best interests of the children, in their own circumstances, not to allow litigation to further continue, as they had been the subject of significant litigation over a number of years and wished it to cease.

62 Ibid at 82, 857.

63 Above text at n 57.

64 (2008) FLC 93–382. A pseudonym – again!

the arrangements for the time which the child spent with each parent; and finally, by making long-term orders that the child not spend more than 2 weeks away from either parent during school holidays. The Full Court of the Family Court of Australia[65] allowed the husband's appeal.

The court began by analysing the relevant parts of the 2006 amendments and noted[66] that they provided no substitute for a specific issues order to deal with arrangements for the *day to day*[67] care, welfare and development of a child[68] and it is also clear that, where parents or parents and another person have an order for shared parental responsibility, they do not need to confer on matters which are not major long-term issues. Although the amendments seemed at pains to remove all reference to, 'long term or day to day care, welfare and development', they did not, the court pointed out,[69] eschew the concept of 'care, welfare and development' of children.[70] By way of general comment on the various provisions, the court stated that:

> ' . . . great emphasis has been placed on the importance of parents jointly sharing responsibility for matters associated with their children's care, welfare and development. Indeed s 61DA now requires the Court to apply a presumption (subject to important qualifications) that it is in the child's best interests for the child's parents to have equal shared parental responsibility.'

Yet the issues raised by these amendments are far from ipso facto easy: thus, s 65DAE specifies that parents need not consult on issues that are not major long-term issues, even if there is an order for shared parental responsibility. The court then raised[71] the fundamental issue as to how, in practice, a parent – or, indeed, the court – determines whether an issue of parental responsibility is a 'major long-term' issue. It went on to comment that the legislation contemplates a degree of elasticity in determining where the line falls between those ideas. Such elasticity, the court thought,[72] afforded proper recognition to the almost endless variety of family circumstances – or, makes parts of the 2006 amendments unworkably vague![73]

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65 Warnick, Boland and Thackray JJ.
66 (2008) FLC 93–382 at 82, 838.
67 Court's emphasis.
68 See Family Law Act 1975, s 65DAE.
69 (2008) FLC 93–382 at 82, 838.
70 See Family Law Act 1975, s 60B.
71 (2008) FLC 93–382 at 82, 840.
72 Ibid at 82, 841.
73 The court, ibid at 82, 840, noted that the definition of 'major long-term issues in relation to a child' to be found in s 4 of the Family Law Act 1975 was not especially helpful in resolving that issue. The definition states that the phrase, 'means issue about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about: (a) the child's education (both current and future); and (b) the child's religious and cultural upbringing; and (c) the child's health; and (d) the child's name; and (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent. To avoid doubt, a decision by a parent of a child to form a relationship with a new partner is not of itself a *major long-term issue* in relation to a child. However, the decision will involve a *major long-term issue* if, for example, the relationship with

As regards the specific issues found by the Full Court to constitute appealable error, the first was that the Federal Magistrate had erred in acceding to the wife's requests that she be given responsibility for the *management*[74] of issues relating to the child's health and education. In that context, the court found[75] that a particular difficulty was that 'management' was not defined in the magistrate's reasons, the orders or, indeed, the Act. The fact that the word was used, the court considered, suggested that management by the wife of particular issues would, in some way, detract from the husband's parental responsibility, a matter which was impossible quantitatively to determine. Any confusion would further be compounded by an acknowledgement by the wife that she would be able to make *decisions*[76] relating to the child's health and education because of the order. On the other hand, her counsel, in the course of argument, specifically eschewed any such suggestion.

Although the court noted[77] that there was judicial dispute as to how it was permissible to examine the reasons for a decision as an aid to construction,[78] it was clearly imperative that orders relating to parental responsibility should be as unambiguous as practicable. 'This,' the court stated, 'is especially so given the extent to which third parties such as schools and hospital rely on court orders to satisfy themselves about the authority of parents to make decisions about their children.' But, quite apart from other considerations, it appeared from his various observations that the Federal Magistrate had attached a very wide meaning to the word 'management', in the court's words, 'giving the wife at least some authority to make important decisions, rather than her simply being a point of contact for educational and medical authorities'.

As has already been observed,[79] the 2006 amendments to the Family Law Act introduced a presumption that it is in the best interests of children for parents to have equal shared parental responsibility. The court then turned its attention[80] as to the rebuttal of the presumption. Generally, the court pointed out that it was necessary to do so to make a finding that it would not be in the best interests *of the child*[81] for the presumption not to be applied.[82] More specifically, the court stated that in its view 'it would be an appropriate exercise of discretion to find that the application of the principle would not be in the child's best interests because the track record of the parents would suggest a high probability of deadlock which would inevitably lead to further proceedings'. In such cases, the court considered, 'the process of reasoning

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the new partner involves the parent moving to another area and the move will make it more difficult for the child to spend more time with the other parent'.

74 Author's emphasis.

75 (2008) FLC 93–382 at 82, 841.

76 Court's emphasis.

77 (2008) FLC 93 382 at 82, 842.

78 *Younghanns and Ors v Younghanns and Ors*; *Younghanns* (1999) FLC 92–836; *Langford and Coleman* (1993) FLC 92–346; *Repatriation Commission v Nation* (1995) 57 FCR 25.

79 Above text at n 70.

80 (2008) FLC 93–382 at 82, 843.

81 Court's emphasis.

82 See Family Law Act 1975, s 60C(2) and (3).

required to rebut the presumption would involve findings related to the welfare of the child, rather than findings concerning, for example, the likelihood that schools and hospitals would find it easier to deal with one parent rather than two'. That last comment, although it might well be correct, does seem to be more than slightly at odds with the aims of the 2006 amendments.[83]

At the same time the court stated that it was also able to envisage circumstances in which the court, in the proper exercise of its discretion, might make specific issue orders in relation to the 'management' of particular aspects of a child's welfare.[84] In the case of broader issues, such as health and education, that should ordinarily be done by the use of the concepts prescribed by the legislation. That, though, the court continued, was dependent on the one basic test for the categorisation of matters which required decisions to be made in the performance of parental responsibility: the distinction between matters which involved *major long-term* issues and those which did not. That distinction, the court regarded,[85] 'as already sufficiently fraught with ambiguity as to make it imperative that no greater degree of ambiguity be introduced by use of other rebellious concepts that find no foundation in the words of the legislation'.

As regards the issue of time spent with the husband, the court found[86] that there was no substance in that ground. The core of that ground of appeal was that the amount of time the child spent with the husband depended on the structure of the husband's working schedule. The magistrate had made an order which worked out as being effectively the same as earlier consent orders. Indeed, it was argued for the wife that it was quite unnecessary for any variation to be formalised as the arrangement had been in place since the original order had been made. It was also argued that it might be difficult to draft any such order as the husband's hours of work regularly changed. It was also argued that 'exceptions' included in any revised order might only have effect on few weekends in each of the four school terms. It was clear that the magistrate considered that any change would be miniscule and, hence, would obviate the need for change. One can only hope that the sanguine view of both magistrate and appellate court is justified; otherwise, there is an immediate risk of further litigation with attendant and undesirable consequences.

The court similarly found no substance in the ground relating to special occasion time. In so finding, the court noted that it had not been directed to any instance, caused by the lack of specificity in the orders, which had led to any dispute regarding such special occasions.[87]

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83 Above n 1.

84 Thus, for instance, in the instant case, the magistrate might have appropriately made an order that the wife have responsibility for the making of appointments with a speech therapist, which had been a matter of some contention.

85 (2008) FLC 93–382 at 82, 843.

86 Ibid at 82, 845.

87 Unlike, as the court noted, ibid, issues relating to health and education.

At the same time, though, the court observed that the absence of specificity in the magistrate's orders would leave the husband at the whim of the wife in relation to the celebration of special occasions, but, more importantly could, in the absence of agreement, lead to a situation whereby *each*[88] parent might be denied contact with the child on special occasions if the occasion fell during the time when the child was living with the other parent. That fact alone might provide an incentive to the parties to agree, since the special occasion could fall during the other party's time with the child in subsequent years.

The court also noted that some or all of the members of the court would have made detailed orders relating to special occasions had they been determining the matter at first instance. Any such orders would have had the potential to minimise future disagreement. Nonetheless, the Court refused[89] to say that the Federal Magistrate was in error in not doing so.[90] Thus, the Court found no merit in that ground.[91]

However, that was not the case with the ground based on contact during school holidays. The effect of the order was that, in the absence of the parties' agreement, neither parent would be able to spend more than 2 weeks at a time with the child during the summer holidays. The reason why the Full Court accepted the husband's argument was that the orders did not reflect the magistrate's intentions as expressed in his judgment.

The magistrate had said that he would make a specific order relating to the 2008–2009 summer holidays but not thereafter, as the parties ought to be able to organise matters themselves towards the relevant time. The order which was made[92] effectively did rule on the very issue on which the magistrate had said that he would not rule; more specifically,[93] nowhere in his judgment was there any provision for there to be any 'default position' which would restrict the length of holidays to 2 weeks unless there was agreement. That, though, was the effect.[94]

Ultimately, the court decided that the matter should be remitted for rehearing by the original Federal Magistrate, if practicable, as no attack had been made on his initial findings of fact. Upon rehearing, the magistrate would be required to make a decision having the benefit of the Full Court's analysis. He should also reconsider whether a specific order was needed to restrain the wife from changing the child's school.

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88 Author's emphasis.
89 (2008) FLC 93–382 at 82, 846.
90 He had given clear and cogent reasons for finding as he did.
91 The court also noted that the ground based on change in arrangements had properly been abandoned.
92 Referring to 'all school holiday periods', regardless of date.
93 (2008) FLC 93–382 at 82, 847.
94 The matter could be remediated by a straightforward deletion from the order.

It is clear that *Chappell* is an especially important decision which demonstrates many of the problems which the 2006 amendments to the Family Law Act have given rise. Thus, it may be that the aims and underlying principles to be found in s 60B are at clear odds with other provisions considered in this discussion and, more importantly, at odds with the aims and aspirations of the people whose activities they seek to govern.

This view is reinforced by the fact that the same problems arise after them as did before. Thus, in *Lamereaux and Noirnot*[95] the issue of parental relocation arose yet again.[96] In *Lamereaux*, the father appealed against an order which had permitted the mother to relocate the residence of the child to France. The bases of the appeal were as follows: first, asserted error by the trial judge in accepting and relying on limited parts of the evidence of the psychologist who had been treating the mother; and secondly, a lack of procedural fairness and asserted error by the trial judge in relying on evidence of an expert given in other proceedings without giving the parties an opportunity to make submissions. The Full Court of the Family Court of Australia[97] allowed the appeal.

First, the Full Court was of the view that the trial judge was in error in ignoring the unequivocal evidence of the psychologist that the mother could cope if the court was to reconsider the issue of relocation on the basis stated by the psychologist.[98] At the same time, the court noted that:[99]

> 'The trial Judge in this case, as in so many finely balanced international relocation cases was faced with a difficult task. The expert providing evidence about the mother's condition was not an independent expert appointed by the Court, but rather an expert who had a therapeutic relationship with the mother.'

In addition, the trial judge did not have the benefit of an independent children's lawyer to obtain evidence and to assist him in formulating orders in the best interests of the child.

In the end, the court was satisfied[100] that the necessary evidentiary foundation for the conclusion that there was a prospect that the mother would fall into a severe depression if she did not relocate was not available to the trial judge based on the psychologist's evidence. There was, hence, merit in that ground.

As regards the procedural challenge, taking into account the various provisions of the Commonwealth Evidence Act 1995 which are relevant to judicial notice, the authority on the use of extraneous material and the need to afford

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95 (2008) FLC 93–364.

96 For a recent commentary, see P Parkinson 'The Realities for Relocation: Messages from Judicial Decisions' (2008) 22 Aust J Fam L 35.

97 Coleman, May and Boland JJ.

98 (2008) FLC 93–364 at 82, 465.

99 Ibid at 82, 464.

100 Ibid at 82, 465.

procedural fairness which, the court considered,[101] in the instant case would have included the right to cross-examine the expert who had given evidence in the earlier proceedings and further cross-examine the psychologist and family consultant, it was inappropriate for the trial judge to incorporate the evidence of the expert into his reasons for judgment.

In relation to relocation as such, Parkinson has commented that:[102]

> 'Relocation disputes are not inevitable. They arise from the choices people make and their perceptions of the costs and benefits of those choices.'

It may be that these disputes are not inevitable, but it is hard to deny that the choices, and *Lamereaux* strongly suggests so, are very often inevitable and it is the choices with which the law must deal.

II PRACTICE, PROCEDURE AND PARENTING

Another matter which is clear from *Lamereaux*, as well as from other cases hitherto discussed, is the relationship between the notions of parenting as they emerge in the case-law surrounding the 2006 amendments to the Family Law Act 1975 and practice and procedure.

Thus, in *Truman and Truman*,[103] the very nature of the trial process was considered by the Full Court of the Family Court of Australia.[104] *Truman* involved an appeal by a father against orders made at the conclusion of the first day of a Less Adversarial Trial (LAT). The father sought that the time be extended to allow him to appeal the orders. The appeal raised the question of the degree to which the orders had the effect of precluding him from appealing and, if so, whether the court had the power to make such an order. If any such order was made under r 22.03(2) of the Family Law Rules, whether the rule was ultra vires of the Act and the court's powers.

The father argued, in addition, that, first, the trial judge erred in having regard to the material filed by the parties, and sought to be read by the father, in the interim proceedings. Secondly, the judge was also in error in accepting and relying on the mother's evidence in circumstances where the evidence was in issue between the parties and the evidence had not been tested. Thirdly, the trial judge erred in his approach to, and acceptance of, evidence given by a family consultant. Fourthly, the trial judge had failed properly to apply the principles relevant to interim parenting determinations to be found in the 2006 amendments[105] and, lastly, the trial judge had failed to deliver adequate and sufficient reasons for the determination. The Full Court allowed the appeal.

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[101] Ibid at 82, 467.
[102] Above n 96 at 55.
[103] (2008) FLC 93–360.
[104] Bryant CJ, Kay and Thackray JJ.
[105] Family Law Act 1975, ss 60CC, 65DAA.

On the general issue of LATs, the court commented that,[106] 'although it is to be expected that the hearing of most trials will be over in a matter of months, it is possible that an LAT could extend longer until final orders are made'. It continued by saying that the Rules had the effect of precluding either party from lodging an appeal until the entire proceedings were concluded. At the same time, it stated that any such rule would impermissibly impact on the substantive rights of litigants, who would be denied the right of appeal expressly given in s 94 (1) of the Family Law Act.

It was not open to the trial judge to come to the conclusion that the mother's position had changed. If the judge had formed that view, then it was incumbent on him to afford the father procedural fairness by clarifying the matter. At the same time, the court took the view that it could not be said that the trial judge had failed to provide reasons which led him to the conclusions which he had reached and, likewise, there could be no doubt as to why the trial judge reached his decision in the exercise of his discretion whilst having regard to the requirements of the Act.[107]

There is a deal to consider in *Truman*, the more so as the court suggested[108] that r 22.03(2) was invalid and, hence, must be amended. The major problem to which the case seems to give rise is the discernable tension between providing appropriate procedural safeguards and, at the same time, minimising complexity and delay. It may be that the combined effect of the Family Law Rules and the 2006 amendments is to do neither.

Another instance is provided by the Full Court's later decision in *Crestin and Crestin and Others*,[109] which added a further complexity. In this case, the paternal grandparents had sought parenting orders in another case conducted pursuant to the less adversarial trial process. The parents of the child were the respondents to the application. The trial judge made interim orders which provided for the child's spending time with the father and grandparents and ordered the preparation of a family report. The trial judge also refused the mother's application to stay the operation of the order against which she appealed.

Eventually, the parties resolved all matters in dispute between them and final orders were made by consent. However, the mother did not discontinue her appeal.[110]

She argued that, first, the trial judge was in error by relying on and preferring untested evidence by the father, who denied violence committed on the child, and preferred his evidence and that of the paternal grandparents in relation to

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106 (2008) FLC 93–360 at 82, 396.
107 Ibid at 82, 413ff.
108 Ibid at 82, 397.
109 (2008) FLC 93–368.
110 She wished the court to determine her application for a costs certificate.

highly contentious issues where it contradicted the mother's evidence. There was no cross-examination and no reasons given for this.

The mother argued, secondly, that the trial judge was in error in departing from the family consultant's recommendations without giving adequate reasons and failing to take into account the consultant's evidence regarding the effect of the orders on the child. Thirdly, she claimed that the judge had failed to address concerns which the mother had raised in her evidence including the violence, and the effects on the child of being separated from her for more than one night at any time since the making of the consent orders. The Full Court[111] allowed the appeal.

The comment made on the first ground was that the court was not clear[112] as to whether or not the trial judge reached his decision having regard to the affidavit material filed or confined his consideration to the sworn statements of the father, mother and paternal grandparents. Further, the mother's counsel had raised issues relating to the assertion of violence perpetrated by the father on the child which was also raised by a significant issue in respect of the child's ability to cope with the possibility of increased time being spent with the paternal grandparents. However, those matters were not addressed by the trial judge.

Thus, in toto, the court considered that the trial judge was in error in failing to produce reasons – in consequence, the transcript did not properly reveal either the reasoning processes involved or that the orders were in the child's best interests in relation to time spent with paternal grandparents. They also found a problem with the judge's treatment of the family consultant's evidence, which was not sworn[113] and it was impossible for the Full Court to determine the weight which had been placed on that evidence in court. It was also unclear as to how far s 69ZU[114] had been taken into account.

Once again, recurrent problems have arisen and have found further confusion in the 2006 amendments. These additional difficulties have been further emphasised by the decision of the Full Court in *Bass and Bass.*[115] This involved an application for leave to appeal by the father. If granted, the application would be transmuted into an appeal against orders which, in effect, had refused his earlier application to discharge the single expert witness who, the mother and father had agreed, should prepare a report in the parenting proceedings concerning the living arrangements for the child. The expert had already prepared one such report.

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111 Bryant CJ, May and Boland JJ.

112 (2008) FLC 93–368 at 82, 517.

113 Section 69ZU of the Family Law Act 1975 provides that: 'The Court must not, without the consent of the parties to the proceedings, take into account an opinion expressed by a family consultant, unless the consultant gave the opinion as sworn evidence.'

114 Above n 113.

115 (2008) FLC 93–366. Another pseudonym.

The trial judge also refused the father's application to be permitted to adduce further evidence from an expert witness other than the previously agreed single expert. On appeal, the father had asserted a bias against him in the report of the single expert witness. However, his appeal was opposed by the mother and by the independent children's lawyer. The Full Court[116] dismissed the father's application.

First, the Full Court was of the view[117] that the father's application to the trial judge, and thus the application to appeal, were premature. The major reason why the court took that approach was that any assertion of bias would best be established through cross-examination of the single expert at the trial of the parenting proceedings. Following that cross-examination, all or part of the report might be rejected or given only limited weight by the trial judge. 'It is not particularly unusual,' the court continued,[118] 'in our combined experience, for trial judges not to accept, or to only give limited weight to, the opinion of a single expert in a children's case.'

Secondly, Division 15.5.6 of Part 15.5 of the Family Law Rules, the court noted,[119] laid down the procedure for clarifying issues which were contained in a report prepared by a single expert witness. This procedure had not been followed. Finally, the Full Court found that no substantial injustice had been occasioned to the father.

Scrutiny of experts also became the subject of the Full Court's later decision in *Carpenter and Lunn*[120] where the wife had appealed against parenting orders and on the refusal of her application to adduce further evidence – namely, a document obtained shortly after trial by the police in response to a report which raised serious questions about the chronology of events relied upon by the trial judge. The father opposed such leave being granted as well as the appeal.

The wife submitted, first, that leave be granted to adduce further evidence because the document involved raised serious questions about the chronology of events on which the trial judge had relied. Secondly, the trial judge had fallen into error in allowing a court-appointed expert's reports into evidence and by giving them undue weight because the facts upon which the reports were based were not identified, proven, or established. The opinions drawn therefrom were not wholly or substantially based on the expert's specialised knowledge and the expert had failed to provide a report within the parameters required.

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116 Finn, Warnick and Thackray JJ.
117 (2008) FLC 93-366 at 82, 487.
118 Ibid at 82, 488.
119 Ibid at 82, 481.
120 (2008) FLC 93–377.

The Full Court[121] allowed the appeal. It considered, first of all, that the interests of justice required the introduction of fresh evidence.[122] Next, the court considered that too much weight had been given to the reports of the court expert: in that context, the court expressed the opinion that:[123]

> 'While it is inevitable that a Court Expert will form views concerning the veracity of those they interview, it is nevertheless important for experts to appreciate they will have all of the relevant information and that they do not have the opportunity of observing the parties and witnesses under cross-examination.'

The court then pointed out[124] the errors made by the court expert, some of which were admitted. More particularly, the most serious of those related to findings which had been made based on an inaccurate perception of the chronology of events which, in turn, were most influenced by the opinions of the court expert.[125]

In the end, the court concluded[126] that the proceedings before the trial judge were 'fundamentally flawed' as a result of the court expert's misapprehension of the relevant chronology and the trial judge's acceptance of the chronology and court expert's conclusions. In consequence, the Full Court ordered a rehearing before a judge other than the previous trial judge. A result of that order was that the court expert might be required to give evidence at the rehearing. The court considered that it would be unsatisfactory for her to be reappointed as the single expert, even though it would mean that the relevant children would have to be re-examined by a different person. The court then made the general comment that:

> 'The social science literature highlights how important it is for professionals to avoid the tendency to make early judgments when dealing with complex situations and then organise subsequent events and information to confirm the original judgment . . .'

III FINANCE AND PROPERTY

After the miasma generated through the 2006 amendments to the Family Law Act, the cases on finance and property have a more traditional and predictable sense to them.

Thus, in *Cook and Langford*,[127] the continuing issue of contributions to property was once more in contention and concerned an appeal by the husband against an order for property settlement. The parties had cohabited for 5 years.

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121 Finn, Boland and Thackray JJ.
122 (2008) FLC 93–377 at 82, 716.
123 Ibid at 82, 719.
124 Ibid at 82, 720.
125 Ibid at 82, 721.
126 Ibid at 82, 731.
127 (2008) FLC 93–374.

The orders provided that the wife pay the husband $2 million and release him from any debt owing to any company controlled by the wife. The total pool of property was $66 million.

The husband challenged the trial judge's decision, arguing, first, a lack of reasoning in finding that the husband's contribution-based entitlement should be assessed as a monetary sum. Secondly, there had been a failure to give appropriate weight to particular contributions made by the husband and, finally, a failure to make an adequate adjustment under s 75(2).[128] The Full Court of the Family Court[129] dismissed the appeal.

First, the Full Court was not satisfied that the trial judge had failed to give adequate weight to any of the contributions made by the husband or to give adequate weight to the finding in respect of contributions.[130] In so doing, the court commented that it:[131]

> ' . . . did not accept that there was any requirement under the legislation or derived from the case law, which imposed on the trial judge a requirement to assess or "compensate" the husband's contributions by reference to objective data such as comparative wages or business earnings foregone in determining the appropriate monetary sum.'

What the court was, rather, required to do was to assess and make findings about the nature of the husband's contributions compared and contrasted with those of the wife and, in the light of such an assessment, to adjust the parties' respective assets, if necessary, to active justice and equity between them.

The Full Court could not discern[132] that the trial judge had failed to take any relevant factor into account or had given weight to any inappropriate factor or that her calculation of the husband's limited contributions was outside the reasonable ambit of her discretion. In sum, it was satisfied that the award was not beyond the range about which there could be reasonable disagreement.

Similarly, in relation to the challenge under s 75(2), the court was satisfied[133] that the trial judge had not erred in the exercise of her discretion, having regard to all the evidence before her, in failing to make any significant adjustments in the husband's favour.[134] As regards the husband's claim that the orders at first instance were manifestly unjust and inequitable, the court noted that, in the light of those orders, the husband had the ability either to retain the substantial home which he had contracted to purchase free from debt, or to purchase a less

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128 The wife did not seek to challenge the judge's orders but sought to challenge the orders in Notice of Contention filed in accordance with r 42.08.5 of the High Court Rules.

129 Finn, Boland and Collier JJ.

130 (2008) FLC 93–374 at 82, 619.

131 Ibid at 82, 620.

132 Ibid at 82, 621.

133 Ibid at 82, 625.

134 Especially on the basis that a back condition, which he claimed, would restrict his employment opportunities in the open market.

expensive home and invest the balance or extinguish the debt on the business which he had acquired, as well as other debts which he had acquired.[135] The court had noted, in fine, the 'unusual circumstances' of the case, presumably meaning that the appeal had been brought, in the circumstances, by the husband who was contending that inappropriate lack of weight had been given to some of his contributions.

That last issue had arisen, together with others, in *Mims and Green and Green*,[136] which, unusually, involved an appeal by the husband's daughter from a previous marriage in respect of a trial judge's decision in property matters regarding bonds deposited in the daughter's bank account by the husband whilst he was overseas. The husband cross-appealed in relation to the order for property settlement.

As regards the daughter's appeal, she claimed that the funds were a gift to her whereas her father asserted, inter alia, that they were a loan. Hence, the daughter submitted that the trial judge had erred in both law and fact in first, the exercise of his discretion and, secondly, in finding that the husband had not given the funds to the daughter and, generally, in preferring his evidence to that of the daughter.

As regards the husband's cross-appeal, he argued that the trial judge had given insufficient weight to his contributions, had failed to apply the law in relation to initial contributions, as well as having failed to provide reasons of a sufficient nature. The judge had also failed in her assessment of the s 75(2) factor, especially in failing to give sufficient weight to the factors which favoured him. The Full Court[137] dismissed both appeals.

To deal, first, with the daughter's appeal, the Full Court[138] was of the view that it had not been shown on behalf of the daughter that the trial judge had erred, either in relation to the findings with respect to credit or to the finding in relation to the central issue, by having regard to evidence which was not reasonably capable of impacting upon the probabilities with respect to such matters. Similarly, there was no impermissible blurring of any distinction between matters of credit and matters going to facts in evidence.

Secondly, the court found[139] there to be no residue of 'justice' or 'equity' upon which the daughter could rely, or the trial judge could appropriately invoke. Likewise, a perusal of the judge's reasoning process showed that it was not inadequate nor was it such as would enliven appellate intervention, as regards her findings on contributions.[140] Again, there was no doubt[141] as to why the

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135 Including legal expenses of the instant case.
136 (2008) FLC 93–359.
137 Faulks DCJ, Kay and Coleman JJ.
138 (2008) FLC 93–359 at 82, 358.
139 Ibid at 82, 361.
140 Ibid at 82, 362.
141 Ibid at 82, 363.

trial judge had made the s 75(2) adjustment, her reasoning processes being transparently apparent. In fine, the trial judge's conclusions did not fall outside the ambit of a reasonable exercise of discretion.[142]

Another area which is potentially generative of confusion relates to financial agreements,[143] and a useful illustration is provided by the decision, again, of the Full Court in *Black and Black*[144] which concerned an appeal by the husband against an order dismissing his application to set aside a financial agreement entered into by him and his wife. The husband had initiated proceedings seeking to set aside the agreement and sought orders that the parties' assets be divided 80:20 in his favour, rather than 50:50 so as to take into account the significantly greater financial contribution made by him. The trial judge had concluded that there was a binding agreement and that none of the matters raised by the husband which might allow him to interfere with the agreement were proven.

On appeal, the husband sought to have the agreement set aside on the grounds that it did not comply with the statutory requirements for a binding financial agreement pursuant to s 90G of the Act.[145] The Full Court[146] allowed the appeal.

First, the court noted[147] that s 90G(1)(b), as it existed before the 2004 amendments, expressly required that the agreement contain a statement from each party that, before they executed the agreement, they had received independent legal advice from a legal practitioner in relation to the matters referred to therein. The section went on to provide that the agreement must also annex a certificate executed by that legal practitioner stating that the advice in that regard had been given to each party.

The agreement entered into by the parties did not refer to the particular requirements set out in s 90G and was not binding on the parties. More generally, the court commented that it was,[148] 'of the view that strict compliance with the statutory requirements is necessary to oust the Court's jurisdiction to make adjustive orders under s 79 [of the Family Law Act]'.

At the same time, surprisingly perhaps, claims for spousal maintenance have not wholly disappeared, despite attempts to subsume them into claims for property redistribution. Thus, in *Oates and Crest*,[149] the wife had applied for leave to appeal and, were leave to be granted, an appeal against two interlocutory orders requiring that she pay her husband the sum of $984.00 per

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142 Ibid at 82, 367.
143 See F Bates 'What Change is for the Better? Australian Family Law in 2000' in A Bainham (ed) *International Survey of Family Law* (Jordan Publishing Limited, 2002).
144 (2008) FLC 93–357.
145 As it was prior to the amendments of 2004.
146 Faulks DCJ, Kay and Penny JJ.
147 (2008) FLC 93–357 at 82, 343.
148 Ibid.
149 (2008) FLC 93–365.

week by way of spousal maintenance and that she be restrained from coming within 100 metres of particular premises.

The wife submitted, first, that the trial judge had failed to take into account, when determining the husband's claim, the impact of the order on an interim property settlement. Secondly, she argued that the judge had either lacked jurisdiction and power to make the order with respect to the premises or, had the trial judge such jurisdiction or power, inevitably he had failed to provide adequate reasons or take relevant facts into account in exercising the jurisdiction and power. The Full Court[150] allowed the appeal in part.

First, the court took the view[151] that the trial judge's approach to determining the interim spousal maintenance claim of the husband was wrong in principle. It would be curious, he considered, in the context of the case at large, if the husband 'was required to meet what the trial judge accepted to be his reasonable weekly needs out of monies which he would not have, which were likely to be substantially added back at the final hearing of financial proceedings between the parties in circumstances where his Honour found that the husband could not otherwise support himself'. However, notwithstanding the trial judge's approach, the challenge to the judge's decision should not be upheld, nor should leave to maintain such challenge be granted.

As regards the restraining orders with respect to the premises, the court concluded[152] that, as the order was not an order for the husband's personal protection, it was an order that the judge could not validly have made. It appeared[153] that the husband was not living at the premises in question and the circumstances in which the Family Court could make an order were limited by the terms of s 114 of the Family Law Act to situations where the order had that effect. Had the trial judge found that the husband was so residing, the foundation for the making of such an order would doubtless have been stronger.

The cases on finance and property have been an intriguing collection, showing some of the areas in which Australian property law is less effective. Doubtless developments in these areas, as in others, will continue.

IV CONCLUSIONS

The 2006 amendment to the Family Law Act seeks to continue the process of restricting judicial discretion. This is a characteristic of the development of Australian family law since 1976. At the same time, there is still scope for the exercise of such discretion.

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[150] Coleman, May and Boland JJ.
[151] (2008) FLC 93–365 at 82, 474.
[152] Ibid at 82, 478.
[153] Ibid at 82, 477.

In *Jacks and Sampson*,[154] parents had appealed against orders made in proceedings between them and the children's grandparents. The orders provided for the time that the grandparents spent with the children and that the children's uncle could be present and spend time with them during those periods notwithstanding that he was not a party to the proceedings and that no such order had ever been sought. The mother was also ordered to undertake psychotherapy treatment, its having been noted that she had indicated a willingness so to do.

In toto, the parents argued that the trial judge was in error in that his discretionary judgment had miscarried in circumstances where, as against the established facts, the exercise of discretion ultimately embodied in the orders was manifestly unjust and plainly wrong. That ground was sought to be established by reference to following particular issues: first, by ordering the mother to attend psychotherapy and, secondly, by making orders for the uncle to spend time with the children when he was not a party to the proceedings when no such order was sought and when the parents had been denied natural justice in that the opportunity to address that order could not arise. The Full Court[155] dismissed the appeal.

In so doing, the court was not flattering in respect of the arguments presented by the appellants at large. 'We do not believe,' the court stated,[156] 'it to be a gross or unfair oversimplification of this challenge to suggest that the complaint is essentially that the evidence, and particularly the expert evidence on the effects on the mother of any order that the children spend time with the grandparents and its likely impact on her care of the children and thus the children, so outweighed any potential benefits to the children arising out of such orders as to preclude the making of such orders in the reasonable exercise of discretion.'

On particular issues, the Full Court was no less emphatic. Thus, as regards the trial judge's reasoning processes and the articulation thereof, the court commented that:[157] 'We fail to see what more [the trial judge] could have constructively said by way of elucidation of his reasoning process . . . In our view, neither this Court nor any party to the proceedings would not be able to discern the reasoning process which led the trial judge to his conclusion.' That complaint, accordingly, lacked substance.

However, the court was less certain about the order relating to psychotherapy[158] and was, 'satisfied that the trial judge was entitled to rely on the mother's expressed willingness to undertake voluntary therapy in reaching

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154 (2008) FLC 93–387.
155 Coleman, Boland and Stevenson JJ.
156 (2008) FLC 93–387 at 82, 979.
157 Ibid at 82, 993.
158 Ibid at 83, 011.

his overall conclusions for the parenting orders made, absent her consent for such therapy, the order made is not supported in the circumstances of this case [by the legislation]'.[159]

Thirdly, as regards the time which the judge had permitted the children's uncle to spend with them, the Full Court stated that the judge's orders:[160]

> ' . . . did not, in our view, confer on [the uncle] any rights which were beyond the right to be present and spend time with the children "during periods they spend time with the maternal grandparents" pursuant to the trial judge's orders, provided that the grandparents were agreeable to his doing so. Objectively, nothing to which we have been referred establishes that if the challenge to the trial judge's orders that the children spend time with their grandparents fails, there is an independent basis for setting aside the order with respect to [the uncle]. Even if it could, setting aside the order in favour of [the uncle] would not preclude him from being present during periods of time the grandparents spent with the children.'

In fine, the Full Court emphasised[161] that it could not be suggested that the trial judge was unaware that the parents were cohabiting in a marriage nor, further, could it be suggested that the judge was unaware of any impact on the parents' marriage of any order that the children spend time with the grandparents despite the opposition of the parents to their doing so.[162] The court then made reference to s 43 of the Family Law Act, which sets out the principles which are to be applied by courts exercising jurisdiction under the Act, and which have been part of the legislation since its inception. The court could not accept that the orders made by the trial judge offended those principles in any regard. On the contrary, in accommodating the mother's concerns and, by so doing, alleviating any impact on the father and the children, the trial judge's approach can be seen as recognising and reflecting the principles to be found in s 43 of the Family Law Act.

Taking all of these issues into account, *Jacks and Samson* demonstrates that, in all the confusion which seems to have resulted from the 2006 amendments to the Family Law Act, at least some of the elements which were representative of the Family Law Act 1975 as initially conceived remain. This does not mean that the 2006 amendments are likely to be subsumed into earlier law in the short term. The future remains, as ever, more than a little uncertain.

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159 Family Law Act 1975, ss 61C, 64B(2)(i).
160 (2008) FLC 93–387 at 83, 014.
161 Ibid at 83, 016.
162 The court, ibid, noted the judge's awareness of the impact of any such orders on the mother and consequent impact on the father.

Belgium

RECENT EVOLUTIONS (OR REVOLUTIONS) IN BELGIAN FAMILY LAW

Jehanne Sosson[*]

Résumé

C'est peu de dire que le droit belge de la famille s'est profondément modifié durant cette dernière décennie. Les premières années du XXIème siècle allaient voir souffler un véritable vent (une tempête pour certains?) de réformes auquel quasiment aucun domaine du droit de la famille n'a échappé.

Les principales réformes concernant le droit des couples seront exposées ici. Le mariage n'est en effet plus le seul modèle de vie en couple organisé par le droit belge. A ses côtés, la cohabitation légale constitue une alternative assortie d'effets juridiques essentiellement patrimoniaux. Le mariage lui-même s'est transformé, puisqu'il est désormais ouvert aux couples homosexuels depuis 2003. Le divorce pour faute a par ailleurs été supprimé et remplacé, en 2007, par le divorce pour désunion irrémédiable. En ce qui concerne les enfants, le droit de la filiation a une nouvelle fois été réformé.

I INTRODUCTION

Belgian family law has fundamentally changed during this last decade. Very significant steps – even avant-garde at the European level – have been made. A lot of very important aspects of family law changed deeply. For the better? It is always a delicate task to try to give an appreciation. The jurist always has his subjectivity and his own conception of the values which he can appreciate or regret to see promoted legally or on the contrary abandoned. Technically, a report however can be made: the quality of the texts, sometimes voted too quickly and subjected to often contradictory political wills, leaves the jurist and even more the judge responsible for applying them more and more perplexed.

We will only discuss here some reforms which appear to be fundamental because they have modified in depth the legal situation of either the couple (Part II) or the children (Part III).

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II COUPLES

(a) The pluralism of the couple's legal situations: marriage, legal cohabitation, de facto cohabitation

(i) Legal cohabitation

Marriage is no longer the only model for couples who live together regulated by Belgian law. It remains the only way by which the law defines a real status (involving a change of 'state' of the person), inducing mutual protection of the partners (even if it is now more reduced). However, since the coming into force on 1 January 1999 of the law of 23 November 1998,[1] legal cohabitation establishes an alternative to marriage initially not very attractive for heterosexual couples but which constituted for 5 years the only way for couples of the same sex to formalise their union, when marriage was not open to them.

Legal cohabitation is open to two persons with capacity, whatever their sex, who share a common life. The only two limitations for the adoption of this regime are the incapacity of one or both cohabitants and the existence for them of another marriage or legal cohabitation. On the other hand, the existence of a family tie does not prevent them from becoming legal cohabitants. Legal cohabitation proceeds from a declaration made by both cohabitants in front of the officer of the registry office in the place where they are living.[2]

Legal cohabitation has very few personal consequences. It does not affect the 'state' of the persons. The legal cohabitants have no legal obligation of fidelity and no obligation of reciprocal assistance, so that there are no maintenance obligations between them, either during their common life or after separation. They both have however, like a married couple, the obligation to contribute to the expenses of the common life in proportion to their abilities.[3] Some other effects similar to those of marriage have been transposed to legal cohabitation such as the protection of the family residence and its furniture (which cannot be sold by the one who is the sole owner without the agreement of the other, for example) and the mutual responsibility for the debts contracted by one of the legal cohabitants for the needs of the common life or the children whom they educate. Regarding the assets, each cohabitant keeps the property acquired from their own income but possessions which neither of the cohabitants can prove to be their sole property are presumed to belong to both.

Even if legal cohabitants can conclude agreements in front of a notary, setting out the precise details of their commitments, in particular on the patrimonial level, the few effects initially awarded to legal cohabitation had led to its being

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1 Law of 23 November 1998, *Moniteur belge*, 12 January 1999 (all Belgian laws can be found on the website: www.just.fgov.be/index_fr.htm).

2 Belgian Civil Code, art 1476.

3 Ibid, art 1477(3).

qualified as 'an empty shell'. A posteriori, it also appears as a first step crossed by the legislator towards homosexual marriage which was authorised some years later.[4]

Legal cohabitation, however, won attention when later laws conferred on it supplementary effects.

Regarding taxes on incomes, the Belgian federal legislator decided to assimilate legal cohabitants to the married couple.[5] Measures were also taken so that legal cohabitants can obtain rates of inheritance taxes identical to those applicable to the surviving spouse (even if, within the framework of Belgium, which is a federal state, these regulations differ according to the region – Flanders, Wallonia or Brussels – in which the cohabitants have taken up residence).

From the inheritance point of view, legal cohabitation initially created no right of inheritance. Legal cohabitants were not each other's heirs. The law of 28 March 2007 grants the surviving legal cohabitant the usufruct of the common residence of the family as well as the furniture in it. Rules relative to the usufruct of the surviving spouse apply by analogy.[6] The surviving legal cohabitant also receives the right to keep the rental lease of the house.

Legal cohabitation comes to an end by the death or the marriage of one or both cohabitants, as well as by a declaration in front of the officer of the registry office made by both cohabitants or by one of them (in this case, the declaration has to be notified by a bailiff to the other, but no motive must be given). The legislator also organises particular procedures to settle disputes which can arise between the legal cohabitants at the moment of, or directly after, the cessation of the cohabitation.[7]

Regarding children, the rules relating to the establishment of maternal filiation (always established by the compulsory mention of the name of the mother on the birth certificate) on one hand and to the effects of filiation (parental authority, maintenance obligations, inheritance rights of children) on the other hand, do not depend any more on the marital or non-marital situation of the father and the mother. The legal cohabitation of the parents makes no difference. As regards the establishment of paternal filiation, it will be established by acknowledgement or by judgment,[8] the legislator not having wished (nor even envisaged) to widen to legal cohabitants the presumption of paternity which, in a marriage, makes the husband the father of the child to whom the married mother gives birth.

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4 See below Part II(b)(i).
5 Law of 10 August 2001 reforming tax law, *Moniteur belge*, 20 September 2001, came into force in 2005.
6 Belgian Civil Code, art 745octies.
7 Ibid, art 1479.
8 See below Part III(b)(ii).

(ii) Simple cohabitation

In addition to marriage and legal cohabitation there is 'simple cohabitation'. 'De facto cohabitants' (so-called in contrast to 'legal cohabitants') benefit from no legal status organising their union. No specific rule governs as such the personal or patrimonial effects of their union. Their legal relations can possibly be regulated only by the application of the general rules of the civil law governing the relations between private individuals (general law of contracts and torts for example). There exists between them no duty of cohabitation (so that they can end their relationship at any time without any formalities), any protection of the family house, no duty of fidelity, no maintenance obligation during or after their common life, and no duty of contribution to the expenses of the household.

The case-law tried to moderate the inequity that those principles can present by using diverse temperaments, but without any legal base. Some isolated decisions of case-law[9] supported the application by analogy of rules applicable to married couples, basing this position on the right of respect for private and family life or the non-discrimination principle of Arts 8, 12 and 14 of the European Convention on Human Rights. These attempts to apply a legal framework to relations out of wedlock by analogy with the institution of marriage received criticism on the basis of doctrine and are mostly not followed in case-law.

As regards assets, the law does not lay down any particular rule. So, each partner keeps ownership of the assets which he or she owned before cohabitation and the assets acquired during this one. That does not naturally prevent the acquisition of properties in joint names by the two partners, but there is no assumption of joint possession of the properties acquired during the common life.

Cohabitation moreover creates no right of inheritance. Cohabitees are not each other's heirs. If one dies, in the absence of a will, their estate will pass to the heirs as defined by the law. A cohabitee can establish the other as their legatee only by will within the limits which exist in favour of certain of their heirs.

(b) The new shape of marriage . . . and of divorce

(i) Same-sex marriage

The law of 13 February 2003, which came into force on 1 June 2003, made marriage accessible under Belgian law to people of the same sex. At the close of a complex parliamentary debate, the Belgian legislator wanted to introduce a form of symbolic equality between heterosexual and homosexual couples, and considered that gender difference should no longer be a condition for access to

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[9] For example, Tribunal de première instance de Liège, 26 June 1980, *Jurisprudence de Liège*, 1981, p 86; Justice de Paix de Merksem, 5 March 1981, *Rechtskundige Weekblad*, 1981–1982, col 49, note J Pauwels.

the institution of marriage.[10] As a consequence, the new art 143 of the Belgian Civil Code provides that two persons of different sexes or the same sex can contract a marriage.

The marriage of same-sex couples is subject to the same conditions of access as a heterosexual marriage, namely the absence of any obstacles associated with kinship,[11] the absence of bigamy,[12] the fulfilment of age conditions (18 years unless exempted by the Juvenile Court),[13] legal capacity and proper consent.[14]

Homosexual marriage produces the same effects as heterosexual marriage: the same reciprocal rights and duties between spouses, the same rules applicable to property, the same rules applicable to its dissolution by divorce or death, and therefore the same rights of inheritance in the surviving spouse. There is, however, a major exception to this principle regarding children who may be born (necessarily by medically or 'amicably' assisted reproduction) within the context of that marriage: the new art 143 of the Civil Code states that the legal rule that foresees that the husband is automatically the legal father of a child born of his wife during the marriage (called 'presumption of paternity')[15] is not applicable if the marriage was contracted between people of the same sex. If this rule had been transposed by analogy into a same-sex marriage, it would have meant that the wife of a homosexual mother would have the automatic right to be legally a 'co-mother' of the child to whom her partner gives birth during the marriage. The Belgian legislator did not want to go that far. But it permitted access to adoption for same-sex couples 3 years later by the law of 18 May 2006.[16]

(ii) Abolition of divorce for fault in favour of divorce for irreconcilable breakdown (and its consequences as to maintenance after divorce)

During 2006, the Belgian legislative chambers commenced an in-depth reflection on a fundamental divorce reform. It was a matter of abolishing divorce for fault and permitting divorce on a considerably accelerated timescale. That reflection resulted in the law of 27 April 2007,[17] reforming divorce, which came into force on 1 September 2007. The reform established the 'right to divorce', involving the concept of marriage as a 'sui generis pact' renewed from day to day, and not as a rigid and indissoluble institution. The legislator also wanted to limit the debate on liabilities in the event of breakdown with harmful effects on relations between the spouses and for the

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10 For more details, see J-L Renchon 'L'avènement du mariage homosexuel dans le Code civil belge' (2004) 2 *Revue de droit international et de droit comparé* 169.
11 Belgian Civil Code, arts 161–164.
12 Ibid, art 147.
13 Ibid, arts 144 and 145.
14 Ibid, art 180.
15 Ibid, art 315.
16 *Moniteur belge*, 20 June 2006, p 31,128; see art 343(1) of the Belgian Civil Code.
17 *Moniteur belge*, 7 June 2007, p 30,881.

children. It was a matter of no longer making fault the central issue in divorce whilst 'leaving room within a legal debate for expression of the victim's suffering'.[18]

There are consequently two types of divorce in Belgium: divorce for irreconcilable breakdown and divorce by mutual consent.

Divorce by mutual consent

This is a divorce which is by nature contractual, requiring the spouses to agree on the one hand to the principle of divorce and on the other to all the consequences of it with regard to both relations between them (and in particular the payment or not of any maintenance after the divorce), and their property or their children.[19] In the absence of an agreement on any point, there can be no divorce by mutual consent. The basis of the divorce is established in agreements prior to the divorce by mutual consent which gives a precise and detailed statement of the points of agreement. Those agreements are subject to the consideration of a judge who examines the formal regularity of everything and the content regarding the provisions concerning minor children of the spouses, knowing that he will recognise officially that part of the agreements.

Divorce for irreconcilable breakdown

In a divorce for irreconcilable breakdown, the grounds for the divorce are to be found in the couple's failure. The divorce is indeed pronounced when the judge observes the irreconcilable breakdown between the spouses, defined as being that which 'makes it reasonably impossible to continue or to recover their life together'.[20]

Irreconcilable breakdown may be proved in different ways: it can principally be established by some deadlines of separation and without proof of a formal legal ground (ie a particular fact that proves breakdown, as discussed below). Those deadlines will vary depending upon whether the divorce is requested by only one of the spouses or by both of them.

When the request is made by a single spouse, irreconcilable breakdown is established if the spouses have been separated de facto for one year.[21] De facto separation may be established by any means of proof (and in particular by the production of documents proving entries of different addresses in the population registers). If it is established that the parties have been separated de facto for one year, the judge will automatically grant the divorce. The separation must be voluntary. A separation provoked solely by specific

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18 Projet de loi réformant le divorce, *Documents Parlementaires*, Chambre des Représentants, session ordinaire 2005–2006, no 2341/1, 15 March 2006.

19 Belgian Judiciary Code, arts 1288ff.

20 Belgian Civil Code, art 229(1).

21 Ibid, art 229(3).

circumstances such as distance due to professional reasons, hospitalisation or imprisonment should not in themselves prove breakdown.

The Civil Code provides moreover that the divorce is also granted if one of the spouses has made the request on two occasions, at an interval of one year. At the preliminary hearing, the judge will adjourn the case for one year, and at that hearing one year later the divorce must be granted if the spouse persists with the request.

When the request is made by the two spouses, the principles are similar but the separation deadline required to establish irreconcilable breakdown is reduced to 6 months.[22] Furthermore, the court may also grant the divorce on the request of two spouses 3 months after they have jointly requested, whether in the case of a period of separation or even if there is no separation.

The parties may also establish proof of irreconcilable breakdown of their marriage by any legal means, proving any fact or fault which makes it reasonably impossible to continue or to recover their life together. In that case the court grants the divorce without delay, namely without waiting for the deadlines mentioned above to be reached.[23] One spouse may thus claim the failure by the other to fulfil their matrimonial obligations, for instance by adultery, injury, insult and so on, or any other fact (even if it does not constitute a fault on the part of one or other spouse) likely to convince the court that, in the particular case, there is a permanent breakdown between the couple. In this case the basis of the divorce is not the fault or the fact thus proved, but the irreconcilable breakdown that fault or fact causes or demonstrates. Fault has therefore lost its role in the granting of the divorce.

The new art 301(2) of the Civil Code provides that 'in the judgment granting the divorce or in a later decision, and on the request of the spouse who is in need, the Court may also order maintenance to be paid by the other spouse'. The legislator has therefore conceived maintenance as ancillary, since the court may order maintenance in the case of need but it does not have to.

Any spouse in need may claim maintenance after the divorce. The circumstances resulting in the granting of the divorce are a priori without impact. Indeed, it matters little whether the irreconcilable breakdown was established on the basis of a precise fact or a de facto separation.

Although fault has lost its role in the granting of the divorce, it has been retained 'with a concern for equity' as to the consequences of the divorce, and still plays a certain role in the order or not of maintenance between the ex-spouses. In fact, the court may refuse to accede to the request for maintenance if the ex-spouse making the request has been at serious fault

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[22] Ibid, art 229(2).

[23] Ibid, art 229(1) and Judiciary Code, art 1255.

which made it impossible to continue life together (therefore in principle a fault occurring before the separation), or if that party has been found guilty of conjugal violence.[24]

Although the existence of a state of need (in addition to the absence of fault) is the prerequisite of maintenance after the divorce, art 301(3) of the Civil Code provides, with regard to calculation of its amount, that maintenance after divorce must cover 'at least the beneficiary's state of need'. The judge establishes the extent of the rights of the creditor taking account on the one hand of the income and the opportunities of the two parties and on the other hand 'the significant deterioration of the economic situation' of the requesting spouse. A series of factors, of which the list is not exhaustive, permits an assessment of the deterioration of the economic situation: the length of the marriage, the age of the parties, their behaviour as to the organisation of their needs and the burden of the children. The state of need can only be justified however if it results from a joint decision of the spouses or an involuntary situation.

The amount of maintenance after divorce is in any event limited to one third of the debtor's income. The benefit of maintenance after divorce is limited in time because 'the period of maintenance may not be longer than that of the marriage'.[25] The maintenance ends moreover on the death of the debtor or the creditor, in the case of remarriage of the beneficiary of the maintenance or at the time when the latter makes a declaration of legal cohabitation and possibly if the beneficiary of the maintenance 'lives maritally' with a third party.

In principle the maintenance takes the form of a monthly allowance. It may be in capital either on the request of the two spouses who agree on that mode at the time of the divorce or later, or on the request of the debtor alone in which case it is for the court to assess the appropriateness of the request. In such a case the capital is calculated in accordance with the table of life expectancy for the creditor.

III CHILDREN: THE ESTABLISHMENT OF LEGAL FILIATION

The Belgian law on filiation had already been significantly reformed at the end of the twentieth century. By the law of 31 March 1987, it abolished the prominent favouring of legitimate filiation and recognised the principle of equality between all children born inside or outside marriage, as well as between the parents, whether married or not. The Belgian Constitutional Court was nonetheless led to observe on numerous occasions that in various ways

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[24] Civil Code, art 301(2).
[25] Ibid, art 301(10).

there was some discrimination. That is the reason why there were further reforms in the law of 1 July 2006,[26] which came into force on 1 July 2007.

The legislator sought to establish a balance between the biological substrate of filiation and its socio-emotional substrate. Although blood links, which these days emerge more easily and more clearly from available scientific examinations, are in principle the fundamentals of the filiation link, the legislator nonetheless sought to temper the systematic search for biological truth by taking emotional links into consideration, in particular through the obstructive role played by the 'possession of status' in certain legal actions in relation to filiation.

(a) Maternal filiation

According to art 312 of the Civil Code, the child's mother is the person indicated as such on the birth certificate. The indication of the name of the mother on the birth certificate is obligatory. At present, Belgian law does not authorise birth under an 'X'.[27] As a consequence, the maternal filiation of the child is automatically established when the birth occurs in Belgium.

If the name of the mother is not indicated on the birth certificate or in the absence of such a certificate, the mother may acknowledge the child before a registrar or a notary. Such recourse to acknowledgement for the establishment of a filiation link with the mother is therefore exceptional. Maternal acknowledgement, like the paternal acknowledgement[28] of an adult or emancipated minor child, is only admissible with their prior consent.[29] If the child is a non-emancipated minor, the consent of the parent with regard to whom the filiation is established is required, in addition to the consent of the child if they are older than 12 years.

If there is no establishment of a maternal filiation link either by indication of the mother's name on the birth certificate or by acknowledgement, the maternal filiation may be established by judgment. The applicant must provide proof that the child is indeed that of the mother alleged to have given birth, either by demonstrating the possession of status of child with regard to the mother or by providing other means of proof.

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[26] Loi modifiant des dispositions du Code civil relatives à l'établissement de la filiation et aux effets de celle-ci, *Moniteur belge*, 29 December 2006, p 76,040.

[27] Even though a proposed law was last year discussed in the Senate to permit a 'discrete delivery' so that the mother would not be obliged to indicate her name (Proposition de loi relative à l'accouchement discret déposée le 21 janvier 2009, Sénat de Belgique, session 2008–2009, proposition no 4-1138/1. It can be found on the website: www.senate.be).

[28] See below Part III(b)(ii).

[29] Civil Code, arts 313 and 329bis.

(b) Paternal filiation

(i) In marriage

Article 315 of the Civil Code provides that a child born during marriage or within 300 days following the dissolution or annulment of the marriage has the husband as the legal father. The husband is therefore presumed to be the father if the child is born during the marriage (even if conceived prior to it) or if the child was born within 10 months following the death of the husband or the divorce of the spouses.

The presumption of paternity does not apply in the case of a homosexual marriage.[30] Moreover, since 1 July 2007, the presumption of paternity may not be applied in certain situations where the spouses are living separately at the time the child was conceived. The presumption of paternity may thus be 'deactivated' on the one hand when the child is born more than 300 days after judicial authorisation given to the spouse to reside separately within the context of divorce proceedings or proceedings to organise the de facto separation of the spouses, or on the other hand when the child is born more than 300 days after the date of entry of the spouses at different addresses in the population registers. At the time of the declaration of birth, the registrar must therefore check that it is not one of those situations. If that is the case, the Registrar will not indicate on the child's birth certificate that the husband is the father, unless the two spouses expressly ask for that presumption of paternity to apply nonetheless.[31]

When paternal filiation is established by application of the presumption of paternity, art 318 of the Civil Code permits an objection to the legal link thus established by an action to contest the paternity link. The applicant must prove that the husband of the mother is not the father of the child. The action may be brought by the mother within one year of the birth, by the husband of the mother within one year of the discovery of the fact that he is not the father of the child, by the person claiming paternity of the child within one year of the discovery that he is the father, and by the child between 12 and 22 years of age or within one year of the discovery that his mother's husband is not his father. The action is not however admissible if the child is in 'possession of status' with regard to the husband, that is to say if the husband has behaved as a father, if the child considers him to be part of the family. In this case the legislator wanted to prefer the socio-emotional link thus established even if it did not correspond to biological reality. If there is no possession of status, the proof which must be produced is that of the non-paternity of the husband. That proof may be provided in any legal manner (DNA or blood test, proof of an absence of cohabitation between the spouses during the entire legal period of conception, evidence from witnesses and so on).

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[30] See above Part II(b)(i).
[31] Civil Code, art 316bis.

(ii) Outside marriage

When paternity is not established by application of the presumption of paternity because the mother is not married, or when that presumption has been successfully contested, the father may acknowledge the child. The acknowledgement of a major or emancipated minor child is only admissible with their prior consent.[32] No procedure is provided if the major or emancipated minor child refuses their consent, so that they have an absolute right of veto.

If the child is a non-emancipated minor, the acknowledgement is only admissible with the prior consent of the parent with regard to whom the filiation is established and of the child if the latter is at least 12 years of age.[33] If such consent is not obtained, the candidate for the acknowledgement may summons the persons from whom the consent is required before the court, which will attempt to reconcile them. The court will not authorise the acknowledgement if it is proved (most frequently through a DNA test ordered by the court) that the applicant is not the biological father of the child. If he is the biological father, then the court will authorise the acknowledgement if the child is aged less than one year at the time the application is made. If the child is aged more than one year at the time the application is made, the court may only refuse to authorise the acknowledgement if it considers that it is obviously contrary to the interests of the child. The Belgian legislator thus considered that if the acknowledgement is not made within one year, it could be a sign that it could be contrary to the interests of the child.

Specific hypotheses and conditions are provided by the Belgian legislator moreover, for example for the child born of rape (which may never be recognised if the mother does not consent), incestuous children (who may only have a single filiation link established, either maternal or paternal) or deceased children.[34]

Finally, an acknowledgement may be made prior to the birth. It will only have full effect however when the child acquires legal personality, that is to say when it is born alive and will survive.

If paternity cannot be established either by presumption or by acknowledgement, it may be established by *judgment* at the close of a paternity action, which may be applied for by the mother or the father within a deadline of 30 years, or by the child before reaching 48 years of age.[35] To be declared admissible, the proof to be provided for the paternity action is clearly the proof of the paternity of the defendant. Article 324 of the Civil Code provides that the 'possession of status' with regard to the claimant father proves filiation; if there is no 'possession of status', the proof of paternity must be provided in

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[32] Ibid, art 329bis(1).
[33] Ibid, art 329bis(2).
[34] Ibid, arts 329bis, 321 and 328.
[35] Ibid, arts 322 and 332ter.

any legal manner; finally, paternity is presumed if it is established that the defendant had sexual relations with the mother during the legal period of conception (between 300 and 180 days before the birth) unless there are doubts as to the paternity, given that the court must in any event reject the application if it is proved that the person seeking the filiation is not the child's biological father.

IV CONCLUSION

Almost all fields of Belgian family law have been reformed recently. Not all of the changes which have been made have been explained here. Other major legislative reforms, such as the total reworking of adoption law, the law relating to medically assisted reproduction and the destination of supernumerary embryos and gametes, or the law of 18 July 2006 preferring the equal shared custody of the child whose parents are separated, will be the subject of another contribution in a later *International Survey*.

In the meantime, other legislative reforms being discussed in Parliament may perhaps have been concluded. The question of legalisation of surrogate mothers, or even the recognition of 'social parenthood', is being discussed in particular.

The Belgian family law of the twenty-first century has and will certainly have a new, even more innovative aspect!

Cameroon

EXCURSION INTO THE 'BEST INTERESTS OF THE CHILD PRINCIPLE' IN FAMILY LAW AND CHILD-RELATED LAWS AND POLICIES IN CAMEROON

*Atangcho Nji Akonumbo**

Résumé

Au fil du temps, les droits de l'enfant se sont développés autour de principes fondamentaux dont le nombre permet de déterminer la mesure à laquelle ils sont protégés par certains états, dans des lois nationales relatives à la famille mais également grâce à des lois et politiques concernant l'enfant. Sur la base de droits fondamentaux concernant les enfants et répondant aux critères d'interdépendance et d'indivisibilité, cette étude essaye d'évaluer le degré d'utilisation du principe de l'intérêt supérieur de l'enfant au Cameroun. Elle soutient que même en ayant reçu les meilleures considérations, tant législatives et juridiques que politiques, ces efforts restent maigres puisque seuls la justice pénale et le travail des enfants ont, dans une certaine mesure, reçu des modifications notables. Toutefois, la mise en œuvre pratique des réformes récentes doit toujours être évaluée par rapport au contexte de coutumes résistantes et *contra legem* ainsi que de pratiques traditionnelles, parmi d'autres manifestations.

En outre, l'entrée judiciaire dans la réalisation des droits de l'enfant a généralement été exceptionnellement frivole du fait qu'il n'y a ni de tribunaux spécialisés pour enfants, ni de juges spécialement formés en matière de droits de l'enfant, par exemple. Le double système judiciaire opérant dans le pays est un atout à la culture juridique, mais il peut parfois être critiqué, quand il crée deux poids deux mesures, sur la même question, dans le même pays. Les réformes en cours dans ce sens semblent répondre à une grande partie de ces préoccupations, malgré le fait qu'elles soient longues à venir et que la victime demeure la réalisation inefficace des droits de l'enfant camerounais.

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I INTRODUCTION

Cameroon is party to most human rights instruments, in particular, the major international and regional instruments dealing exclusively with children's rights, which champion the best interests principle: the United Nations Convention on the Rights of the Child (CRC) in 1993 and the African Union's African Charter on the Rights and Welfare of the Child (ACRWC) in 1997. But, as it shall be seen, early case-law, and to some extent legislation in Cameroon, seem to have anticipated the best interest of the child principle long before its consecration in the CRC and later the ACRWC.[1] Currently, the materialisation of the principle at national level in the country can be seen through a set of criminal, civil, social and administrative measures aimed at the judicial and social protection of the child. Yet, the Cameroonian child does not seem to be taking full advantage of the best interests principle which cuts across the array of the children's fundamental rights. Family law and child law are still under-legislated in Cameroon. In many respects, the issues and standards covered by relevant legislation in these areas are not comprehensive and as a result, dependence on foreign law and international law is commonplace. More so, the poor implementation of existing laws and policies, insufficient resources as well as the influence of obnoxious customs and traditional practices and the country's bi-jural status are also contributory factors.[2] Cultural concerns are no less important and may even downplay universal standards which are themselves sometimes bound in Western values and considered too strong, if not, too abstract for the African society. For example, in most African communities, it borders on the absurd to think that children have freedom of expression or that they should have a say in whatever concerns them, whereas the contrary is a hallmark of the Western culture. Although such attitudes seem to put the rights of the African child in peril, they are a reality and states are obliged to protect and preserve them, Cameroon being no exception. There is no stand-alone child legislation in Cameroon but the best interests of the child principle is to a certain extent engrained in laws and policies relating to custody, adoption, employment, freedom of expression as well as juvenile justice and rehabilitation currently in force. Even within the two main anticipated pieces of legislation involving children's rights, the draft Persons and Family Code and the draft Code for the Protection of the Child, the principle is frequently recalled in relevant provisions as the standard of implementation of children's rights. Before examining these areas of law in Cameroon where the principle has been incorporated, it is worthwhile to first of all examine its driving force.

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1 See Part VI of this chapter.

2 The issue of bi-jural status of Cameroon is elucidated briefly under Part IV(a) below.

II THE 'BEST INTERESTS OF THE CHILD' PRINCIPLE AND THE NOTION OF 'CHILD'

(a) Purport of the 'best interests of the child' principle

The 'best interests of the child' or the 'welfare of the child'[3] means that, when adults or authorities of a state take decisions which affect children, the best interests of children must be a primary consideration. The best interests of the child must be understood as everything that is of some advantage to the child, to his mental, moral, physical and material well-being. The best interests of the child principle is therefore central to legal and policy decision-making about children. This particularly applies to law makers as well as budgetary and policy considerations.[4] It is used by most courts to determine a wide range of issues relating to the well-being of children.[5] Thus, the principle also relates to decisions by courts of law, administrative authorities, public and private social welfare institutions, as well as parents, legal guardians, or other individuals and institutions, services and facilities entrusted with childcare protection. This is a key note message both the CRC and ACRWC convey, yet the implementation of the principle remains a major challenge in contemporary times.[6]

It is submitted that: 'Even if we agree that "best interests of the child" is the gold standard for deciding these questions, there is disagreement about how that test is to be applied.'[7] This simply means that, although the standard is fully understood, it is not a blanket test for determining the effective realisation of children's rights – its implementation is subject to the peculiarities of a set of circumstances and variables: the main stakeholders involved (children, adults and the state), their interests and idiosyncrasies, the nature of state policies, measures, institutions and ethical considerations. As such, a one-size-fits-all gauge of the degree of implementation of the principle cannot be made.[8]

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3 M Henaghan 'Above And Beyond The Best Interests Of The Child' available at: http://tur-www1.massey.ac.nz/~wwcppe//papers/cppeip04/cppeip4j.pdf (accessed 12 February 2010).

4 See generally, UNICEF *Fact sheet: A summary of the rights under the Convention on the Rights of the Child,* available at: www.unicef.org/crc/files/Rights_overview.pdf (accessed 10 October 2009).

5 'Best interests', available at: http://en.wikipedia.org/wiki/Best_interests#Assessing_the_best_interests_of_the_child (accessed 23 March 2010).

6 Fact Sheet No 10 (Rev 1) 'The Rights of the Child', Vienna Declaration and Programme of Action (Part 1, para 21), adopted by the World Conference on Human Rights, Vienna, 25 June 1993 (A/CONF 157/24 (Part 1), chapter 111), available at: www.ohchr.org/Documents/Publications/FactSheet10Rev.1en.pdf (accessed 10 March 2010).

7 E Willemsen and M Willemson 'The Best Interest of the Child: child's right to have stable relationships must be central to custody decisions' Markuula Centre for Applied Ethics, available at: www.scu.edu/ethics/publications/iie/v11n1/custody.html (accessed 23 January 2010).

8 UNCRC, General Comment No 5 (n 10 below) explains this point. It states that: 'Article 3(1) establishes that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private bodies. Article 3(3) requires the establishment of appropriate standards by competent bodies (bodies with the appropriate legal competence), in particular, in the areas of health, and with regard to the number and suitability of staff. This requires rigorous inspection to ensure compliance with the

Briefly stated then, the 'best interests principle' is generally determined by considering a number of factors related to the circumstances of the child and the capacity of potential caregiver(s), with the child's ultimate safety and well-being as the paramount concern.[9] The minimum core obligation of the principle is that the state should take all necessary measures to ensure the full and constant protection of children in all circumstances. In fact, the United Nations Committee on the Rights of the Child (UNCRC) has defined the scope of the obligation of states under the principle. It states that the obligation 'requires states to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests'.[10] As a matter of fact therefore, the best interests of the child principle operates to ensure both the understanding and the extent of the effective realisation of children's rights. Therefore, as one of the four core principles under the CRC,[11] it should normally run across legal and policy considerations on the rights and welfare of children.[12]

That said, the first question that has to be settled in relation to the principle is the notion of 'child' (or 'minor') for the purposes of either child law or family law in Cameroon. This is a complex issue, which amongst other things, brings the ramifications of the country's dual legal system and peculiarities in the different aspects of law into play.

(b) The question of definition of 'child' under Cameroonian law

(i) Generalities

The starting point would be the CRC and the ACRWC. Both instruments define a child as any person below the age of 18 years.[13] Eighteen is therefore the age of majority. This definition, however, presents a possible and, perhaps,

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Convention. The Committee proposes that there should be a permanent monitoring mechanism or process aimed at ensuring that all State and non-State service providers respect the Convention' (para 44).

9 'Determining the Best Interests of the Child: Summary of State Laws' Child Welfare Information Gateway Children's Bureau/ACYF US Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families Children's Bureau, available at: www.childwelfare.gov/systemwide/laws_policies/statutes/best_interestall.pdf (accessed 12 January 2010).

10 UNCRC, General Comment No 11 (2009) (unedited version), 'Indigenous children and their rights under the Convention', Fiftieth session Geneva, 12–30 January 2009, CRC/C/GC/11, para 33, available at: www2.ohchr.org/english/bodies/crc/docs/GC.11_indigenous_New.pdf (accessed 20 February 2010). This is in consonance with the Committee's earlier stance. See also, UNCRC, General Comment No 5 (2003), 'General measures of implementation of the Convention on the Rights of the Child', 27 November 2003, CRC/GC/2003/5, para 12, available at: www.unhcr.org/refworld/docid/4538834f11.html (accessed 23 March 2010).

11 Article 3.

12 The four principles are: non-discrimination (Art 2), the best interests of the child (Art 3) the right to life, survival and development (Art 6); and respect for the views of the child or participation (Art 12).

13 The expressions 'child', 'minor' and 'juvenile' are used interchangeably in this chapter but they should be understood to mean the same thing.

weird interpretation of the age of majority. Nevertheless, it finds sufficient space in view of the way States Parties have had to consider it within their national laws. From the wording of both provisions under the CRC and the ACRWC, a differentiation between the *age of majority* and *minimum legal age* may be drawn. The former is a standard minimum legal tag irrespective of any situation whereby any person of that age is capable of claiming any legal right at his or her behest or subjecting himself or herself to any legal liability. Meanwhile, the latter is a situational minimum tag which varies and is designed in view of either the particular circumstances, the gravity of conduct which the law seeks to protect against, or the branch of law concerned. The CRC and ACRWC therefore set the *age of majority* but not the *minimum legal age*.

Countries which prefer the *age of majority* formula (18 years) in accordance with both instruments probably to avoid discrepancies inherent in the *minimum legal age* formula, have usually done so in respect of the civil law but flipped back to it (*minimum legal age*) in the domain of juvenile criminal responsibility. Criminal laws tend to fragment offences committed by or against the child and correspondingly provide different minimum ages (especially where the child is the victim) in view of aggravating either the offence or the punishment, where necessary. Thus, where the victim of criminal conduct is a child, the lesser the age, the graver the offence and the punishment but, conversely, where the child is the offender, the lesser the age, the lesser the offence and the punishment. The considerations in both circumstances reflect the best interest of the child.

(ii) Dissymmetrical manifestations of the minimum age in Cameroon

The question of minimum age in Cameroon calls into play another question of uniformity of laws as applied in the country. In Cameroon, there may be uniformity in an aspect of law which does not apply to the whole country since there are two legal systems as discussed below. As such, there is no stand-alone age of majority applicable to all aspects of criminal law or civil law. Besides, where there is a uniform age of majority in an aspect of criminal law or civil law, it would further depend on whether that aspect of law is applicable to the whole country. However, these considerations do not apply in the area of criminal juvenile justice since substantive criminal law and criminal procedure are fully harmonised in the whole country. The draft Child Protection Code has opted for the age majority formula and defines a child as anyone below the age of 18 for the purposes of both criminal law and civil law applicable to the whole country, irrespective of the legal system involved. Yet, this is subject to the subtleties of minimum ages under substantive criminal law (just seen in the preceding paragraph) and procedural criminal law (discussed further below) in the best interest of the child.

Current disparities in minimum ages in Cameroon, whether in the domains of criminal law or civil law, are as a result of the country's bi-jural system – English common law/French civil law of the Romano-Germanic origin – which provide different ages under different aspects of law, in the absence of

harmonisation. In the area of civil marriage which is harmonised, the minimum legal age in Cameroon is 21. However, the 1981 Ordinance governing civil status provides an exceptional situation whereby a girl of 15 years and a boy of 18 years can get married under a waiver granted by the President of the Republic 'for serious reasons'.[14] On the strength of the sense of *minimum legal age* drawn earlier, these ages constitute the legal minimum age of marriage in Cameroon. Employment law has followed suit with a minimum legal age. The 1992 Labour Code in Cameroon sets the legal minimum age of employment at 14 years in compliance with International Labour Organisation (ILO) Convention 138.[15] But, there is a proviso which allows the minister in charge of labour to grant a waiver for employment of a child below that age in view of the local circumstances and the nature of the work to be accomplished.

The minimum ages in different situations differ from one area of the law to another under the broad civil and criminal law divide and under the two legal systems as mentioned above, rendering matters complicated. *In civil matters*, the French Civil Code (1804) applicable in Francophone Cameroon considers anyone below the age of 21 as a minor. This is partly identical to the position in Anglophone Cameroon in areas where there is no harmonisation in the national legislation. In family matters for instance, at common law, the father was entitled to the legal custody of his or her legitimate children until the age of 21 years.[16] In contractual matters, the English Minor's Contract Act of 1987 sets the capacity to contract at 18 years. The defunct English Infants Relief Act of 1874 which used to govern contracts entered into by minors adopted the minimum age under the Family Law Reform Act.[17] The latter defined a child as anyone below 18 years. Generally, under English statute law today, the age of majority has since been reduced by statute to 18 years[18] although such post-1900 English statutes in these domains do not apply to the courts of the Anglophone regions of Cameroon.

In criminal matters, the minimum age of criminal responsibility is 10 years. Between 10 and 14 years, the offence can only attract special measures.[19] Above 14 and less than 18 years, criminal responsibility accrues but is only diminished; meaning that minors from 14 years can be criminally responsible. The law does not set a minimum age for sexual consent, for example. In fact, s 296 of the Penal Code simply states that any forced sexual intercourse or compelled sex with a female under or above puberty shall be punished with imprisonment from 5 to 10 years. The ensuing question is: what is the maximum age above puberty which is the limit to majority? The answer seems unclear and what can

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14 Civil Status Registration Ordinance 1981, s 52(1). The law does not provide a single instance of what the serious reasons may be and has left the matter open to speculation and arbitrariness.

15 1992 Labour Code, s 82.

16 *Thomasset v Thomasset* [1894] P 295, CA. Under English law, custody has automatically ceased when the child attained majority (21), but by statute a child now comes of age on his 18th birthday: Family Law Reform Act 1969, ss 1 and 9 and Sch 3(3).

17 Section 1.

18 Family Law Reform Act, ss 1 and 2(1).

19 See s 80 of the Penal Code.

be said at this juncture is that the criminal law in Cameroon still largely rests within very muddy waters as regards the age of sexual maturity, and the age of majority generally.

Whatever the situation or the considerations involved, within the context of this study, a child should be understood as anyone below 18 years.

III THE CRIMINAL JUSTICE SYSTEM AND THE BEST INTERESTS PRINCIPLE

Cameroon has shown keener interest in the promotion and protection of children's rights principally in the domains of crime (where the child may be either the victim or the offender). Here, the best interests principle is addressed in substantive and procedural issues.

(a) Substantive law considerations

Chapter V of Book II of the Penal Code punishes 'offences against children and the family'.[20] These offences aim at protecting the physical and moral interests of children. In most instances, the offences entail the aggravation of punishment when the victim is a child. In other words, the offences are interpreted as infringing the best interests of the child and therefore severely punished to safeguard their physical and mental integrity, particularly in relation to torture and cruel or degrading treatment, public indecency and the incitement to immorality and debauchery. Specifically, the offences include abortion, slavery, prostitution, corruption of youth, indecency to a child under 16, homosexuality, access to alcoholic drinks, advantage of weakness, assault on children, kidnapping, forced marriage, failure to return a child, abuse in respect of bride price, desertion and incest.

Under the CRC and the ACRWC, there is express protection against sexual exploitation and abuse of children.[21] The former specifically makes reference to using children for prostitution and pornographic performances. In effect, the Penal Code punishes various forms of conduct which directly or indirectly constitute either sexual exploitation or sexual abuse of a child. Sexual offences include rape,[22] indecency to a child under 16,[23] indecency to a child between 16 and 21,[24] incest,[25] forced marriage,[26] corruption of youth,[27] moral danger

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[20] Sections 337 et seq.
[21] CRC, Arts 19 and 34; ACRWC, art 16.
[22] Penal Code, s 296.
[23] Ibid, s 346.
[24] Ibid, s 347.
[25] Ibid, s 360.
[26] Ibid, s 356.
[27] Ibid, s 344. Corruption of youth under this provision means anyone who 'in order to satisfy the desires of another person, habitually excites, encourages or facilitates the debauchery or corruption of a person under eighteen years of age'.

(ie allowing a child under 16 years to reside or work in a brothel)[28] and immoral earnings – abetting, or sharing in proceeds from prostitution or being subsidised therefrom,[29] public indecency, corruption of morals and obscene publications.[30] The offence under s 294(3)(a) provides that where the victim of the practice is under 21 years, the penalty (ie imprisonment of between 6 months and 5 years and a fine of from XAF 20,000 to 1,000,000) shall be doubled. Additionally, under s 294(7), a child prostitute is not considered an accomplice. This subsection not only gives impetus to the latter sanction, but is also a major protection in case the prostitute is a child, since she is clearly being exploited and abused sexually under the circumstances. The 1998 law[31] regulating tourist activity merely refers to sex tourism involving children but does not elaborate on its scope or punishment. It states that 'government shall ensure compliance with the Tourism Charter and Tourism Code of the World Tourism Organization, and invites States and individuals to prevent any possibility of using tourism for the exploitation of others'.[32] The major setback with the provision is that it does no more than merely indicate the government's commitment to restrict the practice. The law remains vague as it neither defines sexual tourism nor prescribes punishment against it. Meanwhile, in June 2008 the Government signed an Anti-Sex Tourism Charter that outlines ethical rules for the regulation of tourist activity.[33]

Cameroonian criminal law provides special protective measures which take into account the best interests of the child throughout criminal proceedings where the offender is a parent or a child. In the first situation, s 27(2) and (4) of the Penal Code is instructive. The former subsection states that: 'No woman who is with a child or who has been recently delivered may begin to serve her sentence until six weeks after delivery.' The latter subsection states that: 'Where a husband and wife have been sentenced for the same or different offences to imprisonment for less than a year, and are not in custody at the time of the sentence, and show that they have a fixed common residence and a child under the age of eighteen supported by them and in their charge, the sentence on one may be suspended until expiry of the sentence on the other.' Generally, the right of a child not to be separated from his or her parents against his or her wish is sanctioned by arts 352 et seq of the Penal Code, which punishes child kidnapping, whether by force or by fraud.[34] In the same vein, the Code

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28 Ibid, s 345.

29 Ibid, s 294.

30 Ibid, ss 23–265.

31 Law no 98/006 of 14 April 1998 relating to tourism activities.

32 Ibid, art 5.

33 United States Department of State, 'Cameroon (Tier 2)' in *Trafficking in Persons Report*, Washington DC, 12 June 2007, available at: www.state.gov/g/tip/rls/tiprpt/2007/82805.htm (accessed 14 October 2009).

34 For mere kidnapping, the punishment is imprisonment from 1 to 5 years and a fine of from XAF 20,000 to XAF 2 million. Where the kidnapping involved the use of force or fraud (s 353), it is aggravated to imprisonment of from 5 to 10 years and with fine of from XAF 20,000 to XAF 400,000. The punishment is further aggravated to life imprisonment where the child is under 13 years or the offender's intent was to get a ransom (s 35(1)(a) and (b)). The death penalty applies where the minor dies as a result of the kidnapping (s 354(2)).

punishes failure to return a child to those having a right to claim him or her back. The object of the law here is to break any resistance staged by one parent, for example, who is bent on disrupting links between the child and the other parent. Where the child is placed in a rehabilitation institution, the law obliges the parents not only to contribute to his or her material well-being but above all to maintain a personal, direct and affectionate relationship with the child.[35]

In the second situation (where the child is the offender), there are special prosecution procedures under the Criminal Procedure Code. This is extensively dealt with under the next heading below. Suffice to state here that for the offender, the law provides special procedures – juvenile proceedings and institutions (discussed below) – for proper handling of cases involving juvenile delinquents and their subsequent social reinsertion. As a follow-up measure, juvenile delinquent rehabilitation centres (borstal institutes) were created to handle sentenced child offenders instead of placing them in traditional prison setups where they may copy and develop recidivism. However, most of these child detention centres are history and, as a result, the very ills sought to be averted in adult prison settings reappear since juvenile delinquents are placed in the same prison premises as adult inmates.

(b) Juvenile criminal proceedings

It sounds trite but it should be mentioned that juvenile offenders need special protection under the criminal justice system at all levels; from the time of proffering the charge and commencement of proceedings to the time of punishment. Thus, they should, in particular, be informed directly of the charges against them (where necessary, through their parents or legal custodians), provided with appropriate assistance in the preparation and presentation of their defence, tried as soon as possible in a fair hearing in the presence of legal counsel, provided with other appropriate assistance, unless it is considered not to be in the best interest of the child, in particular, taking into account their age or situation.[36] It is even strongly recommended that detention before and during the trial should be avoided as much as possible.[37]

The 2005 Criminal Procedure Code (CPC) was a major and timely reform in the domain of criminal law in Cameroon.[38] It provides measures in juvenile

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[35] This has been emphasised in the provisions (especially art 7) of Decree no 92/052 of 27 March 1992 on the regime of the penitentiary in Cameroon and Decree no 2001/109/PM of 20 March 2001 on the organisation and functioning of public institutions for childcare and the re-education of socially maladjusted children.

[36] See Human Rights Committee *General Comment no 32 Right to equality before courts and tribunals and to a fair trial*, Ninetieth Session Geneva, 9–27 July 2007, para 42.

[37] See UNCRC, *General Comment no 17 Rights of the child (Art 24)*, Thirty-fifth session, 1989, para 4.

[38] The CPC was instituted by law no 2005 of 27 July 2005. The code entered into force on 1 January 2007. Before the advent of the Code, criminal procedure in Cameroon was divided. In Anglophone Cameroon, the Criminal Procedure Ordinance (Cap 43 of the Laws of the Federation of Nigeria) applied while in Francophone Cameroon, the French *Code d'Instruction Criminel* (*Ordonnance du 14 Février 1838 portant Code d'Instruction Criminel*)

proceedings which go a long way to ensure the fairness of the trial and the best interests of the child principle. Where a child is involved in the same offence with an adult, although the preliminary inquiry is carried out according to the regular rules of ordinary law, it is subjected to the special rules of juvenile procedure under the CPC.[39] These rules concern: custody; consideration of the personality, behaviour and upbringing of the minor; entrustment to a social welfare service; and subjection to medical examination and psychiatric tests or placement in a welfare reception or an observation centre.[40] Juvenile delinquents have the right to be released on bail.[41]

There are no special juvenile courts in Cameroon. The Court of First Instance is therefore competent to hear and determine juvenile cases. During proceedings, the juvenile has a right to be assisted by counsel or any other person who is specialised in the protection of children's rights. Moreover, where the minor is not assisted by counsel, one must be assigned by the court. The object here, as in any court proceedings, is to ensure a fair trial.[42] Juvenile proceedings are carried out *in camera*, otherwise the trial is a nullity.[43] However, the infant's guardian or custodian, counsel, witnesses, representative of services or institutions dealing with children's affairs and probation officers are allowed to attend the hearing.[44] In this vein, the CPC includes an additional facility in juvenile proceedings to ensure the fairness of the trial and the best interest of the child principle. Thus, the presiding magistrate may allow representatives of human rights organisations in charge of children's rights protection to attend the hearing.[45] It should be noted here that such legislative acceptance of human rights institutions in the juvenile criminal law process is a major step towards recognising them as important stakeholders/partners in child law policy implementation. For example, they are in a position to assess the effectiveness of the juvenile justice system generally and the best interests principle in particular, and thus make feasible recommendations towards policy reform. Children have a right to freely express their opinion at any stage during proceedings and on any question and procedures concerning their interests. In juvenile proceedings, the CPC not only requires that the child offender be represented by counsel,[46] but the court is bound to hear the minor as to his indictment or as to any statement the minor may wish to make and questions, in return, may be put to the minor where necessary.[47]

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applied. Both foreign instruments were repealed and replaced by the CPC. The CPC is a harmonised law which accommodates common law and civil law principles. See also n 64 below.

39 CPC, s 716.
40 CPC, s 701 et seq.
41 CPC, s 708.
42 CPC, s 719(2) and (3).
43 CPC, s 720(1).
44 CPC, s 720(2).
45 CPC, s 720(2)(a).
46 CPC, s 719.
47 CPC, s 718(1) and (2).

Furthermore, the juvenile may be required to skip part of the entire hearing.[48] The reason for this measure (including the requirement to hold juvenile criminal proceedings *in camera*) may be to avoid the prejudicial effects of a public hearing on the juvenile such as fear or trauma. At the end of the trial the two assessors assisting in the hearings have a right to be joined in the deliberation and vote together with the judicial officers of the court (magistrate, representative of the legal department and registrar) on the sentence and measures to be taken against the juvenile. They are also consulted on any other issue relating to the proceedings.[49] The CPC requires that judgment be pronounced at a public hearing in the presence of the minor but, in the face of criminal sanctions, no mention of his or her identity or family should be made.[50]

With respect to sentencing, a number of measures may be decreed by the court. A juvenile may be placed under probation by being entrusted to his or her parents, guardian or custodian and is supervised by probation officers. The law provides that the probation consists of means of support, protection, supervision and education. Those entrusted with the probation are required to actively participate in these respects and refrain from impeding the probation officer's duties.[51] The probation order also takes effect even after a term of imprisonment has been served.[52] The legislator's aim here is to rehabilitate and ensure the smooth social integration of the juvenile so that he or she does not suffer stigmatisation and/or return to criminal conduct.

Consideration of the best interests principle is also evident from custody measures under the CPC. This Code provides that: 'Measures of custody shall be taken in the best interest of the minor, and can be changed or cancelled at any time.'[53] The measures involve both persons and institutions. Thus, a child in conflict with the law may be entrusted to the custody of his or her parents, guardian, custodian or any other trustworthy person, a welfare centre or observation home, any specialised institution or a vocational training or health centre. In the case of placement in any of those institutions, the custody order must state the reasons and duration of the custody. In relation to pre-trial custody,[54] minors aged between 12 and 14 years cannot be remanded in custody except when charged with capital murder or assault occasioning death. Meanwhile, minors between 14 and 18 years may be remanded in custody only if deemed indispensable. The law provides that minors can only be detained in a borstal institution or a special section of a prison meant for their detention. However, as mentioned earlier, the problem is that, where no such institution exists, they may be detained in a separate section of adult prisons due to prison accommodation deficiencies and this weakens the best interest principle.

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48 CPC, s 720(3).
49 CPC, ss 709 and 710.
50 CPC, s 723(2).
51 CPC, s 733.
52 CPC, s 725(2)(b).
53 CPC, s 702(3).
54 CPC, ss 704 et seq.

If the juvenile were to serve a prison sentence, instead of merely being placed under custody, the law requires that he or she be placed in a special juvenile incarceration centre known as the borstal institute. This is often not the case since most of such institutions have either been closed or are overcrowded. In these circumstances juvenile prisoners are often incarcerated with adults, occasionally in the same cells or wards. There are credible reports that adult inmates sexually abuse juvenile prisoners under such circumstances.[55] Security forces often hold adults, juveniles, and women together in temporary detention centres as well as subject children to abuse.[56] In a Circular Letter of 27 January 1995 addressed to all public prosecutors in Cameroon, the Minister of Justice frankly acknowledged that the lack of adequate infrastructure had caused the mixing of adult inmates with juvenile delinquents, which encouraged 'promiscuity and contacts with adult inmates' resulting in recidivism of juveniles.[57] Yet, institutions are provided for by law in Cameroon to take care of these children.[58] The first are *prison schools* responsible for the theoretical and practical training of minors under re-education. The second are *special prisons* reserved for children and women and assimilated to the prison schools.[59] Since there are no separate prison establishments for each category, the 1992 decree regulating the penitentiary regime in Cameroon[60] rigorously divides offenders in prison premises on the following criteria: accused; sentenced; sex; and age. Consequently, under the 1992 decree, minors are required to be placed in a special section of the prison.[61] This is in conformity with s 29 of the Penal Code which stipulates that an offender under the age of 18 shall serve his or her sentence in a special establishment, or in the absence of such an establishment, he or she should serve in the same establishment as adult offenders but separated from them.

Beyond juvenile incarceration infelicities, some practical measures have been put in place to address some of the problems affecting juvenile justice and ensure protection of the rights of juvenile offenders in criminal proceedings in conformity with the CPC. In November 2007, assessors in juvenile proceedings and probation officers were appointed by a joint Order of the Minister of Social Affairs and the Minister of Justice.

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55 See 'Cameroon Country Reports on Human Rights Practices – 2009', available at: www.historycentral.com/nationbynation/Cameroon/Human.html (accessed 10 October 2009).

56 For all these issues see generally, Part 1(c) of the 2006 Ministry of Justice Report on the human rights situation in Cameroon, dubbed *Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*.

57 Circular No 00077/128/DAJS on the reduction of the preventive detention of minors.

58 The institutions include: the Bepanda Counselling and Observation Centre for Minors (Decree No 72/461 of 2 September 1972), the Buea Borstal Institute (Decree No 73/155 of 22 March 1973) and the Betamba Cameroonian Childhood Institution (Decree No 73/333 of 25 June 1973). It should be noted that these institutions have either ceased to be functional (Buea) or are functioning at a much reduced capacity (Bepanda and Betamba). However, Decree No 92/052 of 27 March 1992 to regulate the penitentiary regime in Cameroon sets up five categories of prisons, two of which are to house juvenile delinquents.

59 Decree No 92/052 of 27 March 1992, arts 6 and 7. This decree states that children below the criminal majority are subject to a special regime which is not specified.

60 Ibid.

61 Article 20(4).

IV THE BEST INTERESTS OF THE CHILD PRINCIPLE IN CIVIL MATTERS

(a) Family law

Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, it must weigh whether its decision will be in the best interests of the child. As mentioned earlier, there is no standard definition of 'best interests of the child', but the principle generally refers to a range of variables that courts and other state institutions and adults consider when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. In matrimonial proceedings such as judicial separation and divorce and their incidences (custody, adoption, alimony for children's upkeep, etc) different considerations apply in both sides of the legal divide in Cameroon. Before examining the peculiarities under both systems and the standards used in determining the best interest of the child principle thereunder, there is need to pause for a while and examine briefly the bi-jural cliché in Cameroon.

In effect, two systems of law are applicable in Cameroon by virtue of the country's colonial past; the English Law in the Anglophone regions and the Romano-Germanic civil law in the Francophone regions of the country.[62] Thus, apart from areas of law where harmonisation in national rules has been achieved, the two systems of law continue to be applicable in the respective regions of the country. The *quantum* of substantive English law applicable in Anglophone Cameroon is limited to the rules of common law, principles of equity and statutory enactments of general application that were in force in England before 1900.[63] There is an exception here specifically in relation to family law matters: in the domains of probate, divorce and matrimonial proceedings, post-1900 English legislation is applicable in the courts of the Anglophone regions of Cameroon.[64] In Francophone Cameroon, a similar

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[62] See A Akonumbo 'HIV/AIDS Law and Policy in Cameroon: An Overview' (2006) 6 *African Human Rights Law Journal* 85 at 96–97. See also same author in 'Implementation Framework for Children's Rights and Welfare Standards – profiling the harmonization status of child law in Cameroon' (2008 Report, African Child Policy Forum) pp 13 et seq.

[63] Understandably, the time limitation concerns only statutes since common law and equitable rules are not dated. See s 11 of the Southern Cameroon's High Court Law (SCHCL) 1955. With regard to procedure, the practice and procedure of Her Majesty's High Court in England is applicable (SCHCL 1955, s 10).

[64] SCHCL 1955, s 15. Additionally, Nigerian law (statutes) were also applicable in Anglophone Cameroon (then Southern Cameroons) since Britain administered this territory together with Nigeria. See E Ngwafor *Family Law in Anglophone Cameroon* (University of Regina Press, Canada, 1993) p 2. The key areas of law governed by Nigerian statutes (Ordinances) were company law, marriage, child law, civil procedure, criminal procedure and evidence. All Nigerian Ordinances relating to these areas have now been repealed and replaced in Cameroon either by national legislation (or community law) save the area of civil procedure which is still governed by the Supreme Court (Civil Procedure) Rules of the Laws of the Federation of Chapter 211 of the Laws of the Federation of Nigeria (1948). However, English Law continues

situation occurs where the 1804 Napoleonic Code in force in France before 1960 is applicable by virtue of a May 1922 decree. In family law matters, the very first major attempt by Parliament in Cameroon to provide a comprehensive national uniform law across the two regions to cure some of the incongruities caused by the bi-jural status was made in 1981 when the law (Ordinance) governing civil status registration was passed.[65] However, the 1981 law dwells essentially on the civil status of persons (births, affiliation, marriages and deaths) and does not cover important issues relating to child law. In these areas, in the common law and civil law jurisdictions of Cameroon, reference is made to English and French laws respectively subject to the time limitations discussed earlier and the place of non-repugnant customary laws, including relevant international and regional instruments. However, all the relevant areas relating to child law and the law on persons and the family in Cameroon are currently undergoing extensive reform within the two draft laws earlier mentioned and discussed further below.[66]

(i) Custody and adoption

In Francophone Cameroon, the only law that expressly makes reference to the best interests of the child principle is the French Civil Code of 1804.[67] This principle is applied in relation to the custody of children. The rule is that, in the best interest of the child, the spouse who obtains the divorce is conferred the custody of the child. This rule, however, suffers an exception in that the spouse, against whom judgment was given, is allowed to have custody in the best 'advantage' of the child following a social investigation prescribed under art 238(3) of the Civil Code concerning the successful spouse's integrity. In other words, if the court finds out that the spouse who obtains divorce is of doubtful morality, his or her right of custody over any child or children of the dissolved marriage is automatically withdrawn. This principle has seen judicial acceptance in Cameroon from the highest court. The Supreme Court has emphasised that, in considering custody cases of children of a dissolved marriage, judges should decide exclusively in the interests of the said children and their decision in this regard should be final, if reasoned.[68]

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to apply in areas where national legislation is still silent or not yet harmonised. In family law and child related laws (but for the status of persons in relation to the registration of births, marriages and deaths) the areas of adoption, divorce, matrimonial causes and proceedings, probate, succession, custody and adoption of children, and maintenance of spouses and children on divorce are still governed by relevant English statutes (subject to ss 11 and 15 of the SCHCL 1955), subject to treaties signed by Cameroon in the domains of family and child law. The following Ordinances were applicable to juvenile criminal proceedings until their express abrogation by the entry into force of the harmonised Cameroon Criminal Procedure Code on 1 January 2005: the Children and Young Persons Ordinance (Cap 32); the Criminal Procedure Ordinance (Cap 43); and Evidence Ordinance (Cap 62) of the Laws of the Federation of Nigeria 1958. The Children and Young Persons Ordinance covered all areas of child law.

65 Law No 81-02 of 29 June 1981 enacting the Civil Status Registration Ordinance.

66 See Part VII below.

67 Article 302.

68 Supreme Court of East Cameroon, Judgment No 86 of 10 Feb 1970, Bulletin No 22, p 2969; Bulletin No 24, p 2962.

In the case of adoption, the French Civil Code promulgated by an Order of 5 November 1830[69] is applicable in Francophone Cameroon. Article 343 provides that 'no adoption shall take place unless for just motives and is of advantage to the adopted'. This provision is not only vague in its formulation, but also, it places 'just motives' before the best interest of the adopted child, contrary to Art 21 of the CRC and art 24 of the ACRWC which place the paramount interest of the child above everything else. Nonetheless, the provision encapsulates the essence of both articles. It should be remarked that adoption under the French civil law system can only take place if it is in the interest of the child. For example, the rule of '*inheritance reserve*' ('*réserve héréditaire*') applies, the effect of which is to allocate three quarters of the legacy of the *de cujus* exclusively to the children.[70] Also, the law requires the provision of alimony for the upkeep of children.

The law applicable to adoption in Anglophone Cameroon is the Children Act of 1975 (English). The overriding principle that s 3 of this law embodies, noticeably addresses the best interest principle. The section provides:

> 'In reaching any decision relating to the adoption of a child, the court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child through his childhood; and shall ascertain the wishes and feelings of the child regarding the decision and give consideration to them, having regard to his age and understanding.'

The Act therefore enshrines the notion of welfare of the child which is central to the African child's rights in view of the ACRWC. With regard to custody, the Children Act should, however, be contrasted with the Guardianship of Minors Act of 1971 (English). Section 1 of the latter Act requires that the minor's welfare should not only be the first, but also, the *paramount* factor when the court is deciding issues of custody or upbringing of the child. This is fully in line with the CRC and the ACRWC. The Guardianship Act therefore tends to expose the limits of the Children Act. In fact, the Children Act employs only the element of *first consideration* but omits *paramount* and suggests that, although the child's welfare is of first importance, it is not the sole test for determining the court's decision on the welfare of the child, contrary to the Guardianship Act.[71] Similarly, the Matrimonial Causes Act of 1973 (English)[72] makes mention of situations, which are not in strict sense defences, where the court would not only refuse to make a decree nisi of divorce absolute, but dismiss altogether a petition for divorce. So, the court will not make absolute a decree of divorce or of nullity of marriage, or grant a decree of judicial separation without being satisfied that the welfare standards or the best that can be devised under the circumstances of any child who is or may be of the

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69 Articles 343–370.

70 P Nsoa *Rapport d'analyse de la législation Camerounaise relative à l'enfant, à la lumière de la CDE* Programme de Coopération République du Cameroun – UNICEF 2003–2007, p 17. In Anglophone Cameroon, legitimate, illegitimate and adopted children can take under testacy, intestacy or partial intestacy in like manner but there is no such thing as *inheritance reserve*.

71 P Bromley *Family Law* (Butterworths, 6th edn, London, 1981) p 339.

72 Section 41(1)(a) and (b).

family (and named in the order) have been taken into consideration. However, the Act also makes an opening for rendering decree absolute or granting one without delay, irrespective of the fact that there are or may be children, where the circumstances so necessitate.[73] The discretion here is therefore that of the court. But the worry is that, since the 1973 Act does not state what the circumstances may be or give a clue thereto, the court's discretion may be an option port for the issuance of arbitrary divorce decrees without taking into consideration the best interests of children of the marriage. The 1973 Act defines 'welfare' in relation to a child as including custody and education of the child and financial provisions to him or her.[74] A 'child' of the family is defined under the 1973 Act as any minor child who, at the date of the court order, is under the age of 16 or is receiving instructions at an educational institution or undergoing training for a trade, profession or vocation (whether or not he or she is in a profitable employment), or, any other child the court may so direct under the section to be included, taking into consideration special circumstances, in the interest of the child, which warrant that the section be applied to him or her.[75]

(ii) Financial upkeep

Under English law as applied in Anglophone Cameroon, in making an order in favour of an applicant spouse in divorce, nullity and judicial separation, the court takes into account a number of parameters in the best interest of any child of the marriage. These include: the spouses' current financial and prospective means particularly having regard to the financial needs of the child; any physical or mental disability of the child; the station in life of the child before the incident that warranted the spouses' separation; and the manner in which the child was being educated and in which the spouses expected the child to be educated or trained.[76] Additionally, the court is required to exercise its powers to place the child, as practicably and just as possible, in the position he or she would have been if the marriage had not broken down and had each spouse properly discharged their financial obligations and responsibilities towards the child.

There is national legislation on the payment of alimony in the case of divorce or judicial separation. Section 301 of the French Civil Code (1803) and s 76 of the 1981 Ordinance in Cameroon recognise the right of a deserted spouse and her children to alimony for their upkeep. It should be remarked that the legal action for alimony is open to married women only.[77] Even then, widespread ignorance of the law as well as lack of legal provisions with respect to the maintenance for children born out of wedlock are major setbacks that stifle the child's right to survival and development. With regard to children born out of an incestuous or adulterous relationship, the law does not allow them to

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73 Section 41(1)(c).
74 Section 41(6).
75 Section 41(5)(a) and (b).
76 Domestic Proceedings and Magistrates' Courts Act 1978, ss 3(2), 7, 5 and 11(5).
77 Section 76 of 1981 Ordinance on civil status.

establish filiations with their father and so any action for maintenance from them is unfounded. Again, these children cannot claim any succession rights save through their mother.

An April 2003 law on banking secrets in Cameroon[78] provides that the banking secret rule is not binding on the guardian of children, successors and administrator of wills, amongst others. It is, therefore, a violation of the right of these persons to consult relevant banking accounts. This is to ensure that children take possession of any financial gains which are due to them as legatees or otherwise, for their upkeep.

(iii) Legitimation and the right to know parents (affiliation or recognition)

This is an intricate area of children's rights, which is unfortunately, bedevilled by despicable rigour of the law in Cameroon. The right of a child to know his or her parents is contained in art 46 of the 1981 Ordinance. The mother of the child may bring an action before the competent court in search of the child's father within 2 years of delivery or from the time the father ceases to provide for the maintenance of the child. Judgments in this respect must be included in the margin of the child's birth certificate. The aim is certainly to facilitate the establishment of evidence of paternity since by the time of the action the child's birth certificate could have already been established.

The major setback to art 46 is that the action would be rejected if during the woman's pregnancy she had sexual relations or flirted with another man or the alleged father was not physically in a position to be the father. The object of Art 7 of the CRC (the ACRWC is silent on issue of right to know parents) is to enable a child to know his or her parents as a fundamental right and the child is in no way responsible for the mother's morality or the propriety of both parents' sexual relationship. Even worse, on a similar stretch, is that, while the 1981 Ordinance allows the recognition of a child born out of wedlock by the natural father[79] and a child born out of an adulterous relationship of the mother by the natural father after disavowal by her husband,[80] it does not allow the recognition of a child born as a result of rape. The law is silent when it comes to children born out of an incestuous relationship, but it makes sense to think that the same scenario as in the case of rape would apply. In relation to art 43, the Ordinance is caught in a spate when s 41(1)(a) states that '[t]he recognition or legitimation of a child born out of wedlock shall be by a court decision'; meaning that the sole condition for recognition is blood relationship irrespective of the nature of the relationship between the father and the mother that gave rise to the latter's pregnancy. Whatever the case, the law on the right of a child to know his or her parents is quite discriminatory as between

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78 Law No 2003/004 of 21 April 2003.
79 Section 43(1).
80 Section 43(2).

legitimate children, children born out of wedlock and children born out of 'morally vexatious' relationships (rape/incest).

(b) Employment law and child labour/economic exploitation

The Constitution considers the right to work as mandatory for everyone. Such an open-ended obligation disregards the right of children below a certain age not to work. At national level, there is a panoply of legal instruments regulating to child labour.[81] As remarked earlier, the main legislation, the 1992 Labour Code of Cameroon sets the minimum age of employment at 14 in compliance with ILO Convention No 138. Yet, the minister in charge of labour may grant a waiver for a child under 14 to be employed in view of the local circumstances and the nature of the work to be accomplished.[82] In effect, 14 years is the minimum age of admittance for non-risky jobs. For dangerous, difficult and insalubrious jobs that can affect the child's morality and health, the minimum age is 18 years.[83] These include heavy duty jobs requiring energy depending on the age and sex of the child such as carrying or transporting goods, working in mines, quarries, an environment under compressed air, manipulating dangerous equipment and devices, to name a few. Jobs that can affect the child's morality include the manufacture and sale of written and printed obscene articles (posters, drawings, sculptures).

However, special legal measures have been taken in the domain of labour, in the best interests of the child. These measures concern employment conditions and the nature of labour. A few of these measures are discussed here.

With respect to the conditions of work, a May 1969 Order relating to child labour fixes the maximum duration of work in industrial establishments at 8 hours per day with an interval of at least an hour for children under 16 years. Additionally, the Order enumerates prohibited labour for children. Pursuant to s 82 of the 1992 Labour Code, children are prohibited from industrial night work, that is, between 10 pm and 6 am. The annual leave of children below 18 years has been increased from one-and-a-half days a month to two-and-a-half days a month.[84] The 1969 Order prohibits labour that is above a child's physical force as well as any work that is dangerous, unhealthy or that is against his or her morality. Pregnant women or breastfeeding mothers benefit from a special leave regime to enable them to take care of their children.

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[81] These are: the 1992 Labour Code, Decree No 68/DF/253 of 10 July 1968 fixing general employment conditions of servants and house employees; Decree No 69/DF/287 of 30 July 1969 relating to apprenticeship contracts (especially concerning art 42) which sets 14 years as the maximum age for admission into apprenticeship and prohibiting any unmarried master to house a female apprentice worker – art 2); Decree No 16/MTLS/DEGRE of 27 May 1969 relating to the labour of women comprising an annex on prohibited labour for women and children; and Decree No 17/MTLS/DEGRE of 27 May 1969 relating to child labour.

[82] Section 86(2) of the Labour Code.

[83] Cameroon signed eight major ILO conventions including Convention No 138 and Convention No 182 on the worst forms of child labour ratified on 27 May 2002.

[84] Section 90 of the Labour Code.

All these special measures are enforceable on public policy grounds. Non-compliance with the provisions of ss 82, 86 and 90 of the Labour Code dealing with child labour are punished with pecuniary fines and imprisonment. Thus, s 167 imposes a fine from XAF 100,000 to XAF 1 million for violations of the minimum age and paid leave under ss 86–90 while s 168 has a fine of XAF 200,000 to XAF 1.5 million for violation of night work restrictions under s 82. In the event of recidivism, a prison sentence of from 6 days to 6 months is imposed. Forced labour is a malignant aspect of economic exploitation which may be likened to slavery. The Penal Code punishes forced labour and slavery.[85] The 1992 Labour Code prohibits forced labour and defines it as 'any labour or service demanded of an individual under threat of penalty, being a labour or service which the individual has not freely offered to perform'.[86] However, forced labour has been forbidden in Cameroon since the Brazzaville Conference in 1944. The 2005 law against trafficking, slavery and exploitation[87] provides that the exploitation of children comprises abetting prostitution or any form of sexual abuse, child labour or forced labour, enslavement or related practices, servitude or removal of body organs. This law also punishes the subjection of a child to debt bondage; that is, using a child as collateral security for a loan or debt, and to be exploited in due course.

Despite these legislative strides, the worst forms of child labour have been registered in the country in different sectors of economic activity: agriculture, mining, factory, street hawking, for example. The economic exploitation of children as domestic servants is also quite rampant under poor working and wage conditions. Internal trafficking of girls from rural or semi-urban areas of the country towards cities to serve as domestic servants in extended or foreign families is rampant. According to a 2000 ILO study carried out in the three major cities (Yaounde, Douala and Bamenda), thousands of Cameroonian children fall victim to trafficking every year.[88] The survey revealed that children from Chad, the Central African Republic, and Nigeria were paid as little as XAF 3,000 per month to perform chores sometimes lasting 18 hours a day. The children often suffered from malnourishment and sexual abuse.[89]

Domestic labour, generally, is one of the oldest professions in the world and children have always been at the centre of this market.[90] It has therefore been submitted that measures against child domestic servants should be treated with caution.[91] The idea is that not all situations of child domestic labour are bad. The premise is that, if a child from a disadvantaged background is admitted

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85 Sections 292 and 293 respectively.

86 Section 2(4).

87 Law No 015 of 29 December 2005.

88 N Feujio *Lutte contre le trafic des enfants a des fins d'exploitation de leur travail dans les pays d'Afrique occidentale et centrale—Etude des tendances actuelles* (2000) Draft Final Report on Cameroun, Geneva: International Labor Organization and International Program on the Elimination of Child Labor.

89 *Survey Exposes Child Abuse in Cameroon* Panafrican News Agency Daily Newswire, 18 February 2004.

90 UNICEF-ICDI *Les Enfants Domestiques* (1999) 5 *Innocenti* Digest, p 3.

91 Ibid.

into a house as a domestic servant where she is better treated than in his or her own family, or treated without discrimination as children of the recipient family, it will contribute to such a child's psychological stability and development. However, in cases where the child works across the day, does not attend school and enjoy her basic rights and freedoms, this is enslavement. The questions may be far-reaching, depending on the child's sex and age, type of chores and whether he or she lives in or away from the home where he or she serves as domestic servant.

It is common for a middle-class family in Cameroon to have one or several children working for them in exchange for a very low wages and minimal education. Children are recruited on false promises of education, vocational training and paid employment. They are then transported within and across national borders to work under sometimes inhumane conditions and subjected to physical and mental abuse by their employers. Apart from working as domestic servants in towns and cities, in rural areas, children work mainly on farms. In these areas, the ILO study further revealed that very young children below 4 are required to work. The labour legislation encourages such practices by giving power to the minister in charge of labour to grant a waiver for employment of a child below the minimum legal working age of 14.[92]

The practice of child labour in households and fields is a tradition that sometimes masks trafficking.[93] The ILO study reported that trafficking accounted for 84% of child labourers in the three above-mentioned cities. Of these, 40% of employed children were girls, including 7% under 12 years old and 60% who had dropped out of primary school.

Institutionally, the labour rights of children in conformity with the best interest principle in the light of Art 3(3) of the CRC are taken care of in various instruments governing the organisation and functioning of institutions, services and establishments in charge of children, qualitatively and quantitatively.[94] In addition, Cameroon has developed a national plan to control child labour. This plan is a supplement to the national action plan in favour of child survival, protection and development, aimed at abolishing child labour in the long run. The short-term objective targets appropriate protection against all forms of grave child enslavement and degrading abuses likely to infringe on the child's physical and moral integrity. It also intends to enable child labourers to attain a

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92 Section 86 of the Labour Code.

93 'Cameroon: forms of Trafficking', available at: www.protectionproject.org/human_rights_reports/report_documents/cameroon.doc (accessed 2 November 2008).

94 For instance: Decree No 2001/110/PM of 20 March 2001 on the organisation and functioning of public vocational early childhood institutions (arts 18 and 19); Decree No 77/495 of 7 December 1977 amended, laying down conditions for the creation and functioning of voluntary welfare agencies; Decree No 2001/109/PM of 20 March 2001 on the organisation and functioning of public vocational institutions of minors and the re-education of social maladjusted minors (arts 13–20); and Order No 002/LJS/DJA/SA on the organisation and functioning of youth and animation centres (read together with Ministerial Instruction No 00/IM/MJS/DJA/SA of 27 April 1988 on the pedagogic functioning of youth and animation centres).

satisfactory level of overall development, through the improvement of their living conditions and increasing their possibilities of fulfilment in society.[95]

In spite of these actions to prevent child labour and other forms of economic exploitation of children, statistics show that the ill persists. However, child labour experienced a steady decline during the first half of the 2000s. The proportion of child workers dropped from 58% in 2000 to 43% in 2005 and 31% in 2006.[96]

V PARTICIPATION RIGHTS: FREEDOM OF OPINION AND EXPRESSION/INVOLVEMENT IN DECISION AND REFORM-MAKING PROCESSES

Freedom of opinion and expression necessarily complements and boosts participation. The ACRWC recognises freedom of thought, conscience and religion of the African child and implores states parties to respect the duty of parents or legal guardians in ensuring these rights. Participation in any process depends on the freedom to express one's views in order to be an active contributor.

Children in Cameroon currently generally face almost no restriction as to their freedom of expression. The Preamble of the Constitution asserts this freedom. But like in most African societies, the right of children to express themselves and be heard is a cultural issue and as such a matter of degree. Under the cultures of most African countries, children are considered as immature human beings who are learning and hence have no right to express themselves or even to raise questions concerning their well-being. They are required to always listen to adults who are supposed to know their interests and how to go about them. It is up to adults to find solutions to their concerns and needs without having to consider their opinion. The viewpoint of the child is not always required by parents, community and educational institutions.

One of the major efforts by the government of Cameroon to ensure the active participation of children in the implementation of their rights is the establishment of a free and democratic forum for integrating them in the process of reformation of their rights. Thus, in 1998 the Children's Parliament was created. In its concluding observations on Cameroon's first periodic report in 2001, the UNCRC welcomed the creation of the Children's Parliament[97]

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[95] This plan is centred on five points: (1) sensitising and mobilising the national community on issues relating to child labour; (2) developing and reinforcing the well-being and protection of working children; (3) promoting traditional and informal education and apprenticeship; (4) improving and enhancing the legislation on child labour and its implementation; and (5) coordinating and monitoring child labour control activities.

[96] Ministère des Affaires Sociales *Rapport Final : Revue 5 Ans Après de la Session Spéciale Sur les Enfants de 2002 et du Plan d'Action du Monde Digne des Enfant*s (2006) Yaoundé, p 21.

[97] UNCRC C*oncluding Observations of the Committee on the Rights of the Child: Cameroon* 06/11/2001 CRC/C/15/Add.164 (Concluding Observations/Comments), para 5. Available at

because it serves as a forum for children to express their views but remarked that respect for the views of the child remains limited within the family, in schools, before the courts and administrative authorities, and in the society at large, owing to traditional attitudes.[98] The Committee recommended that Cameroonian children should be involved in the formulation and implementation of preventive policies and programmes on epidemics directly affecting them, especially HIV/AIDS and malaria.[99]

Government has advanced on this issue of child participation recently with the help of civil society stakeholders. Children Parliamentarians have also carried out promotional activities through the print media. The Children's Parliament serves as a forum where children express their views and make their voices heard about their rights. Although its resolutions are non-binding, the Parliament has passed a number of resolutions dealing with children's rights. Also, there is no mechanism for systematically following up its recommendations but its proposals are studied very carefully by the relevant ministries. For instance, anti-personnel landmines were banned and education made free within months of submission of children's proposals on these subjects. The children themselves have tried to devise ways to ensure implementation of their proposals with the assistance of NGOs.

A decree of 19 February 2001[100] lays the basis for taking children's views into account. The decree also has the merit of having laid the legal framework for the participation of children in decision-making concerning the functioning of school establishments. In this regard, the decree provides for the representation of students in decision-making bodies at all educational levels. At nursery or kindergarten and primary levels, a pupil elected by his or her classmates represents them at the school council which is the supervision, advisory, deliberation, control and evaluation organ of the school.[101] At secondary school level students are represented in five of the nine decision-making bodies of the school under art 18 of the decree as follows: in the highest body, the school council, two students (a boy and a girl to ensure gender representation); and in the council of delegates, consultative organ regrouping all class delegates. This body is responsible for expressing students' opinions and making proposals on issues of discipline and school life in general. The only setback here is that the functioning of the council may be hampered by administrative discretion since it is the school head who convenes the council when deemed necessary. It would have been proper if the power to convene the council were between the principal and students. This would have ensured a real participatory role in the management of the establishment in the interest of

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www.unhchr.ch/tbs/doc.nsf. The Ministry of Territorial Administration is currently working on a project to set up municipal councils for children.

98 Ibid, para 30.

99 Ibid, para 47(c).

100 Decree No 2001/041 of 19 February 2001 on the organisation of public educational establishments and duties of school administrators to implement the April 1998 law on educational orientation in Cameroon (Law No 98/004 of 24 April 1998).

101 Ibid, art 15.

students. The other three organs are: the class council, the disciplinary council and the general meeting of students' clubs and associations for which adherence is free.[102] The latter is the only body chaired by a student elected by his or her peers.

Freedom of thought, conscience and association are also consecrated in Cameroonian law. This is a booster to the participation rights of children. The law on freedom of association provides that corporate bodies and individuals can benefit from freedom of association.[103] This law includes religious denominations on the list of associations that are subjected to the regime of authorisation. Children are therefore free to choose their religious leaning, subject to parents' appreciation. But in order not to hamper freedom of religion, it would be germane for the law to circumscribe parents' intervention to prevent them from obliging children to follow their religious orientations and beliefs which may not be the best.

The 1990 law[104] on freedom of mass communication provides that the publications of the press media are free, subject to irregular practices that may warrant seizures and prohibitions. There is freedom of communication through informal channels subject to limitations. Children can therefore use the mass communication media to express their views.

VI INFLUENCE OF CUSTOMARY LAW/TRADITIONAL PRACTICES ON THE BEST INTEREST PRINCIPLE

Culturally, in Africa, customs still play a vital role in societal organisation and cohesion. But the question always fraught is how to accommodate customary laws alongside modern laws. This question becomes even more interesting in the area of children's rights, which have Western underpinnings incompatible with African customs. As a matter of fact, the credibility of the CRC as a universal instrument and how the international contexts of the protection of children's rights with its seeming contradictions plays out in Africa has been queried.[105] This equally goes for the ACRWC which is no more than a mirrored facet of the CRC. Oparah Ugochi has questioned whether an understanding of what children's rights mean in the context of a rich variety of cultures as found in Africa, can be developed.[106] Such views only translate the time-honoured

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[102] Ibid, arts 31 and 44.

[103] Law No 90/053 of 19 December 1990 (s 1(3)). Freedom of association is a constitutional right guaranteed in the preamble of the revised 1996 Constitution of Cameroon.

[104] Law No 90/052 of 19 December 1990.

[105] See, eg, U Oparah 'Culture Clash: The Best Interest of the Child Ideology and Customary Norms in Africa' Paper presented at the annual meeting of The Law and Society Association, Hilton Bonaventure, Montreal, Quebec, Canada, 27 May 2008. Available at: www.allacademic.com/meta/p236964_index.html (accessed 22 January 2010).

[106] Ibid.

difficulty of bringing consensus in multilateral arrangements involving states with different values, interests and cultural backgrounds based in time immemorial customs.

It is therefore important to examine the extent to which customary law rules take into account the best interests principle in Cameroon and how the courts here have been applying these rules in appropriate circumstances, in light of the principle. Two things should be noted from the start in respect of customary law in Cameroon. First, in retaining customary law courts in the judicial order, the new law governing judicial organisation in Cameroon[107] implicitly confirms that custom continues to be a source of law in Cameroon. It should be noted that customary law is still uncodified in Cameroon, whereas there are over 250 existing local customs in the country. Divergences in such customs abound and are not only a source of potential conflict but equally pose problems of uniformity in application and consistency in the jurisprudence of the competent courts. Secondly, customary law courts serve as a primary means for settling civil disputes between natives in rural areas, especially in family-related civil matters such as divorce (of polygamous unions[108]), succession, inheritance and child custody.[109] In Anglophone Cameroon, the SCHCL 1955 clearly defines the quality of customary law rules that may applicable in the courts of this part of the country.[110] The SCHCL 1955 provides that the High Court is empowered to 'enforce the observation of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law . . . and nothing shall deprive any person of the benefit of any such native law or custom'.[111] However, the law may, in appropriate circumstances, allow a custom to prevail over a written law where strict adherence to the latter would be prejudicial to one party.[112]

As a matter of fact, early case-law in Anglophone Cameroon and legislation not only anticipated the best interests of the child standard long before its

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[107] Law No 2006/015 of 29 December 2006.

[108] Polygamy is permitted by law but remains a potential source of conflict in succession matters.

[109] Customary law is mostly used in rural areas in customary courts and the courts of first instance based on the traditions of the dominant ethnic group of the area.

[110] In Francophone Cameroon, customary law was instituted and is organised by Decree No 69/DF/544 of 19 December 1969 as amended by Decree No 71/DF/607 of 3 December 1971. In Anglophone Cameroon, the Customary Courts Ordinance Cap 142 of the laws of the Federation of Nigeria 1948 and Law No 79-4 of 29 June 1979 govern customary law in conjunction with SCHCL 1955.

[111] Section 27(1) of the SCHCL 1955. The courts have strictly abided by the principles enshrined in this provision. See *Ngeh v Ngome* (1962-64) WCLR 321; See also, *Immaculate Vefonge v Samuel Lyonga Yukpe* ([1981] CASWP/CC/2/81) cited in Ngwafor, above n 64, pp 5 et seq. In Francophone Cameroon, customary law is applicable by virtue of a 1969 decree on the Organization and Functioning of Traditional Courts in East Cameroon. Its applicability is also based on propriety. Decree No 69/AF/544 of 19 December 1969, art 41(1)(b). Formerly (ie before reunification in 1972), the present Anglophone and Francophone regions were respectively referred to as West Cameroon and East Cameroon.

[112] Section 27(2) therefore states: 'Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either by a strict adherence to the rules of English law.'

enshrinement as a key principle governing children's rights in international human rights law, but went as far as proscribing the applicability of vexatious customs that violated the best interests of the child principle. For example, in *Ngeh v Ngome*[113] the court held that the custom of a local tribe in the North West Region of the country which allowed a husband to claim paternity of a child which his runaway wife begot with another man simply because she had not refunded the bride price was repugnant to natural justice. This judicial position has received legislative approval. The 1981 Civil Status Registration Ordinance provides in s 72 that: 'The total or partial payment of a dowry shall under no circumstance give rise to natural paternity which can only result from the existence of blood relations between the child and his father.' Also, in *Immaculate Vefonge v Samuel Lyonga Yukpe*,[114] the Court of Appeal of the South West Region enforced a custom of a local tribe that forbids a husband from evicting a nursing mother from the matrimonial home. Likewise, the Supreme Court of Cameroon has consistently rejected any custom that is against public policy as enshrined in the Constitution, and confirmed any decision of a lower court to that effect. As such, a decision against a customary law practice that denies the succession of the only direct young surviving daughter of the deceased father was upheld by the Supreme Court.[115] Similarly, the Court confirmed the decision of a lower court that an illegitimate child could not succeed the deceased father if the latter had legitimate children.[116] The jurisprudence of the courts in all the above cases and the law follows equity and good conscience, which, by ricochet, takes into consideration the best interests of the child principle.

Nevertheless, some customs and traditions continue to rival written laws, equity, natural justice and good conscience in most traditional societies in Cameroon especially in the northern regions where Islamic dogma is almost unrivalled. Here, the best interests principle is in peril. In divorce proceedings before the Islamic courts, for example, the principle of the best interests of the child is not the guiding factor in determining which of the parents should have custody over the child. A male child below the age of 7 years and a female child below the age of 9 years are almost invariably left in the custody of the mother. Once a child attains this age, he or she is likely to be in the custody of the father henceforth and the question of the best interests of the child becomes irrelevant.

It is therefore clear that despite legislative and judicial efforts to guide the applicability of customary law, this law, together with other traditional practices and usages of local tribes, literally continue to resist written laws and override them in terms of compliance. Generally, customs and traditions have prospered not because they are in themselves seen as valid in the eyes of their benefactors or recipients, but because they are ancestral linear habits and dictates, often girded in superstitious beliefs, which coerce obedience for fear of

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[113] See n 111 above.
[114] Ibid.
[115] Judgment No 157 of 25 June 1968.
[116] Judgment No 1005 of 9 May 1972.

the unknown – mystical reprisals. The upshot is that some customs, for example, that encourage discrimination in succession rights between boys and girls persist. Under such customs a girl child is not allowed to succeed her father or inherit property, yet the Constitution of Cameroon prohibits discrimination of any kind and proclaims equality between the sexes. This is a serious setback to legislative and policy efforts to curb discrimination affecting the rights of the girl child in many areas governed by customary laws and traditions, and which are beyond the pale of the law. Other redundant customs subsist in some parts of the country especially those that advocate early or forced marriages of young girls for material profit.

The issue of cultural and traditional values and the law is a serious challenge that has seen the sheer marginalisation or neglect of the best interests principle and children's rights. Accordingly, it is commonplace to find traditional and customary law rules followed over certain issues instead of written law to the extent that even international law has been indicted as an active accomplice. Oparah, for example, astutely observes that the 'CRC is widely believed to be deficient for its conspicuous silence on certain customary and traditional practices that affect the welfare and best interest of the child'.[117]

VII CURRENT FAMILY AND CHILD LAW REFORMS AND THE BEST INTEREST PRINCIPLE

As mentioned earlier, in the two draft laws involving children's rights, the draft Persons and Family Code and the draft Child Protection Code, the best interest principle is frequently recalled in relevant provisions as the standard in relation to specific rights.

(a) The draft Persons and Family Code

This draft Code deals with children's rights, notably, adoption, affiliation and succession, amongst other issues.[118] The best interests of the child principle is mainly used in the Code in relation to custody and parental authority. However, the principle is also mentioned in connection with adoption,[119] and guardianship exercised by parents themselves or legal guardians.[120] Still under the draft Code, if a child has domicile with the parents, the child can only be removed from the family residence by a decision of the judge in the child's interest.[121] Children may have personal relations with close relatives except

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[117] Above n 105.

[118] The Code governs the following issues: personal status; rights and obligations of persons; name; domicile; civil status; nationality; marital relationships; affiliation; consanguinity and affinity relationships; minority and majority; matrimonial régimes; succession (s 1(2)(b)).

[119] https://mail.google.com/mail/html/compose/static_files/blank_quirks.html#_ftn1.

[120] https://mail.google.com/mail/html/compose/static_files/blank_quirks.html#_ftn2.

[121] Ibid.

where such a relationship is against the child's interest.[122] Adoption is particularly prominent in the draft Persons and Family Code for the simple reason that adoption procedures in Cameroon have been circumvented on several occasions by foreigners. This situation contributed to the development of child trafficking.[123] The Code is therefore expected to reinforce adoption procedures in Cameroon in order to avoid child abuse and trafficking.

The draft Code on Persons and the Family enunciates non-discrimination in relation to the adoption of children in s 344. Yet, it is uncertain why the draft limits the children who may benefit from non-discriminatory adoption measures under that provision (abandoned children, children with unknown parents or children of parents who died without ascendants, that is orphans, or children remitted voluntarily to public assistance institutions by both parents or the parent to whom the child's affiliation has been established). This may mean that these children apart, other children may be subjected to discriminatory adoption and of course this could be further interpreted as saying that the best interests of such children should be disregarded. In the case of custody, the legal guardian or subrogate guardian is required not to discriminate against the child under his or her custody and to exercise his or her duties personally.[124] The requirement of non-discrimination is perhaps to ensure that the guardian does not discriminate between his or her own biological children or other children living with him or her, since discrimination amongst children living in the same home may cause psychological and development problems to the child. Meanwhile the insistence that the guardian or surrogate guardian should personally carry the guardianship duties and the ensuing rejection of both transfer of the guardianship authority to their respective heirs or spouses is because they alone can fully understand the nature and implications of the commitment they undertook and that is why they accepted it. No other person can therefore exercise those duties with the same vigour and devotion in the best interest of the child as the guardian him or herself. The draft Persons and Family Code even goes further to state that in case this rule is violated, and there is interference in the management the child under custody's estate, the interferer shall be jointly liable together with the guardian for the management as from the time of the interference. Also, the guardian's heirs are answerable for guardian's management until the

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[122] Section 396(1).

[123] UNCRC *Analytical Report of the 738th session: Cameroon* CRC/C/SR.738.12/10/200, para 9. Most cases of adoption are treated at the level of the social services of the Ministry of Social Affairs (MINAS) under doubtful terms and conditions. Moreover, the courts have not developed any clear jurisprudence as to the proper implementation of the best interest principle or as to how best the principle may be applied. This researcher found out that the courts hardly reject any case for adoption and either give the parties directives on what to do to obtain an order or simply refer the parties to the social services of MINAS. As such, there is no case-law from which the jurisprudence of the courts in adoption matters in relation to the best interest principle may be drawn or tested.

[124] Section 432(2) and (3).

appointment of a new guardian.[125] All these measures are to safeguard the bests interest of the child under custody.[126]

In family matters for example, divergence between the rules of custody and adoption applicable in Anglophone Cameroon and those in Francophone Cameroon may favour or disadvantage children on one side of the divide over children of the other side. This situation only translates further the urgent need for the completion of the Protection of the Child Code, which has been in gestation for over half a decade now. It is only hoped that the draft Code should not be bedevilled by the same dilemma that befell the current CPC that was under preparation for more than 20 years.

(b) The draft Child Protection Code

The draft Child Protection Code[127] is expected to be the first single national instrument on the rights of the child. The successful outcome of this Code will be the concrete expression of respect of Cameroon's commitments vis-à-vis the international community.[128] Article 3 of the Code enshrines the best interests principle. It provides: 'In all decisions concerning the child, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be of paramount consideration.' Part I of Book 1 of this Code deals with the general provisions, ie the objectives and basic principles of protection including the best interests of the child principle amongst others (notably supremacy of the family and non-discrimination). The draft Code employs the principle in relation to quite a number of issues.

The Child Protection Code places greater emphasis on defenceless children who are also exposed to all sorts of abuse. These are vulnerable children. The expression 'vulnerable children' calls to mind that of 'child in difficult situation' used in the Child Protection Code.

Also, in ensuring their primary responsibility with respect to the child's education, well-being and development, parents and guardians are required to respect the child and assure that his or her interest always prevails.[129] The draft Code empowers parents to educate their children in the manner they deem fit (moral convictions, philosophy and religion) but that should be in the interest

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125 Section 433.

126 The same reasoning goes for the long list of persons who cannot be legal guardians: children; incapacitated adults; persons sentenced to imprisonment terms for offences against the child, the family, goods and public morality; persons prohibited to exercise the tutelary functions in accordance with art 30 of the Penal Code; persons whose parental authority has been withdrawn; persons convicted for ordinary law offences; persons who are parties to or close relatives to a party to proceedings instituted against the child or that threatens his/her estate; and persons with notorious misconduct or well-known for their lack of integrity (s 434).

127 2007 version of the draft.

128 'Compendium of instruments applicable to the child in Cameroon' *UNICEF – Cameroon* vol II, p 276.

129 Section 18.

of the child.[130] Even when advising children on how to exercise their right to freedom of thought, conscience and religion, parents and guardians are required to do so in a manner consistent with the children's capacities and best interests.[131] In juvenile proceedings, the draft Code provides that the child has a right to be heard by the judge except where that would be against the child's interest.[132]

As in the case of the draft Persons and Family Code, under the draft Child Protection Code, any decision to keep a child within or without the family should be in his or her interest.[133] Where the child is separated from his or her parents, the latter have the right of contact with the child, unless in the child's interest, the court decides otherwise.[134]

The draft Child Protection Code introduces a number of authorities and mechanisms aimed at enhancing specific aspects of children's rights from the standpoint of the best interest principle. As such, there is a delegate in charge of child protection,[135] who has wide surveillance powers to ensure the actual protection of the rights of the child to curb abuses of the past. This delegate is capable of requesting the services of law and order where the rights of the child are violated. He participates at every stage of the proceedings to ensure that the interests of the child are protected. This is in conformity with s 720(2) of the CPC, which refers to persons who may be present during a juvenile trial discussed earlier.

A new custody technique intended for children aged 4, known as 'customary placement',[136] has been introduced, the aim of which is to ensure 'a better living and blooming condition for the child'.[137] Customary placement under the Code is based on the best interests principle. In the words of the Code the placement can 'only be for a just cause and in the best interest of the child'.[138]

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130 Section 21(1).
131 Section 42(1).
132 Section 95.
133 Section 5(2).
134 Section 104.
135 According to the draft Code he shall be every social affairs professional, inspector or assistant in service in a public structure of the Ministry in charge of child protection; every person responsible for a decentralised structure or an operational technical unit of the Ministry in charge of child protection (s 61). The delegate's functions include: playing the role of probation officer where such measure shall be taken; ensuring educational action in an open environment; assisting child in conflict with the law and facilitating legal aid for him or her; inspecting and evaluating public and private child welfare, re-education or detention institutions (s 62).
136 Section 66.
137 Section 67. According to the Code, customary placement is: 'a legal act by which the mother and father or the parent to which the child shall be affiliated, shall request to confine the child to a member of the extended family or a friendly family, who shall consent to receive and raise the child without any discrimination' (s 66). The parent who shall confine his or her child shall be named 'legal parent' and the person who shall receive and raise the child shall be named 'caring parent' (s 66(2)).
138 Section 68.

Also, the draft Code institutes a 'sponsorship'[139] mechanism which is a special protection measure for 'children in difficult situations'.[140] The object of the mechanism is to provide the child with affective, material or financial support with a view to contributing towards his or her education, upkeep and well-being. The future Code does not stop at listing the various themes specifically intended for children in difficult situations or vulnerable children. The legislator equally provides for special protection of the latter.[141]

VIII CONCLUSION

The bests interests of the child principle is no doubt central in the full realisation of every aspect of children's rights but the extent to which it has been incorporated under national legislation in Cameroon relating to children's rights is rudimentary and rather piecemeal. The 2005 CPC is a more or less recent piece of legislation and the only single piece so far that has reasonably addressed the principle in its own domain, although lacunae on some sensitive issues abound. For example, in the area of juvenile justice, the question of absence of specialised child courts and specially trained judges to handle child matters still lingers. Like all reforms, any child reform that fails to protect sufficiently the rights it upholds through sound judicial measures cannot ensure their effective justiciability. That notwithstanding, as with the case of other laws, the overriding challenge of child related laws and policies remain the effective implementation of their provisions and the near absence of appropriate institutions and follow-up measures. Areas such as custody and adoption still largely depend on colonial laws, most of which are obsolete and largely unrelated to the cultural realities of a country with no less than 250 local tribes and customs/traditions. Yet, the influence, omnipresence and quiet overriding force of such customs and traditions over written laws and the precepts of fairness cannot be underestimated. Besides, the hallmark of the double-edged nature of laws resulting from the country's bi-jural status raises concerns as to the uniformity and consistence in the jurisprudence of the courts in relation to the best interests principle as well as triggering the urgent need to harmonise child legislation not only nationally with respect to the bi-jural situation, but equally, in relation to international and regional standards

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[139] Section 85.

[140] Section 53. The draft Code certainly avoids the common but rather pejorative appellation 'children in conflict with the law' which stigmatises and may lead to instant discrimination. Section 53 defines a child in a difficult situation as one whose survival, development or freedom is threatened. The child shall be associated with a difficult situation where his or her living conditions, health, security, morality and education shall be at risk of being compromised. Difficult situations shall include the following: serious negligence or abandonment of the child by his or her parents; vagrancy and isolation; notorious deprivation of education and protection; repeated ill-treatment; sexual exploitation; economic exploitation or exposure to begging; exposure of the child to armed conflict; inability of parents or guardian to carry out their duties of education and control; exploitation of the child for organised crime; disability; exposure of the child to the consumption of drugs; being in conflict with the law; being a child refugee; and being an orphan.

[141] Sections 56–60.

enshrined in the CRC and ACRWC respectively. There is therefore an urgent need for the two draft laws which have been in gestation for almost a decade to be finalised and passed into law. Indeed, both draft laws not only incorporate the best interests principle in their relevant provisions, but also represent comprehensive one-off harmonisation reforms in a dual respect. First, they harmonise national civil law and common law in the areas of family law and child law and, secondly, they harmonise national laws in those areas with international and regional standards in the CRC and the ACRWC.

Canada

LIMITS ON AUTONOMY

*Martha Bailey**

Résumé

Deux récents arrêts de la Cour suprême du Canada élargissent le rôle protecteur des tribunaux tout en marquant les limites de l'autonomie individuelle. Dans la première affaire, la Cour a modifié la doctrine contractuelle sur laquelle se base le pouvoir qu'avaient les tribunaux d'écarter des ententes de séparation jugées manifestement lésionnaires. La nouvelle approche élargit le pouvoir des tribunaux de libérer d'une entente lésionnaire la partie vulnérable qui s'est mise à regretter son engagement après coup. Dans la seconde affaire, la Cour a confirmé la constitutionnalité d'une loi qui permet aux tribunaux de forcer des mineurs matures à se soumettre à des soins médicaux. En cette matière, l'autonomie du mineur mature doit céder le pas à l'autorité du tribunal lorsque celui-ci considère que l'intérêt du jeune patient justifie les soins.

I INTRODUCTION

In two cases decided in 2009 the Supreme Court of Canada ('the Court') considered the circumstances under which the state may rescue individuals from the consequences of their own decisions. The first case involved a separation agreement signed by the parties after the breakdown of their marriage. The wife regretted her decision to sign the contract and asked the Court to set it aside on the grounds that it was unconscionable. The second case involved a mature minor who refused a blood transfusion on religious grounds. The child welfare authorities asked the Court to override the minor's decision in order to protect the best interests of the child. In both cases the Court decided in favour of rescue. The wife, at her own request, was saved from the consequences of her decision to sign the contract. The minor, over her continued principled objections, was saved from the consequences of her decision to refuse the blood transfusion.

II PRIVATE ORDERING OF FAMILY LAW DISPUTES

Private ordering of family law disputes is strongly encouraged in Canada. Legislators and courts have adopted the principles of respecting individual

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autonomy, promoting efficiency by allowing the parties themselves to determine what is best for them, and minimising the public and private costs of court adjudication.[1] Despite their strong endorsement of private ordering, law makers have imposed limits based on the particular nature of family law. Agreements relating to child support, custody or access can be overridden by the court in order to protect the rights and interests of the child.[2] Under narrower circumstances, courts may override agreements for spousal support where there are major concerns with the fairness of the contracting process or the results.[3] The power to override agreements on marital property division is far more limited. In some provinces there is no statutory power to override a valid agreement on property division.[4] Other provinces do give such power to the courts, and British Columbia is the most liberal in this regard, giving its courts the power to override property division agreements that are 'unfair'.[5]

The effect of domestic contracts and the power to override valid agreements differs depending on the statutory scheme that applies. Canada's constitution gives exclusive power over divorce to the federal government.[6] The federal Divorce Act deals with divorce and with the corollary issues of support, custody and access.[7] The provinces have exclusive legislative jurisdiction over property and civil rights within the province.[8] Pursuant to this power, the provinces have enacted statutes concerning support, custody and access when these issues arise outside of the divorce context. The provinces have also enacted laws relating to marital property and domestic contracts. Domestic contracts do not oust the jurisdiction of a court operating under the federal Divorce Act to decide the issues of support, custody and access. Rather, valid domestic contracts are a relevant factor to consider in regard to these corollary issues. The Court has generally interpreted the Divorce Act as supporting deference to valid agreements, unless the agreements fail to protect the rights and interests of children, or there are serious concerns regarding the fairness of the contracting process or results.[9]

The effect of domestic contracts in regard to support, custody and access is different when a court is dealing with these issues under provincial legislation. Domestic contracts are creatures of the provincial legislation, which itself provides for overriding such contracts to protect the rights and interests of children or where there are serious concerns regarding the fairness of the

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1 On these advantages of private ordering, see Robert H Mnookin 'Divorce Bargaining: The Limits on Private Ordering' (1985) 18 *University of Michigan Journal of Law Reform* 1015.

2 See, eg, *Willick v Willick* [1994] 3 SCR 670; Family Law Act, RSO 1990, c F3, s 56(1).

3 See, eg, *Miglin v Miglin* 2003 SCC 24, [2003] 1 SCR 303; Family Law Act, RSO 1990, c F3, s 33(4).

4 See, eg, Family Law Act, RSO 1990, c F3, which allows parties to opt out of the default property division scheme, subject to s 56(4), which empowers a court to set aside a contract.

5 Family Relations Act, RSBC 1996, c 128, s 65.

6 The Constitution Act 1867 (UK), ss 30 and 31 Victoria, c 3, s 91(26).

7 Divorce Act, RSC 1985, c 3 (2nd Supp).

8 The Constitution Act 1867 (UK), ss 30 and 31 Victoria, c 3, s 92(13).

9 *Willick v Willick* [1994] 3 SCR 670; *Miglin v Miglin* 2003 SCC 24, [2003] 1 SCR 303.

contracting process or results.[10] While general principles enunciated by the Court in Divorce Act cases may be helpful, the distinctive nature of the relevant provincial legislation must be the focus when interpreting and applying its provisions.[11] The effect of domestic contracts dealing with marital property is solely within the jurisdiction of the provincial legislators. Marital property is not dealt with in the federal Divorce Act. Provincial laws set out the default schemes of property division that apply in the absence of a contract. It is provincial law that determines the circumstances under which a valid agreement can be overridden or an invalid agreement set aside. The applicable rules are those set out in the provincial marital property statutes and, in the common law provinces, the common law rules of contract.[12]

In the 2009 case *Rick v Brandsema*, the Court addressed the enforceability of a marital property agreement formed in British Columbia and governed by that province's law.[13] The parties married in 1973 and separated in 2000. The parties acquired significant property during their lengthy marriage. After separation, they each employed lawyers and accountants and also used mediation services to help them negotiate a separation agreement. After reaching a settlement on property division and signing a separation agreement, they proceeded with their divorce.

A year after their divorce, the wife applied to set aside the agreement on the grounds of unconscionability, relying on general common law contract principles. In the alternative, she sought a 'reapportionment order' under British Columbia's Family Relations Act, s 65. This provision allows courts to override valid agreements and reapportion assets if the agreement would otherwise be 'unfair' having regard to:[14]

> '(a) the duration of the marriage;
> (b) the duration of the period during which the spouses have lived separate and apart;
> (c) the date when property was acquired or disposed of;
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
> (e) the needs of each spouse to become or remain economically independent and self sufficient; or

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10 See, eg, Family Law Act, RSO 1990, c F3, ss 33(4) and 56(1).

11 See Robert Leckey 'A Common Law of the Family? Reflections on *Rick v Brandsema*' (2009) 25 *Canadian Journal of Family Law* 257, for a helpful discussion of and caution against unreflective application of the Court's Divorce Act decisions to cases involving provincial legislation.

12 An example of a provincial statute that allows a court to override a valid agreement on property division is Family Relations Act, RSBC 1996, c 128, s 65. An example of a statute that allows a court to set aside an agreement on property division is Family Law Act, RSO 1990, c F3, s 56(4). On the applicability of common law contract doctrine, see, eg, *Slaughter v McCormick*, 2002 BCSC 1794, where the court said at para 43: 'The common law contractual defences such as duress, undue influence, unconscionability and mistake are applied to set aside domestic agreements.'

13 *Rick v Brandsema* 2009 SCC 10, [2009] 1 SCR 295 ('*Rick*').

14 Family Relations Act, RSBC 1996, c 128, s 65.

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.'

The trial judge determined that the agreement was 'unconscionable' because the husband had exploited the wife's mental instability at the time of the negotiations by accepting the 'take-it-or-leave-it' offer of settlement she made to him. Under the resulting agreement, the wife received $1,020,000, or $344,752 less than the equal share that she was entitled to under the province's default statutory scheme (ie what she would be entitled to absent an agreement). During negotiations, the husband had failed to make full disclosure and had hidden some assets, but the trial judge determined that the issue was not an absence of disclosure but unconscionability. Because *restitio in integrum* was impossible, the judge declined to rescind the agreement for unconscionability. Instead the trial judge ordered the husband to pay the wife an amount representing the difference between the negotiated equalisation payment and the wife's entitlement under the provincial legislation.[15] The British Columbia Court of Appeal overturned the trial decision. The appellate court acknowledged the wife's mental instability but on its review of the record determined that the wife knew what she was doing when she made the agreement. As well, the appellate court considered that the wife's vulnerabilities were effectively compensated for by availability of counsel. The wife appealed.

The Supreme Court allowed the wife's appeal and restored the trial judgment. The Court decided that the trial judge's finding of unconscionability should be upheld. In doing so the Court modified the common law doctrine of unconscionability by importing into it the test adopted in *Miglin v Miglin*, a case involving an application for spousal support under the Divorce Act and the weight to be given a valid agreement in that context.[16]

In its 2003 decision in *Miglin*, the Court enunciated a two-step approach for applications for spousal support under the Divorce Act where the parties have entered into a valid separation agreement. The first step is to examine the circumstances surrounding the agreement at the time it was made. If the agreement was negotiated or executed in circumstances of oppression or pressure, the agreement may be discounted. A court should not presume an imbalance of power between the couple, and independent legal advice may overcome any existing imbalance between the parties. A court must also consider whether the substance of the agreement complies with the principles of the entire Divorce Act. Even if an agreement does not comply with the Act, it may still be relevant as an indication of the parties' objectives and understanding of their marriage. At the second step, the court determines whether the agreement continues to reflect the intentions of the parties and whether it still substantially complies with the principles of the Act. If the current circumstances of the parties significantly differ from the range of

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15 *Rick*, paras 27–39.

16 *Miglin v Miglin* [2003] 1 SCR 303 ('*Miglin*').

possibilities anticipated by the parties to the extent that the agreement is no longer consistent with the Act, a court may give little weight to the agreement.

Even though the *Miglin* test was developed to determine the weight to be given to valid domestic contracts, the first part of the *Miglin* test was adopted in *Rick* by the trial judge and by the Court as the common law test of unconscionability. Abella J, writing for the unanimous Court, said:[17]

> 'While *Miglin* dealt with spousal support agreements in the context of a divorce, it nonetheless offers guidance for the conduct of negotiations for separation agreements generally, including negotiations for the division of matrimonial assets.'

Abella J further asserted that '*Miglin* represented a reformulation and tailoring of the common law test of unconscionability to reflect the uniqueness of matrimonial bargains'.[18] In *Miglin*, however, the Court, in enunciating its test, had said:[19]

> 'First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context.'

It seems clear, then, that the Court in *Miglin* had not intended to change the common law doctrine of unconscionability. Nor was it necessary for the Court to do so, because the validity of the contract was not at issue in that case. Rather, the issue in *Miglin* was 'the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support'.[20]

The effect of *Rick*, then, is to change the common law test of unconscionability in family law cases. The Court did not acknowledge the implications of using the first part of the *Miglin* test as the common law test of unconscionability. The rationale for adopting a modified – less stringent – test of unconscionability is the same rationale used by the Court in developing the *Miglin* test. Abella J said:[21]

> 'This Court has frequently recognized that negotiations following the disintegration of a spousal relationship take place in a uniquely difficult context. The reality of this singularly emotional negotiating environment means that special care must be take to ensure that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from information and psychological exploitation.'

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17 *Rick*, para 39.
18 *Rick*, para 43.
19 *Miglin*, para 82.
20 *Miglin*, para 2.
21 *Rick*, para 1.

The common law test of unconscionability for marital property agreements is now the first part of the *Miglin* test, ie whether one party exploited the other party's vulnerabilities during the negotiation process to obtain an agreement that deviates substantially from the default entitlement under the marital property statute. This is similar to the common law test of unconscionability for contracts in general enunciated by the Court in 1978:[22]

> 'Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised, and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.'

What is different about the *Rick* test is the level of vulnerability required, the role of independent legal advice, the approach used to assess the fairness of the impugned bargain, and the significance of failure to disclose relevant information.

On the issue of the vulnerability of the wife, the Court deferred to the trial judge's findings. The trial judge found that the wife was mentally unstable and 'vulnerable in the sense that the term is used in *Miglin*'.[23] There was never any scrutiny as to whether the wife was vulnerable enough to meet the existing common law test of unconscionability. The wife had the assistance of lawyers and other professionals. The Court acknowledged that 'when vulnerabilities have been compensated for by the presence of professionals, the agreement should be respected'. But here the trial judge found that the wife's vulnerabilities were not compensated for because her mental instability made her unable to take advantage of the advice, and the Court deferred to this finding.[24]

In assessing the fairness of the bargain, the Court used the default marital property regime as the guidepost. Substantial deviation from the default scheme will satisfy the new test for unconscionability in domestic contract cases.[25] In this regard, *Rick* will satisfy the critics of other decisions in which the Court has upheld agreements that deviate from the default statutory schemes.[26] *Rick* moves closer to a mandatory marital property regime by holding that substantial deviation from the regime will ground an argument of unconscionability.

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22 *Harry v Kreutziger* (1978) 95 DLR (3d) 231 (SCC).

23 Quoted by the British Columbia Court of Appeal in *Rick v Brandsema*, 2007 BCCA 217 at para 29.

24 *Rick*, paras 61 and 62.

25 *Rick*, para 44.

26 The relevant Court decisions, including *Miglin*, and their critics are ably reviewed in Robert Leckey 'Contracting Claims and Family Law Feuds' (2007) 57 *University of Toronto Law Journal* 1.

In coming to its decision, the Court placed far more emphasis on the husband's non-disclosure and purposeful hiding of assets than did the trial judge. Under the doctrine of *uberrimae fidei* the deceived party may avoid a contract simply on the basis of non-disclosure:[27]

> '[T]here is a limited class of contracts in which one of the parties is presumed to have means of knowledge which are not accessible to the other and is, therefore, bound to tell him everything which may be supposed likely to affect his judgment. They are known as contracts *uberrimae fidei*, and may be avoided on the grounds of non-disclosure of material facts. Contracts of insurance of every kind are in this class. There are other contracts, though not contracts of *uberrimae fidei* in the same sense, which impose a duty of full disclosure of all material facts by the parties entering into them.'

In *Rick* the Court did not explicitly say that separation agreements are contracts *uberrimae fidei* but did say that there is 'a duty to make full and honest disclosure of [financial] information when negotiating separation agreements'. Some provinces have enacted statutes that allow courts to set aside domestic contracts on the grounds of failure to disclose significant assets.[28] But even in the absence of such a statute, *Rick* imposes the duty to disclose. The non-disclosure of assets will support a finding of 'exploitation' by the party hiding assets and put the other party in a position of vulnerability. A settlement that excludes the hidden assets will presumably deviate from the default marital property scheme. In this way, the requisite elements of the *Rick* test of unconscionability may be satisfied in cases of non-disclosure.

Rick leaves substantial room for discretion on the part of courts. Justice Abella said:[29]

> 'Whether a court will, in fact, intervene will clearly depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated. It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation. As *Miglin* confirmed, the more an agreement complies with the statutory objectives, the less risk that it will be interfered with.'

The Court emphasised that a trial judge's exercise of discretion and findings of fact should be given deference by appellate courts:[30]

> 'It is inherent in disputes in general, and matrimonial conflicts in particular, that parties have inconsistent versions of the underlying events. It is the trial judge's job as judicial historian to sift through the record, watch and listen to the parties, and determine which version of disputed events is the most reliable. Findings of fact

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27 *Gabriel v Hamilton Tiger-Cat Football Club Ltd* (1975) 57 DLR (3d) 669 at 674.
28 See, eg, Family Law Act, RSO 1990, c F3, s 56(4)(a).
29 *Rick*, para 49.
30 *Rick*, para 30.

> and factual inferences made at trial, as a result, are not to be reversed unless there is a "palpable and overriding error", or a fundamental mischaracterization or misappreciation of the evidence.'

Only in cases of serious errors may an appellate court second guess a trial judge's findings of fact, including a determination that the *Rick* test of unconscionability has been met.

Although the Court determined that the parties' agreement was unconscionable, it also found that *restitio in integrum* was not possible. The agreement had been executed and it was not possible to restore the parties to their pre-contractual position. Therefore, instead of setting aside the agreement and awarding the wife her entitlement based on the default statutory regime, the Court awarded her damages, described as 'equitable compensation', to achieve the equivalent result. A monetary award equal to the difference between what the wife was entitled to under the default marital property scheme and what she received under the contract was ordered. Building on Canadian contract jurisprudence, the Court said that 'where rescission is unavailable because restitution, as a practical matter, cannot be made, damages in the form of "equitable compensation" are imposed to provide relief to the wronged party'.[31]

The Court has long supported the principle of freedom of contract in family law disputes. At the same time the Court and legislators have set definite limits on private ordering. *Rick* narrows the ambit of permissible private ordering by making less stringent the common law test of unconscionability, imposing a common law duty of disclosure on parties, and setting the default marital property scheme as the standard by which the fairness of agreements will be judged. Parties are still encouraged to settle their disputes, but must do so using a fair process and in accordance with the default marital property scheme. As Abella J said, 'the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant statutory scheme'.[32] Failure to heed this admonition will mean that a party who later regrets a deal will be able to look to the court for rescue.

On one view the decision is a victory for the vulnerable. It provides an incentive to give full financial disclosure because failure to do so may be grounds to impugn an agreement. But it should also be noted that the Court has expanded the supervisory role of courts at the expense of respect for party autonomy. It has done so by reducing the requisite level of vulnerability required to satisfy the doctrine of unconscionability and using the default statutory scheme as the standard by which to assess whether the agreement reached the requisite level of unfairness. Applying the new test, the Court determined that the wife's prior conception of the good, which led her to sign the contract, should not be taken seriously because of her mental instability. The Court 'infantilized' her, 'as we

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[31] *Rick*, para 66.
[32] *Rick*, para 50.

do quite properly when we release the very young from the consequences of their choices'.[33] Whether this was indeed a victory depends on one's view of when parties should live with the consequences of their decisions and when courts should rescue them. Going too far in one direction risks letting the wolf devour the sheep. Going too far in the other direction may further weaken parties who are not held to their obligations and may undermine the value of family law contracts. The decision in *Rick* is the latest instalment of the ongoing debate in Canada on the proper ambit of private ordering in family law.

III FORCED MEDICAL TREATMENTS FOR MINORS

The common law 'mature minor' doctrine is well-entrenched in Canada. Under this doctrine, minor children, rather than their parents, have the right to determine their own medical treatment provided the children have the ability to appreciate the nature and consequences of the treatment and its alternatives.[34] The mature minor rule developed out of concerns that minors would not seek medical treatment for sexually transmitted diseases, birth control, abortion, mental health issues or drug abuse if they were required to obtain the consent of their parents.[35] Pursuant to the rule, health care providers could rely on the consent of mature minors, and this consent could not be overridden by a parent or guardian.[36] Whether a mature minor has more than the right to consent to medically recommended treatment that is in the minor's best interests has been less clear. As well, the ambit of a mature minor's right to refuse recommended medical treatment has been uncertain.[37]

Each province in Canada has legislation dealing with health care consent. Some of the provincial statutes set specific rules in regard to the age of consent to medical treatment or limit the effectiveness of a mature minor's consent to treatment that is in the best interests of the child.[38] Other provinces do not fix

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[33] Charles Fried *Contract as Promise* (Cambridge: Harvard University Press, 1981) 21.

[34] The mature minor doctrine is well summarised in Barney Sneiderman et al *Canadian Medical Law* (Thompson Canada, 3rd edn, 2003) at 459–500 ('Sneiderman'); and Joan M Gilmour 'Death, Dying and Decision-making About End of Life Care' in Jocelyn Downie et al *Canadian Health Law and Policy* (LexisNexis Canada, 3rd edn, 2007) 437 at 441–445 ('Gilmour').

[35] Sneiderman, ibid, at 468.

[36] *C(JS) v Wren* [1987] 2 WWR 669 (Alta CA); *Van Mol (Guardian ad litem of) v Ashmore* (1999), 168 DLR (4th) 637 (BCCA).

[37] On the uncertainty as to whether a mature minor can refuse recommended medical treatment see *U(C) (Next Friend of) v Alberta (Director of Child Welfare)*, 2003 ABCA, at para 31 ('*U(C)*') and Sneiderman, above n 34.

[38] See, eg, Civil Code of Quebec, SQ 1991, c 64, art 17, which sets 14 as the age of consent but provides that additional consent from a person with parental authority is also required if the treatment 'entails a serious risk for the health of the minor and may cause him grave and permanent effects'; and Infants Act, RSBC 1996, c 223, s 17, which provides that a minor's consent is not effective unless the health care provider determines that the minor (a)

any age of consent and do not import any requirement that treatment be in the best interests of the child, with the result that mature minors may consent to or refuse any treatment.[39]

Each province also has legislation dealing with child welfare proceedings and the power to make health treatment decisions for children who have been taken into care. Indeed, one of the grounds for taking a child into care is that the parents are refusing or neglecting to provide or consent to medical treatment.[40] Depending on the particular statutory scheme, child welfare authorities who have taken a child into care may stand in the place of a parent in regard to consent to medical treatment,[41] or may obtain court authorisation for medical treatment of the child.[42] The interplay between the mature minor doctrine and the power to authorise treatment of children in the care of child welfare authorities has been addressed in several cases involving a minor's refusal to consent to blood transfusions on religious grounds.

In some cases the mature minor's refusal of consent to blood transfusions has been respected. In *Children's Aid Society of Metropolitan Toronto v K*, for example, a judge refused to order that a 12-year-old girl was in need of protection even though the girl and her parents refused consent to a blood transfusion that was recommended as the girl's only hope of survival.[43] The girl had a 'well thought out, firm and clear religious belief' that grounded her vehement hostility to a transfusion.[44] The girl's prognosis with or without the recommended treatment was poor. There were severe side effects related to the proposed treatment, and the girl's refusal of consent was based in part on her wish to avoid the 'pain and anguish associated with the treatment process'.[45] The judge dismissed the application of the child welfare authorities. Two weeks after the judge's decision, the girl died.[46] There have been other cases in which a mature minor's refusal of a blood transfusion on religious grounds was respected.[47] However, like the decision in *K*, they were based only partly on the finding that the minor had capacity to make the treatment decision. Additional relevant factors included the minor's poor prognosis with or without the transfusion and the treating physician's view that forced treatment would not be effective.

'understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and (b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests'.

39 See, eg, Health Care Consent Act, 1996, SO 1996, c 2; Consent to Treatment and Health Care Directives Act, RSPEI 1988, c C-17.2.

40 See, eg, Child and Family Services Act, CCSM c C80, ss 17(2)(iii) and 21(1).

41 See, eg, Child and Family Services Act, RSO 1990, c 11, ss 62 and 63.

42 See, eg, Child and Family Services Act, CCSM c C80, s 25.

43 *Children's Aid Society of Metropolitan Toronto v K* (1985) 48 RFL (2d) 164 (Ont Fam Ct) ('*K*').

44 *K*, para 33.

45 *K*, para 17.

46 Sneiderman, above n 34, at 462.

47 See, eg, *Walker (Litigation Guardian of) v Region 2 Hospital Corp* (1994) 150 NBR (2d) 362 (CA); *Re Y(A)* (1993) 111 Nfld & PEIR 91 (Nfld UFC).

Other cases have presented courts with a starker choice. In contrast with the cases in which the mature minor's decision was respected, the medical benefits of treatment far outweighed any costs. In these circumstances, courts have used the applicable statutory framework to justify overriding the decisions of a mature minor. In *U(C)*, for example, the Alberta Court of Appeal determined that a court could order forced medical treatment for a child aged 16 who had been taken into care after refusing a blood transfusion on religious grounds.[48] The appellate court ruled that the mature minor rule does not apply in child welfare proceedings, reasoning that the provincial statute provided a 'complete code' that displaced the mature minor doctrine. The appellate court further stated that, while the court must consider the expressed wishes of a mature child in accordance with the governing statute, it is not bound to comply with those wishes. Instead, the best interests of the child govern.

It was against this background that the Court addressed the right of mature minors to refuse medical treatment in *AC v Manitoba*.[49] The *AC* case challenged the constitutionality of a Manitoba statute that allowed courts to authorise treatment for a child in the care of child welfare authorities.

The governing statute was Manitoba's Child and Family Services Act, which allows child welfare authorities to apply for a court order authorising treatment of a child in care where '(i) the parents or guardians of the child refuse to consent to the treatment, or (ii) the child is 16 years of age or older and refuses to consent to the treatment'.[50] Notice of the application must be given to the parents or guardians of the child and the child, if the child is 16 or older.[51] On completion of the hearing, the court 'may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child'.[52] In the case of a child who is 16 or older, the court may not authorise treatment unless satisfied that the child is unable: '(a) to understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or (b) to appreciate the reasonably foreseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment'.[53] Thus, for minors aged 16 or older there is a presumption of capacity to consent to treatment. Only if this presumption is rebutted is the court able to authorise treatment in accordance with the child's best interests. For children under the age of 16, the Act simply empowers the court to authorise treatment in accordance with the child's best interests irrespective of the child's capacity.

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48 *U(C),* above n 37.

49 *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 ('*AC*').

50 Child and Family Services Act, CCSM c C80, s 25(3)(b).

51 Ibid, s 25(4).

52 Ibid, s 25(8).

53 Ibid, s 25(9).

The Act contains general provisions relating to the best interests of the child. Section 2 of the Act provides:

> '(1) The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining best interests the child's safety and security shall be the primary considerations. After that, all other relevant matters shall be considered, including . . .
>
> (f) the views and preferences of the child where they can reasonably be ascertained; . . .
>
> (2) In any proceeding under this Act, a child 12 years of age or more is entitled to be advised of the proceedings and of their possible implications for the child and shall be given an opportunity to make his or her views and preferences known to a judge or master making a decision in the proceedings.
>
> (3) In any court proceeding under this Act, a judge or master who is satisfied that a child less than 12 years of age is able to understand the nature of the proceedings and is of the opinion that it would not be harmful to the child, may consider the views and preferences of the child.'

The *AC* case involved a 14-year-old girl who was admitted to hospital as a result of internal bleeding resulting from Crohn's disease. A few months prior to her admission to hospital, AC had completed an advance directive indicating that she refused consent to blood transfusions under any circumstances. Both AC and her parents were adherents to the Jehovah's Witness faith, and AC's refusal to consent to blood transfusion was based on her religious convictions. AC's parents supported her decision. After her admission, the treating physician requested a psychiatric examination of AC to determine her capability. The three psychiatrists who examined AC determined that she had no psychiatric illness and that she understood the reasons why a blood transfusion might be recommended and the consequences of refusing to have a transfusion.

A few days after AC's admission to hospital, her doctors determined that a blood transfusion was needed. AC refused consent. The child welfare authorities apprehended AC under the Child and Family Services Act and applied for a court order authorising the blood transfusion. Present at the hearing were counsel for the child welfare authority, AC's doctor, counsel for the regional health authority, AC's father, counsel for AC's parents, and a social worker. AC did not participate. The evidence showed that an immediate transfusion was required, failing which there was a high risk of death or serious damage. The judge proceeded on the assumption that AC had capacity to consent, but determined that this was irrelevant. Where the child is under the age of 16, the Act gives the court power to authorise treatment that is in the child's best interests. Therefore the fact that AC had capacity and refused consent did not matter. The judge authorised the transfusion. After the transfusion, AC recovered.

AC and her parents appealed the decision, arguing that the Act was unconstitutional because it violated AC's constitutional rights to freedom of religion, security of the person and equality.[54] The Court of Appeal of Manitoba dismissed the appeal and ruled that the governing statute was constitutional. AC and her parents further appealed to Canada's highest court.

In a split decision, the Court ruled that the impugned statute was constitutional. Abella J, writing for the four-judge majority, included in her opinion comparative law analysis and extensive consideration of the literature and human rights instruments.

The starting point for the majority was 'the principle that competent individuals are – and should be – free to make decisions about their bodily integrity'.[55] This principle includes 'the unqualified right to refuse life-saving medical treatment'.[56] The majority then traced the evolution of the mature minor doctrine in Canada, finding that 'where a child's decisional capacity to refuse treatment has been upheld . . . it has been because the court has accepted that the mature child's wishes have been consistent with his or her best interests'.[57] Its review of developments in other countries led to the conclusion that neither in Canada nor in other similar jurisdictions has the mature minor doctrine led to 'automatic judicial deference' to treatment decisions that will put the minor's life or health in grave danger.[58] According to the majority, the reason for caution in giving effect to the mature minor doctrine is the difficulty of determining that a child is sufficiently mature to make a treatment decision – better to err on the side of life and health when we are not sure.

The majority then turned to the statutory requirement that treatment decisions for children under the age of 16 be made by the court in accordance with the best interests of the child. The majority observed that the best interests of the child test provides the framework within which courts act on behalf of those who are vulnerable. When the child is no longer vulnerable and becomes a mature minor, interventions to protect the child's best interests are no longer justifiable and conflict with the autonomy rights of the child. But the majority further reasoned that the apparent conflict between the principles of welfare and autonomy collapses because the best interests of a mature minor are served by respecting his or her autonomy. Because of the challenge of determining that a minor is mature, the state is justified, according to the majority, in retaining 'the power to determine whether allowing the child to exercise his or her autonomy in a given situation actually accords with his or her best interests'.[59]

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54 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), c 11, ss 2(a), 7 and 15(1) ('the Charter').

55 *AC*, above n 49, para 39.

56 Ibid, para 40.

57 Ibid, para 62.

58 Ibid, para 70.

59 Ibid, para 86.

The majority stated that, if properly applied, the best interests of the child test could result in giving effect to the decision of the minor:[60]

> 'If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to be necessarily to follow that the adolescent's views ought to be respected.'

The more the court is convinced of the child's capacity for mature judgment, the greater the weight that should be accorded the child's wishes. This sliding scale approach is consistent with the Convention on the Rights of the Child, under which the views of a child are accorded increasing weight in accordance with the child's developing maturity.[61]

The majority determined that the impugned legislation, as properly interpreted and applied, did not violate AC's constitutional rights. The majority first looked at s 7 of the Charter, which provides: '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.' The majority found that any violation of AC's security of the person was in accordance with the principles of fundamental justice and therefore there was no violation of s 7. Manitoba's statute, if properly interpreted, did not arbitrarily assume that no one under the age of 16 had the capacity to make treatment decisions. In coming to this conclusion, the majority effectively 'rewrote' the statute to require that persons under the age of 16 be accorded the opportunity to prove that they had sufficient maturity to make the treatment decision. By importing this requirement into the statute, and interpreting the statute's best interests of the child test to require deference to a minor's wishes if a sufficient degree of maturity was proven, the majority 'saved' the statute from attack under s 7 of the Charter.

The majority took the same approach in response to AC's argument that the statute discriminated against her on the basis of age, contrary to s 15 of the Charter. The statute as 'rewritten' by the majority did not discriminate:[62]

> 'By permitting adolescents under 16 to lead evidence of sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged. There is therefore no violation of s. 15.'

The majority also rejected AC's argument that the statute infringed her right to freedom of religion, contrary to s 2(a) of the Charter. Once again, the majority said that the statute, properly interpreted, required giving a child the opportunity to prove sufficient maturity to make treatment decisions and

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60 Ibid, para 87.
61 Convention on the Rights of the Child, TS 1992 No 3, discussed in *AC*, above n 49, para 93.
62 *AC*, above n 49, para 111.

deference to the child's views in accordance with the child's degree of maturity. Thus, the child's religious views are given more deference with increasing maturity, and accordingly there was no violation of s 2(a) of the Charter.

The constitutional analysis of the majority is notable because it effectively redrafted the statute to make it constitutional. The majority achieved this by importing into the statute a requirement that the minor be given an opportunity to prove sufficient maturity to make the treatment decision – a requirement nowhere included in the statute – and by interpreting the best interests of the child test to mean deference to the decisions of a minor who has proved a sufficient level of maturity. This is not the first time that the Court has used its powers of interpretation to effectively rewrite a statute. In 2004, a constitutional challenge was raised against the criminal law provision that protects parties using corporal punishment on children. The majority effectively rewrote the 'reasonable chastisement' provision so that it would not violate the constitutional protections against cruel and unusual punishment, unequal treatment and violation of security of the person.[63] The majority set out a list of behaviours that would not be protected under the impugned provision: use of corporal punishment by teachers, corporal punishment of children under 2 years or of teenagers, corporal punishment using objects, and corporal punishment which involves slaps or blows to the head. Provided the impugned provision was applied as redrafted by the majority, there would be no basis for a ruling it unconstitutional.[64] In *AC*, the majority once again avoided a ruling that a statute is unconstitutional by adopting an interpretation that amounted to a redrafting of the legislation. These efforts at creative interpretation seem to go beyond the appropriate role of the Court.

The majority makes it clear that a child's refusal will never be determinative even if the child is deemed to have capacity. Even applying the majority's sliding scale approach, a minor who is found to have the requisite maturity is not allowed to make the treatment decision. Under the Manitoba statute, it is the court that retains the power to make the treatment decision on the basis of the best interests of the child. The court may decide that it is in the child's best interests to give effect to the child's wishes, but it is the court that makes the decision. The majority does not face up to the constitutional vulnerability of giving the state power over treatment decisions of competent persons.

McLachlin CJ wrote a concurring opinion and was joined by Rothstein J. The Chief Justice determined that there was no violation of s 7 or 15 of the Charter, largely on the basis that setting 16 as the age of consent was reasonable. The Chief Justice determined that the statute did violate the child's s 2(a) right to religious freedom. However, she went on to find that the violation was justified under s 1 of the Charter, which provides: 'The Canadian Charter of Rights and

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63 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76.

64 For discussion of the case, see Martha Bailey 'Resuscitating the Significance of Marriage' in Andrew Bainham (ed) *The International Survey of Family Law 2004 Edition* (Jordan Publishing Limited, 2005) 133 at 148–52.

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.' The Chief Justice found that 'the objective of ensuring the health and safety of vulnerable young people is pressing and substantial, and the means chosen – giving discretion to the court to order treatment after a consideration of all the relevant circumstances – is a proportionate limit on the right'.[65] Therefore, the violation of AC's right to religious freedom was justified, and the constitutionality of the statute was upheld.

The sole dissenting judge was Binnie J. He alone would have ruled the statute unconstitutional, taking into account the statute as it is, not as 'rewritten' by the majority. Binnie J found that the statute was unconstitutional:[66]

> '. . . because it prevents a person under 16 from establishing that he or she understands the medical condition and the consequences of treatment, and should therefore have the right to refuse treatment whether or not the applications judge considers such refusal to be in the young person's best interests.'

Justice Binnie reasoned that the statute was deficient because it did not provide persons under the age of 16 with the opportunity to rebut the presumption of incapacity. Binnie J was unable to find any state interest in subjecting minors to judicial control regardless of their capacity to make treatment decisions.

The implications of *AC* are uncertain, partly because of the variation in statutory regimes across the country. It is constitutionally permissible for provinces to limit the mature minor doctrine and to override the wishes of minors in order to protect the best interests of the child. Minors must have the opportunity to prove that they are mature enough to make a treatment decision, but provinces are able to leave the decision-making power in the hands of a judge. Because of the creative interpretation of the majority in *AC*, the responsibility for ensuring the constitutional application of the relevant legislation rests with judges, who will need to pay close attention to the majority's opinion in *AC.* In some provinces, mature minors who have religious objections to blood transfusions may be deterred from seeking medical assistance.[67]

IV CONCLUSION

Underlying the two family and children's law cases decided in 2009 were questions regarding the interplay between common law principles and statute. In the first case, the Court modified the common law doctrine of unconscionability by adopting a test used to interpret the Divorce Act provisions on spousal support. Using that new test, the Court determined that

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65 *AC*, above n 49, para 156.
66 Ibid, para 177.
67 Claire Houston 'Case Comment: *Manitoba (Director of Child & Family Services) v CA*' (2009) RFL (6th) 397.

the parties' agreement on marital property division was unconscionable. In the second case, the Court modified the statutory regime that allowed forced medical treatment by incorporating a requirement that minors be given an opportunity to prove their capacity to make treatment decisions and interpreting the statutory best interests test as requiring respect for treatment decisions of mature minors. The Court then ruled that, properly construed, the statutory provision was constitutional. In both cases, the result of this judicial creativity was to expand the role of courts to protect vulnerable persons and save them from the consequences of their own decisions.

England and Wales

THE FAMILY THE LAW FORGOT

Mary Welstead[*]

Résumé

L'étude de cette année est consacrée à l'examen d'un type particulier de famille qui a été largement ignoré par la loi. L'histoire de deux femmes âgées non mariées, les sœurs Burden, qui ont vécu toute leur vie ensemble dans une relation d'amour et de soutien mutuel, et leur recours inefficace à la Cour Européenne des Droits de l'Homme (CEDH), alléguant d'un traitement discriminatoire au regard de l'exemption des taxes sur l'héritage pour les époux et les partenaires civils, fournit une excellente illustration des problèmes qu'affrontent les couples consanguins, comme les parents et leurs enfants adultes, ou les fratries qui vivent ensemble dans une relation proche, loyale et de soutien mutuel. Non seulement ils ne bénéficient pas de la plupart des droits familiaux qui s'appliquent aux couples mariés ou aux partenaires civils, mais ils sont en outre exclus du bénéfice des droits moindres accordés aux concubins. Après une discussion sur les décisions de la CEDH, j'examine le salmigondis limité des droits légaux et des devoirs qui existent au sein des couples consanguins. Je conclue en étudiant l'éventualité d'une réforme – l'institution d'une nouvelle forme de partenariat civil – qui ramènerait les membres des familles oubliées à égalité avec leurs homologues mariés et les partenaires civils.

I INTRODUCTION

The story of two unmarried elderly women, the Burden sisters, who had lived together for the whole of their lives in a loving, mutually supportive relationship and their unsuccessful application to the European Court of Human Rights (ECHR) alleging discriminatory treatment,[1] serves as a reminder that there is one category of family members whose needs have been largely ignored by the law. I propose devoting this year's survey to a consideration of the family the law forgot. The ECHR's ruling in favour of the UK Government is a perfect illustration of the failure of the law to address the problems faced by consanguineal couples who live together in close, loyal and caring relationships. Not only do they have no recourse to most of the familial

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1 *Burden v United Kingdom* [2006] 1 FLR 35; *Burden and Burden v United Kingdom* 13378/05 [2006] ECHR 1064 (12 December 2006). For Grand Chamber Decision see *Burden v United Kingdom* [2008] 2 FLR 787; *Burden v The United Kingdom* 13378/05 [2008] ECHR 357 (29 April 2008).

rights available to those who are married or who live with a civil partner, they are also denied many of the lesser rights given to cohabitants.

II THE FACTS IN *BURDEN*

Joyce and Sybil Burden were aged 87 and 80 respectively when they first made their application to the ECHR in 2005. They maintained that the exemptions for spouses and civil partners in the Inheritance Act 1984, which did not apply to couples like them, contravened their rights under Art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ('the Convention') in conjunction with Art 14 of the Convention. Article 1 of the First Protocol provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Article 14 of the Convention provides:

> 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Under the Inheritance Act, a tax of 40% is payable on the value of a deceased person's property over the nil-rate threshold of £275,000 (in 2005/6), including his or her share of anything owned jointly. The same rate of tax is also payable on any gift made by the deceased within 7 years of his or her death. The Inheritance Act exempts from this tax any property left in the will of the deceased to his or her spouse, or inherited by such persons on the intestacy of a spouse (s 18(1)). In 2004, the Civil Partnership Act 2004 gave same-sex partners who had registered a civil partnership the same rights as married couples including the inheritance tax exemption. Joyce and Sybil were not eligible for the exemption because their relationship, although familial, could never be formalised. Both marriage and civil partnership are forbidden to consanguineal couples.

The Burden sisters had a very strong sense of family. They had lived together for 80 years. For the last 29 of these years, they had shared a house built on land left to them in their parents' will. Their parents' and other family members' ashes were scattered on the land. Throughout their lives, they had dutifully cared for relatives, and now they took responsibility for the care of

each other whilst happily leading a life of comparative self-sufficiency. The value of their house and other resources amounted to around £900,000. They had made wills in each other's favour. On the death of either one of them, the other would almost certainly be forced to sell her long-term family home to enable her to pay the substantial inheritance tax to which she would become liable.

The sisters had battled for many years to have the inheritance tax exemption extended to familial relationships such as theirs. They had written regularly to a number of Chancellors of the Exchequer over the years, to ask that some consideration be given to the plight of couples like them; the responses were always negative. When they learned that the Civil Partnership Act 2004 would give same-sex partners the exemption which they had so assiduously sought for themselves, they were left feeling that the law was seriously discriminatory. They decided to challenge the UK Government in the European Court of Human Rights.

III THE ECHR'S DECISION

The UK Government maintained that the Burden sisters' application was inadmissible on a number of grounds under Arts 34 and 35(1) of the Convention. Article 34 provides:

> 'The Court may receive applications from any person . . . claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto . . .'

The government claimed that the sisters were not victims. Their liability to inheritance tax had not yet happened and might never do so; they could not, therefore, claim that their rights were being breached except in some abstract sense.

Article 35(1) provides:

> 'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

The government argued that the sisters had not exhausted the domestic remedies.

The ECHR unanimously rejected both these arguments and accepted the admissibility of the sisters' claim. First, in the light of the sisters' age, it was highly likely that one of them would have to pay the tax. Secondly, if the Burden sisters had sought the domestic remedy of a declaration that the legislation was incompatible with the Convention, there was no legal obligation on the government to amend the offending legislation. In the past the UK

Government had made legislative amendments in 10 out of 13 cases where a declaration of incompatibility had been made. In the remaining three, potential amendments were either pending or remained under consideration.

According to the UK Government, the very nature of Joyce and Sybil Burden's relationship was different from that of spouses or civil partners; it was merely an accident of birth. Even if these relationships could be held to be analogous, their differential treatment with respect to the inheritance tax exemption was within the wide margin of appreciation enjoyed by a Convention state. The policy behind the exemption was to provide surviving partners with a financial benefit and thereby foster stable relationships. The UK Government explained rather obscurely:

> 'That objective would not be served by extending similar benefits to unmarried members of an existing family, such as siblings, whose relationship was already established by their consanguinity, and recognised by law.'

This differential treatment was proportionate; the sisters had not undertaken any of the obligations and responsibilities imposed by the state on spouses or civil partners – a spurious argument indeed because the sisters were prevented by law from doing so. If the government extended the exemption to siblings, it would probably have to grant the same right to other members of families living together and that would have considerable financial implications given that the annual income from inheritance tax at the time of the Court decision was approximately £2.8 billion.

The ECHR rejected the Burden sisters' application by four votes to three. It did not consider in any depth their claim to be in an analogous position to cohabiting married and civil partnership couples, simply acknowledging briefly the fact that the sisters did not have the choice to marry or become civil partners, and that lack of choice was at the heart of their complaint. The Court's ruling centred on the wide margin of appreciation enjoyed by a state in deciding whether, and to what extent, differential treatment is justified. It maintained that states may well need to strike a balance between the need to raise revenue and the social objectives in doing so, and were generally in a better position to determine their social and economic policies than the Court. Their decisions in this regard will, therefore, normally be respected by the Court unless it is evident that they are without reasonable foundation and consequently unjustifiable.

IV DISSENTING ECHR JUDGMENTS

In a joint dissenting judgment, Judges Bonello and Garlicki maintained that once the UK legislature decided to extend the inheritance tax exemption to civil partners as well as married couples, it had failed to establish that it had behaved

reasonably, and in a non-arbitrary manner, by not granting siblings who live together a similar right. In their opinion:[2]

> 'The situation of permanently cohabiting siblings is in many respects – emotional as well as economical – not entirely different from the situation of other unions, particularly as regards old or very old people. The bonds of mutual affection form the ethical basis for such unions and the bonds of mutual dependency form the social basis for them. It is very important to protect such unions, like any other union of two persons, from financial disaster resulting from the death of one of the partners . . . unless some compelling reasons can be shown, the legislature cannot simply ignore that such unions also exist.'

The judges also acknowledged that:[3]

> 'The situation of permanently cohabiting siblings under the UK legislation has also been negatively affected by the fact that – being within the prohibited degrees of relationship – they cannot form a civil partnership. In other words, they have been deprived of the possibility of choice offered to other couples.'

In a second dissenting judgment, Judge Pavlovshi stressed that he was particularly influenced by the nature of the sisters' property which would be subject to inheritance tax:[4]

> 'The case concerns the applicants' family house, in which they have spent all their lives and which they built on land inherited from their late parents. This house is not simply a piece of property – this house is something with which they have a special emotional bond, this house is their home.
>
> It strikes me as absolutely awful that, once one of the two sisters dies, the surviving sister's sufferings on account of her closest relative's death should be multiplied by the risk of losing her family home because she cannot afford to pay inheritance tax in respect of the deceased sister's share of it.
>
> I find such a situation fundamentally unfair and unjust. It is impossible for me to agree with the majority that, as a matter of principle, such treatment can be considered reasonable and objectively justified. I am firmly convinced that in modern society there is no "pressing need" to cause people all this additional suffering'.

Joyce Burden on learning of the Court's decision commented:

> 'If we were lesbians we would have all the rights in the world. But we are sisters, and it seems we have no rights at all.'

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2 *Burden and Burden v The United Kingdom* 13378/05 [2006] ECHR 1064 (12 December 2006) para 3 of dissenting judgment of Bonello and Garlicki JJ.

3 Ibid.

4 Ibid, para 2, as per Pavlovshi J.

V THE GRAND CHAMBER'S DECISION

The Burden sisters did not give up and, in 2007 at their request, the Panel of the Grand Chamber of the ECHR decided to refer their case to the Grand Chamber in accordance with Art 43 of the Convention. The Grand Chamber accepted that the sisters' claim was admissible but rejected it by 15 votes to 2. Unlike the Chamber, it based its decision, not on an acceptance that the UK Government had acted within the margin of appreciation, but on the nature of the relationship between siblings. It refused to accept that such a relationship could be seen as analogous to that of a married couple or civil partners. There was, therefore no discrimination against Joyce and Sybil Burden and consequently no violation of Art 14 taken in conjunction with Art 1 of the First Protocol.

Two of the concurring judges preferred to base their decision on an acceptance that the UK Government's approach fell within the margin of appreciation and was justifiable. Judge David Thór Björgvinsson found the majority view to be flawed because it had compared factors which were not logically comparable. The comparison was:[5]

> '. . . to a large extent based on reference to the specific legal framework which is applicable to married couples and civil partnership couples but which does not, under the present legislation, apply to the applicants as cohabiting sisters . . . any comparison . . . should be made without specific reference to the different legal framework applicable and should focus only on the substantive or material differences in the nature of the relationship as such. Despite important differences, mainly as concerns the sexual nature of the relationship between married couples and civil partner couples, when it comes to the decision to live together, closeness of the personal attachment and for most practical purposes of daily life and financial matters, the relationship between the applicants in this case has, in general and for the alleged purposes of the relevant inheritance tax exemptions in particular, more in common with the relationship between married or civil partnership couples, than there are differences between them.'

That being so, he found that the sisters had been treated differentially. However, he found that the differential treatment was justifiable. He explained that rules relating to familial relationships have come into existence over a long period of time on a step-by-step basis in response to changing moral and social values and:[6]

> '. . . it is important to have in mind that each and every step taken in this direction, positive as it may seem to be from the point of view of equal rights, potentially has important and far reaching consequences for the social structure of society, as well as legal consequences, ie for the social security and tax system in the respective countries. It is precisely for this reason that it is not the role of this court to take the initiative in this matter and impose upon the Member States a duty further to extend the applicability of these rules with no clear view of the

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5 *Burden v United Kingdom* [2008] 2 FLR 787, 266 per David Thór Björgvinsson J.

6 Ibid, 266–267 per David Thór Björgvinsson J.

> consequences that it may have in the different Member States. In my view it must fall within the margin of appreciation of the Respondent State to decide when and to what extent this will be done.'

VI DISSENTING GRAND CHAMBER JUDGMENTS

(a) Judge Zupani

Judge Zupani dissented on the grounds of the logical inconsistency of the majority. He explained that once:[7]

> '. . . the government decides to extend this [tax] privilege to other modes of association, this black and white distinction is broken and the door is open for re-consideration of the question whether the denial of the tax advantage to other modes of association is rationally related to a legitimate government interest.'

He asked himself:[8]

> '. . . why would consanguinity be any less important than the relationship between married and civil partners? Of course, the quality of consanguinity is different from sexual relationships but this has no inherent bearing on the proximity of the persons in question . . . So what does the qualitative difference referred to by the majority come to? Is it having sex with one another that provides the rational relationship to a legitimate government interest?'

For him to make consanguinity the relevant differentiating factor was nothing other than arbitrary.

(b) Judge Borrego

In his dissenting judgment Judge Borrego maintained that the Grand Chamber had not satisfactorily addressed the question of the limits to a state's margin of appreciation. The majority had merely asserted in a circular, or even concentric manner, that the relationship between two siblings was one based on consanguinity and that of civil partners on the legal registration of their partnership and were not comparable which meant that the United Kingdom had not, therefore, acted in a discriminatory way.

In his view, the real issue was whether consanguinity as the determining factor for the payment of inheritance tax was justifiable and within a state's margin of appreciation. He found that the United Kingdom's approach was simply arbitrary and without justification. He explicitly criticised the Grand Chamber's approach:[9]

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7 *Burden v UK,* above n 5, 269 per Zupani J.
8 Ibid, 269–270 per Zupani J.
9 Ibid, 272 per Borrego J.

> 'The fact that the Grand Chamber did not give a reply to the applicants, two elderly ladies, fills me with shame, because they deserved a different approach. I would like to close by quoting Horace, who wrote in Ars Poetica: "parturient montes, nascetur ridiculus mus".'

VII THE SISTERS' REACTION

In functional terms, it is difficult to see how the relationship between Joyce and Sybil Burden could properly be regarded in any way other than analogous with that of a married couple or a same-sex partner. They had chosen to live with each other in their family home in a loving, committed and stable relationship for many decades, foregoing the possibility of marriage or civil partnership with any other person, yet unable to legalise that relationship because of their consanguinity. The sisters, not surprisingly, found it difficult to understand why:[10]

> '. . . two single sisters in their old age, whose only crime was to choose to stay single and look after their parents and two aunts to the end, should find themselves in such a position in the UK in the 21st century. We certainly do not regret our decision to look after our family for a single moment; we were glad to repay them for the happy, good, Christian upbringing they gave us . . . we have been fighting for 32 years just to gain the same rights, as regards inheritance tax, as married couples and couples in civil partnerships.'

VIII THE CURRENT LAW RELATING TO CONSANGUINEAL COUPLES

There are a limited number of legal rights and responsibilities for couples like Joyce and Sybil Burden and it may be appropriate to consider what they are before suggesting possible legal reform to bring those families in line with their analogous counterparts of spouses and civil partners.

(a) A duty of care

Consanguineal couples have no special duty of care towards each other. However, the very nature of their living arrangements makes it more likely that they will be liable for the tort of negligence if they fail to care for each other when care is needed. They may also be found guilty of a crime if the negligence of one results in serious harm to the other.

A good example of this duty of care can be found in *Re Land (deceased)*,[11] a case which dealt primarily with the forfeiture of a right to inherit by a son found guilty of the manslaughter of his mother with whom he had lived for the

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[10] Available at: www.timesonline.co.uk/tol/news/uk/article3837715.ece.

[11] [2007] 1 All ER 324.

whole of his life. At the request of his mother, he gave up his job because she wanted him to care for her. The couple rarely left the family home either together or apart. Eventually, the mother became very ill and could not get in or out of her bed. One day she fell onto the floor, and complained of such pain when her son tried to put her back to bed that he had to leave her where she had fallen. He did not think of asking anybody for help because he did not like imposing on other people. The mother ate her Christmas dinner sitting on the floor, after which survived on whisky until the son decided to call for an ambulance on the following day. His mother was admitted to hospital unconscious, suffering from breast cancer, and with severe bedsores over her whole body. She died two days later.

The son pleaded guilty to manslaughter and was sent to prison for 4 years. He was deprived of his right to inherit from his mother's estate under the Forfeiture Act 1982 but was allowed to claim for discretionary provision from the estate under the Inheritance (Provision for Family and Dependants) Act 1975 (see below).

The son would probably have been liable for the tort of negligence because of his failure to seek help. The basic requirements to establish a duty of care in this context are: some damage to a foreseeable claimant must have been foreseeable; there must have been a sufficiently close relationship between the claimant and the person causing the damage; it must be just and reasonable to impose the duty of care on the person causing the damage. The first and second requirements were clearly met; there was certainly a sufficiently close relationship between the son and his mother, and the damage to her, because of his neglect to act, was foreseeable. It remains questionable whether it would have been just and reasonable to impose a duty of care on him given his developmental difficulties.

(b) Domestic violence

Any couple living together has a responsibility not to engage in physical or mental violence towards each other. If either of them experiences violent behaviour from the other, a civil action can be brought under the Family Law Act 1996 (FLA 1996), whilst a complaint to the police can result in a criminal prosecution under the Offences against the Person Act 1861, the Protection from Harassment Act 1997, or the Domestic Violence, Crime and Victims Act 2004. A successful prosecution can result in a significant prison sentence for the offender.

Where one of the couple has been injured by the other partner who has been prosecuted for the crime (unless there was good reason not to do so), it may be possible for the injured partner to claim compensation from the Criminal Injuries Compensation Board. The couple must have ceased to live together to prevent the criminal from benefiting from the crime.

Consanguineal couples have fewer of the civil remedies related to occupation of the family home under the FLA 1996 than married couples or civil partners. They are also unable to benefit from the more limited rights given to cohabiting couples under the Act because they fall outside the statute's definition of cohabitants as those couples who live together as if spouses, or civil partners. However, provided the consanguineal couple have a proprietary interest in, or a contractual or statutory right relating to, their family home, the Act allows either of them to apply for the grant of an order relating to the occupation of the property. These orders are wide ranging and may allow, inter alia, an applicant to re-enter the home; state when either of them may occupy the home; restrict the right of one of them to occupy it; demand that one of them leaves the home, or exclude one of them from all or part of the home or the area in which the home is situated. The court may also make orders under the Act requiring either one of the couple to make payments relating to their home such as rent, mortgage payments and renovation costs.

In deciding whether to grant an occupation order, the court must first apply the significant harm test in the Act. It is worded in a rather long-winded manner and requires the court to balance the potential harm which might be suffered by either one of the couple (and a relevant child). The court must first consider whether the applicant (or any relevant child) would be likely to suffer significant harm, which must be attributable to the conduct of the respondent, if the occupation order were not made. If the answer is yes, the court must make the order unless the respondent (or any relevant child) would suffer as great or greater harm than the applicant or child as a result of the order. If the answer is no, then the court has a discretion based on a wide range of factors. These include their housing needs, their financial resources, the likely effect of any order, or any decision by the court not to exercise its discretion, on the well-being of either one of the couple (and any relevant child), and the couple's conduct. The courts are most reluctant to award occupation orders unless the circumstances are exceptional. The courts have viewed the grant of an order as a draconian remedy because it interferes with rights relating to property which have generally been regarded as sacrosanct.

The playing field is far more even when it comes to applications under the FLA 1996 by consanguineal couples for orders, known as non-molestation orders, to protect them from any physical or mental violence of a partner. They have the same rights as married couples, civil partners, or cohabitants. The court has a discretion to take into account all the circumstances of the case, including the need to safeguard the health, safety, and well-being of the applicant (or a relevant child), in deciding whether to grant a non-molestation order.

(c) Inheritance rights

(i) Wills

Freedom of inheritance under English law means that consanguineal couples living together may make wills, like anyone else, and leave their property to

whomsoever they wish. The effect of a will may, however, be modified by an application for provision under the Inheritance Act (Provision for Family and Dependants) Act 1975 (see below).

(ii) Intestacy

Parent and child

Where a consanguineal couple have not made wills, the law of intestacy determines who should inherit (see the Administration of Estates Act 1925). A sibling living with a parent will inherit equally with any other siblings on the death and intestacy of that parent, providing the parent was not married or in a civil partnership at the date of death. If the deceased was survived by a spouse or civil partner, the sibling will share half the parent's estate, over the statutory legacy of £250,000, with any other sibling. The parent's spouse, or civil partner, will receive the statutory legacy and a life interest in half the remainder. On their death, that life interest will revert in equal shares to any surviving siblings.

It is not, of course, inevitable that a parent dies before an adult child. Where a child dies first and leaves no children of his or her own, and no spouse or civil partner, the parent will inherit the entire intestate estate.

Siblings

Where two siblings lived together, on the death and intestacy of one of them, the survivor will share the deceased's estate with any other siblings, provided that the deceased left no children, spouse, civil partner, or parents. If any of the latter survives the deceased, the sibling will receive nothing.

The Law Commission Consultation Paper No 191 Intestacy and Family Provision Claims on Death

The Law Commission, in its 2009 consultation paper, rejected making any changes to the current law of intestacy for consanguineal couples. It refused to include them in the category of cohabitants who in its proposals were to be given a statutory legacy. It maintained that the law already provided for consanguineal couples to a certain extent, and that the reasons why they choose to live together were too wide ranging to devise any satisfactory new approach which would be fair. Some of these relationships, it claimed were based on love, others on convenience and others came into existence by pure accident. The Law Commission failed to see that this could equally be said about any familial relationship, be it a spousal one, a civil partnership, or an informal cohabitation. It is unfortunate that the Law Commission did not take the opportunity in its consideration of the current problems of intestate succession to look more closely at the similarity of the problems faced by consanguineal couples and cohabitants.

(iii) Inheritance (Provision for Family and Dependants) Act 1975

The survivor of a consanguineal couple may be eligible to make an application under the Inheritance Act 1975 if he, or she, is able to show that the deceased's will, or the effects of the law relating to intestacy, does not make reasonable financial provision for him or her.

The Act allows applications, inter alia, from a child of the deceased (s 1(1)(c)), or a person being maintained by the deceased immediately prior to death (s 1(1)(e)). Reasonable financial provision for these applicants means such financial provision as would be reasonable for them to receive for their maintenance. Married couples, civil partners, and cohabitants who have lived together for 2 years, are treated more favourably. They do not have to prove that the deceased was maintaining them in order to apply, and reasonable financial provision for spouses and civil partners is defined in the Act as reasonable in all the circumstances of the case. Cohabitants are limited to financial provision which would be reasonable for their maintenance.

The court has to consider a number of discretionary factors in deciding whether, and to what extent, to grant an application. These are laid down in s 3(1) of the Act. These include:

- the applicant's financial needs and resources;
- other applicants' financial needs and resources;
- any beneficiaries' financial needs and resources;
- any obligation or responsibility which the deceased had towards the applicant or any beneficiary;
- the size and nature of the estate;
- any physical or mental disability of the applicant or beneficiary;
- any other matter, including the conduct of the applicant or any other person, which the court considers to be relevant.

Applications by adult children

In spite of the provisions of the Act, adult children have had a hard task in persuading the courts to allow them to benefit from a deceased's parent's estate unless the circumstances are exceptional.[12] However, the case-law has mainly considered adult children who were not living with a parent at the time of

[12] See, eg, *Espinosa v Bourke* [1999] 1 FLR 747; *In re Pearce (deceased)* [1998] 2 FLR 705.

death. It is arguable that where there has been a supportive relationship, the courts may be more inclined to consider applications by adult children favourably.

Applications by parents and siblings

A parent who wishes to make a claim against the estate of a child who was living with him or her, and siblings who were living together, may find it difficult to succeed under the Act.[13] These applicants must show that they were being maintained by the deceased immediately prior to his or her death (s 1(1)(e)). They will be treated as having been maintained if the deceased, other than for full valuable consideration, was making a substantial contribution for money or money's worth towards their reasonable needs (s 1(3)).

In *Jelley v Iliffe*,[14] Griffiths LJ considered the meaning of maintenance for these applicants. He explained that the purpose of the Act was to ensure that, wherever possible, a person who has been put by the deceased in a position of dependency on him or her, does not suffer an injustice by being deprived of financial support after the death of a benefactor. He went on to say that:

> ' . . . if a man was living with a woman as his wife and providing the house and all the money for their living expenses she would clearly be dependent upon him, and it would not be right to deprive her of her claim by arguing that she was in fact performing the services that a housekeeper would perform and it would cost more to employ a housekeeper than was spent on her and indeed perhaps more than the deceased had available to spend upon her. Each case will have to be looked at carefully on its own facts to see whether common sense leads to the conclusion that the applicant can fairly be regarded as a dependant.'

Section 3(4) of the Act imposes a further burden on an applicant claiming to have been maintained by the deceased. The court, in addition to the discretionary matters outlined in s 3(1), must also consider the extent to which, and the basis upon which, the deceased assumed responsibility for the applicant's maintenance, and its duration. Stephenson LJ, in *Jelley v Iliffe*, attempted to lessen the impact on applicants by saying: 'But how better or more clearly can one take on or discharge responsibility for maintenance than by actually maintaining?'

The Law Commission, in its Consultation Paper (see above) has provisionally recommended that an assumption of responsibility by the deceased should not be a threshold requirement for applicants maintaining maintenance by the deceased but should be regarded merely as one of the factors to be taken into account by the courts.

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[13] See *Re B (deceased)* [2000] 1 All ER 665 for an example of a successful application by a parent in the context of a minor child's estate.

[14] [1981] Fam 128, 141; [1981] 2 All ER 29, 38 per Griffiths LJ.

Some consanguineal partners will have supported each other equally prior to the death of one of them. It seems likely that at present they will be excluded from making an application under the Act. The Law Commission has provisionally proposed that it should no longer be a prerequisite for an applicant claiming to have been maintained by the deceased that the deceased made a more substantial contribution than the applicant. If this proposal were to become law, mutual support may not exclude a parent or sibling from making a claim.

(d) Fatal Accidents Act 1976

Consanguineal partners in parent-child relationships may be able to claim compensation from a person responsible for the death of a partner. They are specifically included as potential claimants in the Act. In order to succeed, they must be able to show that the death was caused by a wrongful act, neglect or default, which had the partner not died, an action would have been possible to claim damages from the person responsible for the harm caused. Any compensation awarded is related to the loss claimed to have been suffered by the partner.

Siblings are not specifically included in the Act. They do not come within the definition of a person living in the same household as the deceased for 2 years and as if the spouse or civil partner of the deceased. They are therefore excluded from making a claim for the loss of their sibling partner.

In *Bhawsar v Ahmed*,[15] a mother claimed compensation for the death of her dutiful son, in a road accident. She maintained that he had cared for her and had been expected to do so for the remainder of her life. The deceased had left the family home to become a monk in India. He eventually returned to live with his mother who spoke no English, was generally in poor health and suffered from severe bouts of mental illness. The court with a certain lack of understanding of cultural differences, refused to accept:

> '. . . that the comparatively young deceased would have taken on the responsibilities of looking after the claimant full time, alone and unsupported for the rest of his life. We are not dealing with a man who is of limited ability with a little job and willing to work as a drudge to keep his parent happy and healthy. We are considering an attractive man, well talented who could have done many things. He would have helped to look after his mother had he lived, but I do not think for one minute that he looked upon this as his sole view of life, nor do I believe that had the claimant become more difficult, he would have merely increased the amount of effort he put into looking after her.'

The court awarded the mother £80,000 in addition to funeral expenses. This sum was considerably less than might have been awarded had her claim that she would have had a long-term period with her deceased son in a supportive relationship been accepted.

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[15] [2004] All ER (D) 74 (Apr), para 33.

(e) Law Reform Miscellaneous Provisions Act 1934

As the Cambridge academic, Tony Weir, has put it, this Act provides that 'ghosts can sue'.[16] It allows the deceased to sue for wrongful death through his or her executor. If successful, any damages awarded would accrue to the deceased's estate. This might benefit the deceased's parent, child or sibling who was living with him or her prior to death. Any benefit to them would, of course, depend on the deceased's will, or on the law relating to intestate succession, or on a successful claim by them under the Inheritance Act (see above).

(f) Succession to a tenancy on death

When a consanguineal partner, who was the sole tenant of the family home, dies, a partner may be able to inherit the tenancy and have a secure right to remain there for his or her lifetime. If the tenancy is an assured tenancy, only a spouse or civil partner, or those living together as if a spouse or civil partner may succeed to it.

A detailed consideration of the law in this area is outside the remit of this chapter.

(g) Welfare benefits

For the most part consanguineal partners, unlike spouses or civil partners (and in some cases cohabitants living as if spouses or civil partners), cannot obtain any state benefit based on their partnership status. However, unlike spouses or civil partners or cohabitants, they generally remain independent persons and may apply for benefits in their own right; they are not subject to the cohabitation rule. This rule applies to spouses, civil partners and married couples and means that if one of the partners applies for a means tested benefit, the other partner's income will be taken into account in determining whether the benefit is granted.

Problems can arise if one of the partners wishes to claim housing benefit which is an allowance paid towards the cost of rent or mortgage interest for those who are also claiming another benefit. Consanguineal partners are deemed to be non-dependants for the purposes of a claim for housing benefit. If one of the couple, who is the tenant or mortgagee, claims housing benefit, an amount will usually be deducted from it on the assumption that the other partner could pay towards the costs of his or accommodation, even if he or she does not do so. The amount of the deduction depends on their circumstances.

If one of the partners has agreed to pay rent to the partner, who is the tenant or mortgagee, it may still be possible for him or her to claim housing benefit

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[16] Undergraduate lectures, University of Cambridge, 1982.

towards that rent if it can be shown that the arrangement was not set up merely for the purpose of obtaining the benefit.

IX THE WAY FORWARD

(a) Registration of a civil partnership

Had the Burden sisters been permitted to register their relationship as a civil partnership, they might have done so and acquired all the legal responsibilities and privileges associated with that status. Their expensive application to the ECHR would have been unnecessary. Could registration be a future possibility? A reading of the parliamentary reports in Hansard when the Civil Partnership Bill was passing through Parliament suggests not. One tends to conclude from them that the UK Government is loath to consider any possibility of legislation to improve the lot of consanguineal couples.

(b) The House of Lords amendment

During the passage of the Bill, a senior Conservative Peer, Baroness O'Cathain proposed an amendment to it.[17] The amendment would have allowed siblings, and parents and children over the age of 18 to register a civil partnership, providing that both persons were over 30 years of age, had lived together in the same household for at least 12 years, and were not already married or in a civil partnership. She argued that the original Bill was discriminatory because it would, inter alia, give financial advantages, such as inheritance and capital gains tax exemptions, to same-sex couples which were not available to siblings, or a parent and adult child, who lived with, and cared for, each other. The death of an elderly sibling could often leave the one left behind facing financial hardship and the loss of the family home. The amendment was regarded primarily, and probably correctly, as a device to wreck the possibility of any legal recognition of same-sex partnerships rather than as a serious attempt to help close family members in permanent, long-term, supportive relationships. The House of Lords voted in favour of the amendment by a majority of 18 but it was overturned by the House of Commons when the Bill returned there.

During the debate in the House of Lords, many of the opponents to the amendment did little other than simply state their objection to it. There were few serious attempts to explain the basis of their opposition. The Labour Peer, Lord Alli, expressed his concern about the injustice shown to close family members living together, and claimed that he had pressed the government on a number of occasions to look at the dilemma facing them. However, he maintained that the Civil Partnership Bill was not the vehicle to address the

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[17] Lords Hansard home page, 24 June 2004, col 1362. Available at: www.parliament.uk.

problem, stating rather starkly and with no further elaboration: 'This Bill is about same-sex couples whose relationships are completely different from those of siblings.'[18]

(c) The House of Commons and the amendment

In the course of the debate on the Bill in the House of Commons, Jacqui Smith MP maintained that she too recognised the need to deal with the problems faced by close family members living together.[19] However, she felt that the Bill was not the appropriate place to resolve the issue. It would require fundamental changes to the social security system. Ms Smith also showed concern about the potential problems involved in dissolving a civil partnership between a parent and an adult offspring, and the risks of having to reallocate the civil partnership property which might leave one of them homeless. She found absurd the possibility of a woman who formed a civil partnership with her grandfather having her own father as a stepson. Her imagination knew no bounds as she suggested that a grandson might be encouraged to enter into a civil partnership with his grandmother rather than marry because of the financial incentives of receiving a pension and the inheritance tax exemption on her death. She contemplated with horror the tearing apart of families as siblings fought over who should enter into a civil partnership with which parent. The amendment, in Ms Smith's view, would make the Bill incompatible with the European Convention on Human Rights, because it would allow only some family members to form a civil partnership.

(d) Sex and civil partnerships

Are Ms Smith's and other politicians' arguments really convincing and sufficient to deny the legal recognition of relationships of consanguinity? There is an inevitable temptation to believe that the greatest concern of those opposed to consanguineal civil partnerships is the risk of being accused of fostering incestuous relationships. Yet it is interesting to note the distinct absence of any mention of a sexual relationship in the Civil Partnership Bill and, indeed, in the Civil Partnership Act itself. Sexual consummation of the relationship, or rather the lack of it, is a legal irrelevancy for civil partners. It plays no part in the law relating to nullity of a civil partnership. There is no provision for non-consummation of the relationship as there is in the law relating to nullity for married partners. A same-sex sexual relationship outside of a civil partnership, analogous to adultery in a marital relationship, is not one of the specific facts which would permit a dissolution or separation order for a civil partner. It may, of course be considered as relevant behaviour sufficient to show that the petitioning civil partner cannot reasonably be expected to live with the respondent. Lady Scotland during the House of Lords debate maintained without further explanation that: 'There is no provision for

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[18] Ibid, col 1369.

[19] Civil Partnership Bill [Lords] Public Bill Committee, 19 October 2004, 9.30am Col 011.

consummation in the Civil Partnerships Bill. We do not look at the nature of the sexual relationship, it is totally different in nature.'[20]

In response to Lord Tebbitt's question as to why then could close family members not become civil partners, Lady Scotland simply replied that it would be inappropriate to allow them to enter a relationship akin to marriage.

X CONCLUDING COMMENTS

The legal recognition of spousal relationships and civil partnerships serves the aim of promoting stable and committed relationships. Current legal concerns seem to be centred on the granting of rights to cohabitants who, after all, have the opportunity to enter into legal relationships which would grant them all the rights they so assiduously seek. Why should consanguineal couples be excluded from this attention and not be brought within the protective ambit of the law proposed for cohabitants?

Whilst it is unknown how many adults, who are related consanguineously, would choose to live in a long-term, stable, committed, and supportive relationship with each other, it would be socially beneficial to allow the ones who do to enter into a form of civil partnership with each other. I use the term 'form of civil partnership' deliberately because such a legal relationship would have to include opposite sex close family members and not be limited to same-sex partners. It may even be that any such legislation should not be narrowly drafted and could include heterosexual cohabitants who cannot bring themselves to marry but would be content to register a new form of civil partnership.

I do not share Ms Smith's concerns about the problems which might arise were consanguineal relationships to be granted legal recognition because many of these problems already exist. For instance, these relationships do break down, or end because one of the parties dies. Those involved do not at present have recourse to law in the same way as married couples and civil partners, yet the issues they face are identical. It is difficult to give any serious consideration to Ms Smith's imaginative concern that a grandson, if allowed to enter into a civil partnership with his grandmother, would readily forsake marriage, or civil partnership, with a non-family member merely to benefit from pension and inheritance rights on her death. She ignores the fact that there is nothing to stop anyone from marrying or entering into a civil partnership for cynical, self-serving, pragmatic reasons.

Those who fear problems of family disputes between siblings, over which of them should have the right to register a civil partnership with a parent, seem to ignore present day reality. At present siblings are more likely to argue over which of them should have the responsibility to move in and care for an ageing

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[20] Baroness Scotland of Asthal, House of Lords, *Hansard* vol 426, col 1479 (17 November 2004).

parent. Allowing the registration of a form of civil partnership could make a major difference to the long-term care for the elderly as the Burden sisters so aptly pointed out to the ECHR.

There are also those who worry about the possibility that any reform would show societal approval of incestuous relationships and encourage such relationships to flourish. They do an injustice to all those who live in non-sexual, supportive and caring consanguineal relationships which benefit society both socially and economically.

Until such a time as consanguineal relatives are allowed to register a legal relationship with each other, they will be forced to wade their way through the limited hotchpotch of legal remedies outlined above. These may, at least, give them minimal comfort that they might be housed securely; be protected from violence in their home; benefit to some extent on the death of a partner, and remain an individual for the purpose of welfare benefits.

Germany

EQUALITY, ACCESS TO JUSTICE AND THE PREVENTION OF MISUSE IN FAMILY LAW

Nina Dethloff[*]

Résumé

Le droit familial a connu de nombreuses réformes dans le courant de la dernière période législative en Allemagne. La *Loi visant à prévenir les abus en matière de reconnaissance de paternité*, qui vient compléter la *Loi sur la contestation de paternité*, est entrée en vigueur en 2008. Au 1 septembre 2009, les lois suivantes étaient également entrées en vigueur: premièrement, *la Loi modifiant la Loi sur le partage des biens familiaux* et la *Loi sur le droit de garde*, qui apporte des changements importants au régime matrimonial légal; deuxièmement, la *Loi sur la réforme structurelle de l'ajustement des pensions de retraite* qui bouleverse les règles de partage des droits de retraite; troisièmement, la *Loi générale concernant les matières familiales et gracieuses* qui rassemble en un même texte toutes les règles procédurales relatives au droit familial; quatrièmement, la *Loi modifiant la Loi concernant le droit de garde des tiers*, qui inclut désormais des dispositions relatives au testament de vie. Finalement, ajoutons que *la Loi portant réforme du droit successoral* ainsi que la *Loi sur la prescription des actions*, sont entrées en vigueur le 1 janvier 2010.

I INTRODUCTION

Family law in Germany is an area of civil law that has always been subject to rapid change. However, during the last legislative period the reforms in German family law have been even more numerous than previously. While the reform of maintenance law through the Maintenance Law Amendment Act (UÄndG), which came into force on 1 January 2008, and the reforms of child law in the year 2008 through the Act Clarifying Paternity Independent of Contestation Proceedings (VatKlärG) and the Act Facilitating Family Court Measures When the Child's Welfare is at Risk (FamGMaßnG), have all been discussed in the

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last survey,[1] this has not been the case with the Act Aimed at the Prevention of the Misuse of Acknowledgements of Paternity supplementing the Paternity Contestation Law (VaAnfRErgG)[2] which will be described at the beginning of this chapter (Part II). Moreover, as of 1 September 2009 several other Acts have come into effect: first of all, the Act Amending the Accrued Gains Equalisation Law and the Guardianship Law[3] has led to significant changes in the statutory matrimonial property regime of accrued gains (Part III). Moreover, the Act on the Structural Reform of Pension Rights Adjustment[4] has substantially altered the existing system for the adjustment of pension rights (so-called *Versorgungsausgleich*) (Part IV). Furthermore, the procedure governing family law matters, which was previously laid down in the German Code of Civil Procedure and in the Act on Voluntary Jurisdiction, has been replaced by an integrated Act on Family Law Matters and on Voluntary Jurisdiction, combining the procedure for all family law matters in one Act (Part V). Finally, this chapter will deal with the amendments made to the statute of limitations applicable from 1 January 2010, which have come into force through the Act Amending the Law of Succession and the Statute of Limitations (Part VI) and the Third Guardianship Law Amendment Act which also came into force on 1 September 2009 and includes the legal provision of a living will (Part VII). Although a number of noteworthy decisions by upper courts have further influenced legal developments, this year's survey will confine itself to the abundant legislative activities and close with a brief look at the prospects for the future (Part VIII).

II PREVENTION OF THE MISUSE OF ACKNOWLEDGEMENTS OF PATERNITY

The Paternity Contestation Law Amendment Act (VaAnfRErgG) dated 13 March 2008 introduced a right by the authorities to contest paternity, through which the misuse of acknowledgements of paternity can be countered (cf s 1600(1) no 5).[5] Under German law, the paternity of a man can be established legally by an acknowledgement of paternity, s 1592(2) of the Civil Code (BGB), if the mother is not married when the child is born or if the husband's paternity was successfully contested beforehand. According to the majority opinion, the acknowledgement of paternity is a unilateral declaration of intent which becomes complete without receipt by the other party,[6] but

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1 Dethloff and Kroll 'Strengthening children's rights in German family law', in B Atkin (ed) *International Survey of Family Law 2008 Edition* (Jordan Publishing Limited, 2008) pp 121 et seq.

2 'Gesetz zur Ergänzung des Rechts auf Anfechtung der Vaterschaft' of 13 March 2008, entered into force on 1 June 2008 (BGBl. I 2008, 313).

3 'Gesetz zur Änderung des Zugewinnausgleichs und Vormundschaftsrechts' of 6 July 2009, entered into force on 1 September 2009 (BGBl. I 2009, 1696).

4 'Versorgungsausgleichsgesetz' of 3 April 2009, entered into force on 1 September 2009 (BGBl. I 2009, 700).

5 Cf Dethloff *Familienrecht* (Verlag C H Beck, 29th edn, 2009) § 10 at 41 et seq.

6 Rauscher 'Vaterschaft auf Grund Anerkennung' (2002) *Familie, Partnerschaft, Recht* (FPR) 359, at 360, at 363; Staudinger and Rauscher *Bürgerliches Gesetzbuch* (Sellier and de Gruyter,

requires official recording in view of its far-reaching consequences (s 1597(I)) and for which the mother's consent (s 1595(I)) is required. Accordingly, irrespective of the actual biological descent, it is the person declaring the acknowledgement who is considered to be the father. Paternity thus results from its voluntary assumption, regardless of the motives (belief in descent, love for the mother). Since an acknowledgement can result in the separation of legal and biological paternity, a formalised contestation procedure creates the opportunity to remove the legal paternity of the acknowledging person. For the protection of the child's welfare, considerable restrictions have been placed on the contestation options in terms of person, content and time.

Although the legal structure of paternity by virtue of acknowledgement by a simple declaration is to be welcomed with a view to the child's interests, it also harbours considerable risks of misuse. Since all such acknowledgements have unrestricted effects, including those that are deliberately contrary to the truth, even the person who knows with certainty that he is not the biological father of the child can assume the legal position by means of an acknowledgement, thereby surreptitiously obtaining advantages for himself, the child or the mother, particularly in terms of nationality or migration law. Although it is possible in such a case to contest paternity,[7] until now only a limited number of people immediately affected were authorised to do so (the mother, father, child or potential biological parent). The Paternity Contestation Law Amendment Act has now created a right for the authorities to contest paternity, which can be used to counter the misuse of acknowledgements of paternity (cf s 1600(1) no 5).[8] Moreover, registrars are to refuse the notarisation of acknowledgements of paternity if it is obvious that the acknowledgement of paternity could in fact be contested by the authorities (s 44(1) sentence 3 of the Personal Status Law, *Personenstandsgesetz* (PStG)).[9] In this way the Act aims to counteract the misuse of acknowledgements of paternity by means of which nationality, the right of residence and, indirectly, social benefits are to be obtained surreptitiously.[10] As a precondition of a right of contestation by the competent authority determined by state law (s 1600(6)), there must not exist, or have existed, a close parent-child relationship between the child and the person acknowledging, and the acknowledgement must have created the legal prerequisites for the child or a parent to be granted either permission to enter the country or permission of residence (s 1600(2)). The fact that contestation is ruled out where close parent-child relationships exist is due to constitutional parameters. The social family itself is also protected by art 6 of the Basic Law (*Grundgesetz* (GG)).[11] However, where there exist no such family ties, the

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13th edn, 1993ff) § 1592 at 51 et seq; for a different opinion see Palandt/Diederichsen *Bürgerliches Gesetzbuch* (C H Beck, 69th edn, 2010), § 1594 at 4 (dual nature: also declaration of fact).

7 OLG Naumburg (2008) FamRZ 2146; Münchener Kommentar and Wellenhofer *Bürgerliches Gesetzbuch* (C H Beck, 5th edn, 2008) § 1594 at 4.

8 Cf Dethloff (n 5 above), § 10 at 41 et seq.

9 Cf art 2 of the Gesetz zur Ergänzung des Rechts zur Anfechtung der Vaterschaft (VaAnfRErgG) of 13 March 2008, entered into force on 1 June 2008 (BGBl. I 2008, 313).

10 BT-Drucks 16/3291, 9 et seq.

11 BT-Drucks 16/3291, at 11.

requirements for a right to contestation by the authorities are not high. The mere objective existence of benefits in terms of migration law is sufficient for the presumption of misuse. A corresponding intention to misuse is not required.[12]

The fact that in this way acknowledgements of paternity which have consequences in terms of nationality or migration law become subject to general suspicion must be a cause for concern.[13] The consequences of successful contestation by the authorities include the retroactive cessation of the genetically inaccurate legal paternity but also, in particular, the similarly retroactive cessation of the child's German nationality, or the possibility of a revocation of a right of residence that has already been granted.[14] It seems doubtful whether these consequences constitute an appropriate reaction. After all, the victim is often the child, who is threatened by the loss of his or her familiar environment, language and social network even though the child has not participated in the legal manipulation attempted by his or her parents.[15] However, a certain degree of protection is ensured by restricting the authorities' right to contestation, in accordance with BGB, s 1600b(1a), to one year after the facts relevant to contestation became known, or to a maximum of 5 years after the acknowledgement of paternity took effect or after a child born abroad entered Germany.[16]

III EQUALISATION OF ACCRUED GAINS

On 1 September 2009 the Act Amending the Accrued Gains Equalisation Law and the Guardianship Law came into force.[17] The legislator has thus responded to growing criticism claiming that, although the equalisation of accrued gains has proved to be, in general, an appropriate instrument for financial adjustment upon divorce, some provisions could hardly be reconciled with the purpose of the legal institution.

The idea behind the equalisation of accrued gains is that upon termination of the marriage both spouses are to take an equal part in the gains accrued during marriage. Although the law in this context does not provide for the creation of joint assets or a direct participation in the partner's assets, according to BGB, s 1378(1) it does grant the spouse with a lower increase in assets (accrued gains) a monetary entitlement to half of the difference between the accrued gains of

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12 MünchKomm/Wellenhofer, (n 7 above), § 1600 at 19.

13 Finger 'Anfechtung der Vaterschaft/der Ehelichkeit, §§ 1600 et seq. BGB; zu den geplanten Gesetzesänderungen – Unterhaltsregress und Schadensersatz' (2007) *Juristische Rundschau* (JR) 50, at 56; Genenger 'Von der Einschränkung zur Erweiterung des Vaterschaftsanfechtungsrechts' (2007) FPR 155, at 157.

14 MünchKomm/Wellenhofer (n 7 above), § 1600 at 21; generally on the impact of an application for contestation, Dethloff (n 5 above), § 10 at 58 et seq.

15 Mach-Hour 'Das behördliche Anfechtungsrecht der Vaterschaft und die Folgen für die Kinder' (2009) FPR 147, at 149.

16 Cf Dethloff (n 5 above), § 10 at 44 et seq.

17 For details see BT-Drucks 16/13027 and 16/10798.

both partners. In this way, the assets accrued during the time of marriage are divided in half. The justification for such a division results from the fact that the acquisition of assets during marriage is normally based on the participation of both partners.[18] As a result of the joint creation of value, therefore, the assets must be given to both spouses in equal parts on termination of the matrimonial property regime. This idea of contributory accrual of assets unfolds particular legitimatory force in single-earner marriages, for which the community of accrued gains was originally designed. The partner who assumes responsibility for looking after the children and managing the household enables the other partner to participate fully in professional life and thus helps generate the assets of the gainfully employed partner.[19] The assets acquired by the gainfully employed spouse during the marriage are thus to be considered the result of a joint lifetime's activity. In a marriage where the tasks are divided this equalisation of accrued gains can also be justified as a compensation for the marriage-related renunciation of gainful employment by one spouse. If a spouse fails to accumulate his or her own assets due to the agreed division of tasks, the equalisation of accrued gains ensures that this spouse's failure to organise his or her own economic provisions can be made good.[20]

The criticism which ultimately led to a reform of the equalisation of accrued gains on 1 September 2009 was founded, in particular, on the fact that the participation, by the homemaking spouse, in the partner's income in some cases does not take sufficiently into account the value-creating performance of the former.[21] For example, for the first time the calculation of the accrued gains of the spouses now also takes into account negative initial or final assets. So far, the initial or final assets could not be less than zero; now, however, BGB, ss 1374(3) and 1375(1) sentence 2 provide that liabilities must be deducted beyond the amount of the assets. This is appropriate in view of the fact that the repayment of debt during a marriage is also based on the many and varied activities of the partner. In this way the repayment of debts during a marriage by means of joint achievements by the partners is recognised as an economic accrued gain, which thus needs to be taken into account.

In previous legislation, the protection of the spouse entitled to equalisation against unfair asset manipulation by the partner was in many respects insufficient.[22] Here, in particular, we can see the persistent weakness of a purely monetary equalisation claim, which does not provide for immediate joint ownership of assets but presumes that assets are accounted for at a specific

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18 On the legitimation of the equalisation of accrued gains in detail, Dethloff in *Gutachten A für den 67. Deutschen Juristentag* (2008) at A 87 et seq.

19 Bundesgerichtshof (BGH) (1981) FamRZ 239, at 240.

20 Lieb 'Die Ehegattenmitarbeit im Spannungsfeld zwischen Rechtsgeschäft, Bereicherungsausgleich und gesetzlichem Güterstand' (1970) at 183.

21 For more details see Koch 'Die geplanten Neuregelungen des Zugewinnausgleichs' (2008) FamRZ 1124 et seq.

22 See Brudermüller 'Die Neuregelungen im Recht des Zugewinnausgleichs ab 1.9.2009 – Negatives Anfangs- und Endvermögen, erweiterte Auskunftspflichten, Änderung des Stichtags, Konkretisierung der Beweislast' (2009) FamRZ 1185, at 1188.

qualifying date.[23] Before 1 January 2009, the BGB knew of two different qualifying dates in this respect. For the calculation of the accrued gains of both spouses the decisive date was the date on which the application for divorce became pending, but the actual equalisation claim was limited by the assets existing at the time of divorce. The spouse entitled to equalisation was thus without protection against unfair manipulation by the partner during divorce proceedings. The reform of the equalisation of accrued gains has now harmonised the relevant dates. According to BGB, s 1384 it is now the time at which the application for divorce becomes pending that is decisive for both the calculation of the accrued gains and for the amount of the equalisation claim, so subsequent changes in assets no longer affect the amount of the entitlement. The legal position of the spouse entitled to equalisation has thus been improved substantially.

Another novelty is the protective provision introduced with the reform, which is designed to counteract asset manipulation performed while the marriage was intact. Previously, BGB, s 1375(2) already provided that reductions in assets performed with an intent to place the other spouse at a disadvantage were to be added back to the final assets of the spouse concerned when calculating their accrued gains. In that spouse's balance of assets, therefore, the value of the asset in question still appears. Since the amount of the equalisation claim is, however, limited by the assets actually in existence when the application for divorce became pending, the spouse entitled to equalisation in many cases nevertheless received less than they could have claimed without the unfair reduction in assets. This incongruence is now being removed by BGB, s 1378(2) sentence 2, which provides that the full amount of the unfair reduction in assets must be added to the existing assets. In such cases, therefore, the owing spouse must surrender not only their entire assets but also incur debts in order to meet the equalisation claim.[24] In this way the result achieved is the same as if the unfairly used amount still formed part of the assets of the person owing. He or she does not merit protection in this respect.[25]

The reform also aims to promote the realisation of equal sharing by improving the rights to information for spouses concerning their partner's assets. According to BGB, s 1379(1) sentence 1 no 1, now there is also a duty to provide information about the assets at the time of separation. The right to information, according to BGB, s 1379(2), exists from the date of separation onwards. According to BGB, s 1379(1) sentence 2, proof is to be presented on demand. Since the spouses in most cases are ignorant of the development of their partner's financial situation during the separation stage, this newly introduced right to information, supplements the protection against disloyal reductions in assets.[26] If the assets reported at the time of separation are less than what they were when the application for divorce became pending, the

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[23] On the benefits of the matrimonial property regime of a community of property, see Dethloff (n 18 above), at A 112 et seq.

[24] MünchKomm/Koch (n 7 above), § 1378 at 8.

[25] Dethloff (n 5 above), § 5 at 111.

[26] BT-Drucks 16/13027, at 7.

spouse concerned must now, in accordance with BGB, s 1375(2) sentence 2, demonstrate and prove that the reduction in assets is not due to unfair actions.

The reform of the equalisation of accrued gains has, in particular, also improved the preliminary legal protection against unfair asset shifts. In such situations it becomes necessary to calculate the accrued gains not with reference to the date on which the application for divorce became pending, but prematurely, and to terminate the matrimonial property regime early. Unlike the previous legislation, the premature termination of the community of accrued gains and the associated premature equalisation of accrued gains is now, according to BGB, s 1385 no 2, possible even if a spouse is merely concerned that unfair asset manipulation might be taking place, whereas under the previous legislation such actions needed to have actually taken place.

However, whether and to what extent the new legal provisions will, in practice, actually lead to the envisaged improved protection of the spouse who is entitled to equalisation remains to be seen.

IV PENSION RIGHTS ADJUSTMENT

The Act on the Structural Reform of Pension Rights Adjustment (VAStrRefG) also came into force on 1 September 2009.[27] The purpose of the legal institution of pension rights adjustment (*Versorgungsausgleich*), which was introduced in German law back in 1977 without parallel outside Germany, is primarily to provide the divorced partner who acquired no or a lower entitlement to a pension with an independent provision for old age. The justification for pension rights adjustment is considered to be, in particular, the continuation of the idea of the equalisation of accrued gains.[28] Through pension rights adjustment one partner participates, on divorce, in the entitlements of the other partner to provision for old age or reduced earning capacity. Such participation, like the participation in assets already acquired, is generally justified by the fact that both partners contributed to their creation through their respective activities.[29] At the same time, however, the pension rights adjustment – just like the equalisation of accrued gains – can be understood as compensation for the renunciation by the homemaking partner of their own gainful employment, because the equalisation of pensions creates pension provisions in cases where they are missing on account of the homemaking.[30] The equalisation itself is performed – following the example of the equalisation of accrued gains – via a division in half of the pension entitlements acquired by both partners during the marriage.

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27 See BT-Drucks 16/11903 and 16/10144.

28 On the legitimation of the equalisation of accrued gains, see in detail Dethloff (n 18 above), at A 115 et seq.

29 See also Federal Constitutional Court (BVerfG) (1986) FamRZ 875, at 876.

30 BGH (2007) FamRZ 1964, at 1965.

Even though the legal institution had proved its worth in the past and made an important contribution to combating old-age poverty, which is found primarily among divorced women,[31] a reform of pension rights adjustment was urgently required. The increase in private and corporate pension provisions, in particular, which unlike the statutory pension scheme are not based on a pay-as-you-go model, constituted a fresh challenge for pension rights adjustment in its earlier form. Previously, equalisation was achieved by drawing up a balance sheet of the entitlement of the partners, where the partner with the overall lower pension entitlements was able to claim equalisation by the transfer of pension entitlements in the statutory pension scheme ('one-off equalisation'); consequently it was necessary to make different types of pension entitlements comparable for accounting purposes and thus to convert them to pension entitlements in the statutory pension scheme. In a large number of cases this led to grave inaccuracies and therefore to unjust distribution. The legislator has now responded to this injustice through a fundamental reform of pension rights adjustment. The main goal of the structural reform of pension rights adjustment was not only to do justice to the special features of the asset positions that were to be equalised, but also to simplify the procedure; the procedure is more complicated than in the case of the equalisation of accrued gains only because the equalisation of pensions cannot be carried out without the participation of third parties in the shape of the pension paying institution.[32]

In order to ensure the uniform evaluation of all the entitlements that are to be equalised, the central principle of what is called 'back and forth equalisation' (*Hin-und-Her-Ausgleich*) now applies. According to s 1 of the Pension Rights Adjustment Act (VersAusglG), every pension entitlement that is acquired during the marriage is, as a matter of principle, divided up between the spouses in equal shares. Half of each pension entitlement is then transferred to the partner. In contrast to the previous situation, therefore, every spouse is obliged to equalise his or her own pension entitlements and entitled to equalisation regarding the pension entitlements of his or her partner. In future, no netting of pension entitlements will take place. In this way the spouses participate equally in the future development of the entitlements; this avoids or at least reduces, in particular, subsequent corrections of faulty calculations and incorrect forecasts about the future of entitlements requiring equalisation.

However, the flip side and thus an aspect of the new law which has come in for some criticism is the fact that the hoped-for simplification will be at the expense of insurers.[33] Since every entitlement must now be divided up into equal shares, insurers have to open new insurance accounts for the spouse on divorce, in order to be able to transfer half of the entitlement in question. In order to

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31 For the legal facts, see also Dethloff (n 18 above), at A 117.

32 For the requirements placed on pension rights adjustment by a changing provision reality, see also Gernhuber and Coester-Waltjen *Familienrecht* (C H Beck, 6th edn, 2010) § 28 at 5.

33 Bergner 'Stellungnahme und Alternativvorschlag zum Referentenentwurf des BMJ für ein Gesetz zur Strukturreform des Versorgungsausgleichs' (2008) *Familie und Recht* (FuR) special supplement to no 5/2008.

counter the increased expenses at least to some extent, however, according to VersAusglG, s 18 II entitlements with an equalisation total below a certain level are to be disregarded. Furthermore, when short marriages lasting for no more than three years end in divorce, equalisation only takes place following an application by one of the spouses, according to VersAusglG, s 3 III. Experience has shown that no entitlements of considerable value are built up in such a short time, so the cost expenditure associated with the division would not be proportionate to the equalisation value of the pension entitlements.

All in all, it can be said that the pension rights adjustment has become more transparent and comprehensible as a result of the reform; before it was the domain of experts – a view shared by many legal experts themselves – and its minute details were mastered by very few.

V PROCEDURE IN FAMILY MATTERS

On 1 September 2009 the Act on the Procedure in Family Matters and in Matters of Non-Contentious Proceedings (FamFG) came into force.[34] It replaces the Act on Matters of Non-Contentious Proceedings (FGG) dated 20 May 1898 and reorganises the proceedings in family matters which were previously laid down in various laws, including the Act on Matters of Non-Contentious Proceedings, the German Code of Civil Procedure, the Civil Code and the Household Effects Ordinance. In a formal respect, the goal was to make the family court procedure easier to understand by largely redressing the previous dispersal of provisions which entailed complicated back and forth referrals.[35] The FamFG now consists of nine books. The first contains the general section; the second deals with family matters, which again is preceded by a general section. For the area of matrimonial proceedings and contradictory family proceedings, however, FamFG, s 113 still makes reference to the provisions of the Code of Civil Procedure. Family actions in this sense are mainly actions concerning maintenance and matrimonial property regimes in marriages and registered partnerships (cf FamFG, s 112 no 1 and no 2). The remaining books deal with other matters of non-contentious proceedings. In terms of content, the key underlying structures of the family court procedure remain in place. However, it is worth highlighting the introduction of the so-called Enlarged Family Court (*Großes Familiengericht*). With the FamFG the competence of the family courts, introduced in 1976 by the First Marriage Reform Act, which had already been expanded in 1997, has now been extended to include further matters previously allocated to the civil courts and guardianship courts.[36] Thus, legal disputes that are actually related can now be

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[34] Art 1 of the Act to Reform the Procedure in Family Matters and in Matters of Non-Contentious Proceedings (FGG-RG) dated 17 December 2008.

[35] Cf the government draft BT-Drucks 16/6308, at 162.

[36] In favour of reform, Dethloff 'Vielfalt der Verfahren – Einheit des Gerichts' (2004) *Festschrift Gerhardt*, 89 at 116 et seq; cf also Johannsen/Henrich/Brudermüller Eherecht (C H Beck, 4th edn, 2003) § 1361a BGB, at 44; Bosch 'Familiengerichtsbarkeit – Bewährung und weiterer Ausbau?' (1980) FamRZ 1, at 9 et seq.

decided together. According to s 23b I of the Code on Court Constitution (*Gerichtsverfassungsgesetz* (GVG)) in conjunction with FamFG, s 111, the family courts formed at the regional court are fully responsible for all family matters. The comprehensive and conclusive catalogue of family matters in FamFG, s 111 will also, in future, include procedures relating to guardianship and the care of minors (FamFG, s 151 nos 4 and 5); the guardianship courts could thus be dissolved), adoption matters pursuant to FamFG, ss 186ff, all proceedings under the Violence Protection Act (FamFG, ss 210ff), matters relating to registered partnerships (FamFG, s 269 I) and other family matters (FamFG, s 266), ie proceedings regarding claims arising on account of a family law relationship or its termination.[37] It also comprises other asset-related claims by the spouses against each other, which exist alongside the law of matrimonial property, in particular, disputes concerning the internal equalisation between joint and several debtors or those relating to the return of marriage-related contributions. Although such claims often arise between cohabitating partners as well, whose relationship is of a comparable close nature, family courts will continue not to be competent to decide on such proceedings.[38]

Of great practical importance is the fact that in certain child-related cases a specific obligation to expedite proceedings now applies (FamFG, s 155). Accordingly, in proceedings concerning the residence of the child, access and the surrender of the child as well as in proceedings due to threats to the child's welfare, the date of the hearing must not be more than one month after the commencement of proceedings. Postponement of the date is permitted only for compelling reasons. The deadline set for expert opinions in FamFG, s 163 also takes account of this obligation to expedite proceedings and is designed to counteract the delays often resulting from obtaining expert opinions.

VI STATUTE OF LIMITATIONS

On 1 January 2010 the Act Amending the Law of Succession and the Statute of Limitations came into force.[39] In addition to amendments to the right to a compulsory portion, it also includes amendments to the statute of limitations which concerns specifically family and succession law claims. The Act to Modernise the Law of Obligation of 2001[40] fundamentally changed the statutory limitation rules of the general section of the German Civil Code. Since then, the period of limitation is in general only 3 rather than 30 years. The amendments were adopted in a large number of supplementary statutes in 2004.[41] However, by way of derogation a 30-year limitation period continued to apply in the area of family and succession law claims (BGB, s 197(1) no 2); the

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37 Cf Kroiß and Seiler *Das neue FamFG* (Nomos, 2009) § 1 at 24.
38 Critically in this respect, Dethloff (n 36 above), 89, at 111.
39 BGBl. 2009 I, 3142.
40 BGBl. 2001 I, 3138.
41 Cf the Act Adapting the Statutory Limitation Rules to the Act to Modernise the Law of Obligations, BGBl. 2004 I, 3214.

stated justification for this being that the decisive circumstances can in some cases only be clarified a long time after the claim arises.[42] Although this line of reasoning might have been convincing in succession law claims, it was less so in family law ones.[43]

With effect from 1 January 2010, BGB, s 197(1) no 2 has been repealed and a general limitation period of 3 years introduced for family and succession law claims as well (BGB, s 195). However, according to BGB, s 200 this period does not begin with the creation of the claim (objective point of reference); rather, according to BGB, s 199(1) it begins upon expiry of the first year in which the claim existed and the creditor (cumulatively) either became aware of the circumstances substantiating the claim or grossly negligently failed in this respect (subjective point of reference).

However, certain exceptions to this rule remain. For family law claims the following applies: according to BGB, s 194(2), forward looking claims arising from a family-law relationship will continue not to be subject to the statute of limitations. This refers, for example, to maintenance claims *for the future* against spouses (including divorced ones), registered life partners and relatives.[44] Moreover, in individual cases the objective starting date of the limitation period remains in force (for example, in accordance with BGB, s 1390(3) for claims against third parties in the context of the equalisation of accrued gains or according to BGB, s 1302 for claims in connection with the dissolution of an engagement, although this latter instance is of little relevance in practice).

Shortening the limitation period for family law claims is attenuated by the fact that BGB, s 207 continues to provide for suspension of the statute of limitations for family reasons. Thus the limitation period does not continue during the marriage or life partnership, the parent/child relationship, the guardianship or custodianship.

For family law claims, the amendments have the following impact:[45] claims for the equalisation of accrued gains pursuant to BGB, ss 1372 et seq (which according to the old version of BGB, s 1378(4) were already previously subject to a 3-year limitation period) and claims for compensation due to marriage-related contributions pursuant to BGB, s 313 now move in tandem in terms of the statute of limitations (3 years with subjective start of the limitation period). Regarding the pension rights adjustment pursuant to BGB, s 1587 in conjunction with the VersAusglG, it is debatable whether this constitutes a claim within the meaning of BGB, s 194(1) (i e whether the statute of limitations actually applies). The legislator assumes that the statute of limitations is at least ruled out pursuant to BGB, s 194(2) to the extent that an

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42 Cf reason given for the draft bill in BT-Drucks 14/6040, at 106.
43 See also the reasoning of the draft bill in BT-Drucks 16/8954, at 11.
44 Cf MünchKomm/Grothe (n 7 above), § 194 at 8.
45 Cf reason given for the draft bill in BT-Drucks 16/8954, 11 et seq.

equalisation takes place among the pension paying institutions;[46] consequently, the change in the law on the statute of limitations has an impact only in the exceptional case when a direct monetary equalisation between the spouses must take place (BGB, s 1587 in conjunction with VersAusglG, ss 20ff). In the parent-child relationship the close ties that continue to exist after the child reaches the age of majority must be taken into account. The shortening of the limitation period to 3 years in conjunction with the old version BGB, s 207 (1) sentence 2 no 2 (suspension of the statute of limitations during minority) would have led to an activation of the statute of limitations on completion of the 21st year. By extending the suspension of the statute of limitations in accordance with the new version BGB, s 207(1) sentence 1 no 2 until the completion of the 21st year of life, despite the shortened limitation period children now have up to the completion of their 24th year to assert their claims or to bring about a suspension of the statute of limitations in another way.

Ultimately, the Act Amending the Law of Succession and the Statute of Limitations systematically transfers the evaluations that were made for the general statute of limitations in the context of the modernisation of the law of obligation in 2001 to family law claims. The 3-year limitation period with a subjective starting point is now only deviated from in cases where special reasons require a differing assessment.

VII LIVING WILL

On 1 September 2009 the Third Guardianship Law Amendment Act (3. BtÄndG) incorporated the living will into the German Civil Code.[47] Before, it existed only as a legal institution designed by judge-made law, but this led to considerable legal uncertainty.[48] The new BGB, s 1901a adopts the previous legislation to a large part, but it allows the person drafting the living will greater freedom in terms of content, a freedom which is, however, offset by stricter procedural provisions.[49]

Living wills are written statements by a person of full age able to give their consent to certain medical measures that are made independently of a specific illness and are designed to state in a binding manner whether this particular measure is desired or not in the event of it becoming necessary (cf BGB, s 1901a(1)).[50] The patient thus exercises his or her right of self-determination with regard to future treatment.[51]

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46 Cf reason given for the draft bill in BT-Drucks 16/8954, 11 et seq.

47 Cf art 1 of the Third Guardianship Law Amendment Act (3. BtÄndG) of 29 July 2009, entered into force on 1 September 2009 (BGBl. I, 2286).

48 Dethloff (n 5 above), § 17 at 24.

49 E Albrecht and A Albrecht 'Die Patientenverfügung – jetzt gesetzlich geregelt' (2009) *Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern* (MittBayNot) 426 et seq.

50 Cf reason given for the draft bill in BT-Drucks 16/8442, at 12.

51 BGH (2003) NJW 1588, at 1589.

A valid living will constitutes not just an indication of the will of the person concerned, but a binding expression of their will,[52] which also binds a legal custodian comprehensively.[53] Under German law a custodian is to be appointed if a person of full age is not able (in whole or in part) to take care of their own affairs in a proper manner (BGB, s 1896(1)) and if custodianship specifically is necessary because there is a need for someone to manage the affairs in question (cf BGB, s 1896(2)).

With a living will the person making the declaration establishes bindingly which medical measures are to be taken or to be refrained from in future. At the same time, however, a living will does not make the subsequent appointment of a custodian dispensable. It is the duty of the custodian to examine first of all whether a valid living will exists. If this is the case, the custodian then has to examine whether the person making the will wanted to regulate the situation that has now occurred (cf BGB, s 1901a(1) sentence 1). If the regulatory content of the living will also includes the situation at hand, BGB, s 1901a(1) sentence 2 transfers to the custodian the duty to enforce comprehensively the will of the person being cared for. Ultimately, the custodian will, if necessary, decide on aspects of the treatment that are not provided for in the living will.

There is no duty to draw up a living will (BGB, s 1901a(3)). A living will that has been drawn up can be revoked informally at any time (BGB, s 1901a(1) sentence 3). General guidelines or desired treatments (eg the wish to be allowed to die in dignity) do not constitute the object of a living will.[54] However, these matters are not wholly insignificant but are – as was previously the case – taken into account in the context of BGB, s 1901(3), which provides that a custodian must, as a matter of principle, comply with the wishes of the person being cared for.

The custodian can only consent to life-threatening measures with the consent of the custodianship court (BGB, s 1904(1)). However, where a living will has been drawn up and where there is agreement between the custodian and the physician in charge that the granting of the consent corresponds to the will of the person being cared for, as set out in the living will (BGB, s 1901a(1)), there is no requirement to obtain the consent of the court (BGB, s 1904(4)).

VIII PROSPECTS

Following our examination of the large number of new provisions made during an exceptionally reform-friendly legislative period, one might think that the

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[52] See BGH (2003) FamRZ 748, at 752; Lipp (2004) FamRZ 317, at 320; Müller (2008) Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV) 583, at 584; for a different opinion see: Spickhoff (2000) NJW 2297, at 2301; *Archiv für civilistische Praxis* (AcP) 208 (2008), 345, at 404 et seq.

[53] Cf reason given for the draft bill in BT-Drucks. 16/8442, at 14.

[54] Cf reason given for the draft bill in BT-Drucks. 16/8442, at 13.

area of family law can now expect a phase of calm and consolidation in the foreseeable future. However, appearances are deceptive at least as far as the area of custody for the children of unmarried partners is concerned, as there is still one reform to come: the European Court of Human Rights ruled on 3 December 2009 that the current German legal provision, according to which fathers cannot obtain custody against the will of the unmarried mother of the child, violates Art 14 in conjunction with Art 8 of the ECHR.[55] According to the ruling, this provision amounts to unjustified discrimination against both the mother and against married fathers, as it is disproportionate for the protection of the illegitimate child to refuse to the father by force of law the seeking of a judicial determination whether joint custody corresponds to the child's welfare. In view of the fact that in most European countries the father obtains joint custody independently of his relationship with the mother, either directly by being the biological father or by being able to apply for custody independently through a court decision, the German legislator's scope – according to the ECHR – is limited by the existing European standard. Consequently, a new provision will have to be created soon which, while respecting the European standards and taking careful account of the actual developments, realises the right of children to the assumption of parental responsibility by both parents in a way that corresponds best to the child's welfare.[56]

Furthermore, the new German Minister of Justice has announced a reform of guardianship law in order to better counter the abuse and neglect of minors in the future.[57] If custody is withdrawn from a parent (BGB, ss 1666 and 1666a), a guardian appointed by the family court assumes full responsibility for the child. The guardian is then obliged to care for the person and assets of the child in a comprehensive manner, in place of the parents (BGB, s 1793). In most cases, guardianship lies with the youth welfare office as the 'official guardian'.[58] Until now, one official guardian often looks after a large number of wards (up to 120 children per full-time employee), which makes sufficient personal care virtually impossible. This can lead to considerable risks to the child's welfare, as even the most serious abuses can remain hidden for a long time. The draft bill submitted by the Federal Ministry of Justice thus provides for an official guardian being allowed to look after no more than 50 wards, and that sufficiently personal contact be established between the guardian and the ward. At the same time,

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55 European Court of Human Rights ruling dated 3.12.2009 – 22028/04 (the decision is available in English at: www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ by searching for application number 22028/04).

56 Cf Dethloff 'EGMR stärkt Rechte der Väter – zum Wohle der Kinder' (2009) NJW-aktuell XII, at XIII; see already Dethloff 'Ein Kindschaftsrechtsrecht für das 21. Jahrhundert' (2009) *Zeitschrift für Kindschaftsrecht und Jugendhilfe* (ZKJ) 141 et seq.

57 Cf Federal Ministry of Justice: press release dated 8 January 2010 (download from: www.bmj.bund.de/enid/0c93171b1e109218ebf90480ae0e0bc9,b537b5706d635f6964092d0936343434093a0979656172092d0932303130093a096d6f6e7468092d093031093a095f7472636964092d0936343434/Pressestelle/Pressemitteilungen_58.html).

58 Cf Hoffmann 'Perspektiven von Vormundschaft und Pflegschaft – Anregungen aus der Betreuung' (2005) *Das Jugendamt* (JAmt) 113, at 116; Studie des Instituts für soziale Arbeit eV (2004) JAmt 228 et seq.

the guardianship law is to be extensively modernised. This means that German family law will remain in motion in the future.

Greece

THE INSTITUTION OF FOSTER CARE FOR MINORS IN GREECE

Penelope Agallopoulou[*]

Résumé

La première réglementation concernant les «familles nourricières», introduite par l'article 9 de la loi no 2082/1992 et par le décret présidentiel no 337/1993, n'était pas considérée comme une réussite. C'est pourquoi la Commission qui a rédigé le projet de loi, qui est devenu la loi 2447/1996, et qui concerne «l'adoption, la tutelle des mineurs, les familles nourricières, l'assistance judiciaire et la surveillance judiciaire des affaires d'autrui», était d'avis que l'institution des «familles nourricières», devait être intégrée dans le Code Civil.

Les articles 1655 à 1665 du Code Civil hellénique régissent désormais les «familles nourricières». Récemment, le décret présidentiel no 86/2009 a réglé les questions d'organisation et de fonctionnement des familles nourricières, dans le cadre de la loi 2447/1996, mais en tenant aussi compte de la réalité sociale de la Grèce, de l'intérêt public, de l'intérêt de l'enfant et des problèmes particuliers – surtout administratifs – qui peuvent découler d'un tel placement d'enfant.

Une «famille nourricière» ou des «parents nourriciers» sont, selon l'article 1655 du Code Civil, des tierces personnes (ou même une personne) chargées de prendre soin du mineur, après un accord avec ses parents naturels ou son tuteur ou, en l'absence d'entente, sur décision judiciaire (l'article 1 du décret présidentiel no 86/2009 définit les conditions que les parents nourriciers doivent remplir). Dans tous les cas, la décision judiciaire doit prendre en considération l'intérêt de l'enfant, lequel doit être consulté, selon son état de maturité, avant que la décision du tribunal ne soit prise. En même temps, le tribunal doit écouter les parents nourriciers, les parents naturels ou le tuteur et il doit prendre en considération le rapport préparé par le Service Social.

L'article 4 du décret présidentiel no 86/2009 prévoit l'attribution d'allocations et la mise en place de services pour les parents d'accueil en vue de les soutenir dans l'exercice de leur fonction.

Il convient de souligner que les liens personnels entre l'enfant placé et ses parents naturels sont maintenus. Il est aussi important de noter que, selon l'article 1660 du

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Code Civil hellénique, lorsque un enfant est intégré dans une famille nourricière et qu'en raison de la durée du placement les rapports avec sa famille naturelle ou son tuteur peuvent s'affaiblir, les parents nourriciers ont la possibilité de demander au tribunal que la garde de l'enfant, de même que l'administration de ses biens, soient retirés en tout ou en partie à ses parents naturels. Dans ce cas, les parents nourriciers deviennent tuteurs de l'enfant.

Il faut aussi mentionner que le décret présidentiel no 86/2009 prévoit non seulement la tenue d'un Registre National des Familles nourricières (art 6) visant le contrôle de celles-ci (art 5), mais également des sanctions en cas de violation des dispositions du décret (art 8).

Enfin, les articles 1662–1663 du Code Civil prévoient la possibilité de révoquer le placement, qu'il ait été ordonné par le tribunal ou qu'il résulte d'une entente.

I INTRODUCTION

(a) Historic survey

Ever since the middle of the nineteenth century the social welfare organisations in Greece began placing certain children in foster families. It is interesting to note that in 1861 the Foundling Home of the Municipality of Athens had placed 35 children in foster families called 'adulterine child's nurses' which were provided with a low monthly subsidy. However, in time, these types of foster care programmes fell into disuse.[1] In Greece the institution of foster care for minors in its current form, ie the form of supplying temporary care to children whose families – for one reason or another – cannot care for them, has been practised by state agencies since 1932.[2]

(b) First legislative regulation of the institution

The first legislative regulation of the institution took effect by art 9 of L 2082/1992 and the Presidential Decree No 337 dated 25 August to 2 September 1993. However, this arrangement was not considered successful for the following reasons:

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1 See J Triseliotis and T Koussidou *The Role of Social Work for the Adoption and the Entrustment to Foster Care* (Athens, 1989) pp 247 et seq; T Koussidou 'Brief Presentation of the Institution of Foster Care in Greece' (1992) 1 *Eklogi* 9 et seq.

2 See Triseliolis and Koussidou, above n 1, pp 247 et seq; I Markantonis, AB Riga, N Fakiolas and Th Behrakis 'Adolescence and Institution of Foster Care in Greece' in I Markantonis and AB Riga *Family Maternity, Foster Care* (Athens, 1991) pp 173 et seq; AB Riga 'Foster Mother' in I Markantonis and AB Riga, ibid, pp 153 et seq; Koussidou, above n 1; X Dimitriou 'The Institution of Foster Care in Greece – Juridical Framework. Perspectives' (1992) 1 *Eklogi* 15 et seq; P Salkitzoglou *Bad Exercise of Parental Care* (Athens, 1993) pp 199 et seq; E Agathonos-Georgopoulou 'Protection of Children out of their Natural Families' in *National Organization of protection of children, Protection of children – Tendencies and Perspectives* (Athens, 1994) p 203.

(1) certain sections of it were not in line with the regulations of the Civil Code regarding parental care;

(2) it clashed with the constitutionally safeguarded principles protecting the family life (art 9(1)(b) of the Constitution), the family (art 21(1) of the Constitution), and the personality (art 5(1) in connection with art 20(1) of the Constitution); and

(3) it was in contradiction with Art 9 of the Convention on the Rights of the Child (CRC) which has been ratified by Greece by L 2101/1992.[3]

(c) Today's statutory regulation

Given the fact that the institution of foster care for minors can indeed play a very important role in our times, L 2447/1996 incorporated the institution of foster care for minors in the Civil Code, regulating its general principles in a special 11-article chapter and leaving the regulation of the particulars for the implementation of the institution to Presidential Decrees. The basis for the formulation of the general principles for the institution of foster care for minors is to be found in the guidelines for the Recommendation No R (87) of the Council of Europe.

Recently the Presidential Decree 86/2009 'For the Organization and Functioning of the Institution of Foster Care for Minors' was issued. This Presidential Decree aims at regulating the issues of the organisation and functioning of the institution of foster care for minors in the framework both of L 2447/1996 and of the social reality of the country. Its main purpose is to serve the public interest, the interest of the minor, and the solution – to the extent that this is possible – to the administrative problems emerging during the enforcement of the institution of foster care by the agencies in charge. Naturally, the body of the more recent legislation has also been taken into consideration for its drafting.

II THE CONCEPT AND THE PARTIES TO PLACEMENT IN FOSTER CARE

(a) The concept

In art 1655 of the Civil Code, foster care is defined as the assumption by third parties (foster parents/foster family) of the actual care of the person of the minor because they were entrusted with it either by way of agreement with the

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[3] See Preamble to L 2447/1996 'Adoption, Tutelage, Foster Care for Minors, Judicial Assistance, Judicial Tutelage of Another's Affairs and Other Similar Dispositions' in I Spyridakis *Civil Code* (2008) pp 657 et seq and 706 et seq.

natural parents or the tutor (guardian) or by way of court ruling.[4] It follows from this stipulation that the main traits of foster care for minors are the following:

- it is of limited content because it only refers to the actual care of the minor;

- it functions only temporarily and as a supplement to parental care or the tutelage of minors given the fact that, as a rule, it does not effect changes in the legal relations between the minor and his natural parents or tutor.

(b) The foster care parties

(i) The minor

Only the minor who is under parental care or tutelage may be placed in foster care. No other precondition is required, such as for example that the minor be born in marriage or out of wedlock. According to the Presidential Decree 86/2009 the entrustment of the minor to foster care is opted for especially in the following cases: derelict children, orphans, or children abandoned by both parents – or, by their mother in the case of out of wedlock children who have not been acknowledged by their father; children who are abused or neglected by their parents or other parties living in the same dwelling; and of minors living in various institutions. In other words this happens in cases where parental care is badly exercised, according to arts 1532 and 1533 of the Civil Code; or for minors under tutelage in the cases where art 1607(2) of the Civil Code is applicable, ie when the care provided by the tutor does not help advance the physical well-being or the mental development of the minor.

The question may be raised whether it is possible for a child under the parental care of an adoptive parent to be placed in foster care. The law specifically refers to natural parents; not generally to parents. Should we assume that in fact the legislature, based on what is usually the case, expressed itself in a way which is narrower than what it really intended? Why should the adoptive parents, when facing problems comparable to those of natural parents, be unable to place their child in foster care by way of concluding the appropriate agreement with the foster parents?[5]

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[4] See P Agallopoulou 'The Institution of Foster Care' (1996) 2 *Kritiki Epitheorissi* 161; I Androulidaki-Dimitriadi 'Foster Families' (1997) 2 *Kritiki Epitheorissi* 22; P Agallopoulou 'The Institution of Foster Care for Minors' in *Essays in Honour of Panayiotis Dimakis* (2002) p 25; E Kounougeri-Manoledaki 'Adoption and Foster Care' (1997) *Armenopoulos* 741; F Skorini-Paparrigopoulou 'The New Foster Care for Minors' (2001) *Chronika Idiotikou Dikaiou* 685; F Skorini-Paparrigopoulou in A Georgiadis and M Stathopoulos (eds) *Annotated Civil Code* (collective work) (2nd edn, 2003) vol VIII, arts 1655 et seq; Th Papachristou *A Manual of Family Law* (3rd edn, 2005) pp 415 et seq; I Spyridakis *Family Law* (2006) pp 834 et seq; E Kounougeri-Manoledaki *Family Law* (4th edn, 2008) vol II, pp 523 et seq.

[5] See I Andloulidaki-Dimitriadi, above n 4, pp 226 et seq; Kounougeri–Manoledaki *Adoption and Foster Care for Minors*, above n 4, p 745; Skorini-Paparrigopoulou, in *Annotated Civil*

(ii) The foster parents

The concept

Article 1, para 1 of the Presidential Decree 86/2009 specifies which family qualifies to become a foster family and what are the requirements for foster parents-to-be. Capable of becoming foster parents (according to art 1533(4), 1607(1) section 1, art 1655 of the Civil Code and art 9 of L 2082/1992) are families consisting of spouses – with or without children – and under exceptional circumstances single persons (unmarried, divorced or widowed) with or without children. In all cases it is preferable that the minor and the foster parents be related. The foster parents may be blood relatives or relatives by marriage alliance, in any degree, with the minor (*relatives' foster care*). In the case of more than one foster care candidate the selection has to be done in the order of reference of the previous section, also taking into account the stipulation of art 2(1)(a) and (b), of the Presidential Decree according to which at all times this has to serve the interest of the child. *Relatives' foster care* is always to be preferred.

In other words, what is being attempted by the Presidential Decree 86/2009 is the setting of limits to the concept of '*relatives' foster care*' set forth in the Civil Code by satisfying the demand for what, according to the civil law legislator, is called privileged foster care.[6] Thus *relatives' foster care* has been deliberately stipulated very broadly so as to include both that of kinship by blood and by marriage alliance without any limit to line or degree of relationship. This is due to the fact that the relative is considered as the best candidate for foster parenthood.

Conditions which the foster parents must fulfil

The Presidential Decree 86/2009 (art 2(2)) specifically stipulates that the placement of a minor in foster care is allowed if the following conditions are cumulatively present:

(1) the foster parents fulfil the age limit requirement and their age difference with the minor entrusted in foster care fulfils the requirements set forth each time by the legislation for adoption (according to arts 1543 and 1544 of the Civil Code, it is required that the adopting parent must on the one hand be at least 30 years of age and not older than 60 and on the other hand older than the adoptee by at least 18 years but not more than 50);

(2) the foster parents and those dwelling with them are in good mental and physical health and especially do not suffer from contagious chronic illnesses;

Code, above n 4, art 1655, no 10 et seq; Papachristou, above n 4, p 416; Kounougeri–Manoledaki *Fam Law*, above n 4, pp 526 et seq.

6 See art 1533(4) of the Civil Code.

(3) the foster parents and those dwelling with them have not been convicted by final judgment or that there are no pending criminal charges against them for offences entailing the loss of parental care (according to art 1537 of the Civil Code) or for the violation of any applicable laws regarding narcotics and the trafficking of persons and organs; and

(4) the foster parents and those dwelling with them possess evidence that they have adequate means to cover the basic living, educational, and health care expenses of the minor and that they themselves are able to personally take care of the minor.

Finally in art 1(2) of the Presidential Decree 86/2009 the rule is introduced that the prerequisites for the adequacy of candidates for foster parenthood need to exist throughout the duration of foster parenthood. Naturally, it follows from this stipulation that the agencies charged with supervision of foster care[7] are responsible for checking – at regular intervals or exceptionally – throughout the duration of foster care to see whether these conditions are present. Besides, this is required of them by art 1665(1) of the Civil Code.

Documents the prospective foster parents need to produce

In art 3(1) of the Presidential Decree, are listed the documents the prospective foster parents need to bring to the appropriate agency for the supervision of foster parenthood. This is so that the adequacy and suitability of the foster parents-to-be may be proven, always with the criterion of securing the best possible living conditions for the minor in mind.

Following the presentation of the necessary documents by the interested parties, the appropriate agency needs to conduct a social investigation to verify the adequacy of the candidates for foster parenting so that they may be recorded in the National Register of Foster Care for Minors (art 6(1) of the Presidential Decree).[8] Special consideration is given to whether the applicant has participated in the fast training programme for prospective foster parents, evidenced by the relevant certificate.[9] At the completion of the investigation, which has to be completed within 6 months, the agency immediately communicates its decision to the Institute of Social Protection and Solidarity for the name of the candidates for foster parenthood to be entered in the above-mentioned register.

Benefits and facilities given to the foster parents

Article 4 of the Presidential Decree 86/2009 refers to the benefits and facilities given to foster parents to enable them to cope with the financial burden they

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7 Concerning the agencies charged with the supervision of foster care see Part IV below.

8 See Part III below.

9 In art 7 of the Presidential Decree 86/2009 it is stipulated that the agencies of supervision of foster care may set forth intensive programmes to train foster parents and subsequently provide them with certificates of attendance.

have assumed as a result of having undertaken the actual care of the child (financial assistance to cover current needs, financial assistance for special needs – especially in the domain of health – following a decision of the agency supervising foster care, honorary awards, etc). At this point it should be noted that, when the natural parents or the tutor, always with the interest of the minor in mind, place the child in a foster family – preferably with relatives – concluding with them the relevant agreement, financial assistance is provided to the foster parents only when the party responsible for providing the means of support to the minor is unable to do so. The inability to provide the means of support needs to be evidenced – in particular – by a certificate of penury or by the tax returns of the past 3 years.

III NATIONAL REGISTER OF FOSTER CARE FOR MINORS

Article 6(1) of the Presidential Decree stipulates the keeping of the National Register of Foster Care for Minors. The process and items introduced into the National Register of Foster Care for Minors as well as the regulation of all necessary details are determined by a decision of the Ministers of Justice and Health and Social Solidarity following a previous concurrent opinion of the Hellenic Data Protection Authority.

The keeping of the register was considered necessary, in case no appropriate persons are appointed by the interested parties or none of them is interested in becoming a foster parent. In such cases the court may appoint as a foster family one of the families registered in the National Register of Foster Care for Minors.

IV THE PROCESS OF THE MINOR'S PLACEMENT IN FOSTER CARE

Placement in foster care is done either by way of agreement between the foster and natural parents or tutor or by way of a court ruling (art 1655 of the Civil Code).

(a) Placement by way of agreement

(i) Agreement between natural parents or tutor and foster parents

Agreement between natural parents and foster parents

- Regarding the foster parents it is required that they have legal capacity and that the above-mentioned conditions[10] of the Presidential Decree 86/2009 concur.

- Regarding the natural parents the following is accepted:

  – even minor parents may conclude an agreement regarding the foster care of their child;[11]
  – if one of the parents has previously died or is declared missing or has given up parental care or has been placed under privative judicial assistance (a form of guardianship for adults) in whole or under privative judicial assistance in part – which, however, includes the possibility on that parent's part to conclude foster parent agreements – then the agreement is concluded by the other parent alone;[12]
  – if the child is born out of wedlock and has not been acknowledged by the father, the foster care agreement is concluded by the mother alone;
  – if, finally, the exercise of parental care belongs only to one of the parents,[13] it is considered fairer to accept that both parents conclude the foster care agreement, given the fact that the matter in question pertains to 'the core' of parental care.[14]

Agreement between tutor and foster parents

Where none of the natural parents has or is able to exercise parental care, the child is placed under tutelage and subsequently only the tutor may conclude the foster care agreement with the foster parents, provided that the terms specified by law are upheld (ie the court needs to have given permission following the opinion given by the supervisory council consulted). The foster care agreement is informal. Consequently, it may be concluded in writing or orally.

At this point it needs to be noted that, if the right natural person cannot be found to be appointed as the child's tutor, it is possible for a legal person to be

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[10] See Part II(b)(ii) 'Conditions which the foster parents must fulfil'.

[11] See Skorini-Paparigopoulou, above n 4, art 1655, no 32; Kounougeri-Manoledaki *Fam Law*, above n 4, 531.

[12] See Agallopoulou *The Institution of Foster Care,* above n 4, p 28.

[13] It concerns the case where the exercise of parental care, after a divorce or the interruption of conjugal life, is granted to one of the parents or the case of a child born out of wedlock and not acknowledged by the father where the exercise of parental care belongs to the mother.

[14] See Skorini-Paparigopoulou, above n 4, art 1655, no 34; Papachristou, above n 4, p 416; Kounougeri-Manoledaki *Family Law,* above n 4, p 532.

appointed as tutor. According to art 1600 of the Civil Code, a foundation or an association may be appointed as tutor provided it has been established precisely for this purpose and has the necessary staff and structure. Such a legal person subsequently proceeds with the process of placement in foster care.

It should be stated that art 3(2) of the Presidential Decree 86/2009 mentions the supporting documents required to accompany the minor who is to be placed in foster care following court ruling or agreement between a legal person appointed as a tutor (according to art 1600 of the Civil Code) and the foster parent. The following documents are specifically required:

(a) in the case of orphans, the death certificate of the parents and a certificate by the agencies in charge that the care of the minor has not been entrusted to another natural person;

(b) in the case of single-parent families, the application of the single parent;

(c) in the case of children abandoned by both parents, derelict, abused or neglected, any kind of public document or other evidential material issued by the legal agency in charge from which may be derived the fact of abandonment, dereliction, abuse or neglect of the minor;

(d) final court ruling regarding the appointment of a tutor.

In art 2 of the Presidential Decree 86/2009, it is also stipulated that, in the case of the placement of a minor in a foster family by a legal person entrusted with the minor's tutelage according to art 1600 of the Civil Code and with agreement being concluded in writing, it should be mentioned that the tutor has been made aware of the content of the stipulations of the Civil Code and of the Presidential Decree and has accepted without reservations the preconditions and limitations resulting from them.

(ii) Notification of the social service

When the placement is done by agreement it is explicitly stated by the law (art 1655(2) of the Civil Code) that both the natural parents or the tutor and the foster parents are required to notify the social service of the agreement without delay. According to art 6(4) of the Presidential Decree, the natural parents or the tutor and the foster parents have the burden of notification of the social service independently. Omission of such notification by the foster parent or inexcusably delayed notification entail (for as long as the notification is not done) withholding of the benefits and facilities from the foster parents spelled out in art 4 of the Presidential Decree 86/2009.

(b) Placement by way of court ruling

(i) Issuance of the court ruling

Articles 1532, 1533 and 1607 of the Civil Code govern the case of the minor's placement to a foster family by way of a court ruling. This happens when parental care is badly exercised or, if the child is under tutelage, when the physical well-being of the minor or mental development are not advanced with the services provided by the tutor. The court competent to rule in this case is the One-member Court of First Instance ruling ex parte.[15]

Regarding the placement in foster care by way of court ruling, art 1664 of the Civil Code stipulates that, since it has to be in agreement with the interests of the minor,[16] the court, prior to deciding, needs to listen to the minor's opinion as well, according to the minor's level of maturity. The court must also hear the foster parents as well as the natural parents or the tutor and also take into account the report filed by the competent social department.

(ii) Notification of the Social Service

In the case of placement in foster care by way of court ruling, according to art 6(4) section 2 of the Presidential Decree 86/2009, the notification to the appropriate social service is done within a reasonable time, care of the secretary of the court that ruled in the case, and is directed to the appropriate social service.

V THE LEGAL CONSEQUENCES OF PLACEMENT IN FOSTER CARE

(a) Legal relations between the minor and the natural parents or the tutor

According to art 1655 of the Civil Code the legal relations between the minor and the natural family or the tutor – especially those resulting from parental care or tutelage – remain unaltered unless otherwise ruled by the law.[17]

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[15] On bad exercise of parental care, see art 121 of the Introductory Law of the Civil Code and arts 739 et seq of the Code of Civil Procedure. For the incompetence of the guardian of the minor to fulfil the tutelage duties, see arts 739, 740(1) and 796 of the Code of Civil Procedure. See also Spyridakis *Family Law,* above n 4, pp 839 and 798.

[16] See 'Decision of the Tribunal of First Instance of Thessaloniki 7458/2003' (2003) *Armenopoulos* 289 and 'Decision of the Tribunal of First Instance of Thessaloniki 33777/2005' in Data Bank 'Nomos'.

[17] See arts 1532(2), 1533(1), 1535, 1607, 1660, 1661 of the Civil Code, which rule otherwise.

(b) Obligations and rights of the foster parents

(i) Obligations

According to arts 1656–1658 of the Civil Code the foster parents should:

- facilitate the personal relationships and communication between the minor and the natural parents or tutor;
- provide unfailingly to the natural parents or the tutor, the same as to the social service, information regarding the person, living conditions, and development of the minor;
- not act against the will of the natural parents or the tutor, if it has been explicitly stated.

(ii) Powers and rights

The rule

Regarding the powers and rights of the foster parents it is stipulated in art 1659 of the Civil Code that in the name and on behalf of the natural family or the tutor they exercise all that is necessary for the care of the current and urgent needs of the minor. Naturally, in any case they have the right, prior to taking any decision affecting the minor, to give the chance to the natural parents or the tutor to express their view.

Removal of powers from the natural parents or the tutor

(a) If the minor's integration into the foster family becomes more constant, while at the same time the bonds with the natural parents weaken, the foster parents are entitled to petition the court (the One-member First Instance Court ruling ex parte)[18] to take away from the natural parents, in part or in whole, the care of the minor's person or also the administration of the minor's assets (art 1660 of the Civil Code).

In the case of the removal of powers from the natural parents, the law rightly stipulates that a court ruling is required. Besides, the same is upheld by the above-mentioned Recommendation of the Council of Europe.[19] In this case the requirement for a court ruling is justified given the fact that the foster parents, due to the more constant integration of the minor into the foster family and the subsequent weakening of the bonds with the natural parents, ask to be given the care of the minor's person and the administration of the minor's assets. In this case the relations between the minor and the foster parents are governed by the provisions of tutelage directly (when the foster parents undertake the parental care in

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[18] See art 121 of the Introductory Law of the Civil Code.

[19] See Part I(c) above.

its entirety) or by way of analogy (when only the care of the minor's person – in part or in whole – is entrusted to them).

(b) If the minor is under tutelage and the bonds with the tutor weaken, the foster parents may petition the court either that they be appointed as co-tutors or that the tutelage as a whole be given to them (art 1661 of the Civil Code). Co-tutors will be appointed when only the care of the minor's person is taken away from the tutor but not the administration of the assets as well. However, it is possible that the exercise of parental care as a whole be entrusted to the foster parents.

(c) Naturally, it needs to be emphasised that in order for the court to issue a ruling that would serve the interest of the minor it is necessary for the minor's opinion not only to be heard (as stipulated in art 1664 of the Civil Code) – according to the minor's level of maturity – but also to be taken into consideration. In other words the stipulation in art 1511(3) of the Civil Code, which rules the same regarding the exercise of parental care where the interests of the minor are affected, must apply by analogy.

Should the court omit to hear the minor's opinion in the matter and to take it into consideration, the court ruling would have to explain the reasons for this. Otherwise, the ruling may be modified later on following an appeal or be reversed.[20] The court must also hear the foster parents as well as the natural parents or the tutor and take further into account the report filed by the competent social department.

VI SUPERVISION OF FOSTER CARE

Article 5 of the Presidential Decree 86/2009 spells out in specifics the stipulation of art 1665(1) of the Civil Code and determines the agencies for supervising foster care: they are public agencies and this is so due to the fact that in our country the 'Social Service' provided for by L 2447/1996 has not been constituted as yet.

The competent agency for the supervision of foster care shall:

(1) arrange meetings with the foster family, in order to ascertain the living and upbringing conditions of the minor under foster care;

(2) pay on a regular basis the financial assistance due to the foster family; and

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[20] See G Koumantos *Family Law* (1989) vol II, p 177; Kounougeri-Manoledaki *Family Law*, above n 4, pp 301 et seq; P Agallopoulou 'The Role of the Opinion of the Minor to the Formation of the Court Ruling for the Regulation of the Exercise of Parental Care in Case of Divorce or Interruption of the Conjugal Life of his Parents' in *Essays in Honour of Alkis Argyriadis* (1995) vol I, p 5.

(3) work together with the foster parents, in a constructive way, and treat them with due respect, without any discrimination on the basis of their social or financial condition or their political or religious beliefs.[21]

Finally, it is worth noting that, unless the court needs extra-ordinary information, the agencies which are competent for the supervision of foster care have to compose and send a report to the court on the above-mentioned activities every 6 months.

VII SANCTIONS

The sanctions for those in violation of the stipulations of the Presidential Decree are listed in art 8 of the Presidential Decree. Naturally, these sanctions are applied in addition to other sanctions found in the existing legislation – criminal or administrative. More concretely:

(1) The foster parent who violates the provisions of the decree, other than the sanctions provided for by law, loses the qualification for foster parenthood for one year from the issuance of the agency's decision attesting to the matter. In the case of relapse the qualification for foster parent is definitively lost.

(2) Specifically, the foster parent sentenced by final judgment for an offence entailing forfeiture of the office of parental care (offences committed fraudulently and relating to the life, health and morality of the minor) or for abuse or neglect of the minor, or for offences against the sexual freedom or for violation of the existing legislation on narcotics or the trafficking of persons or organs, forfeits ipso jure the qualification for foster parenthood and may never in the future be considered for foster parenting (arts 1662 and 1663 of the Civil Code referring to the lifting of placement in foster care). The relevant decision is served on the foster parent and the Institute of Social Protection and Solidarity in order to be recorded in the National Register of Foster Parents for Minors.

VIII THE LIFTING OF THE PLACEMENT IN FOSTER CARE

With regard to the lifting of the placement of the minor in foster care, art 1662 of the Civil Code distinguishes between whether the placement was done by way of agreement or by way of court ruling.

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[21] See L 3304/2005 on the application of equal treatment regardless of racial or ethnic background, religious or other beliefs, disability, age or sexual orientation.

(a) Placement in foster care by way of agreement

In the case of placement by way of agreement it is stipulated that, with the exception of the cases in which powers were removed from the natural parents or the tutor (arts 1660–1661 of the Civil Code), in which case revocation is impossible, the natural parents who entrusted the care of the person of the minor to foster parents have the right to revoke it at any time.

(b) Placement in foster care by way of court ruling

If the placement was done by way of court ruling and in the meantime nothing has arisen to take away powers from the natural parents or the tutor (arts 1660–1661 of the Civil Code), in which case revocation is impossible, the court may terminate the placement upon the request of the natural parents or the tutor, provided that the court ascertains that the reasons which gave rise to the placement are no longer present. Also the court may lift the specific placement and entrust other parties with the care of the minor, following the petition of the natural parents or the tutor, other relatives, the public prosecutor or even ipso jure when it is established that the foster family cannot carry out its responsibilities.

In the above cases the stipulation of art 1664 of the Civil Code is applied, according to which the court hears the opinions of the minor, the foster parents, the natural parents or the tutor, and also takes into consideration the report of the social service in charge.

IX CONCLUSION

Doubtless, the integration of the institution of foster care for minors into the Civil Code of Greece is a very important novelty. However, the fact that only the general principles of the institution of foster care for minors were included in it – whereas the regulation of matters regarding the organisation and functioning of the institution were left to future Presidential Decrees – created uncertainty resulting in problems with regard to its right application. Of course, the recent issuance of the Presidential Decree 86/2009 will help with the right implementation of the institution in the future.

In concluding, we would like to point out that foster care for adults – consisting in foster care for adults with special needs and foster care for seniors (as referenced in art 65(3) of L 2447/1996) – should also be regulated by the Civil Code in the future. In a way, this will constitute a supplement to the institution of judicial assistance because it will cover all those cases where, regardless of whether some adults have or have not been placed under judicial assistance, they are in need of care and attention inside a family setting which they do not have.

Gulf States: Bahrain, Qatar, United Arab Emirates

FIRST TIME FAMILY LAW CODIFICATIONS IN THREE GULF STATES

Lynn Welchman[*]

Résumé

Trois pays arabes du Golfe ont codifié leur droit musulman de la famille dans le courant des cinq dernières années – les Émirats arabes unis (EAU) en 2005, le Qatar en 2006 et le Bahreïn en 2009, ce dernier ayant a adopté, à l'issue d'un débat national protégé, la «Partie I» de son code qui s'applique au sein des tribunaux sunnites. Ces trois législations ont de nombreux points communs avec les codifications qu'ont connues précédemment d'autres pays arabes du Golfe en matières familiales (Koweit et Oman), mais sur certains aspects ils s'en éloignent, de même qu'il se démarquent entre eux. Ce survol, basé sur la version arabe des textes législatifs, en résume les aspects les plus importants dans les domaines suivants: les procédures d'enregistrement, l'âge de capacité et de nubilité, l'autorité parentale, la polygamie, les droits et obligations des époux, le divorce, le doit de garde et la filiation.

I INTRODUCTION

In the last 5 years, three Arab states in the Gulf have issued Muslim family codifications for the first time – the United Arab Emirates (2005), Qatar (2006) and most recently Bahrain, where in May 2009 a codified family law was passed for the Sunni section of Bahraini society.[1] These developments leave Saudi Arabia the only Arab Gulf state not to have issued such a law. The first codification in the Gulf came in Kuwait in 1984, while others have followed the adoption, in 1996, of the 'Muscat Document' by the state members of the Gulf Co-operation Council (GCC). The Muscat document (the 'Muscat Document of the GCC Common Law of Personal Status') was adopted 'as a reference' for

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1 UAE Federal Law no 28 of 2005 on Personal Status of 19 November 2005, Official Gazette no 439 (35th year) November 2005, including Explanatory Memorandum; Qatari Law of the Family, Law no 22 of 2006, Official Gazette no 8 of 28 August 2006; Bahraini Law no 19 of 2009 on the Promulgation of the Law of Family Rulings, First Part. See further Lynn Welchman 'Gulf Women and the Codification of Family Law' (written for the Gulf Women's Project in Qatar) in Amira Sonbol (ed) *Retracing Footprints: Writing the History of Gulf Women* (forthcoming).

an initial 4 years, extended for another 4 years in 2000.[2] It is one of two intergovernmental 'model texts' produced in the Arab region on Muslim personal status law; the earlier was drawn up by the League of Arab States (the Draft Unified Arab Law of Personal Status) in the late 1980s.

The three recent Gulf state laws differ in their identification of the residual reference to which the judge is directed in the event of a specific subject not being covered in the text. The 2005 United Arab Emirates (UAE) law includes a detailed provision stressing that 'the provisions in this law are taken from and to be interpreted according to Islamic jurisprudence and its principles', with interpretative recourse to the jurisprudential school to which any particular provision is sourced, and in the event of there being no text, ruling to be made in accordance with the prevailing opinion in the four Sunni schools in the following hierarchy: Maliki, Hanbali, Shafi'i and Hanafi. The Qatari law offers the first codification to have the dominant opinion of the Hanbali school as the residual source, 'unless the court decides to apply a different opinion for reasons set out in its ruling'; in the absence of Hanbali text, the court is directed to 'another of the four schools' and failing this to the 'general principles of the Islamic *shari'a'*. The Bahraini Sunni law directs the judge to prevalent Maliki opinion, thence to the other Sunni schools and then the general jurisprudential principles of the *shari'a.*[3]

Another point of difference lies in the identification of those subjects to the provisions of the law. Here, a somewhat distinctive feature in two of these laws is the variation from the idea of a single national code to govern Muslim personal status matters. In Bahrain in 2009, after vigorous civil society debates, the government submitted a draft for the Sunni section for ratification in the lower house, after the latter rejected an earlier draft that included the Shi'i section; the Sunni law retains the title 'First Part', in anticipation of a second part to eventually govern rulings in the Shi'i departments. In Qatar, the Law of the Family applies to 'all those subject to the Hanbali school of law (*madhhab)'* and provides that along with non-Muslims, Muslims adhering to other schools of law may apply their own rules, or may opt for application of the state's codification. The UAE Personal Status code, on the other hand, applies 'to all UAE citizens so long as the non-Muslims among them do not have special rulings of their sect and community (*milla)*; and to non-citizens in so far as one of them does not adhere to the application of his [personal] law'.[4]

The codes of Qatar and the UAE are quite lengthy documents, and cover a wide range of issues considered to be within the jurisdiction of family law: marriage and divorce and issues arising within and after marriage, rules governing children and the maintenance of other family members, and the various rules governing disposal of property (gift, legacy, succession). The

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[2] The GCC website describes this document as consultative. It was adopted at the 7th session of the Supreme Council of the GCC in accordance with a recommendation from the GCC Justice Ministers, in October 1996. Available at: www.gcc-sg.org/eng/index.php.

[3] Bahrain art 3; Qatar art 3; UAE art 2.

[4] Bahrain art 4; Qatar art 4; UAE art 1(2).

Bahraini Sunni law is shorter and does not cover these last issues. The following overview summarises provisions of the three laws in a set of different areas concerning marriage and children; it does not include the rules on wider family maintenance and disposal of property after death.[5] Also, this chapter does not cover the detailed rules on the wife's rights to dower (customarily split into that part which is paid upon marriage and that part which is deferred until the end of the marriage through death or divorce) or on the details of the maintenance of the wife and children; these are fairly standard elements in codifications across the region.

II REGISTRATION PROCEDURES

All three laws establish the official document of marriage as the standard form of proof to establish marriage for the purposes of the courts, with various formulations allowing for the establishment of a marriage by a ruling of the court in the event that the statutory administrative procedures have not been complied with but the marriage fulfils the *shar'i* (broadly, Islamic law) requirements of validity. Thus the UAE and Bahrain allow establishment of marriage by '*shar'i* proof' and Qatar allows establishment of marriage 'exceptionally . . . in cases in the discretion of the judge'.[6]

Furthermore, all three laws include the requirement that couples intending to marry submit medical certificates as part of the documentation needed by the official charged with registering or notarising the marriage. The tests on which such medical certificates are based may cover both physical and mental diseases and disorders and be regulated by detailed directives under the authority of government health agencies. In the UAE, the law requires attestation from the 'appropriate committee established by the Ministry of Health' that the parties are free of 'conditions on the basis of which this law allows a petition for judicial divorce' while the Explanatory Memorandum refers to genetic disorders, conditions preventing consummation, or those that stand to 'affect future generations'. In Qatar, the law makes tests for inherited conditions mandatory.[7] In Bahrain, a fine is stipulated for those violating the requirements of the 2004 law on medical tests for certain 'hereditary and contagious diseases'.[8] The texts require that the results of one party's tests are made known to the other. The objective is thus to ensure that one party does not marry in ignorance of a particular health condition existing in the other. Less common are texts that address what should happen in the event that the test results are

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5 All translations of the texts – and in the case of the UAE the accompanying Explanatory Memorandum – are my own from the Arabic. Fuller translations of selected extracts from the UAE and Qatari codes are published in the appendix in Lynn Welchman *Women and Muslim Family Laws in Arab States. A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007).

6 Bahrain art 16; Qatar art 10; UAE art 27(1).

7 Qatar art 18; UAE art 27(2).

8 Law no 11/2004 pertaining to 'Medical Tests for those of Both Sexes Intending to Marry' Official Gazette no 2640 of 23 June 2004; Minister of Health Decision no3/2004, Official Gazette no 2667 of 29 December 2004.

potentially problematic; Qatar's law, however, states explicitly that the official documenting the marriage 'is not permitted to refuse to document the contract because of the results of the medical test, in the event that the two parties desire to conclude it'.

III AGE OF CAPACITY AND MARRIAGE GUARDIANSHIP

All three Gulf laws under consideration here follow the pattern established in a number of other Arab personal status codes in setting an age of full capacity for marriage while allowing marriage below this age under certain conditions, including the achievement of puberty and the permission of the court as well as the family guardian (the closest male relative in an identified order, usually the father). The Qatari law thus stipulates actual puberty as a condition for capacity for marriage while documentation of marriage below the ages of 16 for the female and 18 for the male needs the consent of both the guardian and the court, with a stress on the need to ascertain consent. The UAE law sets a presumption of puberty at 18 lunar years for both parties, at which point a woman may seek the *qadi*'s (judge's) permission to marry in the event that her guardian is refusing permission; marriage is however allowed at the attainment of actual puberty with the permission of both judge and the guardian. As for the Bahraini Sunni law, the only explicit provision requires a female under 16 to have the court's permission (as well as her guardian's) as to 'the appropriateness of the marriage' – which will presumably include achievement of puberty.[9] A 2007 Regulation by the Minister of Justice and Islamic Affairs already provided that no marriage contract may be concluded for a female under 15 or a male under 18, 'unless an urgent necessity exists'.[10]

All three laws maintain requirements for a male family guardian (*wali*) in the marriage of a female who is of the age of capacity for marriage; two of them explicitly require that the woman's contract of marriage is carried out on her behalf by her guardian. The Qatari law provides that the guardian undertakes the contract with the permission of the bride. A woman who has no guardian is under the guardianship of the *qadi*, while otherwise the law provides that, if her closest guardian is absent or is obstructing the marriage, she may be married by the *qadi* if a more distant guardian consents, or if several guardians of the same degree disagree among themselves.[11]

The 2005 UAE law justifies its requirement that a woman's marriage contract is carried out by her guardian on the majority juristic view and in view of the 'potential hazards' of a woman undertaking her own marriage; however, the

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9 Bahrain art 18; Qatar arts 14 and 17; UAE art 30.

10 Bahraini NGOs 'The Shadow Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)' September 2008, at p 22. Accessed 5 May 2010 at www2.ohchr.org/english/bodies/cedaw/cedaws42.htm (Bahrain women union).

11 Articles 28–30.

Explanatory Memorandum stresses that the wife's consent is necessary and that it is to ensure that this consent has been given that the law requires the notary to have the wife sign the contract after its conclusion by her guardian. The UAE is unequivocal on the need for the guardian, voiding contracts concluded without the woman's *wali* and ordering the separation of the spouses, although establishing the paternity of any children from such a marriage to the husband; the 'two contracting parties' to the marriage contract are 'the husband and the *wali*'.[12]

In the Bahraini Sunni law, the agreement of the female's *wali* is a condition for the validity of the contract. The law stresses the woman's consent and is quick to pass guardianship to the *qadi* in cases where the guardian's permission is not forthcoming for various reasons. However, the requirement of the recognised *wali* in the marriage of a Bahraini woman is underlined in rather unusual rules addressing the establishment in Bahraini courts of a marriage concluded without the involvement of the *wali*. This provision firstly sets a general rule that such a marriage 'will be considered established by consummation provided the contract is valid under the law of the place where it was concluded'; then it adds that if the wife is Bahraini, the consent of her guardian is required to establish the contract of marriage.[13]

Other powers of scrutiny given to the court in the Bahraini law involve issues of nationality and age groups and clearly reflect particular interests or concerns of the national legislature. Thus the court's consent is needed for the documentation of a marriage between a man aged over 60 and a woman who is not a citizen of a GCC state; and for the marriage of a Bahraini female aged under 20 to a non-Bahraini aged over 50 (in both cases, 'to ensure realization of benefit and adequacy of guarantees').[14]

IV POLYGYNY

The three codes demonstrate a cautious approach towards statutory regulation of polygyny in ways followed in a number of other states in the region – most notably in recent years in Morocco (2004). This is particularly the case with the UAE code, where the focus of the only provisions regulating polygyny is the requirement of 'equity' or 'just treatment' with co-wives, which includes not obliging co-wives to share accommodation.[15] In Qatar, an initial draft which had omitted any regulation of polygyny was amended after public consultations and interventions to require the notary 'to ensure that the wife is aware of the husband's financial circumstances if the husband's situation suggests that financial capacity is not fulfilled', although the notary is 'not permitted to refuse to document the contract if the parties wish to conclude it'. It also requires that 'in all cases the wife or wives shall be informed of this

[12] Article 39.
[13] Articles 12, 23 and 26(1).
[14] Article 21.
[15] Articles 55(6) and 77.

marriage after it has been documented'.[16] Objections were reportedly made by the Legal Committee of the Qatari legislature to this requirement in the draft that an existing wife (or wives) be notified of a husband's polygynous marriage after it is documented, declaring that it could find no *shar'i* basis for this requirement, that it was not local practice, and that such a requirement 'could lead to problems'.[17] The requirement remained in the law, but the objections resonate with those made elsewhere in the region to similar requirements.[18] The Bahraini law has a limited construction of this requirement, whereby a man who is already married must provide the names and addresses of his existing wife (or wives) in the statement of his 'social status' and is required to notify his existing wife of his subsequent marriage (by registered letter, within 60 days) if that wife has inserted a stipulation in their marriage contract against such a marriage.[19] This seems to place the Bahraini text midway between the UAE and Qatari provisions on this particular issue; presumably a wife who has not inserted such a stipulation would not be so notified. The Bahraini law also reiterates 'classical' Islamic law entitlements regarding maintenance and to a just share of the husband's night-times in the event of a polygynous marriage.[20]

V SPOUSAL RELATIONSHIP

When the laws turn to articulate the nature of the relationship between husband and wife, all three laws present lists of rights and duties: one list relates to those shared by the spouses, one to the rights of the wife and one to the rights of the husband.[21] Those listed as mutual include lawful sexual relations, cohabitation, mutual respect and care for and bringing up of children from the marriage. Qatar and Bahrain also include each spouse's respect for the other spouse's parents and relatives. The wife's rights due from her husband include maintenance, the protection of her property, and the right not to be injured physically or mentally by the husband. The husband's rights, due from his wife, include his wife's 'obedience' ('as is customary'/'in kindness', the Bahraini provision adding 'in considering him head of the family') and her stewardship of the marital home and its contents. The Bahraini and Qatari laws include that the wife will 'preserve her person and his property' (Qatar) or, in the Bahraini phrasing, 'preserve him in her person, his property and his house whether he be present or absent'.[22] The Bahraini and UAE laws explicitly rule out the forcible implementation of rulings for obedience.[23]

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16 Article 14.
17 From www.awfarab.org/page/qt/2004/pl.htm (last accessed 11 August 2005).
18 See Welchman, above n 5, p 82.
19 Article 17.
20 Article 37(d).
21 Bahrain arts 36–38; Qatar arts 55–58; UAE arts 54–56.
22 Bahrain art 38(1); Qatar art 58(2).
23 Bahrain art 54; UAE art 158.

All three laws address the issue of the wife's employment outside the home.[24] The Qatari law includes this in a negative provision when dealing with situations when the wife is to be held disobedient (*nashiz*), including 'if she goes out to work without the approval of her husband', although adding 'so long as the husband is not being arbitrary in forbidding her'. In something of a contrast, the UAE law has a longer clause on this, regulating the wife's right to go out to work without being held 'disobedient', 'if she was working when she got married, or if [her husband] consented to her work after the marriage, or if she stipulated this in the contract'. Unusually, the law instructs the marriage notary to 'inquire about' the insertion of a stipulation into the marriage contract on this matter – although it does subject even the implementation of such a stipulation to the 'interest of the family'. The Bahraini law has a lengthy article in similar vein. The UAE and Qatari codifications also address the wife's education; in the UAE law this is included in the list of the wife's rights, 'not being prevented from completing her education'. The Qatari code has a separate article on this, requiring the husband to provide his wife the opportunity to complete the mandatory stage of her education and to facilitate her pursuit of university education 'inside the country, in so far as this does not conflict with her family duties'.[25]

As already noted, the three codifications explicitly allow for stipulations to be inserted in the contract of marriage by either spouse,[26] a facility that is referred to in later provisions regarding notably the wife's employment outside the home, and in the Bahraini law, a subsequent polygynous marriage. In addition, in Bahrain the marriage contract document has been amended, according to a speech by the head of delegation to the UN CEDAW Committee, to ensure that stipulations could be included at the request of the parties.[27] Scholars and activists in the last decades of the twentieth century focused considerable efforts on the option of the insertion of stipulations in the marriage contract, on the basis that the parameters of the marital relationship could be negotiated and clarified between the spouses, with the prospect of legal remedy in the event of breach.

Finally, another issue that has been of concern specifically in the Gulf is that of *misyar* marriage. While various women's rights activists have advocated the inclusion of stipulations as a mechanism through which particular rights can be protected for the wife, the institution of *misyar* marriage rests on mutually agreed binding conditions that are regarded by such activists as compromising the rights of the wife and more broadly the institution of marriage. Specifically, the wife waives her rights to maintenance, accommodation and cohabitation, and generally accepts a condition requiring lack of publicity to the marriage, a

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24 Bahrain art 55; Qatar art 69(5); UAE art 72(2).

25 Article 68.

26 Bahrain art 5; Qatar art 53; UAE art 20.

27 'Speech by: Her Excellency Dr Shaikha Mariam bint Hassan Al Khalifa, Deputy President of the Supreme Council for Women, Head of the Kingdom of Bahrain's delegation, to discuss Bahrain's report of the Convention on the Elimination of all forms of Discrimination against Women' Geneva, 30 October 2008.

sort of 'strategic secrecy' that is often aimed at concealing a man's polygynous marriage from his existing wife and family. The husband 'visits' his wife by day or night, without setting up home with her.

Women's rights activists in the Gulf have been vocal in their opposition to the apparent spread of this institution and its accommodation in law. In the UAE, it appears that their concerns were heeded; the Arab Women's Forum reported that the 2003 draft of the personal status codification originally made specific provision for the formal registration of *misyar* marriages, requiring 'limited publicity' or declaration of the marriage and noting that 'full publicity' was not essential for validity. The limited publicity stood to protect the roles of the wife's family, involving the knowledge of the guardian (who was to conclude the marriage) and family of the woman involved, but not requiring notification of anyone on the husband's side – meaning that the existing wife would not be made aware through formal procedures that her husband had contracted this type of marriage with another woman.[28] This proposal did not survive into the final text of the 2005 law. The Explanatory Memorandum declares as void any stipulation that 'conflicts with the requirements of the contract'; among the examples of such stipulations are included those to the effect that the husband stipulates he will not pay maintenance.

VI DIVORCE

Across the region, making divorce a wholly judicial procedure remains an aim for many women's rights activists, with considerable success in this area in states in North Africa but little in the Gulf states in the recent laws, which broadly retain the husband's right of unilateral divorce (*talaq*) alongside procedures for judicial divorce on a set of identified grounds. The UAE codification states that '*talaq* occurs by declaration from the husband and is documented by the judge'. The Qatari and Bahraini laws have the same wording, although adding a requirement for the *qadi* to attempt reconciliation prior to hearing the husband's divorce pronouncement. All three laws then provide that a *talaq* pronounced out of court can be established by means of acknowledgement or proof.[29] Other than this, the codes in Qatar, the UAE and Bahrain follow practice elsewhere in Arab states by regulating the effects of *talaq* pronounced by the husband in certain physical and psychological circumstances, which mostly go to undermining the presumption of intent on the part of the husband. In such circumstances, the statutory laws provide that either no divorce takes effect, or a single revocable divorce is effected in place of what dominant Sunni *fiqh* (with some differences among the schools) would have ruled a three-fold and irrevocable *talaq*. The laws disallow *talaq* postponed to a future date or pronounced as an oath or another form of suspended or conditional *talaq* actually intended to have someone do or not do something (rather than actually intended to effect a divorce), and take up the generally

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[28] From www.awfarab.org/page/mrt/2004/lo.htm (last accessed 11 August 2005).

[29] Bahrain art 91; Qatar art 113; UAE art 106.

codified position that a *talaq* accompanied in word or sign by a number gives rise only to a single revocable *talaq*. They also provide that no divorce occurs when pronounced under duress, and the Qatari law and Bahraini texts add another widely codified position to the effect that no divorce occurs if a man pronounces it when intoxicated or overwhelmed by rage. The UAE law differs slightly but significantly here, providing that *talaq* does occur when pronounced by a man who has voluntarily lost his power of reason through a forbidden means. The Explanatory Memorandum explains this as a 'penalty for [the husband's] intentional violation of the prohibition [on drink]'.[30]

As for judicial divorce, based on grounds that must be proven in court, the codes follow general patterns in specifying circumstances that are considered to cause harm or injury under the existing description of the husband's obligations: the wife can thus petition for divorce on the specific grounds of the husband's failure to pay maintenance, his disappearance or his unjustified absence or effective (and sexual) desertion of his wife for a specified period, and his being sentenced to a custodial term of more than a specified period. Both spouses may petition for divorce on the grounds of breach of a stipulation in the marriage contract, and having or later developing a chronic mental or physical illness or condition that would (or could) cause harm were the marriage to continue, or preventing consummation or sexual relations. The UAE law is rare in referring explicitly to 'AIDS and similar illnesses' requiring that the judge divorce a couple where such a condition is established in one spouse and there is a fear that it will be passed to the other, or to offspring. The wording here implies that the judge is not to attempt to reconcile the couple or otherwise seek continuation of the marriage, but is obliged to rule for the divorce. The same article deals explicitly with the issue of infertility of either spouse as grounds for divorce, allowing a wife or husband aged under 40 and without her or his own children to seek dissolution in the event that the other spouse, in a marriage that has lasted more than 5 years, has been medically established to be infertile and has already undergone possible treatment for the condition.[31]

At the time of the drafting of the codifications, the debate on the statutory regulation of 'judicial *khul*'' was ongoing in the region. A common form of divorce is consensual *khul*', whereby the two parties agree to a *talaq* by the husband pronounced in exchange for certain compensation (often the waiving of remaining financial rights – notably the deferred dower) by the wife. The difference in the new statutory provisions on judicial *khul*' lies in the court having the authority, after the various attempts at reconciliation, to pronounce *talaq* for the set compensation without the consent of the husband. A few texts already allowed a procedure similar to judicial *khul*' in a marriage before consummation, in provisions that in essence allow a wife to withdraw unilaterally from the contract before cohabitation has commenced. This provision is taken up in all three of the laws under examination here.

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[30] Bahrain arts 86–88; Qatar arts 108–110; UAE arts 101–103.
[31] Article 114.

The perspective changes substantially however when at issue is a consummated marriage where the wife seeks divorce without applying on a specified and statutorily recognised ground for her petition. In the UAE, it was reported that lawyers working around the draft law had lobbied for the inclusion of a provision for judicial *khul'*, and there appeared to be some confusion over the result. In the end, the 2005 text establishes the mutual consent of the spouses to *khul'* as the norm, with the Explanatory Memorandum noting explicitly that 'this law has not taken up what certain Arab personal status codes have done – such as Egypt and Jordan – in considering *khul'* an individual act from the wife'. Nevertheless, in a final clause in the same article, the law does in fact allow the court to rule for *khul'* for an appropriate exchange in the event that the husband is being vexacious in his refusal and where there is 'fear that they [husband and wife] will not live in the limits of God'. Here, the UAE Explanatory Memorandum stresses that this provision applies where there is a fear regarding the conduct of both spouses 'if the relationship continues despite there being no desire on the part of either spouses for it to continue'. The Bahraini law adopts similar wording although disallowing an exchange greater than the dower, while by contrast, and despite some reported opposition to this provision, the Qatari law stays somewhat closer to the original model first legislated in Egypt in 2000.[32] If the spouses fail to agree on divorce by *khul'*, the court appoints arbitrators to seek to reconcile them for a period of not more than 6 months. If this attempt is unsuccessful 'and the wife seeks *khul'* in exchange for her renunciation of all her *shar'i* financial rights, and returns to him the dower that he gave her, the court shall rule for their divorce'.[33]

A final issue in the matter of divorce is compensation for the wife divorced injuriously. Statutory protection of compensation for a divorcée divorced unilaterally by her husband without 'cause' from her side was first included in the Syrian codification of 1953, and it has become a standard feature of Arab state codifications, sometimes termed '*ta'wid*' and sometimes *mut'a* from the provision in Islamic jurisprudential texts of a 'gift of consolation' for a divorced wife. Differences among the various texts include whether there are maximum or minimum limits on the amount of compensation that may be awarded, and how it is to be paid; whether the provision applies only to cases of unilateral *talaq* by the husband or also applies to injury by the husband established in a claim for divorce initiated by the wife; and whether the text focuses on the husband's abuse of his power of divorce, the wife's subsequent material position, or indeed the husband's financial circumstances, and/or specifically requires the court to take into consideration the length of the marriage. The variable here can make a substantial difference to the wife divorced against her will and arbitrarily.

The UAE and Bahraini Sunni codes are less generous to the divorcée on these matters than the Qatari. Both limit the maximum amount of any award to the

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[32] Lynn Welchman 'Egypt: New Deal on Divorce' in A Bainham (ed) *The International Survey of Family Law*, *2004 edition* (Jordan Publishing Limited, 2004) pp 123–142.

[33] Bahrain art 97; Qatar art 122; UAE art 110.

sum of one year's maintenance. In the UAE, the provision appears to constrain the entitlement to cases of *talaq* only, and subjects the entitlement to the circumstances of the husband, while requiring the 'prejudice suffered by the woman' to be taken into account in the assessment. Bahrain adds the length of the marriage and the circumstances of the *talaq* as factors to be taken into account along with the financial situation of the divorcer. The Qatari code however allows an entitlement to *mut'a* to every woman divorced by reason from the husband, with the exception of divorce for lack of maintenance by reason of the husband's poverty, and sets an upper limit of 3 years' maintenance.[34]

VII CHILD CUSTODY

The Gulf laws follow the approach of dividing the functions of parenting into those of custodian and guardian, and identifying the former with the mother and the latter with the father, in the first instance. In this description of the relationship, the custodian has duties of physical care and bringing up of minor children, while the guardian has duties and authorities in regard to their financial affairs, their education, travel and other areas where the ward meets the 'public' world outside the home, as well as being financially responsible for them. The distinct duties of mother (custodian) and father (guardian) reflect gendered assumptions of 'ideal-type' social and familial roles in the upbringing of children, during marriage as well as after divorce, although as already noted, the duty of caring for children and providing them with a 'sound upbringing' is a duty shared by husband and wife in the Qatari and Bahraini laws. The UAE law reflects these assumptions in its description of custody as 'caring for the child and bringing him [/her] up and looking after him [/her] to the extent that this does not conflict with the guardian's right in guardianship over the person [of the ward]'. The Qatari law, after a similar description of the function of custody, adds, significantly, that 'custody is a right shared between the custodian and the minor, and the minor's right is the stronger'.[35]

Developments in personal status laws in the region have tended generally to extend the period of custody normally assigned to a woman over her children following divorce beyond the age limits contemplated in the majority of the *fiqh* rules. In addition, they have increasingly included statutory references to the concept of the 'interest of the child' on which the judge may modify this and other related parts of the law, including primary allocation of custody rights. The three new Gulf laws are part of more recent patterns in this direction. In the draft UAE codification approved by cabinet in 2005, a provision ending the mother's custody over girls at 13 and boys at 11 provoked public condemnation by lawyers who had consulted on previous drafts and held these ages to be a curtailment of existing custody rights. The intervention appears to have had some impact: while the text of the law as passed maintained this position, it

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[34] Bahrain arts 52(d) and 93(d); Qatar art 115; UAE art 140.
[35] Bahrain art 127; Qatar arts 165 and 166; UAE art 142.

allows the court to extend a woman's custody until the male ward reaches puberty and the female marries. The UAE law allows the set extensions beyond these ages to be made by the court in consideration of the ward's interest. The Qatari law provides for a woman's custody to end in the case of male children at 13 and females at 15, while allowing extension (in the ward's interest) to 15 for males and until a female's consummation of her marriage. The Bahraini law sets women's custody to end at 15 for the male ward and for the female at 17 or consummation of marriage, with wards who have reached those ages – and in the female's case have not married – allowed to choose to be under the care (*damm*) of either parent or another person with the right of custody. The UAE and the Qatari codes also provide that the woman's custody continues indefinitely if the ward is mentally or physically disabled, again subject to the best interest of the child.[36]

The court's consideration of the interest of the child is also increasingly required in codifications across the region in assessing the otherwise normative assignment of the function – or right – of custody to an identified succession of relatives. The Qatari law is unusual in setting out what qualities the *qadi* is to consider in making such an assessment of the interest of the child. These include the custodian's affection for the child and ability to raise him or her, the provision of a sound environment in which the child can be brought up and 'protected from delinquency', the ability to provide the best education and medical care, and the ability to prepare the child in terms of morals and customs for the time that he or she is ready to 'leave the custody of women'.[37]

The three laws follow earlier Arab state codifications in requiring that, in the event that custody is assigned to a man, he must have 'a woman with him who can undertake the functions of custody'. However, the UAE and Qatari laws are also part of a quite recent trend of establishing the father as following the mother in the presumptive order of entitled custodians, before the maternal (or in the Qatari case paternal) grandmother and other female relatives. The UAE law explicitly provides that the succession of relatives to custody is followed 'unless the judge decides otherwise in the interest of the child'; the Qatari code is more constrained here, allowing the interest of the child to be considered in the case that a closer relative waives the right of custody (giving reasons for this) in favour of a more distant custodian. However, as noted above, the Qatari treatment of custody already establishes that the interest of the child is paramount: even in regard to the parents it notes that, even if the parents have separated and not divorced, the mother is first entitled to custody of a minor child, unless the *qadi* decides differently in the interest of the child. Apart from this, both these codes take a detailed 'listing' approach, with some 17 individuals or categories of relatives successively entitled to claim custody of a minor child under the UAE law, and 18 under the Qatari law. The Bahraini law normatively assigns custody to the mother followed by maternal and paternal grandmothers and ascendants, only then followed by the father and other

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[36] Bahrain arts 128 and 129; Qatar art 173; UAE art 106.
[37] Article 170.

relatives. It specifically allows the court to 'seek assistance from experts in psychology and sociology in determining [assignment of] custody, taking into account the best interest of the child'.[38]

On another contested issue, all three legislatures address the general rule that a mother loses her right to custody if she remarries a man who is not a close relative of the ward. The specific issue of remarriage remains an advocacy target in different countries, inter alia on the grounds of discrimination (the father not being subject to such restrictions) and on the choice it imposes on women, whose ability to remarry may be constrained by the threat of losing custody of their children, as well as on the grounds of the rights and best interest of the child. The three laws explicitly allow the judge to consider the interest of the child in allowing custody to remain with the mother (or other female custodian) in the event that she has consummated a new marriage with a man who is not a close relative of the ward.[39]

Finally, another regional pattern of codifications with which the three Gulf laws under consideration here have tended to remain consistent is the different rules applying to the non-Muslim custodian of the children of Muslim fathers. Here, the texts tend to set shorter periods of custody – particularly if the custodian is not the mother – or not to allow the extension of the statutory period, sometimes subjecting this to the best interest of the child; they may explicitly allow for custody to be terminated if it is established that she is bringing the child up to believe in a different faith. Thus the UAE law stipulates that a mother of a different religion loses custody of her child unless the *qadi* decides otherwise in the interest of the child, and in all cases that her custody ends when the child is 5 years old. The Qatari law allows a non-Muslim mother to have custody until the child is 7, provided she is not an apostate from Islam, and unless there is fear that the ward is acquiring a different religion. The Bahraini law does not address this explicitly, but unusually includes 'Islam' as a quality that is stipulated in the custodian along with other more standard qualities such as sanity and majority; if this were applied to deny a non-Muslim mother custody of her minor Muslim children, it would be a restriction unfamiliar both in the regional codes and in contemporary Sunni jurisprudence. Specific consideration is again given to the issue of citizenship, with the law providing residency rights during the period of custody for the (non-Bahraini) custodian of a Bahraini ward.[40]

VIII PATERNITY/MATERNITY

The Gulf state laws follow established patterns in the region in the rules governing paternity and the legal affiliation (*nasab*) of a child to her or his father (and thus the establishment of the child's paternal lineage) and those

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[38] Bahrain arts 132–134; Qatar art 169; UAE art 146.
[39] Bahrain arts 130 and 131; Qatar art 168; UAE art 144(a).
[40] Bahrain art 139; Qatar art 175; UAE art 145.

governing adoption. Established jurisprudence (*fiqh*) principles assume that 'the child is [affiliated] to the conjugal bed' and award legitimate filiation to the husband of the woman who has given birth to the child, unless it is otherwise claimed by the husband and proven through the traditional process of *li'an*, where the man denies on oath that the child is his and the woman denies his allegation and the process results in a final divorce between the couple with paternity not established. The three laws codify rules on *li'an*; the UAE law in a final clause allows the court to 'seek the assistance of scientific methods for refutation of *nasab* provided that it has not been previously established', although the Explanatory Memorandum subjects this procedure to the previous clauses of the paragraph describing the *li'an* procedure. The Bahraini Sunni law requires DNA tests to be carried out on all parties before the process of *li'an*, and disallows the refutation of *nasab* by *li'an* in the event that paternity is established.[41]

The Gulf codes under consideration here follow – as do other Arab codifications – established *fiqh* rules in requiring that, to have a 'legitimate' *nasab*, the child must be not only born but also conceived in the framework of marriage or of what the couple believed to be a marriage. The jurists thus looked to minimum and maximum periods of gestation to uphold or undermine the presumption of legitimacy of children born to a married couple. While there was generally consensus on the minimum period of gestation at six months, the jurists differed as to the maximum. Failing the presumption of paternity through a known marriage, paternity and *nasab* (and indeed maternity for a child of unknown parentage) can also be established by acknowledgement, providing certain conditions of feasibility are met, and '*shar'i* evidence'.

All three new Gulf codifications establish one year as the maximum period of gestation and 6 months as the minimum as a substantive rule, although the UAE adds 'unless a medical committee established for this purpose decides otherwise'. The key issue here is the difference made in the laws between a father's paternity and a child's 'lineage' (*nasab*). If paternity is a biological fact, 'lineage' denotes the legally established filiation of the child to the parents and the subsequent establishment of legal rights and claims. In the case of the mother, *nasab* is established by the fact of her giving birth to the child. For the father, on the other hand, in the event of the putative father's denial, the laws generally require proof of an established *shar'i* relationship (that is, legitimate under the rulings of Islamic jurisprudence) between the parents; and as the Explanatory Memorandum to the UAE law notes (p 200) 'this is the fundamental [relationship] because the child follows his [/her] father in *nasab*'. The UAE, Qatari and Bahraini Sunni laws follow the dominant pattern in that biological paternity alone does not give rise to the father's legal and financial responsibilities towards his child; biological maternity, on the other hand, gives rise to a mother's duties to her child whether the child was born in or out of a recognised marital relationship. This brings in the matter of statutory rules for

[41] Bahrain art 78; Qatar arts 96 and 151; UAE arts 97 and 97.

the recognition of marriages. In general, the establishment of paternity and *nasab* is an exception to rules that might otherwise exclude state recognition of rights and claims arising from a marriage not conforming with the procedures legislated as mandatory by the state. In an undocumented and unregistered marriage, for example, the couple may decide to regularise their status in regard to the central authorities when the time comes to register children from the marriage; the principle generally holds that establishing lineage works to establish the marriage, rather than having to establish the formalities of the marriage in order to establish lineage. However, serious problems arise when one party, usually the man, denies the existence of the marriage, and the other is unable to prove it to the satisfaction of the state. The Bahraini law includes a provision explicitly regarding circumstances in which the parties have become 'engaged' with the knowledge of their families and agreement of the wife's guardian but the marriage has not been documented and the woman becomes pregnant; if the husband denies he is the father, 'all lawful (*shar'i*) means may be resorted to in order to establish lineage'. This wording is similar to that used in the 2004 Moroccan law as a result of advocacy from women's and child's rights activists, and has been used there to empower the court to impose DNA testing on a man in certain circumstances of disputed paternity.[42]

The UAE wording on how *nasab* is to be established to the father adds, after the conjugal bed, acknowledgement, and [*shar'i*] evidence, that this can be done 'through scientific methods where the conjugal bed is established'. The Explanatory Memorandum, quoted below, sets out the relationship between the envisaged use of methods such as DNA testing and the jurisprudential rules on 'the existence of the conjugal bed'. In the arguments for the need to establish *nasab* (rather than biological paternity), references are made not only to the range of rights and responsibilities that arise to individuals through filiation but also to the wider societal context:[43]

> 'This article refers to establishing paternity through modern scientific methods such as DNA testing, which are scientific means of establishing the definite relationship between the child and his [/her] father; but in order not to make a mockery of the issues involved in establishment of paternity, by making it a matter simply of establishing this relationship through a medical test, the article has linked its ruling to the existence of the conjugal bed in accordance with article 90. This is to prevent what has happened in a number of cases, with sperm being taken from a man and implanted into a woman without there being any *shar'i* tie between them. Then medical tests establish the paternal relationship, while it is not possible for the child to be attributed to the father in terms of lineage (*nasab*) in such circumstances. These means have developed in our time, and now there are laboratories and sperm banks . . . If we were to allow *nasab* to be established in such cases, it would be problematic in regard for example to inheritance, and the impediment of affinity. And the woman might be married to another man, so lineage is mixed and corruption appears . . .'

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[42] Bahrain arts 77 and 73; Qatar art 88; UAE art 89.

[43] UAE Explanatory Memorandum, above n 1, pp 200–201.

Here, the need to properly assign lineage is linked to the entitlements of those related by *nasab* to proportions of each other's estate under the law of succession, and to the rules prohibiting marriage between a range of persons related through *nasab* and through marriage. The concerns raised at the prospect of 'mixing lineage' move from the more traditional requirement of a 'conjugal bed' and lawful sexual relations to reproductive technologies insofar as the latter involve sperm (or eggs) provided by third parties.

Similar preoccupations with the 'mixing of lineage' – as well as the established *fiqh* position – can be seen to underlie the general approaches to adoption in Arab states. This issue is not dealt with in the UAE or Qatari codes, while the Bahraini law clarifies that adoption may not give rise to the establishment of paternity or its *shar'i* effects.[44] Elsewhere, some Arab codifications explicitly prohibit adoption, while the Algerian family law of 1984 is unusual in including a separate section on the Islamic institution of *kafala*. Broadly speaking, *kafala* is a system of care that allows a child to be looked after and brought up in a family not his or her own, with similar rights of maintenance, education and so on that pertain to minors but without key attributes of *nasab* (family name, fractional inheritance entitlements). The institution of *kafala* is explicitly referred to in the UN Convention on the Rights of the Child (CRC), in the same article as fostering placement and adoption, regarding the care of a child 'temporarily or permanently deprived of his or her family environment'. The UAE entered an explicit reservation to this article, stating that the UAE does not permit this system (adoption) 'given its commitment to the principles of Islamic law'. In the case of Qatar, prior to the announcement of a 'partial withdrawal' of its general reservation to the CRC in 2009, Qatar had already clarified in its initial report to the CRC's monitoring body that it did not recognise adoption as a system.[45] Bahrain entered no reservations to the CRC but clarified in its first report in 2001 that, while it does not apply the system of adoption as understood in the CRC, Bahrain's then Cabinet had approved 'the Fosterage Act' (a law on *kafala*) to regulate this system of care.[46]

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44 Article 72.

45 UN Doc CRC/C/51/Add.5, 11 January 2001 (Qatar's initial report to the Committee on the Rights of the Child).

46 UN Doc CRC/C/11/Add.24, 23 July 2001 (Bahrain's initial report to the Committee on the Rights of the Child).

Hungary

MAINTENANCE OF FORMER SPOUSES, REGISTERED PARTNERS AND COHABITANTS IN HUNGARY ACCORDING TO THE EXISTING RULES AND IN THE NEW CIVIL CODE

Orsolya Szeibert[*]

Résumé

Il existe trois formes légales de conjugalité en Hongrie : le mariage, le partenariat enregistré et la cohabitation. Le mariage est réglementé par la Loi sur la famille et cette institution jouit de la faveur de la Constitution. Le partenariat enregistré, qualifié de «cohabitation enregistrée» dans la terminologie légale hongroise, est encadré par une loi relativement récente, la Loi No XXIV 2009 sur le Partenariat Enregistré et portant Modification des Règles relatives au Partenariat Enregistré et à la Facilitation de la Preuve de Cohabitation. Alors que le mariage est réservé aux couples hétérosexuels, seuls les partenaires de même sexe ont accès au partenariat enregistré. Quant à la simple cohabitation, ouverte à tous les couples, elle est à peine encadrée par le Code civil tel qu'il existe actuellement.

Le présent chapitre traite des aliments entre conjoints, de l'obligation alimentaire entre partenaires enregistrés et de l'étendue de la solidarité matérielle à laquelle sont soumis les cohabitants. L'objectif est d'analyser le texte des lois ainsi que le droit en action. Seuls les époux mariés font cependant l'objet de règles légales formelles, soit celles de l'obligation de soutien entre époux et de l'obligation alimentaire entre ex-époux, alors qu'en ce qui concerne les partenaires enregistrés, il est essentiellement question d'aliments au profit d'un ex-partenaire. Alors qu'en ce qui concerne les ex-époux il existe une jurisprudence bien établie en la matière, on comprendra que cela n'est pas encore le cas pour ce qui est des partenaires enregistrés. Quant aux cohabitants, l'absence de règles sur l'obligation alimentaire, explique le silence de la jurisprudence à ce sujet, même si les tribunaux s'attendent à ce que les conjoints de fait se soutiennent mutuellement pendant la vie commune. En conséquence, nous nous attarderons avant tout aux conditions de l'obligation alimentaire entre ex-époux.

Le nouveau Code civil hongrois a été adopté en novembre 2009. Le Livre III du Code contient les dispositions du droit familial et décrit les trois formes de conjugalité précitées. Ce Livre propose une approche basée sur l'idée de

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conservation et modernisation. Tout en conservant le principe de la primauté du mariage, il en modifie quelque peu les règles en matière de soutien alimentaire et il crée l'obligation alimentaire entre cohabitants. Deux Livres du Code devaient normalement entrer en vigueur en mai 2010, alors que les autres, dont celui sur le droit de la famille, étaient prévus pour 2011. La Cour constitutionnelle de Hongrie a cependant décidé qu'il convenait de prévoir une période préparatoire plus longue.

I SPOUSES, REGISTERED PARTNERS AND COHABITANTS IN HUNGARIAN LAW

In Hungary *marriage* is regulated by the independent Family Act with all of its legal consequences, including spousal maintenance. The Family Act, namely Act No IV 1952 on Marriage, Family and Guardianship, entered into force in 1953 and has been modified several times. Marriage – being open only to heterosexuals – is strongly defended by the Hungarian Constitution. This privileged position of marriage has been reinforced by the Hungarian Constitutional Court several times.[1]

Registered partnership is 'registered cohabitation' according to the proper Hungarian legal terminology, but is an institution which wholly fits into the rank of registered partnerships of Western-European countries. This phenomenon is rather new in Hungary. However, it has a long history. In December 2007 an independent Act on registered partnership was approved by Parliament. This Act of 2007 made it possible for both different-sex and same-sex partners to enter into a registered partnership. The Constitutional Court declared the unconstitutionality of the Act a year later, in December 2008. The essence of the decision was that the registered partnership for different-sex partners and for same-sex partners has to be distinguished and cannot be treated in the same way.[2] The new Act – Act No XXIX 2009 on Registered Partnership and the Modification of the Legal Rules in Connection with Registered Partnership and the Facilitation of the Proof of Cohabitation – was approved in April last year.[3] The provisions concerning registered partnership, which can be established only by homosexuals, entered into force in July 2009. This Act does not define the registered partners (registered cohabitants in the misleading Hungarian terminology), but provides a way to establish this form of partnership.

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1 On the decisions of the Hungarian Constitutional Court concerning the position of marriage see further Orsolya Szeibert 'Unmarried Partnerships in Hungary' in Katharina Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia, 2005) pp 316–319.

2 On the Act of 2007 on Registered Partnerships and the decision of the Constitutional Court see further Orsolya Szeibert 'Cohabitation, Registered Partnership and their Financial Consequences in Hungary' in Bill Atkin (ed) *The International Survey of Family Law 2009 Edition* (Jordan Publishing Limited, 2009) pp 205–206.

3 On the annulled Act 2007 and the Act No XXIX 2009 see further Emilia Weiss 'Gesetz über die registrierte Partnerschaft in Ungarn' (2008) 18 FamRZ 1724–1725 and Emilia Weiss 'Neues zur Regelung der registrierten Partnerschaft in Ungarn' (2009) 18 FamRZ 1566–1567, respectively.

Cohabitation is regulated in the Civil Code, Act No IV 1959 in a laconic way. One provision provides the definition of cohabitation which is to be applied in cases of civil and family law. According to this definition unmarried partners are two persons (either heterosexuals or homosexuals) who live together, without entering into a marriage or a registered partnership, in a common household, in an emotional fellowship and economical partnership (community of life). They cannot be related to each other in direct line, cannot be siblings or half-siblings and neither of them can live at the same time in a marital community of life, a community of life within a registered partnership or in cohabitation with a third person.

Another rule contained in the Civil Code concerning cohabitants regulates their property relations.

II MAINTENANCE OF FORMER PARTNERS UNDER EXISTING LAW AND JUDICIAL PRACTICE

While spousal maintenance is regulated in the Family Act, the rules of which have been interpreted and completed in precedents, this duality of the law in books and law in action is not experienced in connection with the two other forms of partnership. We do not yet have any judicial practice concerning the new institution of maintenance of registered ex-partners, while neither our Civil Code nor any other legal norm contains any regulation concerning the maintenance of the ex-cohabitant. Moreover, while it is doubtless true that both spouses and registered partners 'maintain' each other during the marital and marriage-like common life, there is no such exact legislative expectation for cohabitants. Nevertheless, as we can experience, the same can also be said of them.

(a) Maintenance of former spouse

(1) *Spousal maintenance* has emerged from the maintenance of the divorced wife as it was regulated in the Hungarian Marriage Act in 1894. (Divorced husbands were not explicitly excluded but the regulation was only exceptionally applied to divorced men.) This Act provided for the public regulation of divorce law and gave competence to the public courts to hear divorce cases. It acknowledged the dissolubility of marriages but only on the basis of the principle of fault. Even in the case of the guilt of either or both partners, the courts were unwilling to dissolve the marriage, so that the rate of divorce remained really low.

In 1945 a complex reform of the divorce law happened. The fault-based divorce grounds were partially annulled, so the maintenance of women became subject to the spouses' agreement in the case of a divorce by mutual consent. If the marriage was dissolved upon the ground that the spouses had lived apart for 5

years or more, the court determined maintenance by considering all the circumstances including the behaviour of the spouses during and after the marital community of life.

Although the Hungarian Constitution of 1949 declared that spouses had equal rights and the earlier maintenance of wives was changed to maintenance of spouses, the maintenance of a former husband remained exceptional in practice. From the beginning of the next decade the importance of maintenance between spouses diminished as a consequence of the facts that women began to work and childcare centres were established.

The Hungarian Family Act now in force does not acknowledge any fault-based divorce ground and does not enumerate any divorce ground at all. Instead of grounds, the Hungarian law provides a general clause according to which marriage can be dissolved if married life has broken down completely and irretrievably. Besides, divorce by mutual consent is contained and partly specially regulated in the Act. Mutual consent makes it unnecessary to investigate the reasons for the breakdown of the marriage (if the mutual consent includes an agreement on ancillary issues). In the case of mutual consent there is a presumption that the marriage has broken down. In line with this method of regulation, the system of spousal maintenance is uniform.

It should be remarked that the rules relating to maintenance in the case of divorce are not connected with the rules relating to other post-marital financial consequences.

(2) Spouses *can agree on maintenance after divorce*. They can enter into an agreement either before the divorce proceedings, or during the proceeding itself.

Divorce by mutual consent is a special situation as spouses have to present their agreement when initiating the divorce proceeding. The agreement has to include provisions on the so-called ancillary issues which are the custody and maintenance of the common child, the non-custodial parent's right to contact with the child, the right to use of the matrimonial home after divorce, the distribution of the common property and spousal maintenance. This agreement is judicially settled.

(3) The Family Act grants maintenance to the former spouse subject to *special legal conditions*. These are partly on the claimant's side and partly on the debtor's side. On the claimant's side there are the spouse's lack of means, a situation which has been brought about through no fault of the claimant's own and that she – generally she – or he should not be unworthy of maintenance. The debtor has to be in a situation of being able to pay. The conditions are not defined or detailed in the Family Act. Their interpretation and application have been continuously done by judicial practice.

Lack of means is a general condition. As has been mentioned, the Act does not go into further detail but some factors can be underlined: the age of the spouse,

his or her state of health, illness, the upbringing of children or the fact that she has given up her work during the marriage. The continuous upbringing of children or the completion of certain studies provide ground for maintenance for a specified length of time (eg until the third year of the child in the first case). Advanced age or chronic illness are generally grounds for maintenance for an indefinite period of time. If one spouse has given up her work during the marriage, the definite or indefinite character of maintenance can depend on the specific circumstances of the case.

The claimant's *unemployment* is a debated issue. No crystallised judicial practice can be seen. Some state solidarity as a rather strong principle but according to other viewpoints the payment of the jobseeker is the task of state and not of divorced spouse. Recently, the Supreme Court has established its standpoint according to which unemployment can serve as a ground for spousal maintenance because of lack of means but only subject to additional conditions.[4] It has to be explored whether the claimant has exhausted all the possibilities provided by the social security scheme and whether there has been any relationship between becoming a jobseeker and the spouses' common method of life. Spousal maintenance is usually provided for the jobseeker claimant for a specified length of time.

The next condition, namely lack of means which has been brought about *through no fault of the claimant*, is analysed in close connection with the other conditions. 'No fault' can be ascertained if the claimant has exhausted all his or her resources, for example he or she has done everything which has been expected. The exact level of expectation cannot be stated, as it depends on the circumstances of each case and each marriage. When considering the level of expectation, the court adjusts it to the general social expectation.

The claimant should not be *unworthy* of spousal maintenance due to his or her behaviour during the marriage. The claimant's behaviour is taken into account upon the reference of the debtor and it should be really seriously adjudged conduct. According to the crystallised judicial practice unworthiness is the act or failure of a claimant which has broken the moral basis of the marriage and contributed to the irretrievable and total breakdown of married life. However, unworthiness is not equal to guilt, as in the context of the unworthiness of a claimant spouse the behaviour of the other spouse is also to be taken into account. In the case of the reproachable behaviour of both spouses, unworthiness is not generally looked at.

Even if all conditions are fulfilled, the court cannot order spousal maintenance if the debtor is *unable to pay*. The principle of self-sufficiency is decisive also on the level of maintenance, as spousal maintenance cannot be detrimental to the debtor's own standard of living. The court takes into consideration the debtor's ability to work, his or her real earning capacity and his or her assets. Whether

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[4] In András Kőrös (ed) *A családjog kézikönyve I–II* (Handbook on Family law) (in Hungarian) (Hvg-Orac, 2007) pp 100–101.

the debtor is expected to use his or her assets in order to fulfil a maintenance obligation depends on the kind of assets.

The debtor can refer to the fact that another person has a prior claim to maintenance. A moral obligation to pay maintenance is not taken into consideration but any legal obligation can serve as an important basis of avoidance of spousal maintenance. The debtor's minor children have ranking priority. Adult children who are able to earn their living rank ahead of the claim of a divorced spouse if they pursue full-time education (except when the child is married). The spouse and the divorced spouse follow the children in second place, and other relatives who can put forward a claim for maintenance follow the spouse and ex-spouse. However, the court has the authority to depart from this legal ranking if special circumstances so require.

(4) Maintenance can be paid also in a lump sum but according to the Hungarian judicial practice it is generally to be paid in periodical payments, which means a fixed amount each month. The amount of maintenance depends on several circumstances. The level of lack of means, the ability of the debtor to pay, and the standards of living of both spouses are taken into consideration when the court determines the exact amount of maintenance.

If the circumstances upon which this amount was adjudged change, either of the divorced spouses can ask for the cessation, reduction or even rise of maintenance if they cannot agree. This generally occurs in judicial practice when the debtor has a new child or the claimant's health deteriorates.

Though self-sufficiency is one of the principles of the regulation of spousal maintenance, the claimant has the right to ask for maintenance even at a later date. If the spouse has no lack of means at the moment of divorce, but it occurs at a later date, the claim for maintenance is still available. There is one limitation, namely after more than 5 years from the date of divorce spousal maintenance can be granted only in exceptional circumstances which are to be judged by the court. Such a special circumstance is when the ex-spouses remain cohabiting together after divorce.

Spousal maintenance ceases when the claimant remarries or establishes a registered partnership. Cohabitation itself does not result in the termination of spousal maintenance ex lege, but his or her entitlement to maintenance can cease if he or she has enough resources to meet his or her needs.

(b) Maintenance of former registered partner

The regulations of Act No XXIX 2009 on Registered Partnership and the Modification of the Legal Rules in Connection with Registered Partnership and the Facilitation of the Proof of Cohabitation entered into force in July 2009. According to these regulations one of the main rules is that the regulations concerning spouses are to be applied to registered partners. The exceptions affect only the personal consequences, so the property consequences

of this partnership are just the same as those of marriage. There is of course no judicial practice concerning this issue yet.

One difference between spouses' and registered partners' situations emerges from the fact that divorce and termination of registered partners does not happen in the same way by all means. While spouses can divorce only before a court, another type of 'divorce', simplified divorce, is available for registered partners. If they jointly ask for the termination of their registered partnership, neither of them has a child whom they are jointly obliged to maintain and they have agreed on the ancillary issues listed in the Act, the notary can terminate the partnership. The list just mentioned enumerates the same issues on which spouses have to agree in the case of divorce by mutual consent, including the issue of maintenance of the registered partner, among others.

(c) Maintenance of former cohabitant

Although the Civil Code, which regulates some issues relating to cohabitation, does not contain any rule concerning cohabitants' solidarity either during the community of life or after the termination of their common life, maintenance and taking care of each other in the course of cohabiting are elements of cohabitation which are inseparable according to judicial practice. While this practice has been able to interpret the phenomenon of cohabitation in a liberal way and expect a certain level of solidarity from them, the courts would have breached their competence if they had awarded maintenance after the intentional termination of cohabitation. In summary, it can be stated that no maintenance is available for the ex-cohabitant even if the common marriage-like life lasted for many years and the potential claimant had given up his or, generally, her employment for the sake of the family.

III MAINTENANCE OF FORMER PARTNERS ACCORDING TO ACT NO CXX 2009 OF THE CIVIL CODE

The re-codification of the Civil Code has been going on since 1998. Act No CXX 2009 was approved on 9 November 2009 but it has not entered into force yet.[5] The legislative proceeding provides a long history with a lot of debates and twists especially with regard to non-marital partnerships. The starting point of the debate was the question whether a new Civil Code, the aim of which was to adjust the regulations of the civil law to the new economic and social changes, should contain family law. It had been decided in a positive way and resulted in a Book of the new Civil Code, namely the Family Law Book. This Book embodies the philosophy of the entire re-codification: *preservation*

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[5] Several books, including the Family Law Book of the Code, were planned to enter into force in January 2011 but this plan changed in the last days of April 2010 as a result of a decision of the Hungarian Constitutional Court. The decision was based on the conviction that there would not have been enough time to get ready for the new rules of the books.

and modernisation. It is true for the newly shaped regulation of registered partnerships and cohabitation but affects the marital rules as well.

(a) Maintenance of former spouse

The regulations in the new Family Law Book concerning the maintenance of a former spouse do not codify fundamental changes. Some changes have a rather structural character, while some other changes make the interpretation of certain rules easier. Nevertheless, there are modifications which codify some issues which have been established by judicial practice. Accordingly, the definition and evaluation of unworthiness, the role of agreements between spouses, the possibility of paying the maintenance in a lump sum are fixed in the Family Law Book.

The solidarity of the ex-spouses determines the regime of maintenance which is based also on the constitutional protection of marriage. (The protection appears also in the Family Law Book itself.) Although self-sufficiency is another principle which governs the rules on maintenance, it is not explicitly provided in the legal text. The rules on maintenance mirror the legislator's balancing of self-sufficiency and solidarity.

The conditions for spousal maintenance are identical to those of today. A new rule applies to spousal maintenance if the marriage lasted for less than one year and the spouses do not have a common child. In this case the period of maintenance cannot exceed the duration of the marriage even if the divorced spouse has a lack of means. According to the original conception the court would have had the discretion to set aside this temporal restriction, but the approved Act has abandoned this judicial power.[6]

(b) Maintenance of former registered partner

The Family Law Book of Act No CXX 2009 also contains regulations concerning registered partners. The Family Law Book fixes who can enter into a registered partnership and some basic rules. It refers to Act No XXIX 2009, as well. The rules in Act No CXX 2009 coincide with the existing regulations, and state that the regulations concerning spouses are to be applied to registered partners as the main rule. According to this legislative reference the rules on maintenance of former spouses have to be applied if one of the former registered partners asks the court to award maintenance for him or her.

(c) Maintenance of former cohabitant

Not only the issue of registered partners but also the question of whether cohabitation should be introduced into the new Family Law Book was hotly

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[6] In Lajos Vékás (ed) *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* (*Draft of a New Civil Code for Hungary: An Expert Proposal*) (in Hungarian) (Complex, 2008) pp 422–426.

debated. The new Civil Code balances two opposite views carefully: the regulation of cohabitants is contained in the new Act and their legal position is strengthened with new rights and obligations, but, at the same time, their legal adjudication remains weaker than that of spouses.

Nevertheless, the new Family Law Book regulates a really new institution, the maintenance of a former cohabitant. The cohabitant can claim for maintenance after the termination of the unmarried partnership. The conditions are also enumerated and are partly the same as in the case of married partners: the ex-cohabitant should have a lack of means, the situation must not have been brought about through the claimant's fault and he or she should not be unworthy of maintenance. On the debtor's side the ability to pay is the necessary precondition. However, there is one more not only important but also restrictive condition. As cohabitation is a so-called de facto partnership in Hungary, and also preserves this character in the new Civil Code, another condition is demanded by the legislator, namely either a long-lasting relationship, which means at least ten years, or in the case of a common child at least a one-year-long partnership. Equity can be applied in the case of shorter cohabitation. Not only do the spouse and the divorced spouse as claimants have the same ranking priority, but so do the cohabitant and the former spouse.

IV CONCLUSION

Maintenance of a former partner as a legal obligation can serve as a sign of the attitude of the legislator and also of society. Consequences can be drawn from the level of protection of a partner after the intentional breakdown of common life. The Hungarian rules which are in force now aim to protect at least the former spouse. The law in the Family Act has been applied in judicial practice. However, spousal maintenance occurs not very often in Hungary. Former spouses, especially former wives, claim maintenance, mostly in monthly periodical payments, if they have given up their employment in order to take care of the children and to run the household, or to work in the other spouse's business without paid remuneration. In these cases the women are generally older and maintenance is asked for and awarded for an unlimited period. The other type of case is when the spouses have a common child under 3 and the ex-wives claim maintenance for a limited period of time. If the child is in good health, this period lasts until the child becomes 3 years of age.

The Family Law Book of the new Civil Code widens the available and legally protected sphere of partnerships and contains three forms of marital, quasi-marital and non-marital partnerships: marriage for different-sex partners, registered partnership for same-sex partners and cohabitation for both different-sex and same-sex partners. The familial legal consequences of this huge change have been also drawn, as maintenance of former partners is provided in each case, even under special conditions.

India

ALTERNATIVE DISPUTE RESOLUTION IN INDIAN FAMILY LAW – REALITIES, PRACTICALITIES AND NECESSITIES

Anil Malhotra and Ranjit Malhotra[*]

Résumé

En Indes, l'accent est mis de plus en plus sur la nécessité d'instaurer des mesures contraignantes visant la tentative de réconciliation et l'on y assiste au développement d'une jurisprudence marquée en faveur du règlement amiable des conflits comme alternative aux débats conflictuels devant les tribunaux de la famille. Cependant, avec sa population de 1,1 milliard de personnes, le pays comprend plus de 30 millions d'Indiens non-résidents éparpillés dans 180 pays. La résolution des conflits matrimoniaux de ces citoyens d'origine indienne est souvent problématique, dans la mesure où le droit indien ne reconnaît pas l'échec irrémédiable du mariage comme motif de divorce. C'est la raison pour laquelle les jugements de divorce qui ont été prononcés à l'étranger sans avoir été précédés d'une tentative obligatoire de réconciliation, ne trouvent la faveur ni de la population ni des tribunaux en Inde. La loi devrait donc reconnaître que l'échec du mariage constitue en soi un motif valable de divorce, mais seulement lorsque les époux en font conjointement la demande. Ceci aura un double effet bénéfique. En premier lieu, les conjoints qui éprouvent des différences irréconciliables et qui désirent se séparer à l'amiable, auront une base légale pour le faire et ils éviteront ainsi les longs délais d'une procédure basée sur des motifs inventés de toute pièce. Deuxièmement, cette option pourrait entraîner une diminution des demandes de divorce à l'étranger. Le législateur indien devrait s'attaquer à cette question et proposer au niveau national une législation en matières familiales pour les Indiens non-résidents. C'est désormais devenu un besoin social urgent que d'adopter une loi sur les modes alternatifs de règlement des conflits et de mettre en place les services nécessaires pour permettre la dissolution, en Inde, des mariages célébrés à l'extérieur du pays. À défaut de pouvoir être dissous, ces mariages entraînent des problèmes d'enlèvement d'enfants ainsi que des conflits autour de l'obligation alimentaire et du partage des biens. Ces mariages boiteux doivent pouvoir bénéficier de services d'aide à la réconciliation afin d'éviter qu'ils ne soient dissous à l'étranger sur des bases qui entrent ensuite en conflit avec le droit personnel des parties en Inde. La priorité du législateur devrait être de créer, d'harmoniser et d'équilibrer la structure sociale des Indiens, résidents et non-résidents et des personnes avec lesquelles il ont créé des liens familiaux à l'extérieur du pays. Les

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modes alternatifs de règlement des conflits devraient être développés de façon considérable pour répondre à la situation de ces mariages boiteux.

I INTRODUCTION: THE INDIAN BACKGROUND

The Constitution of India enacted on the 26 November 1949 resolved to constitute India as a Union of States and a sovereign, socialist, secular, democratic republic. Today, a population of about 1.1 billion Indians live in 28 states and 7 union territories within India besides about 25 million Indians who reside in foreign jurisdictions and are called non-resident Indians. Within the territory of India spread over an area of 3.28 million sq kms, the large Indian population comprises of multicultural societies professing and practising different religions and speaking different local languages coexisting in harmony in one of the largest democracies in the world.

The Indian Parliament, at the helm of affairs, legislates on central subjects in the union and concurrent lists and state legislatures enact laws pertaining to state subjects as per the state and concurrent lists with regard to the subjects enumerated in the Constitution of India. Likewise, pertaining to the judiciary, under art 214 of the Indian Constitution there shall be a High Court for each state and under art 124 there shall be a Supreme Court of India. Under art 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India. However, the Supreme Court may not be bound by its own earlier views and can render new decisions.

Part III of the Constitution of India secures 'Fundamental Rights' to its citizens which can be enforced directly in the respective High Courts of the states or directly in the Supreme Court of India by issue of prerogative writs under arts 226 and 32 respectively of the Constitution of India. Under the constitutional scheme, amongst others, 'Freedom of Religion' and the right to freely profess, practise and propagate it is sacrosanct and is thus enforceable by a prerogative writ issued by the superior courts.

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

It is seen that the Indian legal system has grown and evolved with the lives and aspirations of its people and its varied cultures, religious practices and personal laws. The Indian legal system is founded and fortified by age-old concepts and precepts of justice, equity and good conscience, which are, indeed, the hallmarks of the common law.

The Constitution of India is the fundamental authority of law in India. The Constitution gives due recognition to statutes, case-law and customary law consistent with its dispensations. A single unified judicial system is the unique feature of the Indian judiciary system. The Supreme Court at the apex of the entire judicial system is followed by High Courts in each state or group of states. Under the High Courts exists a hierarchy of Civil and Criminal Subordinate Courts. Panchayat Courts also function in some states under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc to decide civil and criminal disputes of petty and local nature. These are grassroots level petty courts meant to decide small disputes at the lowest levels.

II EXISTING FAMILY LAW LEGISLATION PREVAILING IN INDIA

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

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

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

    It may be pertinent to point out that the Indian Succession Act, 1925, is an Act to consolidate the law applicable to intestate and testamentary succession in India unless parties opt and choose to be governed by their

respective codified law otherwise applicable to them. In respect of issues relating to guardianship, the Guardian and Wards Act, 1890 would apply to non-Hindus. Interestingly, s 125 of the Code of Criminal Procedure 1973 provides that, irrespective of religion, any person belonging to any religion can approach a magistrate seeking maintenance. Therefore, apart from personal family law legislation, both Hindus and non-Hindus have an independent right of maintenance under the general law of the land, if he or she is otherwise entitled to maintenance under this Code.

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

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

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

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

For enforcement and adjudication of all matrimonial and other related disputes of any person in any of the different religious or non-religious communities under the respective legislation mentioned above, the designated judicial forum or court where such petition is to be lodged is prescribed in the respective enactments themselves. There is an organised system of designated civil and criminal judicial courts within every state in India which works under the overall jurisdiction of the respective High Court in the state. It is in the hierarchy of these courts that all family and matrimonial causes are lodged and decided by the aggrieved party. In addition, the Indian Parliament has enacted the Family Courts Act, 1984 to provide for the establishment of Family Courts

with a view to promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs. Despite the existence of an organised, well regulated and established hierarchy of judicial courts in India, there are still unrecognised parallel community and religious courts in existence whose interference has been deprecated by the judicial courts since such unauthorised and unwarranted bodies work without the authority of law and are not part of the judicial system.

III BACKGROUND NOTE TO ALTERNATIVE DISPUTE RESOLUTION IN INDIA

It is believed that the development of the country can be also understood from the capability of its legal system in rendering effective justice. The practice of amicable resolution of disputes can be traced back to historic times, when the villages' disputes were resolved between members of a particular relationship or occupation or between members of a particular locality. In rural India, the 'panchayats' (assembly of elders and respected inhabitants of the village) decided almost all disputes between residents of the village, while disputes between members of a clan continued to be decided by the elders of the clan. These methods of amicable dispute resolution were recognised methods of administration of justice and not just an 'alternative' to the formal justice system formed by the sovereigns, feudal lords or the adalat systems initiated by the British and the formal court system. The two systems continued to function analogous to each other. The process followed by the traditional institutions was that of arbitration and conciliation, depending on the character of dispute.

In India there is a massive legal system comprising nearly 15,000 courts across the country. It is the constitutional obligation of the judiciary to exercise its jurisdiction to reaffirm the faith of the people in the judicial set up. Therefore, evolution of new juristic principles for dispute resolution is not only important but imperative. In India the need to evolve alternative mechanisms simultaneously with the revival and strengthening of traditional systems of dispute resolution has been reiterated in reports of expert bodies.[1] Each of these reports saw the process of improving access to justice through legal aid mechanisms and alternative dispute resolution (ADR) as a part of the systematic reform of the institution of the judiciary coupled with substantive reforms of laws and processes.

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[1] Report of the Committee on Legal Aid (1971), Report of the Expert Committee on Legal Aid: Processual Justice to the People (Government of India, Ministry of Law, Justice and Company Affairs, 1973), Report on National Juridicare Equal Justice – Social Justice (Ministry of Law, Justice and Company Affairs, 1977).

IV EXISTING STATUTORY PROVISIONS FOR ADR IN LAW IN INDIA

The sensitivity of the legislature towards providing speedy and efficacious justice in India is mainly reflected in several enactments which are enumerated as follows:

- arbitration under the Arbitration and Conciliation Act, 1996;
- settlement under Order XXXIIA of the Indian Code of Civil Procedure, 1908;
- the incorporation[2] of s 89 in the traditional Civil Procedure Code (CPC) read with Order X Rules IA, IB, and IC for settlement of disputes outside court;
- the establishment of Lok Adalat under the Legal Services Authority Act, 1987 looks to mediation, conciliation and informal settlement of disputes in litigation;
- reconciliation under s 23(2) and (3) of the Hindu Marriage Act, 1955 as also under s 34(3) of the Special Marriage Act, 1954;
- duty of the Family Court to make efforts for settlement under the Family Courts Act, 1984.

(a) The Constitutional Mandate

Article 21 of the Constitution of India declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure established by law. The words 'life and liberty' are not to be read narrowly in the sense monotonously dictated by dictionaries; they are organic terms which are to be construed meaningfully.

The right to speedy trial has been rightly held to be a part of the right to life or personal liberty by the Supreme Court of India.[3] The Supreme Court has allowed art 21 to stretch its arms as wide as it legitimately can.[4] The reason is very simple. This liberal interpretation of art 21 is to redress that mental agony, expense and strain which a person proceeded against in litigation has to undergo and which, coupled with delay, may result in impairing the capability or ability of the accused to defend himself effectively. Thus, the Supreme Court

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2 With effect from the 2002 amendment of the CPC.

3 *Hussainara Khatoon (1) v Home Secretary, State of Bihar* (1980) 1 SCC 81.

4 Article 21 is a Fundamental Right that can be directly enforced in the Supreme Court under art 32 of the Constitution of India. Fundamental Rights, as incorporated in Part III of the Constitution, are different from Constitutional Rights that cannot be directly enforced under art 32. All Fundamental Rights are Constitutional Rights but not vice-versa.

has held the right to speedy trial a manifestation of fair, just and reasonable procedure enshrined in art 21. A speedy trial encompasses within its sweep all its stages including investigation, inquiry, trial, appeal, revision and re-trial. In other words, everything commencing with an accusation and expiring with the final verdict falls within its ambit. The same has got recognition from the 'legislature' as well in the form of the introduction of 'Alternative Dispute Resolution Mechanism' (ADRM) through various statutes.[5]

(b) The Indian Arbitration and Conciliation Act, 1996

The above is a generalised list of statutory enactments which govern the arena of Indian dispute resolution by finding expression in different words under separate laws. Arbitration generally is now a prevalent practice in the Indian civil jurisdiction. Due to mounting arrears of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first enactment on arbitration was the Arbitration Act, 1940. Other supporting legislation in existence was the Arbitration [Protocol and Convention] Act of 1937 and the Foreign Awards Act of 1961. Arbitration under these laws was never effective and led to further litigation as a result of rampant challenge of the awards rendered under these laws. The Indian legislature thus enacted the existing current Arbitration and Conciliation Act, 1996 to make arbitration, both domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the UN General Assembly) and facilitates international commercial arbitration as well as domestic arbitration and conciliation. Under the above 1996 Act, an arbitral award can be challenged only in the manner prescribed and on limited grounds. The 1996 Act also restricts court intervention in arbitration proceedings to minimal interference. India is party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. As the name of the Act suggests, it also covers conciliation, which is a form of mediation. Accordingly, arbitration is a popular mode of dispute resolution in civil disputes and commercial agreements invariably contain an arbitration clause.

(c) Provisions for ADR under the Code of Civil Procedure, 1908

The Code of Civil Procedure, 1908 (CPC), as amended from time to time is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature in India. All litigation of a civil nature in India is essentially governed by the substantive provisions of law, contained in the various sections of the CPC and the corresponding implementing provisions are contained in various orders and rules of the CPC. There are three substantive and procedural provisions contained in the CPC which provide for settlement of disputes outside the court. These can be identified briefly as the following before quoting the details of the respective provisions:

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[5] See 'The Culture of ADR in India by Praveen Dalal' available at: www.odr.info/THE%20CULTURE%20OF%20ADR%20IN%20INDIA.doc.

- Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court;

- Order X of the Code of Civil Procedure, 1908: Examination of Parties by the Court; and

- Order XXXIIA[6] of the Code of Civil Procedure, 1908: Suits Relating to Matters Concerning the Family.

It may now be useful to quote the details of all the three provisions of the CPC mentioned above. They are extracted hereunder in the order given above.

(i) Section 89 of the Code of Civil Procedure: Settlement of disputes outside the Court[7]

With a view to implementing the 129th Report of the Law Commission of India, it was made obligatory for courts to refer disputes after the issues were framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat (a settlement court). It was felt that only after the parties failed to get their disputes settled through any one of the alternate dispute resolution methods should the litigation proceed further in the court in which it was filed. Accordingly, s 89 of the CPC reads as follows:

> **'89. Settlement of disputes outside the Court –** (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for–
>
> (a) arbitration;
> (b) conciliation;
> (c) judicial settlement including settlement through Lok Adalat; or
> (d) mediation.
>
> (2) Where a dispute had been referred–
>
> (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
> (b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

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6 Order XXXIIA inserted by s 80 of Act No 104 of 1976 (with effect from 1 February 1977).

7 Inserted by CPC (Amendment) Act 1999 with effect from 1 July 2002. The earlier s 89 of the CPC was repealed by the Arbitration Act, 1940. There is now an independent Arbitration and Conciliation Act, 1996. The law has been consolidated in that Act and hence the present parallel amendment was necessitated in the CPC in 1999.

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.'

A perusal of s 89 of the CPC quoted above clearly spells out the statutory modes, mechanisms, machinery and procedure provided and stipulated for alternative modes of dispute redressal in all matters of civil litigation in India. These substantive provisions are procedurally supported by Order X, Rules 1A, 1B and 1C as below.

(ii) Order X of the Code of Civil Procedure, 1908: Examination of Parties by the Court

Rules 1A, 1B and 1C were inserted in Order X by the CPC (Amendment) Act, 1999. This was consequential to the insertion of s 89(1) of the CPC, making it obligatory upon the courts to refer the dispute for settlement by way of arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. A settlement can thus be made by adopting any of the said modes specified in the amended s 89. Order X of the CPC along with Rules 1, 1A, 1B and 1C read in the following terms:

'Order X: Examination of Parties by the Court.

1. Ascertainment whether allegations in pleadings are admitted or denied – At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.

1A. Direction of the court to opt for any one mode of alternative dispute[8] resolution.

After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority

Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

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[8] Added by Act No 46 of 1999, s 20 (with effect from 1 July 2002).

1C. Appearance before the court consequent to the failure of efforts of conciliation

Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the court on the date fixed by it.'

As per the Rule 1A above, the parties to the suit are given an option for settlement of the dispute outside court. When the parties have exercised their option, it shall fix the date of appearance before such forum or authority as may be opted by the parties for settlement. As per Rule 1B, the parties are required to appear before such forum or authority opted by them. Rule 1C provides for the presiding officer of the forum or authority to refer the matter again to the court in case it feels that, in the interest of justice, the forum or authority should not proceed with the matter.

(iii) Order XXXIIA[9] of the Code of Civil Procedure, 1908

It may be pertinent to point out that all proceedings under the Hindu Marriage Act and the Special Marriage Act in India are regulated by the provisions contained in the CPC. Accordingly, insofar as suits relating to matters concerning the family are concerned, by an amendment made in 1976, the Indian Parliament in its wisdom added Order XXXIIA to the Code of Civil Procedure to provide for mandatory settlement procedures in all matrimonial proceedings specifically. Order XXXIIA of the CPC which is relevant to the present context is quoted below for reference:

'Order XXXIIA: Suits Relating to Matters Concerning the Family:

1. Application of the Order

(1) The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.

(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:–

(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person;
(b) a suit or proceeding for a declaration as to legitimacy of any person;
(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;
(d) a suit or proceeding for maintenance;
(e) a suit or proceeding as to the validity or effect of an adoption;

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[9] Order XXXIIA inserted by s 80 of Act No 104 of 1976 (with effect from 1 February 1977).

(f) a suit or proceeding, instituted by a member of the family relating to wills, intestacy and succession;
(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. Proceedings to be held in camera

In every suit or proceeding to which this Order applies, the proceeding may be held in camera if the Court so desires and shall be so held if either party so desires.

3. Duty of Court to make efforts for settlement

(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

4. Assistance of welfare expert

In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by rule 3 or this Order.

5. Duty to inquire into facts

In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far is [sic] reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

6. "Family" – meaning of

For the purposes of this Order, each of the following shall be treated as constituting a family, namely:–

(a) (i) a man and his wife living together,
(ii) any child or children being issue or theirs; or of such man or such wife,
(iii) any child or children being maintained by such man and wife;

(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him;
(c) a woman not having a husband or not living together with her husband any child or children being issue of hers, and any child or children being maintained by her;
(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her; and
(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c) or clause (d) of this rule.

Explanation – For the avoidance of doubts, it is hereby declared that the provisions of rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.'

A reading of the above clearly establishes the statutory mandate laid down by the CPC to make an endeavour in the first instance to assist the parties in arriving at a settlement in a matrimonial cause in any matrimonial proceeding before a court of competent jurisdiction. Hence, in any suit or proceeding for matrimonial, ancillary or other relief in matters concerning the family, there is a separate and independent statutory provision providing for mandatory settlement proceedings. This is over and above the other statutory provisions applicable.

(d) Lok Adalat system under the Legal Services Authority Act, 1987

The Legal Services Authorities Act, 1987, as per its preamble, was enacted as:

'An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.'

Under Chapter VI of the Act, authorities may organise Lok Adalats (Settlement Courts) at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. Generally, the Lok Adalat consists of serving or retired judicial officers and other persons of eminence, specified by the respective government in consultation with the judiciary. Over the passage of time, such Lok Adalats have become a popular mode for informal settlement of civil disputes of all nature. Written compromises, settlements and negotiated conclusions drawn up in Lok Adalats are returned to the court of competent jurisdiction for passing an appropriate judicial award, decision, decree or compromise as the case may be. Even matrimonial matters are settled in Lok Adalats and thereafter such negotiated settlements are affirmed by the respective matrimonial courts by appropriate orders or consent decrees/judgments so drawn up.

Lok Adalat generally means 'People's Court'. India has had a long history of resolving disputes through the mediation of village elders. The system of Lok Adalats is an improvement on that and is based on Gandhian principles. This is a non-adversarial system, where mock courts (called Lok Adalats) are held by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee, periodically for exercising such jurisdiction as they think fit. These are usually presided by retired judges, social activists, or members of the legal profession. Lok Adalats do not have jurisdiction on matters pertaining to non-compoundable offences.

There is no court fee and no rigid procedural requirement (ie no need to follow mandatory process laid down by the CPC or Evidence Act), which makes the process very fast. Parties can directly interact with the Lok Adalat judges in vernacular language, which feature is not possible in regular courts.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree and consent to it. A case can also be transferred to a Lok Adalat if one party applies to the court in writing where the matter is pending. If the court sees some chances of settlement after giving an opportunity of being heard to the other party, the matter can be transferred to the Lok Adalat for settlement.

The focus in Lok Adalats is on compromise and settlement. When no compromise is reached, the matter goes back to the regular court. However, if a compromise is reached, an award is made by consent and is binding on the parties. It is enforced as a decree of a civil court after it is affirmed as such by the regular court. An important aspect is that the award is final and cannot be appealed, not even under art 226 because it is a judgment by consent and consent orders are not appealable.

All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a civil court under the Legal Services Authorities Act, 1987.

The Law Commission of India in its 129th Report recommended that the alternate modes of dispute redressal be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court where it was filed and where the matter was pending before settlement was attempted.

(e) Settlement under Indian Family Law Statutes

Reconciliation is mandatory under the Hindu Marriage Act, 1955 (HMA) and the Special Marriage Act, 1954 (SMA). However, other Indian matrimonial statutes do not provide for it and there is therefore no statutory mandate to attempt settlement in other cases.

(i) Reconciliation under s 23(2) and (3) of the Hindu Marriage Act

Section 23(2) of the HMA states that, before proceeding to grant any relief under it, there shall be a duty on the Court in the first instance, in every case to make every endeavour to bring about reconciliation between the parties where relief is sought on most of the fault grounds for divorce specified in s 13 of the HMA. Section 23(3) of the HMA makes a provision empowering the court on the request of parties or if the court thinks it just and proper to adjourn the proceedings for a reasonable period not exceeding 15 days to bring about reconciliation. It must be borne in mind that a Hindu marriage is a sacrament and not a contract. Even if divorce is sought by mutual consent, it is the duty of the court to attempt reconciliation in the first instance. Accordingly, Hindu law advocates rapprochement and reconciliation before dissolving a Hindu marriage. Section 23(2) and (3) of the HMA, relevant for the present context, are reproduced below:

> **'23. Decree in Proceedings –**
>
> (1) …
>
> (2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:
>
> [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.
>
> (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to report.]'[10]

(ii) Section 34 of the Special Marriage Act, 1954

The provisions of s 34(2) and (3) of the SMA are pari materia to the provisions contained in s 23(2) and (3) of the HMA. Even though the marriage contracted under the SMA does not have the same sacramental sanctity as marriage solemnised under the HMA, the Indian Parliament in its wisdom has retained the provisions for reconciliation of marriages in the same terms in the SMA as they exist in the HMA. The mandatory duty on the court is thus in similar terms. For reference, s 34(2) and (3) of the SMA are quoted below:

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[10] Inserted by Act 68 of 1976, s 16 (with effect from 27 May 1976).

> **'34. Duty of Court in passing decrees –**
>
> (1) xx xx xx xx
>
> (2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:
>
> [Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f), clause (g) or clause (h) of sub-section (1) of section 27 of the Special Marriage Act, 1954.
>
> (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.]'[11]

It may be noticed that the provisions under both the statutes are almost identical and accordingly every endeavour to bring about reconciliation is mandatory.

(iii) Other pre-emptive measures under the Hindu Marriage Act, 1955

Section 14 of the HMA is another pre-emptive measure provided by the said Act, which was presumably designed with the object of preventing hasty recourse to legal proceedings by the spouses without making a real effort to reconcile and save their marriage from being dissolved. In this context, it may be useful to quote s 14(1) of the HMA which states that:

> 'Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce,[12] [unless at the date of presentation of the petition one year has elapsed] since the date of marriage.'

Thus, s 14 of the HMA provides a deterrent from initiating divorce proceedings in the first year of marriage. The logic again is to advocate settlement and reconciliation between parties and avoid hasty divorces.

However, under the proviso to s 14 of the HMA, the court is conferred a discretionary power to entertain a petition before the expiry of one year, if it finds on the allegation in the affidavit filed in support of the petition that prima

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[11] Inserted by Act 68 of 1976, s 34 (with effect from 27 May 1976).
[12] Substituted by Act 68 of 1976, s 9.

facie there is exceptional hardship to the petitioner or depravity on the part of the respondent.[13] It presupposes an application for leave of court to present a petition for divorce before the expiry of one year from the date of marriage. Hence, the statute provides discretion to the court in entertaining a petition or divorce in the first year of marriage on the ground of exceptional hardship or exceptional depravity.

Section 14(2) of the HMA further states that:

> 'In disposing of any application under this section for leave to present a petition for divorce before the [expiration of one year][14] from the date of marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [said one year].'[15]

Section 29 of the SMA contains similar provisions with similar bars.

(iv) Petition for divorce by mutual consent

Under s 13B of the HMA and s 28 of the SMA, divorce by mutual consent is available. However, it is not granted instantly and a joint motion made by both parties in the first instance has to wait for 6 months but not longer than 18 months to be confirmed for granting a divorce by mutual consent in the second motion. It is evident that reconciliation may be out of the question in a petition for divorce by mutual consent. But there is an inbuilt opportunity for reconciliation if parties wish to avail of it. When a joint petition is presented, it is adjourned for a minimum period of 6 months. This period is to enable them to think over the matter of divorce and, if the parties want to prolong their consideration of reconciliation, they can do so for another year (total period is 18 months, within which they can move the motion of a decree of divorce). Section 28 of the SMA contains similar provisions with similar bars. The logic in these enactments is again to provide for reconciliation in a thinking period between the first and the second motion.

Some precedents settled by Indian courts may be cited in support. In *Hitesh Narendra Doshi v Jesal Hitesh Doshi*,[16] the minimum 6-month waiting period from the date of the presentation of the petition for snapping the marital ties between the parties by mutual consent under s 13B(2) of the HMA was held to be mandatory and it was held that the court has no power to relax the said compulsory time wait of 6 months and cannot pass a decree of divorce forthwith.

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13 *Gulzar Singh v State of Punjab* 1998 (2) HLR 204 (P&H).

14 Substituted by Act 68 of 1976, s 9, for 'expiration of three years' (with effect from 27 May 1976).

15 Substituted by Act 68 of 1976, s 9, for 'said three years' (with effect from 27 May 1976).

16 2000 (2) Hindu LR (AP) (DB) 45: AIR 2000 (AP) 362.

However, in *Mohinder Pal Kaur v Gurmeet Singh*[17] it was held that the 6-month waiting period can be brought down in cases where an existing divorce petition is already pending for more than 6 months and efforts for reconciliation have been made earlier but without any success. Thus, the waiting period cannot be curtailed in a freshly instituted petition for divorce by mutual consent if, in an earlier petition on fault or other grounds, the parties have already been litigating for more than 6 months and reconciliation between them has been of no avail.

(v) Matters to which reconciliation does not apply: petition on certain fault grounds

When a petition for divorce under the HMA is presented on the ground of change of religion (s 13(1)(ii)), unsoundness of mind (s 13(1)(iii)), leprosy (s 13(1)(iv)), venereal disease (s 13(1)(v)), renunciation of world (s 13(1)(vi)), or presumption of death (s 13(1)(vii)) reconciliation efforts need not be made, that is to say, the provisions of s 23(2) do not apply. The proviso to s 23(2) of the HMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in HMA above.

Similarly, when a petition for divorce is made under the SMA on the ground of 7 years sentence of imprisonment (s 27(1)(c)), unsoundness of mind (s 27(1)(e)), venereal disease (s 27(1)(f)), leprosy (s 27(1)(g)), or presumption of death (s 27(1)(h)), no efforts at reconciliation need be made. The proviso to s 34(2) of the SMA exempts the mandatory requirement of attempting reconciliation between the parties when divorce is sought on any of the grounds in SMA stipulated above.

However, it may be added out of abundant clarification that on all other grounds of divorce, both under the HMA and SMA, the court has an obligation to make efforts at reconciliation.[18] This mandatory and statutory duty of the court cannot be waived.

(vi) Reconciliation by the court

Section 23(2) of the HMA and s 34(2) of the SMA lay down that at first instance it is the duty of the court to make every effort to bring about reconciliation between the parties where it is possible to do so consistently with the nature and circumstances of the case. The words are 'before proceeding to grant relief'. At one time a view was propounded that the reconciliation endeavour should be made towards the end of the proceedings when the court comes to a conclusion that it is going to grant 'relief'. But then the provision also states 'at the first instance' and this has been interpreted to mean that before the court takes up the case for hearing, it should make an effort at

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[17] 2002 (1) Hindu LR (Pb & Hry) 537.

[18] *Pramila v Ajit*, AIR 1989 Pat 163: (1989) 2 DMC 466.

reconciliation. Presently, the latter is the prevalent view and hence reconciliation is to be attempted in the first instance.

(f) Family Courts Act, 1984

The Preamble to the Family Courts Act, 1984 enacted by the Indian Parliament states that it is:

> 'An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.'

In the Statement of Objects and Reasons of the Family Courts Act, five essential requirements were pinpointed in the context of providing reconciliatory efforts to litigating parties and these can be summarised as follows:

(a) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply;

(b) provide for the association of social welfare agencies, counsellors, etc, during conciliation stage and also to secure the service of medical and welfare experts;

(c) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioners. However, the court may, in the interest of justice, seek assistance of a legal experts as *amicus curiae* in the case;

(d) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute; and

(e) provide for only one right of appeal which shall lie to the High Court.

In seeking to achieve the above objects, the endeavour of the Family Courts Act was to adopt a friendly, conciliatory and informal dispute resolution atmosphere which would enable parties to amicably settle their differences without the shackles of the technical rules of the law of procedure and evidence. These objects find expression in the Constitution of the Family Courts Act, its jurisdiction and procedure. The necessary provisions for reconciliation in the Family Courts Act, 1984 are dealt with under s 9 of the Act which reads as follows:

> **'9. Duty of Family Court to make efforts for settlement:**
>
> (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.
> (2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it think fit to enable attempts to be made to effect such a settlement.
> (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.'

The Act also makes it open to the Family Courts under s 12:

> ' . . . to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.'

Clearly, the thought, logic and motive in the Act in making available services of professional experts is to provide counselling, expert help and assistance of trained mediators. Therefore, this enactment is wholesome legislation on reconciliatory modes in family law disputes in the Indian matrimonial jurisdiction.

V ANALYSIS OF THE STATUS OF ADR IN FAMILY LAW IN INDIA

The duty of making or amending laws is on the legislature but to develop it and to interpret it to suit the needs and circumstances of society is the call of the judiciary. Hence, unless and until the beneficial provisions of the matrimonial legislation promoting and advocating reconciliation in matrimonial disputes in India are favourably interpreted and strictly implemented by the courts, the letter of law may be an illusory mirage which remains on the statute book only. It is therefore the solemn duty of the matrimonial courts in India to ensure that the mandatory settlement efforts are actually put into practice and parties are encouraged to actually utilise them for out-of-court settlements. Thus, there is a heavy burden on the courts to discharge this duty failing which it will be neither possible nor useful to enforce reconciliatory measure in matrimonial disputes in the Indian jurisdiction. Accordingly, it would be most useful to cite and quote some recent prominent verdicts of superior Indian courts which have stressed and highlighted the dire necessity of the beneficial provisions of Indian legislation which provide mandatory reconciliation procedures.

Section 23 of the HMA and Order XXXIIA of the CPC and the duty enjoined upon the court came up for interpretation before the Supreme Court recently in the case *Jagraj Singh v Bir Pal Kaur.*[19]

The Supreme Court upheld the order of the High Court summoning the respondent husband by non-bailable warrants:

> '26 From the above case law in our judgment, it is clear that that a court is expected, nay, bound, to make all attempts and section (2) of section 23 is a salutary provision exhibiting the intention of the parliament requiring the court 'in the first instance' to make every endeavour to bring about a reconciliation between the parties. If in the light of the above mentioned intention and paramount consideration of the legislature in enacting such provision, an order is passed by a Matrimonial Court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the court has no such power and in case a party to a proceeding does not remain present, at most, the court can proceed to decide the case *ex parte* against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the learned counsel for the appellant therefore cannot be upheld.'

Hence, the order of the Apex Indian Court upholding the directions of the High Court summoning the respondent – husband in the above case – through non-bailable warrants clearly reflects the legislative intent of attempting mandatory reconciliation procedures. This judgment of the Supreme Court clearly confirms that settlement efforts in matrimonial matters are not an empty meaningless ritual to be performed by the matrimonial court. The verdict clearly reflects the benevolent legislative purpose.

A novel question came up for decision before the High Court of Kerala in *Bini v KV Sundaran*,[20] ie as to whether conciliation is mandatory after the introduction of the Family Courts Act, 1984, even on the excepted grounds of conversion to another religion, renunciation of the world, mental disorder, venereal disease and leprosy. Calling the Family Courts Act, 1984 a special statute, and its provisions to make attempt at reconciliation mandatory at the first instance, the High Court held:

> 'The parties can disagree on matters of faith and still lead a happy marital life if they could be convinced that matters of faith should not stand in the way of union of hearts. Thus though under the Hindu Marriage Act, 1955, no endeavour for reconciliation need be made in a petition for divorce on the ground of conversion to another religion, or other grounds excepted under Section 13(1) of the Hindu Marriage Act, 1955 or on similar or other grounds available under any other law also, after the introduction of the Family Courts Act, 1984, the Family Court is

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[19] JT 2007 (3) SC 389.
[20] AIR 2008 Kerala 84.

> bound to make an endeavour for reconciliation and settlement. The requirement is mandatory. That is the conceptual change brought out by the Family Courts Act, 1984 which is a special statute.'

The court further says that 'the primary object is to promote and preserve the sacred union of parties to marriage. Only if the attempts for reconciliation are not fruitful, the further attempt on agreement or disagreement be made by way of settlement'.[21]

Hence, from a reading of the above judgment it is clear that the duty cast upon the matrimonial courts to attempt mandatory reconciliation cannot be avoided and cannot be circumvented even when divorce is sought on certain exceptional grounds which under the HMA and SMA do not provide compulsory settlement action.

Still further, stressing the need to treat the cases pertaining to family matters in a humanitarian way, the Supreme Court of India in the case *Balwinder Kaur v Hardeep Singh*[22] laid down that:[23]

> ' . . . stress should always be on preserving the institution of marriage. That is the requirement of law. One may refer to the Objects and Reasons which lead to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is 'laid on conciliation and achieving socially desirable results' and elimination of adherence to rigid rules of procedure and evidence.'

The Supreme Court further lays down that:[24]

> ' . . . it is now obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a family dispute. Even where the Family Courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the Civil Courts trying matrimonial causes.'

The Supreme Court held that the objectives and principles of s 23 of the HMA govern all courts trying matrimonial matters.[25]

Deciding on the importance of making an attempt at reconciliation at the first instance, a Division Bench of the Calcutta High Court in *Shiv Kumar Gupta v Lakshmi Devi Gupta*[26] felt that the compliance with s 23(2) of the HMA is a statutory duty of the judge trying matrimonial cases. The court in this case

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21 Paragraphs 3 and 7 of the judgment.
22 AIR 1998 SC 764.
23 Paragraph 9 of the judgment.
24 Paragraphs 10 and 11 of the judgment.
25 Paragraph 15 of the judgment.
26 2005 (1) HLR 483.

relied upon the decision of the Supreme Court in *Balwinder Kaur v Hardeep Singh* (which has been dealt with in preceding paragraphs) and held that:[27]

> ' . . . on a reading of Section 23(2) of the Act and on the perusal of the judgment in Balwinder Kaur on the interpretation of Section 23(2) this Court held that the decree, which was passed without complying with Section 23(2) of the said Act, cannot be sustained.'

In another perspective, in *Love Kumar v Sunita Puri*[28] it was held that the matrimonial court had acted in haste to pass a decree of divorce against the husband for his non-appearance at the time of reconciliation proceedings. The High Court accordingly set aside the divorce decree and remanded the matter back to the matrimonial court to be decided on its merits. The object of s 23(2) of the HMA was explained in paras 19 and 21 of this judgment as follows:

> '19. Under S. 23(2) of the Act it is incumbent on the matrimonial Court, to endeavour to bring about reconciliation between the parties, a great responsibility is cast on the Court. A Hindu marriage is not contractual but sacrosanct, it is not easy to create such ties but more difficult to break them; once annulled, it cannot be restored. A Judge should actively stimulate rapprochement process. It is fundamental that reconciliation of a ruptured marriage is the first duty of the Judge. The sanctity of marriage is the corner stone of civilization. The object and purpose of this provision is obvious. The State is interested in the security and preservation of the institution of marriage and for this the Court is required to make attempt to bring about a reconciliation between the parties. However, omission to make attempts at reconciliation will not take away the jurisdiction of the Court to pass any decree under the Act. This is not correct to say that in a divorce case reconciliation efforts have to be timed immediately preceding the grant of decree and not at any other stage of the proceedings of the trial. Such an attempt can be and should be made at any stage. The matrimonial Court is required to call parties and make a genuine effort for their reconciliation, there is not even a whisper in this provision that the matrimonial Court has the power to strike off the defence of that spouse, who after being given opportunities for reconciliation fails to appear.
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> …
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> 21. But under S. 23(2) of the Act neither such a liability is cast on the one spouse nor such a right is given to the other spouse. Reconciliation is a mutual dialogue to bury their differences. A duty is cast on the Court to call the party at the initial stage for reconciliation. Even before delivering judgment and decree, the Court can make effort for reconciliation. Thus, the stage of trial for calling the parties for reconciliation is left to the discretion of the Court.'

From a reading of the above judgments, it can clearly be spelt out that, though reconciliation is a mandatory process, the timing and stage at which it is to be implemented may vary depending on the facts and circumstances of each case. At the same time causing prejudice to the rights of one party by striking off the

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[27] Paragraph 8 of the judgment.
[28] AIR 1997 Punjab and Haryana 189: 1997(1) HLR 179.

defence or dismissing the petition may actually work injustice to the rights of such party. Therefore, the matrimonial court in its wisdom may fashion and design the stage of attempting matrimonial reconciliation depending on the facts of each case without causing prejudice to the substantive rights of the parties. However, at the same time, the matrimonial court ought not to give the mandatory settlement procedure a go by.

In another case, High Court of Allahabad called it the bounded duty of the Family Court to make an attempt at conciliation before proceeding with the trial of the case.[29] In the recent case of *Aviral Bhatla v Bhavana Bhatla,*[30] the Supreme Court has upheld the settlement of the Delhi mediation centre, appreciating the effective manner in which the mediation centre of the Delhi High Court helped the parties to arrive at a settlement.

From a reading of the recent pronouncements of law discussed above, it is apt to conclude that there is a growing emphasis on the need for attempting mandatory reconciliatory measures and wherever matrimonial courts have been lacking in their duties to do so, superior Indian courts have stepped in, to set the records straight. Therefore, there is a growing jurisprudence to adapt to out-of-court settlement and reconciliation rather than litigating in matrimonial courts. However, the performance of this mandatory exercise ought not to be reduced to an empty ritual or a meaningless exercise. Otherwise, the utility of the beneficial provision will be lost.

VI CONCLUSIONS: NEED FOR REFORM AND SOME SUGGESTIONS

The philosophy of alternate dispute resolution systems is well illustrated by Abraham Lincoln's famous words: 'discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time.' These words spell out grim reality and truth.

Litigation in respect of any matter concerning the family, whether divorce, maintenance and alimony or custody, trial of juvenile offenders or any other matrimonial cause, should not be viewed in terms of failure or success of legal action but as a social therapeutic problem. It should not be viewed as a prestigious dispute in which parties and their counsel are engaged in winning or defeating, but as a societal problem needing resolution. The amicable settlement of family conflict requires special procedures designed to help people in conflict and in trouble, to reconcile their differences, and where necessary to obtain professional assistance. Family disputes need to be seen with a humanitarian approach and hence attempts should be made to reconcile the differences so as to not disrupt the family structure. Adjudication of family

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[29] *Rajesh Kumar Saxena v Nidhi Saxena* 1995 (1) HLR 472.
[30] 2009 SCC (3) 448.

disputes is an entirely different matter from conventional civil or criminal proceedings, it is a different culture and has a different jurisprudence altogether.[31] The whole of society feels the reverberations of a family dispute.

Whereas there already exist some provisions for the conduct of arbitration, conciliation and Lok Adalat in different statutes, the need for a framework to regulate the ADR process as a whole and mediation in particular has been sought to be fulfilled by the Supreme Court of India. It has done so by providing the final version of the Model Rules of ADR and the Model Rules of Mediation, both framed by the Law Commission of India, in its orders passed in the case of *Salem Bar Association v Union of India*[32] with a direction that all High Courts should adopt these with such modifications as they may consider necessary.

The Supreme Court has also made an observation regarding the disturbing phenomena of the large number of cases flooding the courts pertaining to divorce or judicial separation. Recently, in 2009, in *Gaurav Nagpal v Sumedha Nagpal*[33] the Supreme Court observed:

> 'It is a very disturbing phenomenon that large numbers of cases are flooding the courts relating to divorce or judicial separation. An apprehension is gaining ground that the provisions relating to divorce in the Hindu Marriage Act, 1955 (in short the 'Marriage Act') has led to such a situation. In other words, the feeling is that the statute is facilitating breaking of homes rather than saving them, this may be too wide a view because actions are suspect. But that does not make the section invalid. Actions may be bad, but not the Section. The provisions relating to divorce categorise situations in which a decree for divorce can be sought for. Merely because such a course is available to be adopted, should not normally provide incentive to persons to seek divorce, unless the marriage has irretrievably broken. Efforts should be to bring about conciliation to bridge the communication gap which lead to such undesirable proceedings. People rushing to courts for breaking up of marriages should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving of marriage and not breaking it. As noted above it is more important in cases where the children bear the brunt of dissolution of marriage.'

However, we cannot remain oblivious to the fact that India with its population of 1.1 billion Indians has over 30 million non-resident Indians who live in 180 countries abroad. Some of these former Indian citizens are foreign nationals with overseas spouses. But, the fact remains that their personal family law still governs them due to extra territorial application. Resolution of marital disputes of such citizens of Indian origin creates conflicts since India does not have on its statute book irretrievable breakdown of marriage as a ground for divorce in India. Therefore, foreign divorce decrees on the breakdown ground with no prior mandatory reconciliation procedures do not find favour either in

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[31] See Paras Diwan *Law of Marriage and Divorce* (Preface to the 1st edn) (Universal Law Publishing, Delhi, 5th edn, 2008).

[32] 2003 (1) SCC 49.

[33] AIR 2009 SC 557, para 50.

Indian courts or in the domestic societal set up. How does one resolve such emerging dimensions of family law disputes where marriages solemnised in India are sought to be dissolved abroad in countries of foreign residence? The authors have advocated a solution[34] penned as follows:

> 'The answer therefore is that the existing three-tier divorce structure in India under the HMA 1955 and the SMA 1954, i.e. fault grounds, mutual consent principle and break down theory, seems to provide sufficient options in the existing societal structure. Therefore, no major changes are called for. However, a civilized parting of spouses where a marriage has irretrievably broken down needs to be incorporated in the statute book as an additional ground for divorce, but only in cases where both the parties to the marriage jointly petition the court for such relief. This, in the opinion of the authors, will have an immediate two-fold benefit. First, where parties have irreconcilable differences and want to part amicably, an option will be available to them to part legally and logically without resorting to a protracted time-consuming legal battle on "trumped-up" grounds. Secondly, recourse to divorce in foreign jurisdictions may decline once a proper legal option of irretrievable break down is available on Indian soil. Irretrievable breakdown can thus serve as an additional ground for divorce in the HMA 1955 and the SMA 1954, and to prevent hasty divorces or misuse, sufficient statutory safeguards can be incorporated to arm the judiciary to prevent any abuse of the process of law. Keeping the Hindu ceremonial and sacramental concept of marriage intact is essential. Erosion of values in matrimonial life must be checked, and traditional marriage protected. The institutions of family, home and children of the marriage, as they exist today under Hindu law, need protection. Hindu law therefore does not need any major overhaul. It is self-sufficient, but does need some immediate amendment.'

The above views of the authors clearly depict the inbuilt conciliatory settlement theory embedded in Indian family law to save the marriage by in-house settlement. But, marriages solemnised in India according to personal laws of non-resident Indians who have permanently migrated abroad need to find resolution in the existing statutory family laws either by suitable amendments or a brand new legislation which will incorporate corresponding mandatory conciliatory procedures. For this problem, the authors have advocated their suggestions in this regard in the following words:[35]

> 'A reading in totality of the matters in the overseas family law jurisdiction gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdictions, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to avoid them from importing judgments from foreign Courts to India for implementation of their rights. The answer therefore, lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now

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[34] See Anil Malhotra and Ranjit Malhotra *Acting for Non-Resident Indian Clients* (Jordan Publishing Limited, 2004) ch 3, pp 76–77.

[35] See Anil Malhotra *India, NRIs and the Law* (Universal, New Delhi, 2009) at pp 271–272.

> seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Till this is done, foreign Court judgments in domestic matters will keep cropping up and Courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way. However, in this process, the Indian judiciary has made one thing very clear i.e. the Indian Courts would not simply mechanically enforce judgments and decrees of foreign Courts in family matters. The Indian Courts have now started looking into the merits of the matters and deciding them on the considerations of Indian law and the best interest of the parties rather than simply implementing the orders without examining them. Fortunately, we can hail the Indian judiciary for these laudable efforts and till such time when the Indian Legislature comes to rescue with appropriate legislation, we seek solace with our unimpeachable and unstinted faith in the Indian Judiciary, which is rendering a yeoman service.'

Therefore, the dire pressing need of the day in the current social milieu, where 30 million Indians now live outside India, is to create a law and infrastructural machinery for ADR mechanisms in resolving marriages solemnised in India but which have been fractured or broken abroad. For the lack of resolution, they lead to interparental child removal custody conflicts, disputes of maintenance and differences over settlement of matrimonial property. It is these limping marriages which need reconciliatory formulas in India to prevent them from being split abroad on grounds and reasons which do not find favour with the personal family laws of the parties in India. These cross border marital conflicts should not stem into or branch out into other ancillary issues multiplying the problem. This, in the opinion of the authors, ought to be the focus of the legislative intent today in creating, harmonising and balancing the societal structure of Indians, non-resident Indians and all those who form relationships with them to build families abroad. ADR needs to be developed in a big way for resolving limping unions.

Some suggestions can be mooted by the authors to improve the situation and to make ADR a reality in the structure of the current Indian family law.

(1) Participation of citizens

Alternative dispute resolution cannot see the light of the day unless citizens also 'participate' in that movement. The citizens can help in the achievements of these benign objectives by restraining themselves while invoking jurisdictions of the 'traditional courts' where the matter in dispute can be conveniently and economically taken care of by ADR mechanisms. The right to speedy trial is not a fact or fiction but a 'constitutional reality' and it has to be given its due respect. The courts and the legislature have already accepted it as one of the media of reducing the increasing workloads on the courts. The same is also gaining popularity among the masses due to its advantages. We need 'private initiatives' for not only the establishment of ADR facilities in India but equally a 'liberal use' of the same by its citizens. This initiative needs awakening by self consciousness and not by implementation of laws. Spouses, parents and couples need to realise the advantages of reconciliation, mediation

and alternative dispute resolution methods in the family structure. Matrimonial relief carved out by settlement will serve better than results obtained by adversary litigation involving time, effort, finances and above all by breaking up a family.

(2) More authority should be given to the Family Courts

Family matters should not be litigated in any court unless it is of an extraordinarily grave nature; it should be amicably resolved. Family disputes such as divorce, matrimonial property division, custody of children and maintenance should not come into the higher courts and they should be resolved mutually and conclusively in the Family Court itself. It would save the time of the superior courts where other matters could be resolved in the time which would have been consumed for settling matrimonial disputes. Family disputes are disputes that can be resolved even in the home itself by a unanimous consensus. Mandatory reconciliatory procedures should assume finality so that matters can be put to rest conclusively without any further challenge.

(3) Creation of more Family Courts

The necessity and urgency of creating more Family Courts under the Family Courts Act, 1984 in India is a very important factor which will contribute to the resolution of family law disputes by ADR. The current handling of matrimonial litigation by conventional courts in jurisdictions where there are no Family Courts is a poignant reminder of the situation created by lack of Family Courts in such jurisdictions. The availability of trained counsellors, mediators, professionally trained persons and above all specialist family law judges would all form part of a well organised team in a Family Court which in turn would itself create a mechanism and structure for alternative disputes resolution of family law disputes. This would therefore give a new dimension to the existing matrimonial scenario in the Indian jurisdiction.

India has the laws to promote ADR modes in the existing litigation setup but the infrastructure, professional assistance and the medium through which these beneficial reconciliatory mediation procedures are to be implemented are lacking within India. Therefore, creating the via media by which the beneficial ADR laws can be implemented in family law disputes is what is required today. Additionally, legislative changes are required for providing reconciliatory methods of marriages of non-resident Indians. The package is wholesome. The need is dire. The numbers are huge. The sooner we begin, the sooner reform will start.

Japan

THE JAPANESE CHILD PROTECTION SYSTEM: DEVELOPMENTS IN THE LAWS AND THE ISSUES LEFT UNSOLVED

*Ayako Harada**

Résumé

Au Japon, depuis le début des années 1990, on assiste à une augmentation sensible du nombre de cas d'enfants maltraités dont s'occupent les centres locaux d'aide sociale à l'enfance. *Jido Gyakutai Boshi Ho*, une nouvelle loi relative à la prévention des mauvais traitements dont sont victimes les enfants, a été adoptée en 2000 en réponse à ce phénomène. Depuis, cette loi ainsi que d'autres lois relatives à la protection de l'enfance, ont fait l'objet de révisions successives visant à remédier aux difficultés que pose leur mise en oeuvre. C'est ainsi que s'est graduellement développé le système de protection de l'enfance au Japon. Le présent texte s'intéresse au fonctionnement actuel du système de protection de l'enfance et illustre quelques difficultés concrètes qu'il rencontre. Il commence par une brève description du contexte social dans lequel s'inscrit cette augmentation des cas de maltraitance des enfants. Ensuite, il examine les règles régissant chaque phase de l'intervention de protection et il fait état de leur application concrète sur le terrain. Finalement, ce texte analyse les problèmes institutionnels et juridiques auxquels le système est confronté et qui nécessitent un effort soutenu de réforme.

I INTRODUCTION

The number of child abuse and neglect cases in Japan has been dramatically increasing since the early 1990s. In 2000, the Child Abuse Prevention Act, an Act created to deal with the child abuse problem, was enacted. Since then, this Act and another law deeply related to the child protection system have been revised with the intention of fixing the problems that had occurred within the system.

This chapter first describes the social background of the rapid increase in the number of child abuse and neglect cases in Japan. Then it examines how the rules and regulations are provided by the laws and how they are implemented in

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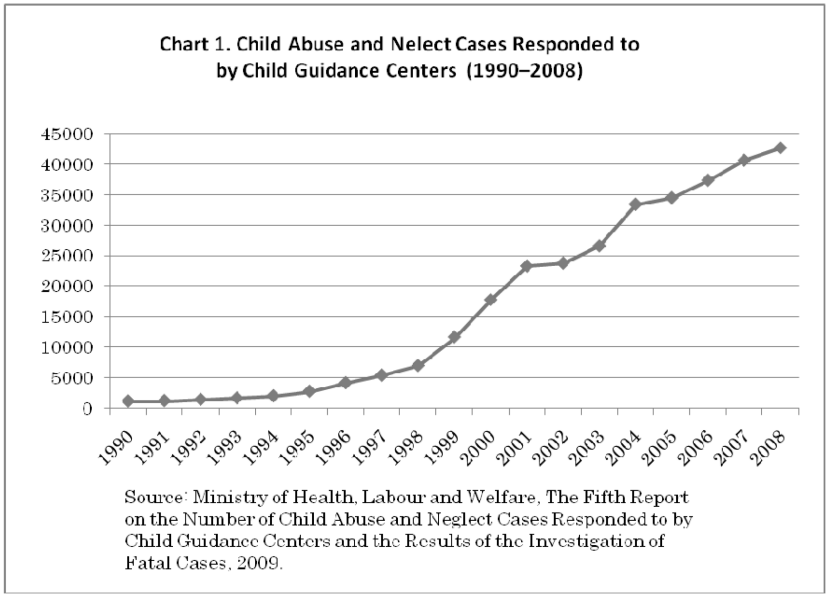
practice at each phase of the child protection proceedings. And, finally, it discusses the issues still left unsolved, which require us to continue our intensive reform efforts.

II THE INCREASE IN CHILD ABUSE AND NEGLECT CASES AND ITS SOCIAL BACKGROUND

Let us begin with a brief discussion of the rapid increase in the number of child abuse and neglect cases in Japan. As seen in Chart 1, there has been a steep rise in the number of child abuse and neglect cases that are responded to by child guidance centres, the public agencies in charge of child protection services. In 1990, child guidance centres responded to 1,100 cases; this rose to 42,662 in 2008.[1] (Note that the total Japanese population was approximately 128 million in 2008.)



[1] Ministry of Health, Labour and Welfare (2009) *The Fifth Report on the Number of Child Abuse and Neglect Cases Responded to by Child Guidance Centre and the Results of the Investigation of Fatal Cases* [*Jido Sodansho ni Okeru Jido Gyakutai Sodan Taio Kensu Oyobi Kodomo Gyakutai ni Yoru Shibo Jirei To no Kensho Kekka To no Dai 5 Ji Hokoku ni Tsuite*], available at: www.mhlw.go.jp/houdou/2009/07/h0714-1.html (accessed 28 February 2010).

There are two plausible explanations for the sharp increase in the number of child abuse and neglect cases. First, the incidence of child abuse and neglect may actually have increased due to the social circumstances that negatively affect the parenting abilities of contemporary families. As a result of rapid urbanisation after World War II, family ties and community relationships have become weaker than before. However, social support for families, particularly for families with children, has not been developed well in Japan. Without sufficient support, many families are struggling with economic hardships, unstable employment, destruction of the marital relationship, single parenthood, family members' health problems, social isolation, and other hardships that jeopardise their parenting abilities. While families with child abuse problems usually face more than one of these hardships, economic hardships seem to be especially common among them.[2] Their hardships have been becoming more serious due to economic downturn in Japan since the early 1990s.

Secondly, the increase in the number of abuse and neglect cases may reflect a change in social attitudes toward child abuse and neglect. It is only recently that child abuse and neglect have become recognised as serious social problems in Japan. Concerned professionals and citizens started child abuse prevention activities, such as telephone counselling services, in the mid-1980s. The national government officially started to count the number of child abuse cases in 1990 and, 10 years later, enacted the Child Abuse Prevention Act, an independent Act created to deal with child abuse and neglect problems. The developments in social activities and public policy have changed our attitude toward child abuse: we now feel that child abuse is a serious social problem that we have to deal with. As a result, more and more cases are now being discovered in our society and reported to the public agencies.

Though it is difficult to tell exactly how valid each of the explanations may be, it seems both of them have contributed, at least to some extent, to the dramatic increase in the number of child abuse and neglect cases in the last two decades.

III BASIC STRUCTURE OF THE JAPANESE CHILD PROTECTION SYSTEM AND PROCEEDINGS PROVIDED BY THE LAWS

The Japanese child protection system is structured according to the provisions of several related laws. The Child Welfare Act (Jido Fukushi Ho),[3] the Child

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[2] See Ryoichi Yamano *The Poorest Country for Children, Japan – Effects of Child Poverty on Children's Learning Abilities and Emotional/Physical Developments and its Impact on Society* [*Kodomo no Saihinkoku, Nihon – Gakuryoku, Shinshin, Shakai ni Oyobu Shoeikyo*] (Kobunsha, Tokyo, 2008) pp 106–111.

[3] Law No 164, 12 December 1947.

Abuse Prevention Act (Jido Gyakutai no Boshi To ni Kansuru Horitsu, so-called 'Jido Gyakutai Boshi Ho'),[4] and the Civil Code (Mimpo)[5] are particularly important.

The Child Welfare Act (CWA) provides the general regulations on public child welfare services. The Act empowers prefectural governments and child guidance centres to take administrative measures to meet the needs of children and their parents, including social care of the children. This Act has been amended several times since the late 1990s to clarify or expand the administrative authority and responsibilities in relation to child protective and social care services.

The Child Abuse Prevention Act (CAPA) is an Act that lays out the responsibilities of the national government and the prefectures in preventing child abuse and neglect and protecting children from harm. This Act was amended in 2004 and in 2007.

The Civil Code (CC) is a law that provides the basic rules for relationships between private individuals. Part 4 of the Civil Code, entitled 'Relatives [Shinzoku]', provides for legal family relationships and the rights and responsibilities among family members. Several articles of Part 4 stipulate the relationships between parents and children, define parental authority, and provide requirements for forfeiting parental authorities. These articles are especially relevant to child protection proceedings.

Chart 2 visualises the basic structure of the Japanese child protection system. The rest of this section examines how the proceedings are framed by the laws and how they are implemented in practice.

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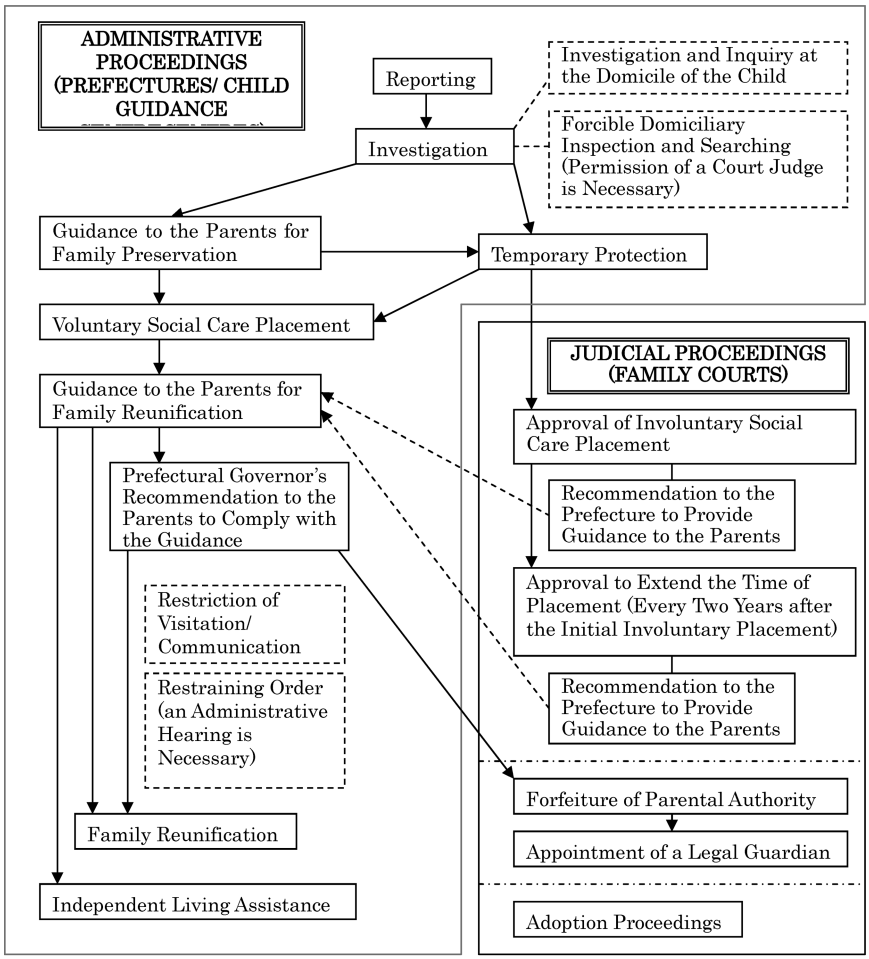
4 Law No 82, 24 May 2000.
5 Law No 89, 27 April 1896.

Chart 2. The Japanese Child Protection System



(a) Reporting

The Child Welfare Act provides that any person shall report to a child guidance centre or other public offices when he or she finds that a child is without any guardian or when he or she finds it is inappropriate to leave a child in the custody of the child's guardian. A child under such situations is defined as 'the child in need of protection' (CWA, arts 6-2(8) and 25). The Child Abuse Prevention Act clarifies that any child under the age of 18 who is abused or neglected by his or her guardian falls within the definition of 'the child in need of protection' who needs to be reported (CAPA, arts 2 and 6). The Child Abuse Prevention Act also provides that any person shall report when he or she *suspects* child abuse or neglect, clarifying that we should report even when we are not completely sure that abuse or neglect has actually occurred (CAPA, art 6).

CAPA, art 5 states that teachers and other school personnel, workers at child welfare institutions, physicians, public health nurses, lawyers, and other individuals whose professions are related to the welfare of children should be committed to early discovery of child abuse. The 2004 revision of this article provided that not only these professional individuals but also organisations (eg schools) should be committed to early discovery of child abuse. This clarification was introduced to avoid inner-organisational disputes over the necessity of early discovery and reporting.

Although there has been controversy over whether reporting responsibility should be mandatory for professionals,[6] the current laws do not provide criminal punishment for their failure to report. The legal scheme for reporting does not involve immunity for good-faith wrong reports either, which is criticised as a deficiency of our reporting law.[7] However, the Child Abuse Prevention Act does at least provide a couple of measures that help promote reporting. First, the Act requires officials to keep secret the identity of the person who reported (CAPA, art 7). And secondly, the Act requires professionals not to interpret the laws that criminalise the unlawful disclosure of confidential information as preventing the compliance of their responsibility to report child abuse (CAPA, art 6(2)).

The Child Abuse Prevention Act defines the four categories of child abuse that should be reported: physical abuse, sexual abuse, neglect and emotional abuse (CAPA, art 2). The 2004 revision of this article clarified that the guardian's failure to protect a child from abuse by a non-parent adult falls within the definition of neglect. The revision also clarified that incidents of domestic violence at the domicile of a child are regarded as emotional abuse to the child.

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6 See Minoru Ishikawa 'Legal Policies for Child Abuse and the Problems to be Solved [Jido Gyakutai o Meguru Hoseisaku to Kadai]' (2000) 1188 *Jurist* [*Jurisuto*] 2–10 at 6.

7 See, eg, Hiroko Goto 'The Revision of the Child Abuse Prevention Act and its Shortcomings [Jido Gyakutai Boshi Ho no Kaisei to Sono Mondaiten]' (2004) 6(9) *Contemporary Criminal Law* [*Gendai Keiji Ho*] 54–61 at 57.

The Child Abuse Prevention Act prohibits child abuse and neglect by any persons (CAPA, art 3), but provides only for proceedings that deal with cases of child abuse by 'guardians', defined as persons who exercise parental authority over the child, who are the legal guardians of the child or who currently have physical custody of the child (CAPA, art 2). The Child Welfare Act uses the same definition of 'guardians' and lays out the services available to the child and his or her guardians (CWA, art 6). In practice, most of the 'guardians' involved in the child protection system are the birth parents of the child. According to the report of the Ministry of Health, Labour and Welfare, of all the child abuse and neglect cases that were responded to by child guidance centres in 2006 (37,323 cases), the birth mother was the primary perpetrator in 62.8% (23,442 cases) and the birth father was the primary perpetrator in 22.0% (8,219 cases).[8]

(b) Investigation

CAPA, art 8 states that directors of the child guidance centres shall try to verify the safety of a child in a timely manner when a report has been received. The prefectural governor may have officials enter the domicile of the child and conduct necessary investigations and inquiries, if there is a suspicion that the child is abused or neglected in the domicile (CAPA, art 9).[9] Support from police officers shall be requested when necessary (CAPA, art 10). In 2006, child guidance centres conducted 238 investigations and inquiries at the domicile of the child.[10]

If the child's guardian does not co-operate with the investigation and inquiry at the domicile of the child, the guardian may be punished by a fine (CAPA, art 9(2), CWA, art 61-5). However, the possibility of a fine may not be sufficient to affect the attitude of the guardian. For example, the guardian may firmly refuse to co-operate with the investigation, completely shutting the door to prevent investigators' contact with the child. To prevent delay in the confirmation of the child's safety in such a situation, the 2007 revision of the Child Abuse Prevention Act introduced the measure of forcible domiciliary inspection and searching. To invoke this measure, the required steps have to be taken as follows.

First, the prefectural governor shall issue a summons that requires the guardian to appear with the child (CAPA, art 8-2). If the guardian refuses to appear with the child, the governor may issue a second summons (CAPA, art 9-2). If the guardian refuses a second time, and if there is a suspicion of child abuse or

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8 Ministry of Health, Labour and Welfare (2007) *The Number of Child Abuse and Neglect Cases Responded to by Child Guidance Centres in 2006* [*Heisei 18 Nendo Jido Sodansho ni Okeru Jido Gyakutai Sodan Taio Kensu To*] (hereinafter, *Child Abuse Cases in 2006*), available at: www.mhlw.go.jp/bunya/kodomo/dv16/index.html (accessed 28 February 2010).

9 According to CWA, art 12(3), directors and social workers of the child guidance centres are regarded as the assisting officials of the prefectural governor. In practice, investigations and inquiries are conducted by social workers of the child guidance centres.

10 See *Child Abuse Cases in 2006*, above n 8.

neglect, the governor obtains the permission of a court judge to have officials conduct forcible domiciliary inspection and searching (CAPA, art 9-3). The permission of a judge empowers the officials to forcibly enter the domicile by breaking the door locks if necessary (CAPA, art 9-7). During the fiscal year of 2008, there were 28 cases of the first summons, 3 cases of the second summons, and 2 cases of forcible domiciliary inspection and searching. As a result of the two cases of domiciliary inspection and searching, four children were found endangered and removed from their domiciles through the measure of temporary protection.[11]

(c) Temporary protection

The Child Abuse Prevention Act and the Child Welfare Act require directors of the child guidance centres to pursue temporary protection of a child when necessary (CAPA, art 8, CWA, art 33(1)). Temporary protection shall not exceed 2 months, but directors of the child guidance centres may extend the term of protection if necessary (CWA, art 33(3) and (4)). There were 10,221 cases of temporary protection due to child abuse or neglect in 2006.[12] Most of the protected children are placed in temporary protection shelter facilities in the buildings of the child guidance centres.

Under the Child Welfare Act, temporary protection is regarded as an administrative measure that may be pursued without providing the guardian any opportunities to be heard by a court, even when he or she is against it. Although administrative appeal and administrative litigation are available for the guardian who wants to raise an objection to temporary protection of his or her child, the administrative appeal and administrative litigation seem to be insufficient to provide due process of law for the guardian. Administrative appeal, on the one hand, does not necessarily provide a neutral forum since the investigation is conducted by an official of the prefecture.[13] Administrative litigation, on the other hand, is conducted in a court, but the issues of child protection may not be properly dealt with in this type of litigation for several reasons: not the prefecture but the guardian has to bear the economic burden of filing a petition as well as the burden of proof as a plaintiff; the case is not heard by a family court that has expertise in dealing with family issues; administrative litigation usually takes a long period of time, and so on.[14] From

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[11] Ministry of Health, Labour and Welfare (2009) *Report on Summons and Other Measures Conducted in 2008* [*Heisei 20 Nendo ni Oite Jisshi Sareta Shutto Yokyu To ni Tsuite*], available at: www.mhlw.go.jp/houdou/2009/07/dl/h0714-1b.pdf (accessed 28 February 2010).

[12] See *Child Abuse Cases in 2006,* above n 8.

[13] See Ministry of Health, Labour and Welfare (2007) *Guideline for Managing Child Abuse Cases* [*Kodomo Gyakutai Taio no Tebiki*], chapter 10.

[14] See Hirohito Suzuki et al 'Proposal for the Revision of the Law on Parental Authority and the Related Laws [Shinken Ho Oyobi Kanren Ho Kaisei Teian]' (2010) 650 *Journal of Family Register* [*Koseki Jiho*] 4–13 at 10–11; see also Japan Federation of Bar Associations (2009) *Opinion for the Reform of the System of Parental Authority for the Prevention of Child Abuse* [*Jido Gyakutai Boshi no Tame no Shinken Seido Minaoshi ni Kansuru Ikensho*], pp 22–23, available at: www.nichibenren.or.jp/ja/opinion/report/data/090918.pdf (accessed 28 February 2010).

the perspective of procedural due process, many commentators argue that there should be at least a post facto court hearing to authorise temporary protection.[15] It should also be noted that the lack of a court hearing to authorise the separation of a child from his or her guardian may be contrary to Art 9 of the Convention on the Rights of the Child, which requires the State Parties to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities *subject to judicial review* determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child' (emphasis added).

The current laws are unclear about whether and to what extent the guardian's parental authority is restricted when the child guidance centre conducts temporary protection. According to the Civil Code, a child who has not attained the age of majority (20 years of age) shall be subject to the parental authority of his or her parents (CC, art 818), and a person who exercises parental authority holds the rights and owes the responsibilities to care for and educate the child (CC, art 820). Since there is no court authorisation to suspend the guardians' parental authority when temporary protection is conducted, the guardians tend to think that their parental authority is intact and, therefore, they are entitled to visit, communicate with their child or even get their child back anytime they want to. When their requests are rejected, some of them become furious and violent to the social workers and the staff members at the temporary protection shelter.

To deal with this problem, the 2007 revision of the Child Abuse Prevention Act introduced a new provision that empowers directors of the child guidance centres to restrict the guardian's visitation or communication with the child who is under temporary protection, if it is necessary for the protection of the child (CAPA, art 12). The restriction of visitation or communication can be pursued without any court hearings. It is true that the child guidance centres have to deal with many parents whose behaviour is uncontrollable without such a restriction, but there remains a question of procedural due process in restricting the contact between a child and his or her guardians.

(d) Social care placement of the child

Out-of-home care provided through the public child welfare system is called 'social care' in Japan. Social care may be provided by a child welfare institution, a group home, or a foster family home. In Japan, most of the children who need social care are placed in child welfare institutions due to lack of sufficient

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[15] See, eg, Tsuneo Yoshida 'Toward the Revision of the Child Abuse Prevention Act – An Examination from the Legal Perspective [Jido Gyakutai Boshi Ho no Kaisei ni Mukete – Hoteki Shiten kara no Kento]' in Tsuneo Yoshida (ed) *Legal System for the Prevention of Child Abuse – Issues and Directions for the Law Revision* [*Jido Gyakutai Boshi Ho Seido – Kaisei no Kadai to Hokosei*] (Shogakusha, Tokyo, 2003) pp 3–32 at p 19; see also Ishikawa, above n 6 at p 8 and Suzuki et al, above n 14 at pp 9–10.

number of foster family homes and group homes. Among the 4,125 social care placements due to child abuse or neglect in 2006, 93.9% were placements in child welfare institutions.[16]

Under the Child Welfare Act, prefectures may place a child in social care based on the recommendation of the child guidance centre, unless such a placement is not against the will of the person who exercises parental authority over the child (CWA, art 27(1), (3), and (4)). In other words, as long as the parent is not against the social care placement of his or her child, the prefecture may conduct the placement as an administrative measure, without any court involvement. In practice, social workers at the child guidance centres offer the option of social care to the parents and convince them to give consent to the placement while the child is protected in a temporary protection shelter.

If the parent does not accept the social worker's offer of the social care placement, the prefecture may pursue the placement through the approval of a family court. A family court may issue the approval when it finds that the guardian abuses his or her child or significantly fails to care for the child, or if there is any other situation where the welfare of the child is extremely harmed under the custody of the guardian (CWA, art 28(1)).

Social care placements by a court approval (ie involuntary social care placements) were quite rare until the mid-1990s. The national total number of court approvals was less than 20 in each year from 1989 to 1995.[17] The number has gradually increased since then. In 2006, there were 170 approvals.[18] Nevertheless, the tradition of pursuing voluntary placements is still intact. As mentioned above, there were 4,125 social care placements due to child abuse or neglect in 2006, whereas there were only 170 court approvals for involuntary placement in the same year. This data indicates that only about 4% of the placements were involuntary in 2006. The preference for voluntary placement may be appropriate when child abuse is not severe and the parent is co-operative, but if voluntary placement is pursued in severe child abuse cases or when the parent is not co-operative at all, it raises a concern of delay or abandonment of a placement necessary to protect children.[19]

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16 See *Child Abuse Cases in 2006*, above n 8.

17 Supreme Court of Japan, General Secretariat, Family Bureau (2005) *Trends in the Cases of Article 28 of the Child Welfare Act and Actual Conditions in the Management of the Cases* [*Jido Fukushi Ho 28 Jo Jiken no Doko to Jiken Shori no Jitsujo*] (20 November 2003–19 November 2004) *Monthly Bulletin on Family Courts* [*Katei Saiban Geppo*] Vol 57 No 8, pp 133–143 at p 134.

18 Supreme Court of Japan, General Secretariat, Family Bureau (2009) *Trends in the Cases of Article 28 of the Child Welfare Act and Actual Conditions in the Management of the Cases* [*Jido Fukushi Ho 28 Jo Jiken no Doko to Jiken Shori no Jitsujo*] (January–December 2008) *Monthly Bulletin on Family Courts* [*Katei Saiban Geppo*] Vol 61 No 8, pp 141–159 at p 143; hereinafter, *CWA Art 28 Cases in 2008*.

19 There is a statistic that demonstrates this concern. The child guidance centres of Tokyo Prefecture reported that among the cases in which centres considered a social care placement to be necessary for the child, parental consent was quickly or fairly easily obtained in 49.6% of cases. However, it reported that the consent was obtained only after intensive efforts to convince parents in 31.0% of the cases. In addition, the plan of placement was abandoned

There is no legal time limitation of voluntary social care. Therefore, the child may stay in social care for many years, as long as the parents are not against the placement. On the other hand, if the placement is involuntary, the placement may not exceed 2 years, unless the prefecture obtains the approval of a family court to extend the time of placement. To pursue the extension of the placement, the prefecture has to show that the child will be abused, significantly neglected or extremely harmed by the parent unless the social care placement is continued (CWA, art 28(2)).

The Child Welfare Act empowers directors of the child welfare institutions and foster parents to take the necessary measures in relation to the care, education and discipline of the child (CWA, art 47(2)). Although the parent of the child retains the parental authority to care for and educate the child unless his or her parental authority is forfeited through an independent legal proceeding provided by the Civil Code, the parent cannot intervene into said measures taken by the director of the child welfare institution or the foster parent.

However, the current laws do not provide any rules to allocate the rights and responsibilities in making specific decisions for the care and education of the child in social care. In addition, family courts do not have jurisdictions over disputes related to the care and education of the child in social care, which occur among the parent, the social care provider and the child guidance centre. The lack of rules and court proceedings raises serious confusion and inconvenience in the care of children in social care. For example, the parent may refuse to give consent to the medical care that the social care provider and the child guidance centre find necessary for the child. In such a situation, the medical care may be given up due to a concern that the parent still holds the right to make all the medical decisions for the child.

The Child Abuse Prevention Act provides several measures to control contact between the child and the parent while the child is in social care. First, directors of the child guidance centres and directors of the child welfare institutions may restrict parental visitation or communication if it is necessary for the protection of the child (CAPA, art 12). The 2007 revision of the Child Abuse Prevention Act provided that directors of the child guidance centres and directors of the child welfare institutions may prohibit parental visitation and communication not only when the social care placement is involuntary but also when it is voluntary. Secondly, according to CAPA, art 12(4), prefectural governors may issue a restraining order that completely prohibits the parent's access to the child for up to 6 months. To take this measure, all the following requirements must be met: (1) the child has been placed in social care by court approval (ie the placement is involuntary); (2) parental visitation and communication

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because parental consent was not obtained or because the social workers could not even talk to the parents in 14.9% of the cases. The centres filed a petition for court approval of an involuntary placement in only 4.5% of the cases. Tokyo Prefecture, Department of Welfare and Health (2005) *The Current Status of Child Abuse* [*Jido Gyakutai no Jittai*] *(Part 2)*, available at: www.fukushihoken.metro.tokyo.jp/jicen/gyakutai/files/hakusho2.pdf (accessed 28 February 2010).

have been completely restricted by the director of the child guidance centre or by the director of the child welfare institution; and (3) a restraining order is necessary to prevent child abuse or to protect the child from harm. The governor must conduct an administrative hearing before issuing the order. If the parent does not comply with the restraining order, the parent may be punished by imprisonment or a fine (CAPA, art 17). These provisions were also introduced in the 2007 revision of the Child Abuse Prevention Act.

Prohibition of parental contact or communication may be necessary to protect the child from harm, but it would have a strong impact on the relationship between the parent and the child. To strike a balance between protecting children's safety and maintaining family relationships, family courts may have to be involved in deciding whether and how the parent may contact their child while the child is placed in social care.

Children in social care are supposed to be taken care of in a safe and nurturing environment, but this assumption may be untrue in reality. In Japan, most of the children in social care are placed in child welfare institutions rather than foster family homes, as already described. Unfortunately, many incidents of institutional abuse have been reported so far. There are also incidents of child abuse or neglect by foster parents. In order to prevent and respond to the incidents of child abuse and neglect in social care, the 2008 revision of the Child Welfare Act provided the responsibilities of the prefectures to take necessary measures to collect reports, investigate the reported cases and protect the children from harm (CWA, art 33-10 through 33-17).[20]

(e) Guidance for the parents and family reunification

Prefectures may, as an administrative measure, have child guidance centre social workers or other designated professionals provide guidance to the parents and the child (CWA, art 27(1) and (2)). The guidance to the parents shall be provided appropriately with due consideration to family reunification and other necessary measures to provide a favourable family environment for the child (CAPA, art 11(1)).

When a prefecture takes the administrative measure of providing guidance to a parent, the parent is obliged to comply with the guidance (CAPA, art 11(2)). If the parent fails to comply with the guidance, the prefectural governor may formally recommend that the parent comply (CAPA, art 11(3)). If the parent still fails to comply with the guidance and the director considers the parent's exercise of his or her parental authority to be extremely harmful to the welfare of the child, the director of the child guidance centre may file a petition to

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[20] For a detailed analysis of the current legal scheme to prevent child abuse in social care, see Kohei Yokota 'The Legislation to Revise a Part of the Child Welfare Act – Social Care: Focusing on the Prevention of Institutional Abuse [Jido Fukushi Ho no Ichibu o Kaisei Suru Horitsu – Shakaiteki Yogo: Shisetsu Nai Gyakutai no Boshi o Chushin ni]' (2009) 1374 *Jurist* [*Jurisuto*] 39–47.

forfeit the parental authority of the parent (CAPA, art 11(5)). As discussed below, however, it is fairly rare for the directors to pursue the forfeiture of parental authority.

In the current child protection system, the involvement of family courts in the family reunification services is quite limited. Family courts may recommend that the prefecture provide guidance to the parents when the courts issue the approval of involuntary social care placement or extension of the placement (CWA, art 28(6)), but it is under the discretion of the courts whether they issue a recommendation or not. In practice, the courts do not issue such recommendations very often.[21] In addition, the courts do not have jurisdiction to periodically review the effects of the guidance they recommended or to order the parents to comply with such guidance.

Practitioners and researchers point out that guidance to the parents fails very often due to a serious conflict between the social workers and the parents, especially when the child's social care placement is involuntary. Although the Child Abuse Prevention Act empowers prefectural governors to issue formal recommendations to parents to comply with the guidance as explained above, social workers do not regard such recommendations as an effective measure for encouraging parents to comply with the guidance, because the governor's recommendation does not legally bind the parents to do so. Some commentators argue that family courts should have the authority to directly recommend or order the parents to comply with the guidance or to utilise the services that the courts authorise as necessary for the parents.[22]

According to the Child Welfare Act, the prefectural governor may decide whether and when the social care placement should be over (CWA, art 27(5)). When the governor decides to end the placement, the governor must hear the opinion of the child guidance centre, and of the social worker who provided guidance to the parent, and consider the effects of the guidance and the measures to be taken to prevent abuse or neglect after the child is reunified with the parent (CAPA, art 13). Family courts do not touch on the prefectural governor's decision of family reunification, except when the prefecture pursues family court approval to extend the placement every 2 years after the initial involuntary placement, where the court must consider the possibility of family reunification in deciding whether the court should approve the extension of the placement. In a great majority of the cases, family reunification is completed without any court involvement, no matter whether the placement was voluntary or involuntary.

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[21] Family courts issued recommendations to the prefecture to provide guidance to the parents in only 16 out of 145 approvals of involuntary placement in 2008. (The total number of approvals was 169 in 2008, but the data of only 145 approvals was available). See *CWA Art 28 Cases in 2008,* n 18 above at p 151.

[22] See, eg, Japan Society for Prevention of Child Abuse and Neglect (2009) *Opinion for the Reform of the System of Parental Authority in Relation to Child Abuse* [*Jido Gyakutai o Meguru Shinken Seido Minaoshi ni Tsuite no Ikensho*], pp 9–10, available at: www.jaspcan.org/20091126JaSPCAN_shinken.pdf (accessed 28 February 2010).

As a whole, there seem to be two inherent problems in the Japanese family reunification scheme. First, there is no court review to assure the safety of the child before the child is returned to the parents. There is a possibility for the child guidance centre to rush into a wrongful family reunification decision that is harmful to the child. Sadly to say, there are reports of children who were severely harmed or killed after they were reunified with their parents.[23] Secondly, the parent and the child do not have any opportunity to be heard in a family court, even when they are against the decision of the child guidance centre about their reunification.

(f) Forfeiture of parental authority

The Civil Code provides that family courts may, upon the petition of a relative of the child or a public prosecutor, authorise the forfeiture of parental authority, if the parent abuses their parental authority or there is gross parental misconduct (CC, art 834). Forfeiture of parental authority does not mean a permanent termination of parental authority or complete deprivation of the legal status as a parent. When the cause of the forfeiture is eliminated, the family court may, upon the petition of the parent or a relative, revoke the authorisation of the forfeiture of parental authority (CC, art 836). According to the Child Welfare Act, the director of a child guidance centre may also file a petition for the forfeiture of parental authority to a family court (CWA, art 33-8). The Child Abuse Prevention Act provides that the forfeiture of parental authority should be appropriately pursued to prevent child abuse or to protect abused children (CAPA, art 15).

In the context of child protection proceedings, directors of the child guidance centres may pursue forfeiture of parental authority if a parent severely abuses or neglects the child and administrative measures are not sufficient to change the behaviour or attitude of the parent. But in practice, directors of the child guidance centres rarely pursue forfeiture of parental authority. In 2006, there were only three petitions from directors of the child guidance centres and two of them were authorised in the court.[24]

There are several reasons for the infrequent use of forfeiture of parental authority in the Japanese child protection system. First, there is a technical difficulty in pursuing this measure. The director of the child guidance centre has to find someone who is willing to become the legal guardian of the child if there is no one who holds parental authority over the child as the result of the forfeiture of parental authority. The Civil Code requires that the guardian of a child must be a private individual, which prevents the director of the child guidance centre from serving as the legal guardian of the child. Some

[23] During the period between January 2007 and March 2008, at least four children died due to abuse by their parents after they were reunified with their parents. See Social Security Council of the Ministry of Health, Labour and Welfare (2009) *Report on the Results of the Investigation of Fatal Child Abuse Cases* [*Kodomo Gyakutai ni Yoru Shibo Jirei To no Kensho Kekka ni Tsuite*], pp 6–7, available at: www.mhlw.go.jp/bunya/kodomo/dv37/dl/10.pdf.

[24] See *Child Abuse Cases in 2006*, n 8 above.

commentators argue that we should introduce new legal rules to enable the directors of the child guidance centres to become the legal guardian of the child when no one holds parental authority for the child.[25]

Secondly, there is a structural difficulty in pursuing the forfeiture of parental authority. The child guidance centre is in charge of providing guidance and support to the parent for family reunification. Pursuing forfeiture of parental authority will destroy the relationship with the parent, as forfeiture of parental authority is regarded as placing strong moral blame on the parent. If the child guidance centre's relationship with the parent is destroyed, reunification will be impossible, since there is no effective measure to encourage the parent to co-operate with the centre's services, as discussed above. Therefore, the child guidance centres recognise forfeiture of parental authority as 'the last resort',[26] to be invoked only when they have to deal with parents who are extremely abusive and uncontrollable without invoking such a strong measure.

(g) Independent living assistance for the child

The laws do not describe when prefectures can, or should, terminate their efforts to reunify the child with the parent. Therefore, the child in social care and his or her parent retain a possibility of reunification until the child is too old for social care.[27] Unless the parent attempts to intervene in the child's life in social care in an extremely harmful manner, his or her parental authority remains intact, because the child guidance centre almost never files a petition for forfeiture of parental authority when the parents are not harmful to the child, as discussed above.

Generally speaking, child guidance centres do not attempt to find an adoptive family for children in social care, even when family reunification is deemed impossible. Neither the Child Welfare Act nor the Child Abuse Prevention Act requires child guidance centres to initiate adoption services for the child who cannot be reunited with his or her parents. It seems that child guidance centres provide adoption services only when the parents express a wish to place their child for adoption. Adoption may be legally finalised according to the Civil Code, which provides the legal requirements and outlines the court proceedings for adoption.

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[25] See Japan Federation of Bar Associations, above n 14 at pp 13–14.

[26] See Yoshida, above n 15 at p 21.

[27] According to the CWA, the national and prefectural governments are responsible for the welfare of children under the age of 18 (CWA, art 4(1)). Therefore, a child's maximum age for social care placement is 18, but prefectures may extend their placement until they turn 20 (CWA, art 31(2)). In practice, however, children may have to leave social care before they turn 18, since child guidance centres may end the social care of the children who finish compulsory education at the age of 15 (elementary and junior high school education is compulsory in Japan) without a plan to enter high school or who drop out of high school while in social care. These children are usually assisted to find a job and leave social care.

The Child Abuse Prevention Act provides that the national and prefectural governments are required to provide services not only to protect children from abuse and neglect but also to support them in becoming independent individuals (CAPA, art 4(1)). This provision indicates that if the children cannot be reunified with their parents, the governments are responsible for the care and support of them until they start living independently. The 2008 revision of the Child Welfare Act expanded the responsibilities of prefectures to provide independent living assistance for the children who have left social care (CWA, art 33-6). Unfortunately, however, many practitioners argue that it is difficult to provide sufficient care and support to prepare the children for independent living due to lack of resources. They express a concern that many adolescents may have a difficult time in society after they leave social care.[28]

IV ISSUES YET TO BE SOLVED

The Japanese child protection system has been developed through the efforts of practitioners, researchers and policy makers, mostly since the mid-1980s. The legal structure for the child protection system has also been developed thanks to the enactment and the revisions of the related laws mostly since 2000. However, many issues are still left unsolved. There are some areas where intensive reform efforts are necessary.

First, we should develop sufficient child welfare service resources to protect all endangered children, to facilitate safe and nurturing social care for them, and to provide adequate support for their parents to fix their problems. Lack of resources is a very serious deficiency of our system. Especially problematic are the lack of a sufficient number of social workers in the child guidance centres and their heavy caseloads. According to research, the average caseload of child guidance centre social workers was 107, which was significantly higher than their counterparts in other developed countries.[29] This problem has occurred due to the delay in increasing the number of social workers. Although child abuse cases increased by more than 30 times during the last 15 years, the number of social workers to respond to them has not even doubled during the same period.[30] Without a sufficient number of professional social workers, it is impossible to protect children in a timely manner or provide adequate guidance and support for parents, as the laws require them to do.

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[28] See, eg, Tetsuro Tsuzaki 'The System to Provide Support for Child Abuse Cases and its Problems to be Solved [Jido Gyakutai ni Taisuru Enjo no Shikumi to Sono Kadai]' in Tetsuro Tsuzaki and Kazuaki Hashimoto (eds) *Current Situation of Child Abuse – Toward the Establishment of a Collaborative System* [*Jido Gyakutai wa Ima – Renkei Shisutemu no Kochiku ni Mukete*] (Minerva Shobo, Kyoto, 2008) pp 16–26 at pp 24–25.

[29] Jun Saimura 'The Directions the Japanese Child Abuse System Should Proceed Toward [Korekara Nihon ga Susumu beki Hoko towa]' in Tetsuro Tsuzaki and Kazuaki Hashimoto (eds) *Current Situation of Child Abuse – Toward the Establishment of a Collaborative System* [*Jido Gyakutai wa Ima – Renkei Shisutemu no Kochiku ni Mukete*] (Minerva Shobo, Kyoto, 2008) pp 203–217 at pp 205–206.

[30] Ibid, p 205.

Secondly, we should reform the legal provisions on parental authority in order to better protect the interests of abused and neglected children. Under the Civil Code currently in effect, parental authority is regarded as the power stemming from a person's status as a biological or an adoptive parent to a child rather than the privilege obtained through his or her role in caring for the child in accordance with the best interests of the child. Some researchers recommend that the phrase 'parental authority' in the Civil Code should be replaced by 'parental obligation' to emphasise that parents have responsibilities as well as rights to care for and educate their children in accordance with their best interests.[31] On the basis of the new philosophy of parental rights and responsibilities, we should re-establish the legal scheme to regulate parental rights and responsibilities in the specific context of the child protection proceedings. For example, we should clarify how the parental rights and responsibilities are restricted or allocated when the child guidance centre conducts temporary protection of the child or when the child is placed in social care. In addition, we may have to introduce a new legal framework to suspend parental rights and responsibilities, either temporarily or partially, to enable prefectures or child guidance centres to make decisions for the care and education of a child when the parent's decisions would be harmful for the child. The Ministry of Justice has recently begun considerations on these issues as preparation for the revision of the legal provisions on parental authority. There is a possibility that the provisions of the Civil Code and other related laws on parental authority will be revised in the near future.[32]

Thirdly, we should expand the jurisdiction of family courts to cover the important stages in child protection proceedings. The jurisdiction of family courts over child protection proceedings as provided by the current laws seems to be too limited to ensure the safety and welfare of children. In expanding the family court jurisdiction, we will have to overcome many challenges, both technical and philosophical, since our child welfare system has been operating without court authority for many years. Before the dramatic increase in child abuse cases already described, the child welfare system provided services to parents who understood their problems and asked for guidance and support on their own; therefore, there was basically no demand for court involvement in child welfare services. However, the situation surrounding child welfare has completely changed since child guidance centres started to respond to child abuse cases. The child guidance centres now deal with more and more parents who neither admit their problems, nor accept the social workers' guidance, nor easily provide consent to the social care placement of their children. Without

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[31] Suzuki et al, above n 14 at p 6.

[32] A study group formed by the Ministry of Justice in June 2009, consisting of leading researchers and practitioners in the fields of family law and child welfare, issued a report in January 2010 that discussed the necessity of the reforms of the legal provisions on parental authority and argued possible directions of such reforms (available at: www.moj.go.jp/MINJI/minji191-1.pdf, accessed 28 February 2010). Upon the completion of this report, the Minister of Justice requested the Legislative Council of the Ministry of Justice to draft an outline of the revision of the Civil Code's parental authority provisions. On 5 February 2010, the Legislative Council decided to form a new subcommittee to conduct preparatory discussion for the revision.

well-structured legal proceedings in which the courts conduct hearings and issue necessary decisions and orders, the child guidance centres face enormous difficulty both in intervening and in supporting the family. Although it is arguable how far the jurisdiction of family courts should extend, it could include post facto authorisation of temporary protection, adjudication of the fact of child abuse, approval of social care placement, authorisation and periodical review of service plans, management of parental visitation, decisions about reunification, suspension and forfeiture of parental authority and planning for a substitute family when reunification is impossible.

And fourthly, we should consider how we can ensure there is procedural due process for the parent and the child. Their views and opinions should be heard and respected in decisions that affect their family relationships. Especially when a child is separated from his or her parent, the parent and the child shall be given an opportunity to participate in the proceedings and make their views known, in accordance with Art 9(2) of the Convention on the Rights of the Child. Participation in the proceedings would be promoted through the help of an independent representative. Currently, the child guidance centres are represented or supported by lawyers more often than not, but the parents and the children are usually unrepresented. Some practitioners suggest that the parents should be supported to obtain adequate legal advice and assistance from a lawyer when they are involved in the child protection system.[33] The lawyer would help the parents see their situations objectively, make sound decisions about their options and communicate their views in a legally appropriate manner. We should also recognise the importance of an independent representative for the children, as some commentators suggest.[34] The independent representative would help the children understand what the proceedings mean to them and form their own views and advocate their views and interests in the proceedings.

V CONCLUSION

The Japanese child protection system has been gradually developed thanks to enormous practical and legislative efforts over the last few decades. However, we still have many issues to overcome in order to better serve the interests of abused and neglected children. Reform efforts should be continued, both in developing social welfare resources sufficient to meet the needs of the children and their parents, and in establishing a legal system responsible for making

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[33] See, eg, Yoshihiko Iwasa 'Child Abuse Cases from a Lawyer's Perspective (2) – After the Two Revisions of the Child Abuse Prevention Act [Bengoshi kara Mita Jido Gyakutai Jiken (2) – Jido Gyakutai no Boshi To ni Kansuru Horitsu no Nido ni Wataru Kaisei o Hete]' (2009) *Monthly Bulletin on Family Courts* [*Katei Saiban Geppo*], Vol 61 No 8, pp 1–48 at pp 42–43.

[34] See, eg, Ryoko Yamaguchi 'The American Legal System for Child Abuse and Issues in the Japanese System [Amerika no Jido Gyakutai Ho Seido to Nihon no Kadai]' in Tsuneo Yoshida (ed) *Legal System for the Prevention of Child Abuse – Issues and Directions for the Law Revision* [*Jido Gyakutai Boshi Ho Seido – Kaisei no Kadai to Hokosei*], (Shogakusha, Tokyo, 2003) pp 188–224 at pp 219–220.

decisions about what should be done for the safety and interests of the children in each stage of the child protection proceedings.

New Zealand

HOW NEW ZEALAND FAMILY LAW DEALS WITH POWER IMBALANCES

*Mark Henaghan**

Résumé

Le rôle du droit de la famille est de palier aux déséquilibres des pouvoirs au sein des familles. Le présent article analyse la manière dont le droit de la famille néo-zélandais intervient à cet égard dans des cas où il y a de la violence contre les enfants. Un pouvoir accru est donné à l'État. Deux arrêts de la Cour suprême et un arrêt de la Cour d'appel, qui se penchent sur la question de la perte de pouvoir économique d'un des conjoints, démontrent cependant qu'il y a encore du chemin à parcourir avant d'atteindre l'objectif, celui d'assurer le potentiel économique des épouses ou des partenaires qui prennent charge de la maison et des enfants.

I INTRODUCTION

All family relationships have the potential for power to be concentrated too heavily in favour of some interests at the expense of others, whether it be the power of parents over children, the power of the state over individuals, or the power of money and property over childcare and household contributions to a marriage or relationship. The prime function of family law is to ensure power is evenly distributed and not abused.[1] At any moment in time a study of family law in a country reveals whose interests are given priority and thereby empowerment and whose are not.

II VIOLENCE IN FAMILIES

New Zealand appears to be a small, peaceful country of 4 million people. The Honourable Katrina Shanks MP, in a parliamentary debate on the 22 September 2009,[2] reminded the country of the shameful record we have when it comes to violence that happens within families. Based on police records there are over 80,000 incidents per year in New Zealand that are primarily about

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1 Mark Henaghan 'The Normal Order of Family Law' – A Review of J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2006) and (2008) 28 *Oxford Journal of Legal Studies* 165–182.

2 NZ Parliamentary Debates, 22 September 2009.

violence occurring in families, whether it be one adult partner against another or a parent or other relative against a child. The actual figure is likely to be much higher because it is well documented that much violence that occurs within the home is never reported.

Since the implementation of the Domestic Violence Act 1995 in 1996 over 200 women and children have been killed by family members, whether it be a husband, a partner, a parent or a relative.

Apart from the traditional family law approach to family violence of providing protection orders, support programmes for victims and stopping violence programmes for perpetrators, there is a strong movement to use the criminal law more, which gives the state more power when there are risks of violence.

(a) The Domestic Violence (Enhancing Safety) Bill

The most radical change proposed in the Domestic Violence (Enhancing Safety) Bill is the provision for what are called Police Orders. These are on the spot orders made by police where they believe on reasonable grounds that such an order is necessary to ensure the immediate safety of the partner or child of the person. The police officer is required to assess the likelihood of present or past violence and the serious likelihood of further violence, the welfare of children, hardship if an order is used and 'any other matters the constable considers relevant'. The consequence of the Police Order is to remove the perpetrator from his or her home and stop all contact with his or her family for up to 5 days. The objective is to empower and protect the victims of domestic violence by the immediate issuing of orders which require perpetrators to keep their distance.

Bill Atkin[3] has rightfully questioned whether Police Orders give state officials too much unchecked power. The natural justice safeguards are absent. There is no express requirement for the respondent's side of the story to be heard. Nor is there any specific process for the victim to be heard. These matters could be brought under the provision requiring the police officer to have regard to 'any other matter the constable considers relevant'.[4] There is no provision to appeal the order or at least challenge whether or not it meets the statutory test before a judge. Giving so much power to the police has the potential to create an imbalance of power between state and citizen to address another imbalance between perpetrator and citizen. Putting in safeguards of natural justice and accountability will still give protection.

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3 'Domestic Violence Laws – no overhaul but radical changes' (2009) 6 *New Zealand Family Law Journal* 126–134.

4 Domestic Violence (Enhancing Safety) Bill, proposed s 124B(2)(e). This was enacted as part of the Domestic Violence Amendment Act 2009 on 27 October 2009.

(b) Proposed new offence of failure to protect child or vulnerable adult from risk of serious harm

The death of two young baby twins, Chris and Cru Kahui, led to a public outcry in New Zealand. The twins were in a household with a number of adults. They were taken to hospital and died of non-accidental head injuries. The family exercised their right to silence and said nothing. Eventually the police charged the father of the twins with murder. The prosecution case was based on circumstantial evidence of the likely time of death and the likely presence of the father in the house with the twins at that time. The jury finding of not guilty roused public anger that two young children could be killed, yet no one found responsible for their deaths.

The New Zealand Law Commission[5] has recommended a new crime – failure to protect a child or vulnerable adult from risk of serious harm. A child is a person under the age of 18 years. A vulnerable adult is a person unable, by reason of detention, age, sickness, mental impairment, or any other cause, to withdraw him or herself from the care or charge of another person. Persons whom the duty is imposed on are, first, members of the same household as the victim. The definition of 'member of a particular household' is wide.[6] It includes persons who do not live in the particular household of the child or vulnerable person but who are so closely connected with the household that it is reasonable in the circumstances to regard them as a member of the household. Flatmates and regular visitors to a household, such as the boyfriend who regularly stays overnight, are likely to come within the definition. In determining close connection, frequency and duration of visits and whether there is a familial relationship are to be had regard to. There is no definition of what a familial relationship is. Schoolteachers are not covered by the provision, even though they have regular contact with children. Child carers may be covered by the definition if they spend regular time in the household. A child carer who cares for a child in their own household will come within the provision if the child was in their household at the time of the act or omission giving rise to the risk of death or serious injury. The other groups covered by the definition are staff members of any hospital, institution or residence where the victim resides.

In order to be caught by the provision the member of the same household or staff member of any hospital, institution or residence must have frequent contact with the child or vulnerable adult. Frequent contact is not defined in terms of what would amount to frequency and for how long it should last. They must also 'know' that the victim is at risk of death, serious injury or sexual assault as the result of an unlawful act by another person or an omission by another person to perform a statutory duty such as failing to feed a child. Knowledge in the criminal law includes constructive knowledge, that is when

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5 *Review of Part 8 of The Crimes Act 1961: Crimes Against The Person* (New Zealand Law Commission, November 2009).

6 Crimes (Offences Against the Person) Amendment Bill, clause 24.

the circumstances are obvious and a blind eye is turned to them. For example, it is clear that a child is being regularly beaten from the bruising and the frightened behaviour but the household members choose to ignore it. The final element of the offence is a failure to take reasonable steps to protect the victim from the risk. Persons under the age of 18 at the time of the act or omission who are members of the household are exempt from being charged. The offence is modelled on s 5 of the Domestic Violence, Criminal and Victims Act 2004 (UK). The English offence applies only when the child or vulnerable person has died.

What constitutes 'reasonable steps' will be a matter for juries. The offence has a maximum penalty of 10 years. The objective is to protect the vulnerable by requiring action from those close to victims. That is laudable in its attempt to give some power to potential victims through the obligations placed on household members to do what is necessary to protect them when they are at risk. The major weakness in the legislation as drafted is the vagueness of who or who may not have the obligation and what degree of risk is necessary before intervention is warranted. This gives a great deal of power to determine after the event who should have intervened and when. As currently drafted it would not meet Lon Fuller's test for a proper legal system where citizens should understand what the law is because it is clear: 'The desideratum of clarity represents one of the most essential ingredients of legality.'[7] Law is no longer a matter of rules of conduct but a hierarchy of power where officials decide on the day.

(c) Child and Family Protection Bill

The explanatory notes to the Child and Family Protection Bill state that in 2007 6,400 children were involved in applications for protection orders in New Zealand. Some of those children will have been the subject of violence and most of them will have witnessed violence. The focus of the Bill is to close gaps in the current law designed to protect children.

The Domestic Violence Act 1995 is silent on whether children remain covered by a protection order when the applicant (for example the mother) dies. The Bill[8] clarifies that a protection order that has not lapsed or been discharged continues for the benefit of any child of a deceased applicant until the age of 17. At 17 the proposed new law makes it clear that the young person can apply to have the order continued until the young person no longer ordinarily or periodically resides with the applicant for the order or the order is discharged, whichever comes first.

The Bill addresses an inconsistency in New Zealand family law. Under the Domestic Violence Act 1995 psychological abuse of a child (which includes

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7 Lon L Fuller *The Morality of Law* (Yale University Press, Revised Edition, 1977) at 63.

8 Child and Family Protection Bill, clause 6(5). Proposed amendment to Domestic Violence Act 1995, s 16.

witnessing physical, sexual or psychological abuse of a parent) is a ground for granting a protection order. The Care of Children Act 2004, which deals with parenting orders (day-to-day care and contact), has specific provision where a child is at risk of physical or sexual abuse but psychological abuse is not included.[9] Currently s 5(e) of the Care of Children Act 2004 states the overriding principle that a child *must* be protected from all forms of violence. The proposed amendment will clarify that all forms of violence means physical, sexual and psychological abuse.[10] This is a strong statement from the state that vulnerable children must be treated with dignity and respect.

The Bill strengthens the protection for children at risk of unlawful removal from New Zealand. Currently a court only has power to prevent removal where the risk is 'imminent' that the child will be removed. Under the Bill[11] the word imminent is removed so that the threshold is not so high to obtain an order that a child not be removed from New Zealand.

International adoptions create the possibility that parents are induced to give their child up for money or by other means. New Zealand is a signatory to the Optimal Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Child and Family Protection Bill introduces a new offence into the Adoption Act 1955 to comply with New Zealand's obligations under the protocol.[12] The offence of inducing consent to adoption by fraud, duress, undue influence (by payment or otherwise) or other improper means has the maximum penalty of 7 years. The offence does not have to occur in New Zealand and, because of the high penalty if it does occur outside New Zealand, the offender can be extradited to New Zealand.

(d) Who should control the dead body of a child killed by the actions of a parent?

James, a 2-month-old baby boy, had a severely damaged brain as a result of injuries inflicted deliberately by his mother. The mother during the course of a jury trial pleaded guilty to the charge of causing grievous bodily harm to the child with intent to do so and was sentenced to 6 years in prison. James was still surviving at the age of 5, severely brain damaged with the ability to respond to other human beings only by touch. While in prison the mother married the father of the child. She was released on parole from prison on the condition she had no contact with the child. The child suffered a severe medical episode that led to the doctors fearing he may die imminently. A lawyer for the child had been appointed in earlier proceedings. The lawyer became concerned that if the

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9 Care of Children Act 2004, s 58.

10 Child and Family Protection Bill, clause 19. Proposed amendment to Care of Children Act 2004, s 5(e)

11 Child and Family Protection Bill, clause 25. Proposed amendment to Care of Children Act 2004, s 77.

12 Child and Family Protection Bill, clause 32. Proposed amendment to Adoption Act 1955, s 27.

child died then there would be a conflict between the biological parents and the paternal grandparent of the child over burial and other arrangements. The lawyer for the child applied to the High Court[13] for direction in advance as to what should happen if the child died. In effect the lawyer for the child was asking the High Court to take jurisdiction by making an order in relation to a living child that would only come into effect after the child's death.

The High Court has jurisdiction to make guardianship orders[14] over a living child whereby the court takes guardianship of a child, but can such orders still apply once the child has passed away? At the hearing there was dispute between the biological parents and the paternal grandmother over disposal of the child's remains. The grandmother wanted to keep the ashes and have them buried with her in a family plot in Levin in the North Island of New Zealand. The biological parents wanted the ashes to be interred in the father's family plot in Picton in the South Island on the basis that members of the father's family had been buried there since 1899.

Heath J ruled that the Care of Children Act 2004, which deals with disputes over the care of a child, applies only to living children. Section 16 of the Act casts obligations and duties in relation to living children. A child is defined in the Act as a person under the age of 18 years. The jurisdiction of the Care of Children Act is for children living at the commencement of the Act and born after that time. Heath J had ruled in an earlier case[15] that the Care of Children Act did apply to the unborn child because of New Zealand's international obligations under the United Nations Convention on the Rights of the Child, which includes an express reference in its preamble to the need for 'special safeguards and care, including appropriate legal protection' for a child *before as well as after birth*. There is no such provision for the deceased child. They are so vulnerable as to not be recognised in legislation.

The High Court has an inherent jurisdiction to deal with questions that are not the subject of specific legal rules. Judicial authority establishes that the jurisdiction can be exercised only in circumstances within the scope of the jurisdiction and when there is no conflict with statutory regulation provisions.[16] This is an important concession to parliamentary sovereignty. The source of the inherent jurisdiction is s 16 of the Judicature Act 1908 which says the High Court shall continue to have all the jurisdiction which it had on the coming into operation of that Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand. There are no limits prescribed by the statute in terms of whether a child is alive or dead. There are statutory

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13 *Re JSB (A Child); Chief Executive of Social Development v TS and SB*, High Court Auckland, 4, 16 November 2009, CIV 2004-404-3116, Heath J.

14 Care of Children Act 2004, s 30.

15 *Re An Unborn Child* [2003] 1 NZLR 115 (High Ct).

16 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA), *Donselaar v Mosen* [1976] 2 NZLR 191 (CA), *Champtaloup v Northern Districts Aero Club Inc* [1980] 1 NZLR 673 (SC and CA), *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC), *Butler v Craig* [2008] NZCA 198, Master Jacob 'The Inherent Jurisdiction of the Court' (1970) *Current Legal Problems* 23, at 48–49.

provisions in the Administration Act 1969 which cover who has priority to administer the estate of a child who has passed away without a will – namely the legal parents.[17] There are no statutory provisions which cover the situation where there is a dispute between family members of how the child's human remains should be disposed of.

Misconduct in respect of human remains is a criminal offence in New Zealand[18] which shows there is a desire to treat human remains with reverence and dignity. Unseemly conflict over the remains of a child would put the dignity of those remains at risk. Heath J said that it was in the child's 'best interests to put in place a mechanism to avoid unseemly conflict between family members after his death'.[19]

The biological parents and the grandmother argued at the hearing that they each had a prior right to make arrangements for the disposal of James' remains. There is no direct statutory authority in New Zealand identifying the person entitled to custody and control of a body after death. The general approach has been to follow the priority for the right to apply for letters of administration when a person dies without a will. These priorities are about administration of the estate and not directly about disposal of the body.

Where a death has been reported to a coroner, once the coroner has finished their inquiry they are no longer to withhold the body from 'family members'. The term 'family members' is not defined in the Coroners Act 2006. The term 'immediate family' is defined in the Coroners Act. This is the group of people to whom a coroner is required to give notice if a post mortem is to be directed. Immediate family is defined as members of the dead person's family, whanau[20] or other culturally recognised group who were in a close relationship with the person or who had, in accordance with the customs or traditions of the community of which the person was part, responsibility for or an interest in the person's welfare and best interests. The section goes on to make it clear that the spouse, civil union partner or de facto partner of the dead person are included as are a child, parent, guardian, grandparent, brother or sister of the dead person as well as stepchildren, step-parents, stepbrothers or stepsisters of the dead person.

The definition of immediate family in the Coroners Act is much wider than the order of who has priority to administer the estate of a person who dies without a will. Rule 27.35 of the High Court Rules sets the priorities. First is the surviving spouse, civil union partner or de facto partner, followed by children of the deceased, then the parent or parents of the deceased, which would be first priority in the case of young children, then brothers and sisters of full or half blood or failing them a child of a brother or sister who has died during the

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17 Administration Act 1969, s 6(2).

18 Crimes Act 1961, s 150.

19 Above n 13, at para 57.

20 A Maori (the indigenous people of New Zealand) term for wider family which includes grandparents, uncles and aunts, nieces and nephews.

lifetime of the deceased. Finally come grandparents, followed by uncles and aunts of full or half blood or failing them any child of an uncle or aunt who has died during the lifetime of the deceased.

There are few authorities on the decision as to what should happen with regard to burial of a body. This was 'no surprise because in New Zealand and in other common law countries the funeral arrangements are sorted out within the family who resolve such issues as burial or cremation, the place where the service is to be held, the form of the service, religious or civil or some combination thereof'. Therefore in most cases there was 'normally no need to go to the law'.[21]

Using the priorities of persons who would be entitled to a grant of administration of a person's estate as the priorities for who should decide on burial has the appeal of certainty and predictability to it. But it does not allow for the particular circumstances of each case which is a vein that runs strongly through family law.

The Supreme Court of South Australia in *Jones v Dodd*[22] said the proper approach is:

> '. . . to have regard to the practical circumstances which will vary considerably between cases and the need to have regard to the sensitivity of the feelings of various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matter which might touch upon the question.'

This is a very sensitive approach but also leaves the judge with an open-ended discretion. Whose feelings should be given most weight? Which religious, cultural and spiritual matters should prevail?

Hale J in *Buchanan v Milton*[23] takes a 'weighing up of views approach'. The tension in the case was between adoptive parents of a male Aboriginal Australian who was living in England at the time of his death as an adult and his Aboriginal biological mother who wanted to return the body to Australia for burial in accordance with Aboriginal culture. Hale J found there were 'special circumstances' because of the deceased's adoption in Australia, the family move to England, a subsequent unhappy reunion with the biological parents in Australia and the interests of the deceased's daughter but did that make it necessary to displace the normal order of administration? The decision as to who should be given the grant of administration was made by taking account of the views of the birth family, the views of the adoptive family, the best interests of the deceased's daughter and the views of the deceased as relayed through evidence. Hale J found that the deceased had been fully

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21 Per Fogarty J in *Clarke v Takamore* (2009) 27 FRNZ 676, at para 23, where there was a dispute over the place a Maori man ought to be buried.

22 (1999) 716 SASR 328.

23 [1999] 2 FLR 844.

adopted into the British community and did not identify as an Aboriginal person, even though he had been given the opportunity to do so. The outcome was there was no necessity to displace the normal order and the adoptive parents were given the grant of administration.

There is a common sentiment that those who have been instrumental in causing serious injury to their children through violent behaviour 'ought to be regarded as having forfeited the right to make decisions about the child's remains on death'.[24]

An unequivocal parent's right in law to bury a child was questioned by Deeny J in *Re LL*[25] in the Queen's Bench Division of the High Court of Northern Ireland by using the example of an 'abusive parent, newly released from prison, perhaps for the offence of cruelty to his own child, [who] could march into the ward in which the child had died and snatch the lifeless body from the grieving foster parents who have loved and cared for the child for a decade'.

James' father's parental rights were to be considered distinctly from those of the mother. The father played no part in causing the injuries to James. Steps taken by the mother to rehabilitate and the extent of her remorse were also considerations to be taken into account. Heath J ruled that the issue of prior entitlement to bury or cremate and determine the way in which human remains will be disposed of must be determined after death 'in light of the circumstances prevailing at that time'.[26] One of the parents or the grandparents could predecease the child or there may be reconciliation between the parents and the paternal grandmother. Because of these possibilities Heath J was not prepared to make orders that predetermined what should happen when the child died.

Using the inherent parens patriae jurisdiction of the High Court Heath J appointed the lawyer for the child as the court's agent for the specific purpose of liaising with relevant personnel at the Bay of Plenty District Heath Board and the Child Executive of the Ministry of Social Development about removal of the child's remains and their disposal on the child's death. The lawyer for the child was given authority by the order to act as a custodian of the child's body, to take control of the child's body and to arrange for the child to lie at a funeral home or morgue pending resolution of any disputes between his biological parents and his paternal grandmother as to disposal of the child's mortal remains. The lawyer for the child was given specific directions on the child's death to consult the biological parents and paternal grandmother to determine whether the child should be buried or cremated, service or services to be held, location of any service, whether any person or persons should be excluded from attending a particular service, who should be able to see or tend the body pending burial or cremation and the place at which the child's remains should

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[24] Per Heath J in *Re JSB (A Child); Chief Executive, Ministry of Social Development v JS and SB,* 16 November 2009, High Court Auckland, CIV 2004-404-3116, at para 77.

[25] [2005] NIQB 38.

[26] At para 80.

be laid to rest. If there was conflict on all or any of the issues set out by Heath J then application to the High Court was to be made within 36 hours of the death with notice to the parents, the paternal grandmother, the Bay of Plenty District Health Board and counsel appointed to assist the court. Such an application was characterised by Heath J as essentially 'a contest between the biological parents and the paternal grandmother'.[27] If there was no dispute on the matters listed by Heath J then the lawyer for the child was authorised to release the body to family members to implement their agreement.

The lawyer for the child was required to file three monthly reports that were to be served on all the parties (parents, grandparent, hospital, Ministry of Social Development) which set out the current state of the child's health, any change of circumstances relating to the current views held by the parents and the grandmother and any other facts the lawyer for the child considered relevant to any direction the court may have been asked to make on the child's death. James was in a totally vulnerable situation. Heath J realised this in the judgment and by appointing the lawyer for the child as the court's agent with directions was able to provide protection for the child's best interests whilst being sensitive to the differences between the parents and the paternal grandmother.

James, died at 6.30pm on 13 January 2010 after an order was made by consent of the parents and grandmother in the High Court directing that his oxygen supply could be withdrawn as recommended by the doctors caring for him. James' maternal grandmother and caregivers were with James at the time he passed away. Sadly on the first night James was alone in a morgue because the police and Coroners office would not let the body be moved to a funeral home. The government officials took the view that James was a child in state care and therefore had to remain in the morgue. James was not a child in state care – he was a child under the parens patriae jurisdiction of the High Court where specific directions had been given to the lawyer for the child to take custody of James' body after his death. Counsel to assist the court in a memorandum to the court said:

> 'It is sad that the very situation that was sought to be avoided by the one day hearing and 8 counsel, including the Attorney-General intervening, has now eventuated – albeit not because of any family disputes but rather disputes between government agencies.'

James's body was released to the lawyer for the child.

The lawyer for the child and counsel to assist the court had worked very hard with the family to have amicable arrangements. The parents and paternal grandmother agreed on the arrangements. The mother was allowed to see James on two occasions but did not attend the funeral. The room James lay in was decorated with toys from James' caregivers. James' three siblings all spent time with him. The father and his mother attended the funeral and sat together.

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[27] At para 15.

One sibling sang at the funeral and another spoke. The burial clothes were agreed to by the grandmother and mother and father. A CD of children's music that James listened to was played at the funeral. After the funeral helium balloons were released by all present. James was cremated by agreement of his family. The ashes were to be handed to James' mother and father to have a service of their own at home. The ashes were intended for a separate plot in Picton alongside the plot of the father's family. The lawyer for the child concluded her final report to the court: 'James has been able to die while sleeping peacefully and then be farewelled by all who loved him in a most gracious and inclusive manner.' The judges and the lawyers involved had ensured that a powerless, vulnerable child had been given dignity in death and disputes avoided. This was family law at its best.

III RELATIONSHIP PROPERTY

(a) Economic disparity

New Zealand was an early pioneer in legislating a presumption of equal sharing of relationship property. The Matrimonial Property Act 1976 made the home and family chattels subject to a strong presumption of equal sharing no matter when they had been acquired for married couples.[28] Other property acquired during the marriage was subject to equal sharing unless one of the parties could show they had clearly made a greater contribution.[29] The Property (Relationships) Act 1976, as it became known after amendments which came into force in 2002, strengthened the presumption of equal sharing to apply to all property acquired during the relationship[30] with the narrow exceptions of extraordinary circumstances[31] and marriages and relationships of short duration (less than 3 years).[32] Civil unions and de facto relationships (of more than 3 years) are included in the equal sharing legislation.

One of the principles of the Property (Relationships) Act 1976 is to recognise the economic advantage that one party may have from a relationship or marriage and the economic disadvantage the other party may suffer.[33] Section 15 of the Property (Relationships) Act 1976 allows a court to award compensation out of relationship property or order the transfer of relationship property if after the division of relationship property (which would be 50/50 in most cases), the income and living standards of one spouse or partner are likely to be significantly higher than the other spouse or partner, because of the

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28 Matrimonial Property Act 1976, s 11.
29 Matrimonial Property Act 1976, s 18.
30 Property (Relationships) Act 1976, s 11.
31 Property (Relationships) Act 1976, s 13.
32 Property (Relationships) Act 1976, s 14.
33 Property (Relationships) Act 1976, s 1N.

effects of the division of functions within the marriage or relationship such as one partner taking on the role of daily care of children.[34]

Robertson J, of the New Zealand Court of Appeal, in *X v X (Economic Disparity)*[35] said there are two major circumstances when a s 15 claim, known as an economic disparity claim, can be made. One is when a person has supported a spouse to obtain qualifications and expertise which provide that spouse with an enhanced future earning capacity. The division of functions in such a relationship is focused primarily on increasing their earning capacity and the other focused primarily on supporting them in that endeavour and therefore should be compensated for the difference in earning capacity and living standards at the end of the relationship.

The other situation is where one spouse has forgone pursuing his or her career to provide domestic support and be the primary carer of the children. That was the situation contested in *X v X* although aspects of the first situation could have been argued to be relevant because the wife did support the husband while he increased his qualifications by obtaining an MBA.

The economic disparity provision (s 15) of the Property (Relationships) Act 1976 is silent on how compensation should be calculated. Chisholm J in the New Zealand High Court in *P v P*[36] commented that 'the absence of any meaningful guidance in s 15 about how the question of an award is to be calculated is remarkable'.

The Court of Appeal in *X v X (Economic Disparity)* in their first attempt to set out how the calculation should be made could not agree on the method but did agree on the result. Mrs X, who had been out of the paid workforce for 14 years caring for children and looking after the home, originally claimed $1.5 million in compensation. By the time the appeal reached the Court of Appeal the claim was reduced to $400,000. Mr X claimed that no order should be made and that Mrs X, who had received $3.75 million as her half share of relationship property, had no economic disadvantage. Mr X also argued that Mrs X made an autonomous choice not to continue in the paid workforce and therefore it was not the effects of the marriage that caused the disparity but Mrs X's own choice. Robertson J rejected any suggestion that there ought to be an inquiry into how the decision about the division of domestic roles was made. Robertson J said there is a presumption 'in the absence of clear evidence to the contrary'[37] that it was a joint, mutual decision by the parties.

Mr X argued that even if there was a significant disparity between income and living standards at the end of the marriage Mrs X had already had the

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[34] See B 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.

[35] [2009] NZFLR 985 at paras 49 and 50.

[36] [2005] NZFLR 689.

[37] At para 119.

significant advantage of a half share of the large amount of capital accrued during the relationship and the 'advantage' of remaining out of the paid workforce to care for the children.

Robertson J rejected this argument. The Property (Relationships) Act is based on the premise that each party to a marriage or relationship is equal and that their contribution counts as equal. Mrs X's half share of the capital was based on her equal contribution – it was not an advantage. At the end of the marriage, because of the time out of the paid workforce, Mrs X's ability to earn had significantly dropped.

In working out the amount to be awarded Robertson J relied on a paper by Joanne Miles, 'Dealing with Economic Disparity'[38] which divided s 15 cases into two categories. One which may be entitled 'personal disparity' cases is where the disparity reflects lost earning power by the claimant spouse because of opportunities forgone during the relationship. The other is where the disparity reflects an enhanced earning capacity by the respondent and the claimant seeks compensation for loss of a chance to share in the enhancement.

Robertson J conceded[39] that there may be cases that overlap both categories, but *X v X* was categorised as a 'personal disparity' or 'but for' case. All the disparity cases that have come before the New Zealand courts have been classified as 'personal disparity' cases.[40]

Priestley J in *De Malmanche v De Malmanche*[41] observed that in some cases a party's higher income or living standard will be solely attributable to natural flair, a view with which Robertson J agreed. This may deter some claimants arguing that they have contributed to enhancing the other party's earning ability. But if marriages and relationships are partnerships of equals, as the Property (Relationships) Act 1976 states, and each party's contributions are equal it will be nigh on impossible to show that one party has developed their earning ability on their own. On the facts of *X v X (Economic Disparity)* Robertson J accepted that Mr X 'undoubtedly has business acumen and flair, but he also had the benefit of Mrs X's full time focus on the couple's children and maintenance of the home'.[42] As John Donne said: 'No man is an island.'[43] *X v X* was not just a 'personal disparity' case but also a case where the wife's efforts enabled Mr X to enhance his earning ability, which will be the situation in all other economic disparity claims where the other party plays their role in the relationship.

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38 [2003] NZ Law Rev 535.
39 At para 119.
40 Eg, *P v P* [2005] NZFLR 689; *V v V* [2002] NZFLR 1105; *Fischbach v Bonnar* [2002] NZFLR 705 and *McGregor v McGregor (No 2)* [2003] NZFLR 596.
41 [2002] NZFLR 579.
42 Above n 35 at para 106.
43 Meditations 17 from *Devotions Upon Emergent Occasions* (1624).

The Court of Appeal proceeded on the assumption in *X v X (Economic Disparity)* that they were compensating Mrs X for what she had lost for being out of the paid workforce and not also for what Mr X had gained by being in the paid workforce with the support he received from his wife.

A number of accounting experts gave evidence in the case. Robertson J commented that deciding the amount of compensation for a disparity claim:[44]

> ' . . . does not engage the courts in a simple accounting exercise but in a sensible jury assessment role . . . No rote formulae can reliably throw up award sums that are just. The court must determine the justice of an award on the basis of its assessment of the parties' overall financial circumstances, the value of the loss sustained by the claimant party, and the future earning potential of each party.'

The Court of Appeal started with a 'but for' income – what Mrs X would have been likely to be earning if she had not taken time out of the paid workforce. An estimate was then made of what Mrs X could actually earn. The difference between the 'but for' and the 'actual' income is the disparity that Mrs X had suffered. Allowances were then deducted for contingencies given the pay out was made in advance. An estimate was then made of how many years it will take Mrs X to be able to earn the 'but for' income. This was a major part of disagreement between the judges in the Court of Appeal. Robertson J thought it would take 9 years, the majority (O'Regan and Ellen France JJ) thought it would take 18 years. Robertson J said that after the 9-year period, because of the financial position of the parties, their capital assets and the ages of the children, 'the consequences of the division of responsibilities within the relationship do not need to be further compensated for'.[45] The majority accepted the experts' views that it would take 18 years for Mrs X to reach the level of earnings she would have had, had she not taken time out of the paid workforce.

The overall result was the same for all the judges because of disagreement over whether compensation should be halved. Robertson J took the view that there is nothing in s 15 requiring compensation to be halved. The majority reasoning was that the loss for which the disadvantaged party is being compensated for is the loss of future earning capacity brought about by the division of roles in the relationship. Because the division of roles was a matter of a joint decision, the view was taken that the compensation order should be halved. The result was that 'Mr X, as the advantaged party, was required to pay his share of the loss represented by the reduced future income earning capacity of Mrs X'.[46] This means that Mrs X must pay the other half which has the effect that she bears half the burden of her lost earnings.

The reality is the courts are concerned to pay out too much in disparity awards. No case has yet recognised compensation for supporting the enhanced earning

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[44] At paras 128, 129.
[45] At para 132.
[46] At para 233 per O'Regan J.

of the other party and the halving provision enables the courts to keep the amount at a level they feel comfortable with. For the economically disadvantaged party who stays at home, whilst they receive something (Mrs X received $240,000, which was only an extra 3.5% of the total value of the property), it is well short of full compensation for the disadvantages they have suffered and the advantage the other party has gained by increasing their earning capacity. New Zealand is not doing as well as it should in rectifying the economic imbalance that occurs at the end of a marriage or relationship when one party takes on the role of home and child carer.

(b) Trust-busting to protect relationship property claims

Trusts were originally used as an equitable means of disposing of property in situations where the common law had barriers. For example, at common law married women were not recognised as having the legal capacity to own property in their own right. A trust was a means of them benefiting from property held in trust for their benefit.

Trusts are most commonly used now to protect assets from creditors and to avoid paying tax. They are a legal device to shift the consequences of legal ownership. Property that is in trust generally falls outside the part of property that can be claimed at the end of a marriage or relationship. The Property (Relationships) Act 1976 does not have strong trust-busting provisions (ie provisions to enable property in trust to be taken account of in relationship property disputes). Property which is intentionally put into trust to defeat the claims of a spouse or partner can be retrieved.[47] The difficulty is proving such intentional disposition of property where there are ready-made other explanations such as good business practice to protect property from creditors or tax collectors.

Where intent to defeat a claim cannot be proven then the only other option provided in the Property (Relationships) Act[48] is that, where a trust has the effect of depriving a person of a claim to what would have otherwise been relationship property, then they can be awarded other relationship property or income from the trust. Often there is no other relationship property as it is all in trust and income from the trust may be minimal. What the Act does not allow is for the court to go into the trust and redistribute the property in the trust.[49]

Mr and Mrs Ward married in 1991 and lived on a farm which had been in Mr Ward's family since 1959 when it had been acquired by his father and which Mr Ward started working on in 1983. Just before the marriage Mr Ward was

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47 Property (Relationships) Act 1976, s 44.

48 Property (Relationships) Act 1976, s 44C.

49 The recommendation of the Working Group on Matrimonial Property (*Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988)) was to provide a provision that would allow the court to go into the trust and redistribute.

given the opportunity to purchase the farm, which had been owned by a family company in which Mr Ward owned 18.7% of the share capital. Mr Ward had an agreement with the other shareholders which gave him the option to purchase their shares. This was completed in 1993 with a bank loan and advancement of the purchase price by his father and uncle. After the purchase Mr Ward owned 10,099 shares in the company and Mrs Ward had one share.

In 2000, 9 years into their marriage, under a matrimonial property settlement Mr Ward's shares in the farm company were resold to the parties equally by Mr Ward transferring half of the share capital to Mrs Ward. Mr Ward also transferred half of the interest from the farming business to Mrs Ward and they farmed the property as equal partners.

Mr and Mrs Ward then transferred their half shares in the farming company into a trust for a sum of $540,000. Each party advanced $270,000 to the trust to finance the trust's acquisition of the shares. The trust then forgave the debt at the maximum amount allowed each year to avoid the tax called gift duty. There was $198,000 owing when the matter first went to court. The trustees are Mr and Mrs Ward and their children who all take income and capital at the sole discretion of the trustees. Further beneficiaries are the children's direct dependants. The farm was valued at over $2 million.

Section 182 of the Family Proceedings Act 1980 allows a court after dissolution of a marriage or civil union to inquire into an ante-nuptial or post-nuptial settlement and to vary the terms of such settlements. The provision does not apply to de facto relationships. The provision had its origins in the Divorce and Matrimonial Causes Act 1863 (based on the Matrimonial Causes Act 1859 (UK)). At that time marriage settlements were common in families with property. Such settlements were based on continuance of the marriage. If the marriage ended then injustice could occur by enforcing the settlement as it would for Mrs Ward where her half share of the farm was in a trust where she was a minority trustee.

The New Zealand Supreme Court[50] held that the basis for doing justice under s 182 of the Family Proceedings Act 1980 is the expectations the parties had of the settlement, in particular the expectations of Mrs Ward. If the marriage had continued Mrs Ward would have had the equal benefits with Mr Ward from the settlement. Once dissolution of the marriage occurred Mrs Ward expectations were taken away. The trust earned no income after paying a management fee to Mr Ward for running the farm. Mr Ward received a benefit because he occupied the farm property. The farm was worth $2 million but could only be sold if the trustees agreed. The Supreme Court upheld the Family Court order to divide the trust into independent halves, one for the benefit of Mrs Ward and the children and the other for the benefit of Mr Ward and the children.

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[50] *Ward v Ward* [2009] NZSC 125.

If Mrs Ward had been in a long-term de facto relationship with Mr Ward then she would not have received any relief. This undermines the policy of the Property (Relationships) Act which is to give de facto partners[51] rights to claim relationship property on equal terms with married couples. This disempowers non-property owning de facto partners who work hard for the good of the relationship but may be left empty handed if all the property is in trust.

(c) Claims to increases in value of separate property

Section 9A of the Property (Relationships) Act 1976 allows for claims to increases in value of what is termed separate property. Separate property is property that is not relationship property. Generally, it is property acquired before the relationship or after the relationship,[52] or by gift, succession, survivorship or as a beneficiary in a trust.[53]

The property in *Rose v Rose*,[54] the first case to be decided under the Property (Relationships) Act 1976 by the New Zealand Supreme Court, is an example of separate property. One farm was owned before the marriage and was separate property on that basis. The other farm was inherited.

Mrs Rose claimed the increase in value to both farms occurred during the marriage. The first claim which was upheld by the Supreme Court was that partnership funds which were held to be relationship property had been used to develop the vineyard of one of the farms. Section 9A(1) of the Property (Relationships) Act says that where the increase in value of separate property is attributable (wholly or in part) to the application of relationship property then the increase in value is relationship property so Mrs Rose was entitled to 50% of the increase.

Mrs Rose's claim to the other farm was under s 9A(2) of the Property (Relationships) Act 1976 which allows for claims to increases in the value of separate property that are attributable (wholly or in part and whether directly or indirectly) to the contribution of the other spouse. Mrs Rose claimed that her work in the home, taking care of the children and her income from outside employment were contributions to the marriage which enabled Mr Rose to carry out beneficial work on the separate property. The Supreme Court held that the work in the home and with the children together with Mrs Rose meeting a significant proportion of the family's domestic expenses freed up Mr Rose to work on the farm and not draw much income from the farm, which meant that more money was available to develop the vineyards on the farm. Section 9A(2) entitles a party to a share of the increase based on contributions to the increase in value. Mrs Rose received 40% of the increase, the rest being

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51 Whether of the same or opposite sex.
52 Property (Relationships) Act 1976, s 9 defines separate property.
53 Property (Relationships) Act 1976, s 10.
54 [2009] NZSC 46, [2009] 3 NZLR 1.

for the husband because of his 'greater' **c**ontribution. The husband was given the benefit for inflation and general increases in land prices.

Margaret Briggs and Nicola Peart[55] point out the conceptual inconsistency in the legislation. The application of relationship property leads to automatic 50/50 sharing whereas efforts in the home do not. The outcome is that the 'application of a small but not trivial amount of relationship property would entitle the non-owning spouse or partner to share equally in the consequential increase in value, whereas substantial actions by the non-owner are unlikely to result in equal sharing of the increase in value'.[56] Property contributions are given more weight than the harder effort of looking after the home and children.

IV CONCLUSION

New Zealand family law is turning to criminal law to deal with child abuse. This empowers the state with the risk, if there are no checks and balances of unnecessarily disempowering family members. New Zealand family law says contributions, whether they are material or caring and emotional to a marriage or relationship, count equally.[57] The reality is monetary and material contributions are given greater weight with the resultant economic disempowerment for the partner who does most of the home and childcare.

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[55] 'Sharing the Increase in Value of Separate Property Under the Property (Relationships) Act 1976: a conceptual conundrum', in press for the 2010 *New Zealand Universities Law Review*.

[56] Ibid.

[57] Property (Relationships) Act 1976, s 18.

Nigeria

WOMEN, CHILDREN AND THE FAMILY UNDER NIGERIAN LAW: DEVELOPMENTS AFTER A DECADE OF DEMOCRATIC EXPERIMENTATION

*'Dejo Olowu**

Résumé

Tous les débats relatifs aux droits des femmes, des enfants ainsi que les sujets sur le mariage et la famille ne doivent pas être occultés dans le débat démocratique ayant cours actuellement au Nigéria. D'un régime militaire centralisé et répressif, le Nigeria a transité en 1999 vers un régime civil avec des institutions démocratiques. Cet article évalue les différentes règles, lois et jurisprudences qui sont intervenus dans les domaines des femmes, des enfants, de la famille lors de cette première décade démocratique (1999-2009). En se basant sur les normes relatives aux droits fondamentaux de l'homme auxquelles le Nigéria adhère, cet article souligne le défi de la mise en œuvre de ces règles au point de vu local. Même si des progrès ont été noté dans certains domaines, cet article souligne et identifie les lacunes flagrante nécessitant plus de réformes et des réponses de la société civile dirigeante.

I INTRODUCTION

With pomp and fanfare, Nigeria returned to another stint of democratic experimentation on 29 May 1999, after almost two decades of military rule. The end of the first decade of the new millennium therefore coincided with the end of the first decade of the longest attempt at entrenching democratic rule in Nigeria since it attained independence from Britain in 1960. As with every society just breaking free from dictatorship or other forms of authoritarian rule, expectations were rife that the return to democratic rule would usher in a more creative approach to the observance of human rights in general and the protection of the rights of women and children in particular.

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Of course, the 10 years of democratic rule have witnessed quite a number of legislative, judicial and policy interventions in many areas implicating women, children and the family in Nigeria, yet so much remains to be done in the area of reforms. To put this in perspective, it must be borne in mind from the onset that Nigeria is a State Party to all the core international and regional human rights treaties pertaining to women, children and the family, particularly the Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965; International Covenant on Civil and Political Rights (ICCPR), 1966; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984; the Convention on the Rights of the Child (CRC), 1989; and the Convention on the Rights of All Migrant Workers and Members of Their Families (MWC), 1990. In addition, Nigeria is a State Party to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-SC) as well as the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP). At the regional level, Nigeria is a State Party to the African Charter on Human and People's Rights (African Charter), 1981; the African Charter on the Rights and Welfare of the Child (the African Children's Charter), 1990; and the Protocol to the African Charter on Human and People's Rights on the Rights of Women, 2003 (the African Women's Protocol). In terms of formal commitments to international standards, therefore, Nigeria is replete with a bevy of normative frameworks all of which obligate the state to secure their domestic implementation.

Despite the array of human rights treaties binding on the Nigerian state, egregious violations of human rights in general and the rights of women and children in particular were established phenomena in the years preceding the current civilian regime, many of which continue to date. Several works of scholarship have been produced on the general state of human rights violations in Nigeria and it will serve no useful purpose to revisit these in this paper.[1]

The inevitable questions, however, that arise here are: to what extent has Nigeria's new experience of democratisation and civil rule positively impacted

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[1] See generally Derek Asiedu-Akrofi 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37(3) *American Journal of Comparative Law* 571; Ayesha Mei-Tje Imam, Renee Pittin and Helen Omole *Women and the Family in Nigeria* (1989); Oluyemisi Bamgbose 'Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl' (2001–2002) 10 *University of Miami International and Comparative Law Review* 127; Joy Ezeilo *Laws and Practices Relating to Women's Inheritance Rights in Nigeria: An Overview* (Enugu: Women's Aid Collective, 2000); Philip C Aka 'Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo' (2003) 4 *San Diego International Law Journal* 209; Christopher E Ukhun and Nathaniel A Inegbedion 'Cultural Authoritarianism, Women and Human Rights Issues among the Esan People of Nigeria' (2005) 5 *African Human Rights Law Journal* 129; Andrew Ubaka Iwobi 'No Cause for Merriment: The Position of Widows under Nigerian Law' (2008) 20(1) *Canadian Journal of Women & the Law* 37–86.

the protection of the rights of women and children in the country? In concrete terms, has there been any marked departure from the procedural and systematic violations of the rights of women and children that prevailed in the period prior to the current democratic dispensation? What has been the role of the current democratic government in safeguarding the dignity and worth of every woman and child against entrenched social and cultural norms that had for so long subjugated them? In futuristic terms, what prospects have the 10 years of civil rule signalled for women's rights, children's rights and the protection of family system in Nigeria? This chapter addresses this plethora of questions, highlighting some of the legal and policy reforms that have been devised to respond to identified challenges. While acknowledging the flurry of reform initiatives over the last decade, this chapter nonetheless accentuates critical areas of the law fervently requiring vigorous judicial, legislative and other strategic interventions.

The approach adopted in this chapter flows from the general to the particular, providing the reader with an understanding of the background to current problems; legal and policy frameworks as well as juridical developments within the set period.

II WOMEN, CHILDREN AND THE FAMILY UNDER NIGERIAN LAW: A THEMATIC OVERVIEW

The law that governs family relations, including the laws of marriage and the rights of inheritance and succession, among others, is an area of law that has an immense impact on the status and welfare of women and children in Nigeria. It is an area that is rendered particularly complex by the interaction of plural legal systems. For reasons ranging from history to culture, the average Nigerian is today subject to at least two distinct, and sometimes conflicting, legal systems. Customary law usually regulates family and allied relations, while statutory law regulates other aspects of life. There is no denying the fact that some aspects of customary law and practices are discriminatory and harmful.[2] The competing values of these plural legal systems more often than not result in denial of rights, and, ultimately, access to justice is adversely affected.

In most parts of Nigeria, women make up a large portion of the economically and politically vulnerable population. Legal pluralism does much to deny them their rights. This denial of rights is more patently seen in the areas of marriage and inheritance. The issue of inheritance is an important one because it is one

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[2] For convenience and brevity, the term 'customary law' in this paper is employed to cover indigenous laws and practices as well as the Islamic law or Shari'a variants. In *Oyewumi v Ogunesan* (1990) 3 NWLR (pt 137) 182 at 207, Obaseki, JSC had defined this species of law as: 'The organic or living law of indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people . . .' See also Elias, CJN, in *Kharie Zaidan v Fatoma Mohssen* (1973) 11 SC 1 at 21, on the same point.

way by which women can have access, especially, to economic resources such as land. Most traditional Nigerian communities are agrarian based. Accordingly, a lack of access to the main resource, land, makes women economically dependent and thwarts their efforts at achieving economic independence for themselves and their families. As a result of legal plurality, the law of inheritance is fraught with uncertainty and inequality.

The discussions in this chapter therefore highlight the concept of legal pluralism and how it plays out in Nigerian society. Flowing from general to particular themes, the chapter focuses on how the concept has affected the rights of women where marriage and succession to property is concerned, among other sub-themes. Underpinning the discussions in this chapter is the reality that whatever affects the rights of women indirectly and inevitably affects the rights of children, and by extension, family life in society. To this end therefore, the discussions revolve around the interwoven tripartite themes of women, children and the family in Nigeria. Further, this paper also examines attempts made by Nigerian courts over the last 10 years at effecting harmonisation, even though often producing conflicting results, as well as the legislative efforts in an effort to promote respect for equality and non-discrimination.

(a) Customary law dilemmas with marriage and inheritance in Nigeria

Although marriage creates a contractual relationship between the parties, its validity and consequent rights are dependent on law. In societies where there are multiple systems of law, the implication is that there are also different kinds of marriages, and there is substantial asymmetry between these attendant rights. In other words, the type of marriage that a couple contracts determines the rights, such as succession, that attach to such marriage.[3]

Customary law may be defined as a body of rules and norms whose legitimacy is rooted in tradition and is claimed to have existed since time immemorial. As a body of laws largely unwritten and rooted in tradition and historical practices, customary law is fraught with certain inherent problems that render its application detrimental to women and children, especially in the area of marriage and inheritance. It operates in such a manner as to give men precedence over women. Such gender inequality relegates women and children to a subordinate position, which in turn affects their access to resources.[4] For this reason, traditional customary conceptions of marital rights do not always acknowledge the contributions that wives make to the acquisition of family

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[3] See generally Sope Williams 'Nigeria, Its Women and International Law: Beyond Rhetoric' (2004) 4(2) *Human Rights Law Review* 229; Iwobi, above n 1, at 43–45; Reginald Akujobi Onuoha 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' (2008) 10(2) *International Journal of Not-for-Profit Law* 79.

[4] Onuoha, above n 3, at 82; Maryam Uwais 'Women, the Constitution and Applicable Laws' available at: www.greatbrakriver.com/mmf2009/downloads/Women,%20The%20Constitution%20and%20Applicable%20Laws.pdf (accessed 23 March 2010).

wealth, regardless of what statutory law has to say on the subject. Conflict thus comes to the fore when a husband dies without a will and customary law is to apply to the allotment of his assets.

The complexities are even more pronounced where marriages are contracted under more than one legal system. For instance, in contemporary Nigeria, there is hardly any marriage celebrated under statutory law that is not preceded by the performance of all the essential rights of a valid marriage under customary law. The question then arises as to under which law the dissolution of the marriage and distribution of property would be carried out.

Another dimension to the issue of complexity is the fact that customary law marriages, which also include marriages contracted under Islamic law, are potentially polygamous even though not necessarily so in practice. Whatever the social and economic advantages of polygamy in traditional society might have been, it must be admitted that under present-day conditions, it is a cause of many social ills; a happy and intimate family life cannot be established in the atmosphere of jealousy and rivalry which usually characterises polygamous unions. Problems with resource allocation, ownership of property, and inheritance issues are inevitably heightened in a polygamous context.

(b) Inheritance rights of spouses under customary law

Broadly speaking, customary law rules of inheritance are more often than not directly linked to the kind of kinship system practised in the particular locality or the edicts of the religion said to constitute the customary law of a particular people. In most parts of Nigeria, inheritance depends on whether one comes from a patrilineal or matrilineal family (religious customary law excluded). In some localities, the kinship system is bilateral where children are equally related to both their mother's and father's families and every biological descendant, male or female, is a recognised relative.[5] The right to inherit rights in property is determined by membership of the family, and such membership is traced through females from a founding female ancestor (matrilineal) or through males from a founding male ancestor (patrilineal). Therefore, an heir must necessarily be related to the deceased through such a male or female ancestor. Although the rules and incidents of inheritance may differ among kinship systems, in all cases inheritance generally does not result in any greater independence for married women.[6]

Under customary law in many Nigerian native communities, for instance, a woman has the right to own property in her own name. Nevertheless,

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[5] See Itoro Eze-Anaba 'Domestic Violence and Legal Reforms in Nigeria: Prospects and Challenges' (2007) 14 *Cardozo Journal of Law & Gender* 21.

[6] See generally Andreas Rahmatian 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' (1996) 10(3) *International Journal of Law, Policy & the Family* 281; Ezeilo, above n 1, at 10–12; Joy Ezeilo *Women and Children's Rights in Nigeria* (Enugu: Women's Aid Collective, 2001) pp 18–20; Williams, above n 3, at 234.

customary law takes the position that a wife is duty-bound to assist her husband in his undertakings, and any property acquired with such assistance belongs exclusively to the husband. Customary law thus treats the customary family's rights of inheritance as integrated and paramount. Justice Azogu explains the situation this way:[7]

> 'Igbo customary law denies women the right to inherit property in all but a few cases such as in matrilineal societies where women have right to own property. Igbo society is predominantly patrilineal. In patrilineal societies, however, incidents of ownership of property differ according to whether they pre or post-nuptial property.'

Because a wife is not considered to be a part of her husband's family, whether patrilineal or matrilineal, any claims she may purport to make to marital property are met with severe opposition. Blood ties take precedence over conjugal ties, and because the entire estate, by custom, devolves on the husband's customary family, widows often become destitute. The closest a widow may come to benefiting from property jointly acquired with her deceased husband is if, by the relevant customary law, her children are heirs.[8] Even under Islamic law, which allows women to inherit from a deceased husband, there is discrimination in terms of quantum along sexual lines: whereas a widow is allowed a quarter of her husband's estate, a widower takes half of his deceased wife's estate.[9]

In the past, there existed certain sound underlying assumptions for what now seems to be the lack of protection for widows. By custom, it was the legal responsibility of the customary successor to maintain the surviving widow and children from the estate of the deceased. This obligation was discharged with all seriousness by customary successors. In this present age characterised by individualism and greed, however, the interests of the widow and children are more often than not subjugated to the personal interests of the customary successors-in-title. It is therefore not uncommon to find widows who have been thrown out of their matrimonial homes and children who have become destitute upon the intestate death of a husband or father.

Roles that were historically played by the customary family in the lives of the surviving wife and children, such as bearing all the funeral expenses for the deceased, are in some communities now foisted on his wife and children. In the

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7 GI Udom Azogu 'Women and Children: A Disempowered Group under Customary Law' in Yemi Osinbajo and Awa U Kalu (eds) *Towards A Restatement of Nigerian Customary Laws* (Lagos: Federal Ministry of Justice, 1991) pp 129–135, at 132.

8 See generally the dictum of Beckley J in *Sogunro-Davies v Sogunro-Davies & Others* (1929) 2 NLR 79, 80, stressing that native Yoruba law and custom deprived wife's inheritance rights in her deceased husband's estate because devolution of property follows blood ties. See also Williams, above n 6.

9 See Yusuf Aboki 'Property Rights of the Customary and Islamic Law Spouse in Divorce: Issues, Problems and Proposals for Reform' in Olawale Ajai and Toyin Ipaye (eds) *Rights of Women and Children in Divorce* (Lagos: Friedrich Ebert Foundation, 1997) pp 143–161; Uwais, above n 4.

face of these realities, it is unconscionable to still insist on the dominance of the customary family in matters of inheritance.

(c) Shari'a and the fair trial rights of women in Nigeria

The systemic denial of fair trial rights to women under the Islamic penal law known as Shari'a came to the fore early in the current democratic dispensation as many northern states within the Nigerian federation adopted this legal system wholesale. In a series of cases that drew the attention and ire of the international community, several Moslem women were sentenced to various terms of punishment including *hadi* lashing in public, imprisonment, and even death. Although the superior courts in Nigeria were to either drastically reduce the terms of sentence or overturn the verdicts of guilt on procedural grounds, there is no overlooking the fact that the operations of the Shari'a legal system worked hardship against accused women and subjects them to lower safeguards of fair trial rights.

(d) Children's rights profile in Nigeria

An extensive multidisciplinary study carried out and published by several Nigerian professionals in 1996 had reported the widespread existence of various acts and practices violating the rights of children involving physical, psychological and sexual abuse and exploitation in numerous forms including corporal punishment, humiliation, credit bondage, harmful traditional rites of which female genital mutilation is one, child labour, street trading, indecent exposure, child abandonment, unlawful adoptions, and lots more.[10] Almost two decades after that empirical publication, many of these violations as well as new forms of abuses remain rife.[11]

(e) Other forms of discriminatory practices affecting women, children and the family

Beyond the subjugation of women and children's rights based on customary law practices, various other systemic violations of the dignity and worth of women and children persist in Nigeria. In the criminal justice systems of both northern and southern Nigeria, the penal laws only exclude pregnant women from serving the death penalty while there is no express provision excluding

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[10] Ignatius A Ayua and Isabella Okagbue (eds) *The Rights of the Child in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies, 1996).

[11] See 'Dejo Olowu 'Child Labor Phenomenon and Institutional Inertia in Africa: The Nigerian Experience' (2003) 13(2) *Caribbean Law Review* 157; Larry OC Chukwu 'Adoption of Children in Nigeria under the Child's Rights Act 2003' (Papers presented at the 12th World Conference of the International Society of Family Law, Salt Lake City, Utah, 19–23 July 2005); Ignatius Orisewezie 'Circumcision and the Law' *Daily Independent* 11 December 2007; 'Whipping the Child', Vanguard, Editorial Comment, 29 February 2008; Esther Ajayi 'Child Rights in Nigeria: Problem and Panacea' available at: http://web.uvic.ca/iicrd/graphics/fullpaperayaji.pdf (accessed 23 March 2010).

pregnant women from serving other sentences not involving death.[12] In other words, a pregnant woman is liable to serve her sentence notwithstanding her pregnancy. This is antithetical to the global efforts aimed at enhancing the lives, development and well-being of women. I contend that it will be more desirable to have a provision obliging criminal trial courts to suspend all prison sentences involving pregnant women until such a time when the court is satisfied by positive medical evidence that such women are fit to serve their sentences. The situation where female convicts give birth to children in Nigerian prisons is antithetical to universal human rights values in this age.

It has also been the plight of Nigerian women to be declared ineligible to stand as guarantors of credit and loan facilities or as sureties in bail proceedings. Nigerian women are also subjected to the requirement of husband's consent before surgical operations are carried out even where such involves threat to a woman's life. Similarly, until mid-2009, as we shall discuss shortly, married Nigerian women are routinely and procedurally compelled to produce a letter of consent from their husbands as prerequisite for the grant of an international passport.

It is apt to add that, as at today, the only form of marriage recognised under Nigerian law is the union between a man and a woman, governed either by statute or customary laws. Any relationship between two adults of the same sex is not only unlawful but has always been an act that renders anyone found guilty thereof to criminal sanctions under the Criminal Code of the southern states and the Penal Code of the northern states. It follows therefore that 'family' in the Nigerian context refers exclusively to a man, his wife or wives and their children.[13] Attempts at changing this scenario have been futile as we shall consider shortly.

How have the three arms of government in Nigeria been responding to these enumerated challenges? How have they responded in legal and policy terms over the last decade? To these queries we now turn.

III JUDICIAL INTERVENTIONS

Because of the unrelenting discriminatory practices perpetrated under customary laws, widows are increasingly taking their cases to court in their pursuit of remedies. Unfortunately, the regular civil courts of law do not always reward their efforts with justice. In some cases, judges feel constrained to a

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[12] See Bamgbose, above n 1; 'Dejo Olowu 'A Critique of the Rhetoric, Ambivalence and Promise in the "Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa"' (2006) 8(1) *Human Rights Review* 78 (hereinafter Olowu, A Critique).

[13] See generally Rahmatian, above n 6, at 285; Adepoju G Onibokun *Male Sexuality and Family Life in Nigeria* (Ibadan: Centre for African Settlement Studies and Development, 1998) 21; EA Odike *Modern Nigeria Family Law with Marriage Act and Matrimonial Causes Act* (Enugu: Renaissance Publishers, 2003) p 32.

strict interpretation of customary law to the disadvantage of widows. A consideration of some of the landmark decisions in Nigerian courts over the last decade will be instructive.

After a litany of decisions in which Nigerian courts had upheld some of the customary practices that subjugate women,[14] the penultimate court in Nigeria (the Court of Appeal) in *Augustine Nwofor Mojekwu v Caroline Mgbafor Okechukwu Mojekwu*,[15] had struck down the custom of 'oli ekpe' which forbade the female child of a deceased man to inherit her father's property but rather confers that right on the son of the brother of the deceased person. Delivering the lead judgment, Niki Tobi, JCA, as he then was, pronounced:[16]

> ' . . . Is such a custom consistent with equity and fair play in an egalitarian society such as ours where the civilised sociology does not discriminate against women? Day after day, month after month and year after year, we hear of and read about customs which discriminate against the womenfolk in this country. They are regarded as inferior to the men folk. Why should it be so? All human beings – male and female – are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi "*Oli-ekpe"* custom relied upon by the appellant are not consistent with our civilised world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth. I believe that God, the creator of human being, is also the final authority of who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the "*Oli-ekpe"* custom of Nnewi is repugnant to natural justice, equity and good conscience.'

Although this decision had boldly signalled a new tide that a court of law, being a court of equity as well, cannot invoke a customary law which is repugnant to natural justice, equity and good conscience and that the *oli-ekpe* custom was one of such customs, judicial pronouncements striking down customary law rules which are discriminatory against women and children have often been criticised as inaccurate. Because customary law is essentially unwritten and, as already noted, differs from locality to locality, it is inevitable that any purported judicial pronouncements will be flawed. It was against this background that the Court of Appeal's pronouncement in the *Mojekwu* case was criticised by the Supreme Court when the case came before it on appeal in

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[14] See, eg, *Taiwo v Lawani* (1961) All NLR 733; *Edebiri v Osagie* (1964) MNLR 95; *Awobodu v Awobodu* (1979) 2 LRN 339; *Nwanya v Nwanya*, (1987) 3 NWLR (pt. 62) 697; *Okwueze v Okwueze* (1989) 3 NWLR (pt 109) 321.

[15] [1997] 7 NWLR (pt 512) 283. See Hauwa Evelyn Shekarau 'Developments in Nigerian Family Law: 2002–06' in B Atkin (ed) *International Survey of Family Law 2007 Edition* (Jordan Publishing Limited, 2007) p 253.

[16] [1997] 7 NWLR (pt 512) at 304H–305H.

Mojekwu v Iwuchukwu.[17] The legal issue before the Supreme Court was whether the Court of Appeal erred in holding the *oli-ekpe* custom to be repugnant and contrary to the gender equality provisions under the Nigerian Constitution and pertinent international human rights instruments.

The Supreme Court held that the rules of procedure precluded the Court of Appeal from determining whether *oli-ekpe* custom was repugnant since neither of the parties to the case brought the validity of the custom as a legal issue before the court. The apex court, per Uwaifo JSC, criticised the Court of Appeal's pronouncement as follows:

> 'I cannot see any justification for the court below to pronounce that the Nnewi native custom of "*Oli-ekpe"* was repugnant to natural justice equity and good conscience . . . The learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi "*Oli-ekpe"* custom and that is quite understandable. But the language used made the pronouncement so general and far-reaching that it seems to cavil at, and is capable of causing strong feelings against all customs which fail to recognise a role for women. For instance the custom and traditions of some communities which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practice by the system by which they run their native communities.'

The Supreme Court however upheld the Court of Appeal's judgment in the case because, in its view, it did not result in miscarriage of justice. It found that the kolanut tenancy was indeed the applicable customary law, and thus, the respondent and her family were rightfully held to be the owners of the property in issue. However, it held that Court of Appeal erred in holding that the *oli-ekpe* custom is repugnant to natural justice.

In reaction to the Islamic law rule that forbids a woman from divorcing her husband except if the husband so consents, the Court of Appeal in *Salamatu S Wapanda v Abubakar S Wapanda*, per Muhammad, JCA, held:[18]

> 'The Quranic exhortation requires that if mutual love cannot work, husband should release the wife from the bond of marriage. If in spite of the wife's unhappiness, the husband refuses to give her release, he shall certainly be guilty of non-compliance with Quranic injunctions. The Kadi [Islamic judge] shall give a relief to the wife by ordering the husband to divorce the wife and on his failure or refusal to do so the Kadi shall become competent to pronounce divorce of the wife on behalf of the husband.'

In *Joel Anode v Samuel Mmeka*,[19] the respondent as plaintiff at the trial court claimed against the appellant inter alia a declaration that the plaintiff's mother

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[17] (2004) 11 NWLR (pt 883) 196. The names of the parties changed because while the matter was pending before the Supreme Court of Nigeria, Caroline Mojekwu (the original party to the suit) died and was substituted by her daughter, Mrs Iwuchukwu.

[18] [2008] 2 NWLR (pt 1068) 364 at 394.

[19] [2008] 10 NWLR (pt 1094) 1.

Nnemuwa having been left at home in accordance with the *ndiukwu umuiyi akabo* custom to rear children for the continuance of Mmeka Akabuisi lineage and the plaintiff having been begotten by her at home is entitled to inheritance of Mmeka Akabuisi's property as sole, surviving male in Mmeka Akabuisi's family lineage following the death of Chibua Mmeka without issue. According to the respondent, his mother, Nnemuwa, was not given out in marriage but was left at home by her father in accordance with the *ndiukwu umuiyi akabo* custom to rear children for the continuance of her father's lineage. The respondent claimed he was born by Nnemuwa at home and was therefore entitled to the inheritance of Mmeka Akabuisi's property as the sole surviving male in Mmeka Akabuisi lineage following the death of one Chibua Mmeka without an issue. The appellant as defendant contested this claim on the ground that the plaintiff was born out of wedlock. At the conclusion of the hearing, the trial court, in its judgment, believed the evidence of the respondent and consequently entered judgment in favour of the respondent on his first claim. Unanimously dismissing the appeal, however, the Court of Appeal held, inter alia, that:[20]

> 'By virtue of section 42(2) of the 1999 Constitution, a citizen of Nigeria shall not be subjected to any form of disabilities or restrictions to which members of other communities, ethnic groups, places of origin, sex, religion or political opinion are not made subject. In the instant case, it is rather obvious that the respondent was born by his late mother Nnemuwa out of wedlock. However, the fact that the respondent was born out of wedlock is totally irrelevant and cannot thus militate against him in inheriting the estate of his maternal grandfather Mmeka Akabuisi, the father of the respondent's mother Nnemuwa.'

Several cases after this have reaffirmed the protection of the dignity and worth of women and children. In *Mrs Pauline Asika & Others v Charles Chukwuma Atuanya*, per Denton-West, JCA, the Court of Appeal held that:[21]

> ' . . . if a custom tends to discriminate against a particular section of the populace, that custom even if not subject to litigation should not be allowed to prevail since it is against the tenets of the Constitution of the Federal Republic of Nigeria, 1999. Any custom or culture that does not enhance the human dignity of man or woman is inconsistent with the fundamental objectives of the Constitution and should therefore not be allowed. I therefore, with respect, call on the Nigerian state to protect, preserve or promote only the Nigeria cultures, which enhance human dignity and discard all cultures that are discriminatory and intolerable as repugnant to natural justice, equity and good conscience.'

This trend continued through 2009. In *Mr Edmund Chukwu & Others v Chief JS Amadi & Others*,[22] the Court of Appeal held, inter alia, that:[23]

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[20] Per Saulawa, JCA at 18–19.
[21] [2008] 17 NWLR (pt 1117) 484 at 518.
[22] [2009] 3 NWLR (pt 1127) 56.
[23] Ibid at 84.

> 'In the instant case, the Ikwerre native law and custom in question which tends to disentitle and dispossess the appellants [who are women] of the land in dispute, is most undoubtedly not only repugnant to natural justice, equity and good conscience, but also unconstitutional, inhumane and unjust.'

In *Dr (Mrs) Margaret Essien v Obong Joseph Effiong Essien & Others*,[24] the Court of Appeal held that 'a direct financial contribution to the purchase price of a matrimonial home or to the repayment of the mortgage instalments in respect of same is sacrosanct before joint interest can be inferred'.[25]

In *John Phillip Okechukwu Tabansi v Vivian Ifeoma Tabansi*,[26] the appellant and respondent were married at the Marriage Registry of Enugu North Local Government on 3 September 2001 and had a wedding ceremony at St Michael Catholic Church Asata, Enugu on 5 October 2002. The case brought before the trial court by the appellant was for a petition at the High Court of Anambra State sitting at Otuocha for dissolution of marriage and access to the only child of the marriage until she attained the age of 10 years and thereafter, custody of the child. The respondent filed a cross-petition wherein she sought an order dismissing the petition, a decree of dissolution of her marriage with the appellant, custody of the child and 80,000 Naira per month from the appellant for the maintenance of the child. In its judgment, the trial court dismissed the petition and granted the respondent's cross-petition. The appellant was dissatisfied and appealed to the Court of Appeal contending that the trial court was wrong in accepting the evidence of the respondent that it was the appellant that abandoned the respondent despite his unchallenged evidence on how the respondent deserted him and never came back. Unanimously dismissing the appeal, the court held inter alia:

(1) In considering maintenance in matrimonial proceedings, the education, maintenance and upkeep of a child are serious and sensitive matters which should not be hamstrung by technicalities. Therefore, what is best for the child should be the paramount consideration of the court.

(2) On the submission of the petitioner that the upkeep of the child is the responsibility of both parents, the court held: 'The petitioner has submitted that the upkeep of the child is the responsibility of both parents. At Common Law it is the responsibility of the man to take care of his family.'[27]

Another matrimonial dispute decided in 2009 vindicated the new trend. In *Musa Francis Buwanhot v Mrs Kehinde Buwanhot*,[28] the appellant presented a petition for the dissolution of the marriage between him and the respondent on the ground that the marriage had broken down irretrievably. He also prayed for

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[24] [2009] 9 NWLR (pt 1146) 306.
[25] Ibid per Owoade, JCA, at 330.
[26] [2009] 12 NWLR (pt 1155) 415.
[27] Ibid at 430, per Alagoa, JCA.
[28] [2009] 16 NWLR (pt 1166) 22.

the custody of the four children of the marriage. In answer to the petition, the respondent prayed for the dismissal of the petition, custody of the four children of the marriage, 500,000 Naira monthly as maintenance and alimony, and payment by the appellant of school fees, uniforms and medicaments of the four children. At the conclusion of the hearing, the trial court gave judgment decreeing the dissolution *nisi*. The court granted custody of the four children to the respondent and gave the appellant unrestricted access to the children at all reasonable times, payment of school fees, cost of books uniforms, medicaments of all the four children of the marriage by the appellant, 40,000 Naira monthly allowance by the appellant for the maintenance of the respondent and the four children and an order that the appellant should maintain in a habitable state, his personal house at No PL 125, Gigiring Hwolse, Jos, Plateau State where the respondent as well as and the four children of the marriage lived. Dissatisfied with the judgment and orders of the trial court, the appellant appealed to the Court of Appeal. Unanimously dismissing the appeal, the court held inter alia:[29]

> 'Since the welfare of the children of the marriage, in terms of their peace of mind, happiness, education and co-existence, is the prime consideration in granting custody, the trial court had no option but to grant custody to the respondent. The abuse and deprivation they suffered in the hands of their step-mother and to a less extent in the hands of their father, is most horrendous and disheartening. I will venture to say that he should make peace with his children and make amends. The house where he lives with his new woman and her child and sisters, is a no-go-zone for the four children in issue. They are living in his house in Jos, a house which is almost collapsing to his knowledge. The fact that the respondent is living in the house, and the marriage has been dissolved, does not derogate from the fact that he has a legal and moral responsibility to cater for his children and provide a habitable environment for them to live, attend school and go through life with minimum distress . . . Taking the whole circumstances into view, coupled with the clear, cogent and uncontroverted evidence before the court, the order of the trial court directed at the appellant to maintain in a habitable state of repair, his house at plot PL 125 Gigiring Hwolshe, Jos, where his children and the respondent live, has clearly and inevitably flowed directly and naturally, from the order of custody of the four children of the marriage, granted to the respondent.'

Adding another perspective to the foregoing trend was the decision in *Dr Mrs Priye Iyalla-Amadi v Comptroller-General, Nigeria Immigration Service (NIS) & Another*.[30] Here, Mrs Iyalla-Amadi had sought a renewal of her international passport in February 2008 and was told by NIS officials in Port Harcourt that she needed prior written permission from her husband. The NIS argued that the requirement for consent was put in place to perpetuate the authority of the man over his wife, no matter the status she had attained in society. It also stated that the requirement was set to avoid unnecessary breakdown of marriage institution in the country. The Federal High Court rejected and nullified the entrenched age-old oddity that required that married women obtain their husband's consent before acquiring or renewing their

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[29] Per Yahaya, JCA, at 36–37.

[30] Reported in *This Day Lawyer*, 23 June 2009.

Nigerian passports as a violation of s 42(1)(a) of the 1999 Constitution and art 18(3) of the African Charter, being discriminatory on grounds of sex, hence unlawful and unconstitutional. Justice GK Olotu, presiding judge of the Federal High court, in his verdict, held, inter alia that: 'This kind of policy has no place in 21st century Nigeria.'[31] It is remarkable to note that this was the first case of its kind where a woman's rights were upheld against a state agency in Nigeria.

In the criminal context, the case of *Pius Nweke v the State*,[32] decided within the period covered, stands out as the most instructive. Here, the appellant was convicted and sentenced to death for the death of his wife. He had killed his wife on the ground that he suspected that the pregnancy she was carrying belonged to another man. The appellant lost his appeals up to the Supreme Court and was duly hanged as prescribed by law.

Notwithstanding earlier judicial uncertainties, the trend of judicial decisions reveals a gradual inclination toward the recognition and protection of the rights and interests of women and children, as opposed to those of the customary family or of patriarchal institutions, in the absence of an adequate national legislative framework on the subject. The cases reflect a shift in the assumption that it is the man who solely provides for the family and, therefore, singularly acquires all family property. Even though some of these cases show considerable judicial empathy for the position of women, the courts are however clearly limited in the scope of remedies they can grant to women. This is a consequence of the confines of customary law rules of succession. It is also a result of the lack of broad-based national legislation defining the rights of surviving spouses *vis-à-vis* the customary family.

IV STATUTORY AND POLICY INTERVENTIONS

The shift in judicial attitudes toward marital property has been followed closely by legislative and policy initiatives in Nigeria. In light of the injustice perpetrated by the application of customary law rules, some state governments have taken various legislative steps aimed at gender equality generally and intestate succession specifically. Widespread critical agitation by Nigerian civil society groups prompted such initiatives.

Within the first year of the inception of the Olusegun Obasanjo administration, Nigeria adopted its National Policy on Women, 2000. By the terms of this policy, the federal government of Nigeria committed itself to the improvement of the plight of women by tackling general and peculiar problems affecting Nigerian women and by mainstreaming gender equality into all facets of national development. Towards the end, the policy document devotes elaborate segments to women's health; women's education; women's

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[31] Ibid.

[32] (2001) 4 NWLR (pt 704) 588.

employment; participation in agriculture; industry; science and technology; the environment; political representation and policy making processes as well as legal reform and legislative protection. Part of the measures identified in eliminating discrimination in labour and employment were personal income tax; maternity leave; favourable conditions of service, etc. All these were to be included in revised national labour laws.

With regards to the specific measures for legal reform and legislative protection, the minimum age of all forms of marriage will be 18 years; customary laws were to be reviewed and codified to eliminate uncertainties and arbitrariness; existing laws were to be harmonised and new ones made to guarantee women's rights to inheritance, ownership of land and property, custody of children, and the assertion of reproductive and sexual health; and laws were to be enacted to criminalise acts of domestic violence and other harmful cultural or traditional practices affecting women and widows.

Still at the policy level, the federal government created a Ministry of Women Affairs, the first in the history of the country; established the Office of the Special Adviser on Women Affairs in the Office of the President; and also set up a Law Review Committee to look into anti-women laws with a view to making positive changes.

Promising as these measures were, very few among them translated into legal frameworks. In response to the menace of child and women trafficking,[33] the Nigerian National Assembly enacted the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act in August 2003. Under this Act, all acts involved in the trafficking business, ranging from recruitment, transportation, purchases, sale, transfer, receipt or harbouring, use of deception, coercion or debt bondage, to involuntary servitude in forced or bonded labour or in slavery-like conditions, are prohibited. Apart from these, 26 different sections of the Act create specific offences on human trafficking and its related activities.[34] The federal government followed up this statute by establishing the National Agency for the Prohibition of Trafficking in Persons (NAPTIP), with a mandate to enforce the law, coordinate other laws against trafficking and adopt measures to eradicate trafficking. Several states of the federation have since enacted laws modelled on the 2003 Act to address the phenomenon of trafficking in women and children.[35]

In ameliorating the negative effects of obnoxious traditional practices affecting women, no federal enactment has emerged. However, some states where the denial of the right of women or female children to inherit their deceased fathers' properties had been systemic, there are now statutes prohibiting such

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[33] See 'Dejo Olowu 'Child Trafficking, Children's Rights and the Crisis of State Interventionism: The West African Experience' (2004) *Human Rights Law Review* 62–74.

[34] Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, ss 11–28.

[35] See generally VE Kalu 'Hype about Women's Rights in Nigeria: A Comparative Analysis of Domestic and International Juridical and Operational Standards' (2005) 2(1) *Ife Juris Review* 61, 68.

denials.[36] One model of this trend is the Prohibition of Infringement of a Widow's Fundamental Rights Law, 2001, enacted by the Enugu State House of Assembly. Apart from prohibiting the compulsion of any widow to have her head shaved; to sleep either alone or on the same bed with the corpse of her dead husband; to be married to a relation of her late husband; to solitary confinement for any given period; or to vacate her matrimonial home,[37] this statute further prescribed an offence punishable with a fine of 5,000 Naira (approximately 40 US Dollars) or 2 years' imprisonment against any person found guilty of conspiring with another, aiding, abetting, counselling, procuring or assisting another person in contravening this law.[38] More significantly, the law explicitly provides that no widow shall be dispossessed of any property acquired by her deceased husband without the consent of the widow.[39]

The Cross River and Edo States also passed the Violence against Women Laws in 2002 and 2003, respectively. These statutes prohibit all manners of abuse against women and girl children ranging from female genital mutilation to sexual exploitation.[40] Following massive campaigns by Nigerian civil society groups, the Violence against Women (Prohibition) Bill was presented to the National Assembly in 2003, with wide-ranging criminal and civil measures against the phenomenon of violence. That Bill is yet to be passed as at the time of completing this paper.

In March 2009, the Nigerian National Assembly held a public hearing on the Same-Gender Marriage (Prohibition) Bill, proposed in 2008. What captured most newsprint headlines was the protest by hundreds of young lesbian, gay, bi-sexual and transvestite (LGBT) men and women organised by the Queer Alliance, an unprecedented public show of such magnitude in a conservative society as Nigeria. At the hearing, a number of civil society groups, including the Human Rights Watch, Global Rights, and Amnesty International, spoke against the Bill, while religious groups, including the Anglican Church of Nigeria, spoke in its favour. The proposed Bill, which is yet to be put to a vote, seeks to broaden the criminalisation of homosexuality in Nigeria, prohibiting not just same-sex marriage but any form of same-sex cohabitation in which parties 'intend to live together as husband and wife'. Homosexual activity is already illegal, punishable by up to 14 years in prison under the Criminal Code and the Penal Code, and same-sex marriage is not legal under any of Nigeria's legal systems: the Marriage Act, Islamic law, or indigenous customary law.

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[36] See, eg, Oyo State Widows' Empowerment Law, 2002; Anambra State Malpractices against Widows and Widowers (Prohibition) Law, 2004; Edo State Inhuman Treatment of Widows (Prohibition) Law, 2004; Ekiti State Widowhood Law, 2005.

[37] Prohibition of Infringement of a Widow's Fundamental Rights Law, 2001, s 4(1).

[38] Prohibition of Infringement of a Widow's Fundamental Rights Law, 2001, s 6.

[39] Prohibition of Infringement of a Widow's Fundamental Rights Law, 2001, s 4(2).

[40] On this point, see Edo State Female Circumcision and Genital Mutilation (Prohibition) Law (1999); Cross River State Girl-Child Marriages and Female Circumcision (Prohibition) Law (2000); Rivers State Abolition of Female Circumcision Law (2001); Ogun State Female Circumcision and Genital Mutilation (Prohibition) Law (2000); and Ebonyi State Abolition of Harmful Traditional Practices Against Women and Children Law (2001).

However, the proposed Bill adds prison sentences of 3 years for anyone attempting to enter a same-sex marriage and 5 years for anyone 'aiding and abetting' a same-sex marriage.

Human rights groups struck a fairly moderate tone in opposing the Bill, criticising the excessively broad definition of same-sex marriage and its redundancy given Nigeria's already-existing prohibitions of all homosexual activities. The Bill appears to provide additional legal grounds for the harassment of the LGBT community and human rights groups. Moreover, speakers emphasised its inconsistency with Nigeria's international human rights commitments as a signatory to the African Charter, as a member of the UN Human Rights Council, and as party to the ICCPR. The debate mimics the reactions to a similar but broader Bill proposed in 2006, which never went to vote. Predictably, this Bill will meet the same fate. Surviving the human development challenges in Nigeria is harsh enough even without adding official hostility towards sexual minorities.

With regard to children, the singular and most remarkable legal development within the decade covered was the enactment of the Child Rights Act, 2003. Aimed at domesticating the Convention on the Rights of the Child and the African Children's Charter, this statute codifies the provisions prohibiting all forms of discrimination and harmful traditional practices against children as are found in international children's rights treaties as well as the Nigerian Bill of Rights contained in Chapter IV of the 1999 Constitution.[41]

Despite the promise of this enactment, it has suffered vehement opposition from the predominantly Islamic states of northern Nigeria. Efforts at stopping child marriage are usually rebuffed by Islamic clerics, parents and state parliamentarians in northern Nigeria, who contend that banning the practice contravenes cultural and religious norms of the region's Islamic communities. To date, Jigawa State is the only state in northern Nigeria to have enacted an equivalent state law modelled on the Child Rights Act.[42]

The Constitutional and Treaty Framework

Section 1 of the Constitution of the Federal Republic of Nigeria, 1999, stipulates that:

> '(1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> (2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

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41 UNICEF, The Child Rights Act, Information Sheet, August 2007.

42 Jigawa State Child Rights Law, 2007.

> (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.'

Chapters II (Fundamental Objectives and Directive Principles of State Policy) and IV (Fundamental Rights) contain several provisions that create an obligation for the state and non-state actors to avoid discrimination on any grounds including sex. Section 42(1) puts it more succinctly as follows:

> 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:
>
> (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions are not made subject . . .'

Besides other statutory provisions, therefore, Nigeria has constitutional provisions that seemingly guarantee the rights of women regarding the themes under discussion. Such statutes usually echo the relationship between all other laws and the Constitution, asserting the Constitution as the supreme law of the land.

The application of customary law invariably warrants a discussion on human rights, particularly equality before the law, non-discrimination, the right to own and hold property, access to justice, and related rights. By reason of Nigeria's colonial legal heritage, the common law of England, the doctrines of equity as well as statutes of general application in force in England as at 1 January 1900, form an integral part of its laws in addition to certain English statutes that have been received into its laws by local legislation. Other sources of Nigerian law include local legislation (state and federal) and Nigerian case-law as well as indigenous customary laws. The principles of judicial precedent and hierarchy of courts are also a fundamental part of the Nigerian legal system with the Supreme Court of Nigeria at the apex of the court system. It is thus obvious from a reading of all the relevant provisions that the constitutional provisions in general, and any rights guaranteed therein in particular, are superior to any customary law norms.

Nigeria has also ratified international treaties that oblige them to ensure equality as well as respect for women's rights. International treaties on women's rights are expedient for a number of reasons. They offer universal definitions for these rights, and while these definitions may not suit specific places and instances, they are a starting point. Further, they constitute important tools in the efforts to improve the lot of women. States parties to these treaties have an obligation to take concrete steps for the realisation of the guaranteed rights. Such steps begin with ratification, and although simple ratification of

international treaties does not immediately translate into improved rights for women, it paves the way for the passage of implementing legislation if such does not already exist.

The CEDAW is one critical international treaty that is relevant to the issues under discussion. Under CEDAW, Nigeria officially condemns discrimination against women in all ramifications. It also agrees to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women. Article 5 of CEDAW specifically imposes a positive obligation on states to do away with customary rules and practices that discriminate against women.

Even more specific to Nigeria is the African Charter, art 2 of which provides that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political opinion.' Article 3 of the African Charter also stipulates that every individual 'shall be equal before the law' and 'shall be entitled to equal protection of the law'. The position of the African Charter on the family, women and the obligations of the state as stated in art 18 is that:

> '1. The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and moral.
>
> 2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community.
>
> 3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.'

Reinforcing the international frameworks against the systemic marginalisation of and discrimination against women is the African Women's Protocol.[43] Unlike the African Charter however, both the CEDAW and the African Women's Protocol have not been domesticated in Nigeria, rendering them unenforceable in the technical sense.

V AN APPRAISAL OF STATUTORY, POLICY AND JUDICIAL DEVELOPMENTS: POINTING TO THE FUTURE

The laws that have been passed to alleviate the hardship caused by the application of customary law rules on matters of discrimination against women constitute a radical departure from customary law and are significant landmarks in family law reform in Nigeria. To some extent, they have helped

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[43] Olowu, A Critique, above n 13.

the plight of women in some states of the federation where they have been passed. The impact of the laws on women, however, has been minimal for a number of reasons.

The high illiteracy rate, especially among the rural population and the urban poor, means that a lot of women are ignorant of the existence of these laws and the rights they afford. Even where they are aware of the existence of such a law, financial considerations hamper any efforts to enforce the rights that women may have under the law. The harsh reality is that legal procedures relating to estate administration in Nigeria are cumbersome and costly. Most women cannot afford to pursue the rights spelled out under these laws. The snail pace at which cases are handled thus invariably defeats the whole purpose of seeking legal redress from the courts.

The laws themselves have inherent problems that limit their effectiveness in protecting the rights of women. The mode of estate distribution prescribed in some of the laws gives rise to complications. The portions allocated to surviving spouses are sometimes criticised as being inadequate and not reflective enough of a spouse's contribution to marital property. With customary marriage being the most common form of marriage among rural dwellers and traditional Nigerian societies, polygamy remains a reality in modern Nigeria. Where division of the estate has to be among different groups with differing interests, conflict is inevitable. The result is fragmentation or depletion of the estate as, to minimise conflict, affected parties may prefer to convert the property into cash and divide the proceeds accordingly.

Furthermore, the statutory enactments constitute a super-imposition of legal edicts on time-honoured notions of marriage, property, and succession rights, which are themselves founded on traditional customs and norms. These customs and norms have operated within the framework of established patterns of kinship systems and gender segregated patterns of behaviour, and they cannot be done away with by the mere stroke of legislative pen. Societal perceptions on the role and position of women and their limited access to the formal justice system constitute a hindrance when it comes to enforcing the inheritance rights of women. In many cases, social and family pressure, and the fear of offending the customary family and being isolated often compel women to give up their rights. To the disadvantage of women, customary law continues to apply upon the intestate death of a person in the majority of cases.

Turning to other interventions already discussed in this chapter, a critical look at some of these laws will reveal their shortcomings. Despite the seeming strides made by these statutes, they are actually ineffective in improving the lot of women and children. The laws contain certain anomalies that make the statutes practically ineffective. The relationship between statutory laws (particularly the Constitution) and customary laws is sometimes not expressed in clear terms. It is done in a manner, rather, that leads to more confusion and problems for women. With regard to penalties for offences created, the fines prescribed are paltry when weighed against the gravity of the criminalised acts. An example

lies in s 63 of the Labour Act, 2004, which prohibits the engagement of a child in any employment injurious to the physical development, health, and moral standing of the child. Section 64 of that Act stipulates that offences under the foregoing sections are punishable with a fine not exceeding 100 Naira, equivalent to less than one US dollar.

Notwithstanding these marked shortfalls, statutory provisions are a step in the right direction in the sense that they offer a standard against which all unwritten laws are to be judged. They also create an awareness of rights even though they are more theoretical than practical. The hope is that, from theory, they will eventually be translated into practice for the welfare of all women and widows in particular.

The ingrained position that customary law still occupies in inheritance matters, in spite of legislation on the subject, is reflective of the fact that in-depth social research and public debate prior to the passage of these laws were lacking. Most women are ignorant of the rights afforded them under the laws. If these laws are to have their desired impact, then it will be expedient to launch extensive educational as well as legal aid programmes that target mainly the rural areas where these laws are yet to have any significant impact.

Legal literacy is an invaluable tool for the empowerment of women because it provides essential information that allows women to exercise their rights. The Beijing Declaration and Platform for Action of the Fourth United Nations World Conference on Women stated that 'while women are increasingly using the legal system to exercise their rights, in many countries lack of awareness of the existence of these rights is an obstacle that prevents women from fully enjoying their human rights and attaining equality'.[44] Nigerian women are snared by the conflicting legal systems that exist. Customary and statutory laws have not always merged in such a way as to guarantee protection and enforcements of women's rights. Customary laws must reflect the realities of the modern Nigerian society and uphold the rights of women and children, but when this proves difficult, customary laws must give way in the interest of women, children and family life.

On this note, the ongoing constitutional review process in Nigeria must be made to consider injecting a constitutional provision for affirmative action in favour of women, much in the same way as the 'federal character' clause which requires ethnic balance in the composition of all governmental bodies and agencies under the Constitution.[45]

Moving to another dimension, the importance of these international instruments in the fight for equal rights for women cannot be over-emphasised. Progressive judges have had recourse to them when domestic legislation on an

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[44] Beijing Declaration and Platform for Action, Fourth World Conference on Women, 4–15 September 1995, UN Doc A/CONF 177/20 (17 October 1995), para 227.

[45] See Constitution of the Federal Republic of Nigeria, 1999, ss 14(3), 171(5), 217(3), 219 and 223.

issue is deficient. An illustrious case was the Botswana case of *Attorney-General v Unity Dow*.[46] The Court of Appeal affirmed the decision of the lower court that a provision of Botswana's Citizenship Act infringed the fundamental human rights of women.

While the *Mojekwu v Mojekwu* decision (Court of Appeal) represented a very progressive attitude toward the rights of women, it is submitted that the failure of the judges at the apex court to rely on international instruments in affirming the reasoning of the lower court and to address the injustice associated with the application of customary law leaves much to be desired. There is therefore an urgent need for the domestication of CEDAW, its optional Protocols and the African Women's Protocol in Nigeria. This could be done if the federal government would enact these treaties into law as a Schedule to an enabling Act, in accordance with s 12 of the 1999 Constitution.

Law reform and statutory interventions are just one way of transforming the plight of women and children in Nigeria. Sight must not be lost of the veritable role of policies. Although the Nigerian state has adopted various policies on the themes covered by this chapter, the challenge remains in their implementation. Civil society groups should take the state to task on its commitments to international standards by filing comprehensive 'shadow reports' before treaty monitoring bodies, identifying where Nigeria's legal and policy actions are not advancing its treaty obligations. Policy and legal initiatives by the Nigerian state must be backed up by political will.

In this regard, Nigerian civil society groups have always acted as indispensable agents in the protection and promotion of the rights of the vulnerable in society. Their continued and intensified efforts to promote women's rights through legal literacy programmes in the areas discussed must therefore be encouraged.

While the Nigerian Government has formal commitments and policies on many of the issues in this chapter, public knowledge of such policies is scanty and they are at best confined to the corridors of their purveyors. In responding to this challenge, human rights and civil liberties should become mandatory components of all curricula from primary school and throughout all levels of education in Nigeria. This suggestion is not esoteric, drawing on lessons from the transformative educational agenda of post-apartheid South Africa and the imperative lessons of Nigeria's repressive past. Only a conscious, integrative, all-encompassing human rights approach to the problematic issues raised in this chapter will evolve a culture of equality and non-discrimination in Nigeria in a sustainable way.

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[46] (1992) 6 BCLR 1.

VI CONCLUDING REMARKS

Although democratic regimes are generally considered auspicious for the greater observance and implementation of human rights,[47] the realities of the first decade of democratic rule in Nigeria signal that democracy alone may not be enough for the realisation of the promise of human rights. In the Nigerian context, family law issues, particularly those relating to inheritance, have been rendered peculiarly complex by the interaction of plural legal systems. Historical legacies in the form of colonialism and religion have played a huge role in forming the socio-political contours in Nigeria, and this is what has informed the interplay of laws, policies and the systemic violations of rights in its current form.

In many Nigerian communities, customary norms and practices have been extensively altered by statutory interventions although their effect varies from state to state. In spite of legislative restrictions on, or prohibition of, customary norms and practices, the fact still remains that members of the various communities still regulate most of their affairs in accordance with custom, especially within the family context. This jeopardises the statutory rights of women and children and puts them at a disadvantage to men. Customary law of inheritance generally puts the interests of the deceased's customary family ahead of those of a surviving spouse and children, with widows usually being worse off than widowers.

It has been shown that, while judicial, policy and statutory interventions have attempted to assuage the problems, much more needs to be done in terms of human rights education, legal aid, and in-depth social research into customary laws and practices, the results of which should inform the promulgation, amendment or repeal of existing statutory laws on the subject. After all, human rights education should be a life-long process through which people at all levels and in all strata of society learn respect for the dignity and worth of others and a channel of ensuring that respect in all societies.

This chapter has emphasised that statutes, policies and case-law addressing the issues of marriage, inheritance, and exploitation are indispensable tools in the struggle for equality and improved life for women and children. All arms of government, particularly the judiciary, and civil society, have significant roles to play in this struggle. A sustained progressive approach by judges to the provisions of national and international instruments guaranteeing women's and children's rights will go a long way in improving the lot of women. Legal literacy must therefore become a foremost feature in the activities of all organs and agencies, government as well as the civil society.

Far from being an *ex cathedra* pronouncement on all the dynamics which should inform the improvement of the plight of women, children and the

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[47] See generally John O McGinnis and Ilya Somin 'Democracy and International Human Rights Law' (2009) 84 *Notre Dame Law Review* 1739.

family in Nigeria, this chapter would have fulfilled its purpose if it stimulates further intellectual discourses and comparative enquiry.

Puerto Rico

BIOLOGICAL VERSUS LEGAL PARENTHOOD DEBATE IN PUERTO RICO

Gerardo José Bosques Hernández[*]

Résumé

Le présent texte fait état des derniers développements en droit de la filiation à Porto Rico. Au courant des dernières décennies, la jurisprudence a été une source d'importants changements en matière de contestation de paternité et elle a apporté des réponses à certaines questions récurrentes. Par contre, la jurisprudence a refusé de modifier les normes pour ce qui est des délais de rigueur auxquels sont soumises les contestations de paternité, notamment en maintenant la date de la naissance de l'enfant comme *dies a quo* obligatoire lorsque le parent résidait à ce moment-là à Porto Rico. D'importantes pressions sociales, particulièrement de la part de parents non biologiques condamnés à verser des pensions alimentaires, ont amené législateur à adopter la Loi No 215, sanctionnée le 29 décembre 2009.

La Loi No 215 (2009) introduit des changements significatifs au droit de la filiation de Porto Rico. Elle codifie la plupart des principes dégagés par la Cour suprême en la matière. Parmi les innovations, on y trouve un système double de détermination du point de départ dans le calcul des délais de contestation de paternité. La loi maintient le principe d'un *dies a quo* objectif à l'égard du parent biologique, soit l'inscription de l'enfant dans les registres de l'état civil, mais elle introduit un *dies a quo* subjectif en faveur du parent légal, soit la connaissance par ce dernier de la vérité biologique. De plus, la loi oblige les tribunaux à donner la priorité à l'intérêt de l'enfant plutôt qu'à l'intérêt du père putatif ou de la mère qui agit en recherche de paternité.

I INTRODUCTION

Puerto Rico's paternity law is regulated in the Civil Code of 1902, which was the Spanish Civil Code extended by Royal Decree in 1889, reorganised in 1930 and now in the process of revision and reform since 1997. The latest redaction

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of the articles on filiation dated from 1942.[1] Since then the legislature has not comprehensively re-examined the paternity issues, until now. Law No 215, approved on 29 December 2009 represents a profound reform of parentage law in Puerto Rico, and came into force on 29 January 2010. The most significant change introduced by Law No 215 is a scheme for the time-limit to challenge paternity based on knowledge of the true biological nexus. On this subject, the bill distinguishes between an action filed by the 'legal parent' or by the 'biological parent'. The legal parent – without differentiation between voluntary acknowledgement or marital presumption – has 6 months and the *dies a quo* is a subjective date, ie when the parent became aware of the biological reality. Nevertheless, in the case of the biological parent, as well as for the legal or biological mother, the term is one year counting from an objective date, the child's inscription on the Public Registry. Furthermore, if the child is a minor the court should seek to protect the child's interest over the interest of the putative father or mother seeking biological paternity.

The issues in paternity disputes are not new. It has been previously considered by Puerto Rican legislature, and more importantly, rejected by the Supreme Court on several occasions. Until now, Puerto Rican case-law updated most of the paternity laws, thus the need to briefly take a look at last decade's case-law, which was then codified by Law No 215. By the same token, it is necessary to examine the legislature's attempts to reform paternity law, addressing recent bills and the scheme proposed in the draft of Book Second on *Family Institutions* presented by the Puerto Rico's Commission for the Revision and Reform of the Civil Code to the Legislature.

Family law reforms need to resemble the cultural and social traditions of the people governed by the law. Perhaps the difficulty in Puerto Rico is that the actual Code was not designed for Puerto Ricans, but this is a significant concern that a comprehensive Code reform should deal with.[2] The legal and social perception of the law of paternity has changed significantly in the last century. In fact, nowadays we can talk about an international tendency to adopt a realist theory governed by the principle of truthfulness, which gives pre-eminence to biological parentage.[3] It is unavoidable to point out the impact of constitutional principles on family law. Indeed, especially in paternity law, one of its greatest achievements was the eradication of the distinction between the legitimate and illegitimate child. The search for equality between children started very early in Puerto Rico compared to most jurisdictions, in the landmark case *Ocasio v Díaz* (1963).[4]

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1 Law No 229 and 243 of 12 May 1942. See generally Guaroa Velázquez 'La extensión de la acción de filiación en el derecho puertorriqueño' (1957) 27 Rev Col Abog PR 237.

2 Álvarez González 'La Reforma del Código Civil de Puerto Rico y los Imperativos Constitucionales: Un Comentario' (1991) 52 Rev Col Abog PR 223, 224 (saying that the Civil Code of Puerto Rico is not ours, it was not made by us nor with our society in mind).

3 Ingeborg Schwenzer (ed) *Tensions Between Legal, Biological and Social Conceptions of Parentage* (Intersentia, 2007).

4 See Constitution of Puerto Rico 1952, art II, Bill of Rights, s 1; Law No 229 of 12 May 1942; Law No 17 of 20 August 1952; *Ocasio v Díaz*, 88 DPR 676 (1963).

Among many others, there are two main factors that contributed to the realist theory tendency. The first factor is developments in the scientific field.[5] Half a century ago it was unthinkable to be able to identify a child's parents with absolute certainty. The development of reliable genetic testing and the creation of sophisticated and complex programmes to establish paternity have led us to question the once absolute and conclusive presumption of *pater vere est quem iustae nuptiae demonstrant*. Perhaps of greatest significance in the long run, the second factor is the social transformation of the family including major changes in family forms. Compared to almost 50 years ago, many more children are born to unmarried women, and many more children spend portions of their lives living in households with a parent and the parent's partner who is not the child's biological parent but who may function as a parent and to whom the parent may or may not be married.

These changes are not confined to a small island in the Caribbean, but are taking place across the world. The laws from the mid-twentieth century regarding legal parentage sometimes deal inadequately with new problems that arise or do not address them at all. One of the most prominent issues concerns time-limits of the action to contest filiation and the moments when the period commences, its *dies a quo*.[6] Centuries ago, short periods for the action to lapse was the idea of protecting family unity and harmony. This idealist notion is based on the assumption that if the parent cannot challenge paternity he will assume the consequences. At a point where the investigation of paternity was forbidden, there was not much to do. But times have changed. In this chapter, I will examine Puerto Rico's evolution of the norms regarding challenges to paternity. Although the main focus will be on the time-limits of the refutation of the marital presumption, to a minor extent it is necessary to have a wider picture and address the contest to voluntary acknowledgement paternity.

II PATERNITY IN PUERTO RICO

The Puerto Rico Supreme Court has defined filiation as a biological reality that is subsequently regulated by the law which distributes rights and obligations between parents and children.[7] The Court pointed out that filiation unfolded into legal paternity and biological paternity, concepts that are linked, because the former presupposes the latter.[8] It is worthwhile saying that despite the progress made in this area by the Supreme Court there was a long way to go.[9] Indeed, Law No 215 deals with most of those claims that the court rejected.

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5 See Lugo Irizarry 'La investigación de la paternidad y de la maternidad; avance hacia un análisis de Derecho Comparado' (1990) 30 Rev Der PR 107; Rodríguez Trinidad 'La sangre habla: las pruebas de exclusión de paternidad' (1985) Forum, Año 1, Núm 3, pág 14.

6 Cortés Burgos 'El Problema de la caducidad en la filiación' (1982) 86 Rev Der P 185.

7 *Sánchez Encarnación v Sánchez Brunet*, 154 DPR 645 (2001); *Mayol v Torres*, 164 DPR 517 (2005).

8 *Mayol v Torres,* ibid.

9 Bosques Hernández 'Qué la Realidad Biológica Coincida con la Realidad Jurídica' (2007) 41 Rev Jur U Inter PR 539.

Nonetheless there have been Supreme Court judgments that represent significant legal developments leaning toward the realist theory governed by the principle of truthfulness, which gives pre-eminence to biological parentage. But the latest opinions stuck to a strict conception of the *pater est* presumption.

(a) Establishing paternity in Puerto Rico

In Puerto Rico, under old art 113 of the Civil Code of Puerto Rico (CCPR), legitimate children were those born more than 180 days after the marriage and those born during the marriage. Additionally, old CCPR, art 114 declared that a child born within 180 days following the marriage was legitimate if the husband did not dispute the child's legitimacy. Concerning children born after marriage dissolution, old CCPR, art 115 declared legitimate those born less than 300 days following the dissolution. From a reading of those articles it can be seen that Puerto Rico had adopted the old Roman maxim *pater est quem vere iustae nuptiae demonstrant*, as many jurisdictions had historically done.[10] It is a rebuttable presumption based not only on the objective fact of the date of birth, but also on the belief that during the period of conception husband and wife did not have other partners. Thus, old CCPR, art 113 acknowledged in its second paragraph that against this presumption of legitimacy can only be admitted proof aimed to demonstrate the physical impossibility of the husband having access to his wife during the first 120 days of the 300 days prior to the child's birth. Law No 215 of 2009 gave a new composition to CCPR, arts 113–115. The new art 113 does not deal with the limitation regarding proof, but instead deals with paternity and maternity presumptions. Concerning paternity, the new article contemplates two possible approaches to establish the presumption. First, the husband of the mother is the legal father of those children born during the marriage and those born 300 days before marriage dissolution. Technically, it merges old CCPR, arts 113, 114 and 115 and corrects the old discrimination of those children born during the first 180 days.

On the other hand, the second paragraph of new CCPR, art 113 creates a paternity presumption based on voluntary acknowledgement of the child. The main reason for this change is to eliminate all trace of discrimination regarding illegitimate children. From now on, it is the same presumption: one based on marriage and the other based on acknowledgement, but for all legal purposes it is the same presumption. But, the law does not deal with the issue of which presumption will prevail in the case when both of them apply. In *Moreno Alamo v Moreno Jiménez* (1982), the Supreme Court faced the challenge of a voluntary recognition coinciding with the presumption of legitimacy of the mother's husband, because even though they were separated at the time of the birth there was a valid marriage.[11] The High Court recognised that old CCPR,

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[10] See Rule 16 of the Evidentiary Rules of Puerto Rico, Law No 202 of 31 July 1999; see also, Evidentiary Rules of Puerto Rico, Rule 82(B), (C) and (D) 32 LPRA Ap IV R 82, regarding presumptions on the DNA testing.

[11] 112 DPR 376 (1982).

art 113 established a rebuttable presumption of paternity for the benefit of a child born in a marriage, but argued that it cannot rely on a categorical and unconditional presumption, almost absolute, with exclusion of customary rules of evidence and other circumstances besides the birth.[12] Therefore, the court affirmed that the voluntary acknowledgement defeated the marital presumption of paternity. Commenting on the exegesis of the origin of the presumption of paternity the court noted how its development responded to the impossibility, under the state of science of the nineteenth-century codes, to prove through direct evidence who is the true biological father.[13] Consequently, for this matter *Moreno Alamo v Moreno Jiménez* is still good case-law in Puerto Rico. The third paragraph of the new CCPR, art 113 is an adaptation of the old maxim of *mater semper certa est*, declaring that birth determined maternity. Therefore, the norm negated the possibility of a surrogate motherhood contract. Moreover, according to the new CCPR, art 115, birth creates a motherhood presumption. Therefore, there is no discrepancy with the cornerstone of motherhood *mater semper certa est*, namely that the woman who gives birth to the child is presumed to be his or her legal mother. The difference is that now it is clearly a presumption that according to the law it can only be challenged in two circumstances: first, in case of childbirth simulation and secondly when an inadvertent substitution of the child occurred during birth or after.

(b) Challenging paternity in Puerto Rico

As stated by the Supreme Court of Puerto Rico there are essentially two legal methods to address the question of whether a child born during marriage is really the fruit of that union, one called the 'open system', where exclusion of paternity is based exclusively on evidence that the husband cannot be the parent of the newborn, and does not have short time-limits on the action when it comes to proving lack of biological nexus, the other one called the 'closed system', under which the concrete factual circumstances to challenge the legal presumption must be exhaustively provided, in a *numerus clausus* system.[14] The 'closed system' was followed by the Napoleonic Code, based on the principle of *favor legitimitatis*. Hence the European and Hispanic American codifications in the nineteenth century relied on the French model, while the 'open system' is accepted by most modern codes and courts. Puerto Rico has now achieved an open system, by broad interpretations that have opened large gaps in the narrow nineteenth-century standards.[15] Additionally, Puerto Rico's Supreme Court has recognised that 'there is no doubt that most modern legal systems seek, wherever possible, that biological reality matches the legal reality'.[16]

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12 Ibid at 385–386.

13 Ibid at 379–380, reaffirmed in *Ramos Serrano v Marrero Rivera*, 116 DPR 357, 360 (1985).

14 *Moreno Alamo v Moreno Jiménez*, 112 DPR 376 (1982); Serrano Geyls *Derecho de Familia de Puerto Rico* (2002, vol II, Universidad Interamericana de Puerto Rico), p 886.

15 Ibid at 924.

16 *Mayol v Torres*, above n 7.

Regarding voluntary acknowledgement, it should be highlighted that Puerto Rico's Supreme Court has recognised three types of actions to challenge the acknowledgement.[17] The first is the invalidity of the acknowledgement for lack of the requirements concerning the effectiveness of the act, a defect in the form of the act. The second is the challenge for vitiation of consent; this means that recognition was obtained by violence or intimidation.[18] On this type of action the Supreme Court noted that there is no question of the truth of parenthood, or the need to refute the biological link – only the validity of the recognition is challenged. The third type of action, admitted a few years ago in *Mayol v Torres* (2005), is a challenge exclusively based on the fact that paternity does not coincide with biological reality. This case is important because it welcomes the 'realist' trend in the 'open system'. Still, it failed to respond to the time-limit issue, as Mayol's voluntary recognition was contested within the statutory period.

(c) Standing to challenge paternity

One of the rules that has undergone more changes in the Puerto Rican case-law is standing to challenge paternity. Legitimacy to challenge parenthood was recognised in old CCPR, art 116, which provides that legitimacy can be challenged only by the husband or his rightful heirs. The heirs may only challenge the legitimacy of the child in the following cases: (1) if the husband had died before the expiration of the period for filing the action in court; (2) if the husband died after filing the claim without renouncing the action; and (3) if the child was born after the death of the husband. This article is a classic example of the closed system, where it allows only in limited circumstances an action to challenge paternity. As has been previously stated, there was a clear tendency in the case-law to establish an open system for standing purposes. By 1954, in *Agosto v Javierre*, the Supreme Court recognised that minors themselves, the so-called 'sons of adultery', had standing to challenge their filiation.[19] The court held that the amendments made during the 1940s had implicitly amended old CCPR, art 116.[20] This interpretation gave the child, the central character in the drama, the same opportunity to access the judicial arena.[21] It is important to note that this decision revoked several previous rulings that denied this right to children trying to achieve their true filiation.[22] There, the Supreme Court held that, to establish the real facts surrounding the true parentage, it should not maintain a spurious paternity or a false filiation based on maintaining artificial integrity of a marriage.[23] Subsequently, in *Perez*

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17 *Castro Torres v Negrón Soto*, 159 DPR 568, 19 (2003).

18 *Sánchez Encarnación v Sánchez Brunet,* above n 7; *Almodóvar v Méndez,* 125 DPR 218, 243 (1990); *Oaks Reyes v Ortiz Aponte*, 135 DPR 898 (1994).

19 77 DPR 471 (1954).

20 Law No 229 of 12 May 1942, Law No 243 of 12 May 1945.

21 *Agosto v Javier*, above n 19 at 486.

22 See *Pérez v Rosario*, 72 DPR 514 (1951); *Pueblo v Santiago*, 70 DPR 837 (1950); *Figueroa v Díaz*, 75 DPR 163 (1953); *Armaiz v Santamaría*, 75 DPR 579 (1953); *Vargas v Jusino*, 71 DPR 389 (1950).

23 *Agosto v Javierre*, above n 19 at 491.

Nieves v Superior Court (1960), the court limited the rule of *Agosto v Javierre*.[24] Twenty years later, in *Robles López v Guevárez Santos* (1980), the Supreme Court, with constitutional bases and regardless of the text of old CCPR, art 116, upheld that a child should have standing to contest his alleged paternity for the purposes of claiming his true parentage.[25]

In *Robles López* (1980), the court further stated that in an action challenging alleged legitimate paternity, if the child is represented by his mother, the court shall appoint a legal guardian for the child.[26] Concerning legal guardians, in January 2009 the court discussed their standing to challenge paternity by representation of the child. In *Álvareztorre Muñiz v Sorani Jiménez* (2009), a case where the time-limit lapsed for the presumptive parent to challenge paternity, the Appellate Court ordered the prosecutor (the child's legal guardian) to file a claim challenging paternity, representing the minor.[27] The Supreme Court revoked the intermediate court decision arguing that the legal guardian does not have the legal faculty for that action. It was argued that it would exceed the guardian's authority, because that action in this context belongs only to the child. In concrete terms, the child's legal guardian should defend the child's interest, but it has an impediment to challenge paternity, unless it is in the child's best interest.

With respect to the biological parent the High Court, in *Pérez v Torres* (1956), did not recognise standing in for a biological father, to challenge a legitimate paternity in an effort to establish his status as the real and legal father.[28] Later, in *Ramos Serrano v Marrero Rivera* (1985), the court recognised that the alleged biological father has standing to challenge paternity.[29] And in *Sánchez Encarnación v Sánchez Brunet* (2001),[30] the court again was faced with an action challenging voluntary recognition. There the court made an important pronouncement: it recognised standing in the biological father, the child and the legal father that acknowledged the child. Therefore, by case-law standing to contest paternity is the same, regardless of whether the action is to challenge a marital presumption or a voluntary acknowledgement.

The court continued, in *Castro Torres v Negrón Soto* (2003),[31] the tendency to equate a challenge to voluntary recognition with a dispute over the marriage presumption. They recognised in the biological father standing to contest the voluntary recognition of another man. It is interesting that the recogniser had challenged his recognition, but his action was dismissed because it lapsed. Subsequently, the biological father, who lived in the United States, challenged the recognition. The court applied the term of 6 months provided in old

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24 81 DPR 832 (1960).
25 109 DPR 563 (1980).
26 *Robles López v Guevárez Santos*, ibid at 568.
27 2009 TSPR 12, res 22 January 2009.
28 79 DPR 611 (1956).
29 116 DPR 357 (1985); revoking *Pérez v Torres*, 79 DPR 611 (1956).
30 Above n 7.
31 Above n 17.

CCPR, art 117, when the challenger was not in Puerto Rico. The court added that this term, under the rule above, commenced running from the day the person with standing had knowledge of the action of recognition or registration in the Public Registry.

Regarding the topic of standing to challenge paternity, Law No 215 of 2009 codifies most of the case-law developments of the last four decades, but it does not stop there. With the new scheme, CCPR, arts 114–116 deal with standing in an extremely progressive and open system. To challenge paternity, new art 114 recognises standing in (1) the presumed father; (2) the biological father; (3) the mother; and (4) the child, by himself or by his legal representative. By the same token, new art 115 recognises standing to challenge the presumption of maternity, on limited circumstances, in: (1) the alleged mother; (2) the biological mother; (3) the child, by himself or by his legal representative; and (4) the presumed father.

(d) The expiration of the term

The time-limit and *dies a quo* for the action to challenge paternity was provided in old CCPR, art 117:

> 'The action to challenge the legitimacy of the child must be exercised within three months of the child's registration if the husband is in Puerto Rico, and six months if he is outside of Puerto Rico counting from the date he learned about the birth.'

Undoubtedly the short time seeks to avoid the uncertainty that a long term represents for the status of a child born in wedlock. In 1991, the Puerto Rico Supreme Court had before it a constitutional challenge to this rule.[32] At that time the interest in the certainty of family relationships prevailed, justifying a shorter term, even on constitutional grounds. In addition to the rules contained in the Civil Code, the Law of Child Support Enforcement delegated to the Child Support Administration (ASUME, in Spanish) the authority to determine paternity in cases of alimony where a child seeking support had not been acknowledged by the presumed father.[33] The law provided an expedited administrative procedure, which as noted by an important portion of the Puerto Rican doctrine is 'of questionable validity'.[34]

The new CCPR, art 117 deals with time-limits for proceedings to contest filiation, to challenge either the presumption of paternity or maternity. The first paragraph deals exclusively with the action filed by the presumed legal father, adopting a 6-month limitation period counted from the date that the legal father is or should be aware of the inaccurate filiation. It adds, as a transitional position, that for previous cases the period will be counted from

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[32] *Calo Morales v Cartagena*, 129 DPR 102 (1991).

[33] See Law No 5 of 30 December 1986, as amended in particular by Law No 86 of 17 August 1994, art 11 of the Special Law of Child Support Enforcement, 8 LPRA, s 510.

[34] Torres Peralta *La Ley Especial de Sustento de Menores de 1944 Y El Derecho de Alimentos en Puerto Rico* (1997) Edición Especial, Publicaciones STP, Inc p 7.1.

the date when the Act was approved. Since the law entered into force on 28 January 2010 old cases that have not been ruled on had until 28 July 2010 to file their actions. The second paragraph fixed a one-year limitation period for actions filed by the biological parents (the father or the mother) as well as for the legal mother to challenge either presumption of parenthood (fatherhood or motherhood). The *dies a quo* of the action is the birth registration in the Population Registry. Then the third paragraph specifies that, in a challenging action related to a child who has not attained the age of majority, the court shall ensure a balance between the protection of the child's best interest and the interest of the alleged father or mother to harmonise the legal filiation with the biological reality.

Until now, in absence of legislative expression, the Supreme Court of Puerto Rico through the years has unleashed the straitjacket. There was a trend in the court to facilitate the matching of biological and legal parentage, but with some steps backwards. As Judge Irizarry Yunque points out, 'the court has been making its way through the tangled jungle of prejudices and social conventions and technicalities of law to make the truth shine and acknowledge for all legal purposes the parent and child biological relationship'.[35] That said, let us briefly review some remarks of the Supreme Court concerning the time-limits.

Discussing the time-limits within which a challenge to fatherhood has to be brought, in *Santiago Ojeda v Cruz Maldonado* (1979), the Supreme Court applied CCPR, art 117, and argued that the statute of limitations for filiation issues cannot be interrupted.[36] Recall that Puerto Rico's Civil Code, at that time, did not expressly establish the limitation period for challenging a voluntary acknowledgement. In this situation, in *Alcaide v Morales* (1920), the Supreme Court set a deadline of 15 years, because it was a personal action without fixed term, governed by CCPR, art 1864.[37] Subsequently, this rule was repealed in *Almodóvar v Méndez Román* (1990).[38] They stated that it was discriminatory and unconstitutional to maintain separate time-limits for challenging paternity whether by marital presumption or by voluntary recognition. Thus, it was resolved that the deadline to contest the voluntary recognition by express mandate of the Constitution cannot be different from the term granted by old CCPR, art 117 to the husband to contest the legitimacy of the child.[39]

As advanced in *Calo Morales v Cartagena Calo* (1991), the Puerto Rico Supreme Court faced an action contesting the constitutional validity of the

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35 *Ramos Serrano v Marrero Rivera*, 116 DPR 357, 363 (1985).

36 109 DPR 143 (1979).

37 28 DPR 278 (1920), followed in *Santiago Ojeda v Cruz Montalvo*, 109 DPR 143 (1959); *Román v Mouriño*, 51 DPR 728, 731 (1937); *F Rodríguez Hnos y Co v Aboy*, 66 DPR 525, 540 (1946); *Rossy v Martínez*, 70 DPR 737, 741 (1949); *Rivera v Rivera*, 78 DPR 908, 911 (1956); *Ríos v Banco Popular*, 81 DPR 378, 407 (1959).

38 125 DPR 218 (1990).

39 *Almodóvar v Méndez Román*, above n 18 at 230.

terms set forth in old CCPR, art 117.[40] It was argued that the rule provided for the husband challenging the marital presumption of legitimacy contravened the constitutional provisions guaranteeing human dignity, art II, s 1; the due process of law, art II, s 7; and equal protection of the law, art II, s 7 of the Constitution of the Commonwealth of Puerto Rico. The court upheld the constitutional validity of the provision. Let us take a brief look at each of the arguments. The first argument was based on the equal protection of the law. It was argued that CCPR, art 117 infringed the equal protection of the law because it recognised in the child a broader right to contest its legitimacy than in the husband. The court noted that the actions recognised in the parents to challenge paternity cannot be compared with the actions where the child searches for his true filiation. The main argument was that the obligations and duties of the parents could not be compared with the fact that the child has almost no obligations towards the parents at that age. This justifies, in the court's opinion, unequal treatment.

The second argument was due process of law. They argued that CCPR, art 117 infringed the father's right to due process of law because it did not allow the parent to present scientific evidence to challenge the legitimate paternity after the time lapse, even though it was after the time lapsed that he became aware of the biological reality. The due process of the law of constitutional guarantee protects the husband who challenges the presumption of paternity of the children of his wife within the period specified in old CCPR, art 113. It was submitted to the court that this protection guarantees the right to have his day in court and present his cause of action. In its procedural aspect, it guarantees adequate notice and hearing. Although the court recognised that the shortness of a term may violate the due process of law when its application becomes laughable, because the remedy sought does not provide the father a reasonable opportunity to exercise his action, the court resolved that there was no breach of the constitutional provision. It justified its decision by stating that the compelling interest in preserving the stability and security of the status of family members should prevail over the husband's interest in challenging the presumption of lawful paternity in a term greater than that allowed by old CCPR, art 117.[41] The court further stated that there is always the space reserved to the legislature in order to extend the period for the action to challenge paternity. Thirdly, with regard to the dignity of the deceived husband, the court discarded the argument. They stated that the need for certainty and stability in the status of the children and stability in family relations required certainty, not leaving the action to the husband's free will to start the computation of the term.

(e) A trend in the case-law

In *Mayol v Torres* (2005) the court recognised the possibility of challenging paternity by the sole reason of its inaccuracy, but they did not discuss the issue

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[40] 129 DPR 102 (1991).
[41] Ibid at 142–143.

regarding time-limits. As has been said earlier, in *Mayol* the action was filed on time, so there was no need to argue the matter, but it was predictable that it was going to resurface. In *González Rosado v Echevarria* (2006), the court answered the question;[42] Associate Justice Anabelle Rodríguez Rodríguez delivered the majority opinion as well as in *Mayol*. Unfortunately, following *Calo Morales* (1991) the court established that the term to challenge a voluntary acknowledgement of paternity by inaccuracy begins to run from the date of the recognition. Besides the majority ruling, this is the case where the winds of change basically appeared around the courthouse. There were two dissenting opinions, one by Associate Justice Jaime Fuster Berlingeri that compared the ruling with a straitjacket, because the legal father had to challenge the act of voluntary recognition before knowing the reason that motivated the action. It was argued that in practice, in *Mayol* they established the right to challenge and on the other hand, in *González Rosado*, it became impossible to exercise that right. By the same token, the dissenting opinion of Associate Justice Liana Fiol Matta argued that the term must start from the date the challenger has knowledge of reliable biological inaccuracy or knows of facts that could lead a judge to have a real doubt about the accuracy of affiliation, whichever comes first.

The topic has also been around the Appellate Court for some time. Particularly regarding the time-limits and their *dies a quo*, which could be predicted, the rulings are inconsistent. Prior to the approval of the Law No 215 (2009), new developments were announcing a change to the norm, mainly with an appellate sentence that was accepted for revision by the Supreme Court in May 2009. Let us briefly take a look at the facts of the case. Mr Antonio Vázquez-Vélez and Ms Carelyn Caro-Moreno were married from 16 February 2002 to 19 June 2006 when they got divorced by mutual consent.[43] Their child was born on 10 October 2005 therefore according to then CCPR, art 113 the marital presumption applied. After the divorce decree was final, Mr Vázquez became aware that, while he was serving in the Iraq war as a US Army Military Police that from February 2003 until December of that year, Ms Caro had a romantic affair with Mr Daniel Valentín-Rodríguez. On 27 July 2006, Mr Vázquez took his son for a DNA paternity test. The result indicated a zero percent (0%) probability of paternity. Mr Vázquez gave the results to Ms Caro, who admitted that the child's father was Mr Valentín. The challenging action was filed on 1 September 2006. Thus, the action was filed 37 days from the day he became aware that he was not the father, but it was 11 months from the day the child was born.

The trial court dismissed the action on 21 December 2007 and the Appellate Court on 14 August 2008.[44] But, the intermediate court recognised, in a footnote, the dissenting opinions of Justices Fuster Berlingeri and Fiol Matta in *González v Echevarría*, above. Moreover, it remarked that one judge from the

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42 2006 TSPR 176 res 21 November 2006.

43 A non-contentious divorce recognised by the Supreme Court in *Figuroa Ferrer v ELA*, 107 DPR 250 (1978).

44 *Vázquez Vélez v Caro Moreno*, res 14 August 2008, KLAN20080175.

appellate panel, although applying the case-law, recognised that the current facts and the court interpretation allows the following: (1) a child with a parent who is not his biological father; (2) a parent with a child who is not his biological child; (3) a biological father without his child; and (4) a mother with a child whose parent is not his biological father.

With those determinations from the intermediate court Mr Vázquez appealed to the Supreme Court. In May 2009, the Supreme Court decided to accept and reconsider the case.[45] Normally this is an internal process where no resolution or sentences are published on the matter. Nevertheless, the court published the acceptance with a dissenting opinion of Associate Justice Anabelle Rodríguez Rodríguez, the same judge that delivered the majority opinions in *González Rosado* (2006) and *Álvareztorre Muñiz* (2009). The purpose of the dissenting opinion was to point out the factual similarities with past rulings. Indeed, the court had ruled on the same facts, but a new composition in the Supreme Court could mean a change in the case-law. In fact in February 2009, three new associate justices were appointed to the Supreme Court.[46] Curiously enough, two of the judges came from the Appellate Court, where they had intervened in panels that considered time lapses for paternity challenges.[47] As appellate judges they argued that it was their duty to interpret the case-law as established by the Supreme Court, that, if a change is needed it was the duty of the Supreme Court.[48] There was no oracle needed to predict a possible change in the case-law. Now it is interesting to observe the application of the new rule, allowing by a transititional provision for retroactive application. The courthouse was not the only governmental branch confronted with paternity issues during the last decade. Let us take a look at the legislative developments that ended up in the new Law No 215 (2009).

III LEGISLATIVE ATTEMPTS TO REFORM

The issue of *paternity* disestablishment has become one of the legislature's hot topics around the world. Puerto Rico has not been the exception. Changes in the rules on paternity challenges have been considered in bills and recommended to the legislature on several occasions. Thirty-five years ago, the Report on the First Book Draft of the Civil Code of Puerto Rico before the Council on the Justice Reform of Puerto Rico in 1974 recommended extending the term limit for actions contesting paternity, by marital presumption and by voluntary acknowledgement, to 6 months if the alleged father is in Puerto Rico

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45 *Vázquez Vélez v Caro Moreno*, res 1 May 2009, TSPR 70.

46 They were sworn in on 10 March 2009.

47 Associate Justices Mildred Pabón-Charneco and Rafael Martínez-Torres were judges on the intermediate court and Justice Erick Kolthoff-Caraballo was a judge in the court of First Instance.

48 See *Martínez Vega v Cordero Velázquez*, res 10 January 2007, KLAN0601080; *Castro Sánchez v Quiñones Rosado* res 4 September 2008, KLCE0801091; *Ortiz Arroyo v Aponte Álvarez*, res 18 November 2008, KLAN0801673; *Figueroa Medero v Santiago Ortiz*, res 9 December 2008, KLAN0801646.

and to a year if he is not.[49] It further recommended that in either case the period should commence from the day the person challenging becomes aware of the birth.[50] This was then justified because Puerto Rico's Vital Public Records do not enjoy the principle of publicity and therefore the inscription per se, cannot impute knowledge.[51] Unfortunately, this report was not even presented to the legislature.

During the last decade these matters have been on the legislative agenda. We can distinguish two different legislative initiatives. First a more traditional legislative work, presenting bills to amend the Civil Code. The second initiative was a more comprehensive and structured vision, aimed to introduce a whole new Puerto Rican Civil Code. Let us look at those two initiatives separately.

(a) Legislative bills

Over the last 10 years, six bills have been considered in the legislature aiming to amend several aspects of parenthood; finally the last one was approved. The first bill was *P of H 1757*, presented on 5 May 1998. This bill was approved unanimously by the House of Representatives and sought to admit evidence to prove biological paternity, increase the time period to challenge paternity to 12 months as a single period[52] and recognise standing to challenge paternity in the biological father. Unfortunately, it was not included in the Senate's agenda that year and that was the end of the bill. The second bill, *P of H 525* was filed on 15 February 2001, aimed to increase the time period to 6 months after the challenger learned of the birth, as a single period. This bill was not even considered in its chamber of origin. The third is the *P S 932* presented on 7 September 2005, aiming to codify the case-law stated in *Mayol v Torres* (2005).[53] The purpose was to recognise the right of any person who has voluntarily acknowledged a child to challenge the recognition. After a few public hearings nothing else was mentioned, not even a commission report was filed.

The fourth bill was *P S 1896*, filed on 14 February 2007. It was a well structured and comprehensive reform of all the articles concerning *paternity* disestablishment; it codified standing to challenge paternity and maternity with an open view, included the evidentiary use of DNA testing, increased the time-limit to one year starting when the challenger acquired knowledge that he was not the father and establish transitional rules providing that it would apply

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[49] See Report on the First Book of the Civil Code of Puerto Rico, submitted to the Council on Justice Reform in Puerto Rico, San Juan, 1974, pp 165 et seq; Proposed Amendments to the Civil Code of Puerto Rico, prepared by the Family Law Committee of the Puerto Rico Academy of Jurisprudence and Legislation.

[50] See *Castro Torres v Negrón Soto*, where the Puerto Rico Supreme Court used the reports of 1974 and 1999 to draw criticism of the current system.

[51] Ibid at p 206.

[52] A single period means that there is the same time period to challenge either the marriage presumption or voluntary acknowledgement.

[53] Above n 7.

to all pending cases, but any prior case would be *res judicata*. This bill was approved by the Senate by a majority, with a clear minority party vote against. Unfortunately it turned into a political dispute rather than a policy issue. Nonetheless, it was also approved by the House of Representatives, again with the express minority vote against, but with some major changes. In the end, the only matter included in the bill was the time-limit, which led to a pocket veto[54] of the Governor on 5 August 2008. But it was not the end. As will be seen *P S 1896* was the model for the next two projects, the last one becoming Law No 215 (2009).

On 2 January 2009, *P S 111* was filed by the same congressman that filed *P S 1896* (14 February 2007). In fact it was a verbatim copy of the original bill. On 26 May 2009 it was approved unanimously in the Senate. The House of Representatives, also unanimously, approved it on 22 June 2009, but with three changes proposed on the floor of the legislature. The first concerned the maternity presumption. In Puerto Rico, as in many jurisdictions, birth determines maternity and surrogate motherhood is not prohibited nor admitted. The House of Representatives amendment established that birth determines maternity except if there is a contract otherwise. This is not the place to discuss the adequacy or not of surrogacy, but an indirect recognition without any regulation or norm is as irresponsible as not dealing with it at all. The second amendment gave standing to the putative father to challenge motherhood. The original bill in cases of motherhood recognised standing to the putative mother, the biological mother and the child (by his guardian ad litem), of course limited to cases of simulation of childbirth or inadvertent substitution of child during birth or after. Thus, it was now proposed that the father had standing to challenge motherhood. The third amendment dealt with transitional provisions. In reprehensible language, it established that prior decisions were *res judicata*, except if the putative or the biological father had conclusive proof that contradicted paternity. It is a fact that DNA testing nowadays is conclusive proof. Thus, the real effect of the amendment was that it welcomed all actions regardless of the principle of *res judicata*. It was a dangerous road; one thing is to allow paternity challenges with a *dies a quo* established on knowledge of the putative father, it is another to consciously allow all denied *paternity* disestablishment actions to be reconsidered, without any parameters. Unfortunately, all three amendments were approved by the House of Representative, and consented to by the Senate 3 days later. The end of the project was predictable; on 5 August 2009 the Governor once again rejected the bill with a pocket veto.

Two months later, on 7 October 2009, the same congressman filed *P S 1195*. In essence it is the same project once again, including the second and third amendments made to *P S 111* (2 January 2009). Thus, the reference to surrogate mothers was not included this time. On a fast track process, the

[54] The Governor can reject a bill by simply refusing to sign it. This action is known as a 'pocket veto', coming from the analogy of the Governor simply putting the bill in his pocket and forgetting about it. Unlike a regular veto, Congress has neither the opportunity nor the constitutional authority to override a pocket veto.

project was again approved by the Senate on 2 November 2009, and 8 days later by the House of Representative on 10 November 2009. This time the Governor signed the bill on 29 December 2009, becoming Law No 215.

(b) The Civil Code Revision Commission

Besides traditional efforts in the legislature to reform parentage laws, the Commission for the Revision and Reform of the Puerto Rico's Civil Code has been also working on the topic. But, on account of its importance it is necessary to make some remarks on the Commission's history and methodology.

Former Puerto Rico's Chief Justice Trías Monge affirmed in 1983 that the reformation of the Puerto Rican Civil Code was unavoidable. He also maintained that it was time for the Puerto Ricans to make a Code of their own, because our Code was basically the Spanish Code with some minor but important amendments.[55] Some recodification efforts were made through law school initiatives and the Puerto Rico Academy of Jurisprudence and Legislation, but for different reasons they were unsuccessful.[56] The first formal legislative initiative was introduced by Law No 85 of 16 August 1997, which created the Joint Permanent Commission for the Revision and Reform of the Civil Code of Puerto Rico.[57] This governmental approach from the legislature worked in a non-political and continuous effort with the purpose of drafting the revised Civil Code for the island of Puerto Rico.[58]

The preparatory study submitted by the Commission in 1999 emphasises the inadequateness of the short terms that currently exist to bring paternity challenging actions.[59] It proposed a one-year term and a *dies a quo* of knowledge of the birth or the fact of registration.[60] Nevertheless, the reporter cited the *Judiciary Gender Discrimination Commission Report*, saying that if the *dies a quo* is determined by conditions or circumstances as objective as the mere

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[55] José Trías Monge 'Consideraciones sobre la Reforma del Código Civil de Puerto Rico' (1983) 52 Rev Jur UPR 143. See also Álvarez González 'La Reforma del Código Civil de Puerto Rico y los Imperativos Constitucionales: Un Comentario' (1991) 52 Rev Col Abog PR 223, 224 (saying that 'the Civil Code of Puerto Rico is not ours, it was not made by us nor with our society in mind').

[56] See generally Ivette Coll de Pestaña et al 'Vista Ejecutiva de la Comisión Conjunta Permanente para la Revisión del Código Civil de Puerto Rico' (1998) 32 Rev Ju UIPR 347; Rivera Rivera 'Reflexiones en torno a la proyectada Revisión del Código Civil' (1998) 32 Rev Jur UIPR 355; Leiva Fernández 'La Revisión del Código Civil en Puerto Rico' (2003) 42 Rev Der PR 17, 23.

[57] Law No 85 of 16 August 1997, 2 LPRA s 141a.

[58] For a complete description, history and methodology implemented by the Commission see Figueroa Torres 'Crónica de una Ruta Iniciada: El Proceso de Revisión del Código Civil de Puerto Rico' (2001) 35 Rev Jur UIPR 491; Figueroa Torres 'Crónica de una Ruta Adelantada: Los Borradores del Código Civil de Puerto Rico' (2006) 40 Rev Jur UIPR 419; Figueroa Torres 'Recodification of Civil Law in Puerto Rico: A Quixotic Pursuit of the Civil Code for the New Millennium' (2008) 23 Tu Eur & Civil L F 143.

[59] See Preparatory Study submitted to the Permanent Joint Commission for the Revision and Reform of the Civil Code of Puerto Rico in 1999 (www.codigocivilpr.net).

[60] Ibid.

birth registration in the Registry, in some instances it would not meet the general principle that time-limits begin to run from the day the affected person could take action or knew the facts justifying the cause of action.[61] A few years later Puerto Rico's Revision Commission presented the draft of the Second Book of *Family Institutions* to the legislature on 12 January 2007. Relevant to this chapter, art 281 of the Second Book of the Revised Civil Code Draft of Puerto Rico promoted a one-year period for the action and a *dies a quo* based on the subjective date, from the moment the challenger knew or should have known facts that create a real doubt about the accuracy of the filiation. Remarkable enough, as mentioned in the comments of the draft, the language of the proposal came from the dissenting opinion of Justice Fiol Matta in *González v Echevarría*.[62] That draft book is part of a more extensive and comprehensive revision effort occurring in the island. Therefore, when looking at the citation of the draft, we have to bear in mind that it is a draft under consideration of the Puerto Rican legislature and that it will almost certainly experience changes. That is exactly the purpose of considering preliminary drafts in public hearings, to receive the comments of the people and improve the work of the Commission.

IV CONCLUSION

Puerto Rico's parentage rules have found a safe port. Law No 215 (2009) strikes a balance between the best interests of children in preserving intact father-child relationships while permitting non-biological fathers a short window to challenge a seemingly unfair *paternity* establishment. But it mainly responds to growing concerns regarding blind protection given to an unreal filiation. Deception should not be sustained just because the time lapses and no one knew the time was running. The Supreme Court of Puerto Rico has adequately dealt with most of the parentage rules during the last decades. Law No 215 (2009) finally deals with the time-limits topic and introduced an open system with a subjective *dies a quo*.

Now trial courts will have to deal with the effect of the transitional provision. As has been previously observed, art 6 of Law No 215 (2009) recognised the retroactive application of the law. First, for all pending cases in the courts, this will not raise many concerns. Secondly, for all those cases previously denied by the court, only when there is conclusive evidence showing sufficient cause to bring a paternity dispute may those petitioners file their action again within a period of 6 months from the approval of the Act. This will generate a great amount of cases. Most of these actions will be from parents paying alimony to children, without any biological nexus. This imposes a great responsibility on

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[61] Ibid, p 282, quoting 'Informe sobre Discrimen por Razón de Género en los Tribunales de Puerto Rico' August 1995, p 203.

[62] Above n 43.

trial court judges, who will have to apply the third paragraph of new CCPR, art 117, balancing the interest of the alleged father or mother with the child's best interest.

South Africa

THE STATUTORY DOMESTIC PARTNERSHIP COMETH

*Bradley S Smith**

Résumé

En dépit des nombreuses innovations dans le droit de la famille depuis l'introduction d'un régime démocratique en Afrique du Sud en 1994, il reste une lacune importante dans la législation qui ne prévoit rien en ce qui concerne les personnes impliquées dans des relations conjugales informelles. Cet article analyse les conséquences de l'état du droit actuel et il décrit le droit prospectif tel qu'il se dessine dans un projet de loi de janvier 2008 sur le partenariat domestique.

I INTRODUCTION

South Africa became a constitutional democracy on 27 April 1994 when the 'interim' Constitution[1] (superseded 2 years later by the 'final' Constitution, 1996) came into operation.[2] The cornerstone of this democracy – constituted by a Bill of Rights[3] – made it fairly certain that, despite not providing for a fundamental right to marry,[4] pressure would be brought to bear on the legal position that had persisted until that date in terms of which the monogamous heterosexual civil marriage concluded according to the Marriage Act 25 of 1961 was the only legally recognised form of intimate relationship. While the law of marriage was expanded to include both monogamous and polygynous customary marriages as from 2000,[5] same-sex life partners[6] had – commencing

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1 Act 200 of 1993.

2 The 'final' Constitution of the Republic of South Africa, 1996 came into operation on 4 February 1997.

3 Chapter 3 of the interim Constitution and chapter 2 of the final Constitution, 1996.

4 See the Constitutional Court's comments on the reasons for not constitutionalising the right to marriage and family rights in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) at paras 99–102.

5 In terms of the Recognition of Customary Marriages Act 120 of 1998 (which came into operation on 15 November 2000) a customary marriage is a marriage concluded according to customary law; the latter concept being defined by the Act as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.

6 The terms 'life partnership' and 'domestic partnership' bear the same meaning and are used

with the abolition of the crime of sodomy in 1998[7] and the recognition of the same-sex life partnership as an independent legal entity 2 years later[8] – began to gain increasing recognition of their unions by way of piecemeal judicial pronouncements.[9] The major rationale underlying these extensions was the fact that the laws in question were found to '[discriminate] unfairly against same-sex couples, whom the law did not permit to marry, but who nevertheless lived in relationships that mimicked marriage in all other respects'.[10] As a corollary hereof, in the sole case to date involving the possible extension of an invariable consequence of marriage (namely the ex lege extension of the reciprocal duty of support to a surviving spouse in need of maintenance)[11] to a surviving *heterosexual* life partner, the highest court in South Africa refused to do so on the basis that the law did not discriminate unfairly against persons who, despite being legally permitted to do so, had nevertheless elected not to marry one another.[12]

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interchangeably throughout Parts I and II of this contribution. However, where the Domestic Partnerships Bill, 2008 is discussed (Parts III and IV), the term 'domestic partnership' is used for the sake of clarity.

7 See in general *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), judgment delivered on 9 October 1998.

8 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 36; P de Vos 'The "inevitability" of same-sex marriage in South Africa's post-Apartheid State' (2007) 23 *South African Journal on Human Rights* 432, 462.

9 For example, in *Gory v Kolver NO* 2007 (4) SA 97 (CC) the Constitutional Court held that the Intestate Succession Act 81 of 1987 was henceforth to be read in such a way as to provide for the survivor to a permanent same-sex life partnership in which the partners had undertaken reciprocal duties of support to inherit intestate, and in *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) the Supreme Court of Appeal held that a surviving partner to a permanent same-sex life partnership in which mutual support obligations had been undertaken could institute a claim for damages for loss of support against the wrongdoer who had wrongfully and culpably killed the deceased breadwinner. Similar recognition was also granted to same-sex couples by the courts in the cases of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (the right of a same-sex life partner to be regarded as a 'spouse' for the purposes of the (now-repealed) Aliens Control Act 96 of 1991); *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T) (the right of a same-sex life partner to be registered as a 'dependant' of the other partner who was by virtue of her employment a member of the South African Police Services' medical aid scheme); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) and 2003 (4) SA 266 (CC) (the right of the same-sex life partner of a judge in a partnership in which reciprocal support obligations had been undertaken to be entitled to the benefits conferred on a 'spouse' in terms of the (subsequently repealed and updated) Judges' Remuneration and Conditions of Employment Act 88 of 1989); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) (the right of the same-sex life partner of a woman to whom a child has been born in consequence of artificial fertilisation to be registered, along with the birth mother, as the parent of that child); and *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) (the right of a same-sex couple to adopt children jointly).

10 J Sinclair 'South Africa: A new definition of marriage: Gay and lesbian couples may marry' in B Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing Limited, 2008) pp 397–409 at 398.

11 In terms of the Maintenance of Surviving Spouses Act 27 of 1990.

12 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at paras 55–60, read with Sachs J's dissenting judgment at para 154.

Meanwhile, the road to same-sex marriage was steadily under construction. In this regard lesbian and gay rights activists deliberately employed in South Africa what has been referred to in the Dutch context as 'the law of small change'[13] in order gradually to realise the end goal of same-sex marriage;[14] a goal that was achieved when the Civil Union Act 17 of 2006 came into operation on 30 November 2006. This Act provides for same- or opposite-sex couples[15] comprised of adult persons[16] to enter into a monogamous 'civil union' which may take the form of either a marriage or a civil partnership;[17] the latter option being provided for those couples who wish to formalise their relationship without necessarily entering into a marriage.[18] A marriage or civil partnership entered into in accordance with the Civil Union Act of 2006 gives rise to exactly the same legal consequences as a marriage concluded according to the Marriage Act 25 of 1961.[19] Although three statutes currently govern the institution of marriage in South Africa (namely the Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998 and the Civil Union Act 17 of 2006), the unions concluded and formalised in terms of all three Acts are regarded as having identical status in law.[20]

Despite these post-1994 developments, a major lacuna still presents itself within the context of South African family law in that no specific legislation exists to regulate the position of persons who are involved in non-formalised domestic partnerships (that is to say couples who have neither validly married one another in terms of any of the three Acts mentioned earlier nor have entered into a civil partnership in accordance with the Civil Union Act).[21] In

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13 K Waaldijk 'Others may follow: The introduction of marriage, quasi-marriage, and semi-marriage for same-sex couples in European countries' (2004) 38 *New England Law Review* 569, 577.

14 See De Vos (above n 8): 432 et seq.

15 See BS Smith and JA Robinson 'The South African Civil Union Act 2006: Progressive legislation with regressive implications?' (2008) 22 *International Journal of Law, Policy and the Family* 356, 357–368 for a discussion of the difficulties created by the Act's references to sexual orientation.

16 In South Africa the age of majority is set at 18 years – see s 17 of the Children's Act 38 of 2005.

17 Section 1 definition of 'civil union'.

18 P de Vos and J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 795, 820; D Bilchitz and M Judge 'For whom does the bell toll? The challenges and responsibilities of the Civil Union Act for family law in South Africa' (2007) 23 *South African Journal on Human Rights* 466, 484.

19 Section 13 of the Civil Union Act 17 of 2006: '(1) The legal consequences of a marriage contemplated in the Marriage Act [25 of 1961] apply, with such changes as may be required by the context, to a civil union. (2) With the exception of the Marriage Act [25 of 1961] and the [Recognition of] Customary Marriages Act [120 of 1998], any reference to– (a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and (b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.'

20 See s 2 of the Recognition of Customary Marriages Act and s 13 of the Civil Union Act (quoted in the preceding note).

21 A second lacuna is the fact that marriages which have been concluded in accordance with the tenets of recognised religions (such as Hinduism or Islam) *without also being solemnised in accordance with South African marriage legislation* (which may be termed 'purely religious

this contribution the implications of the current state of affairs will be elucidated, and potential domestic partnerships legislation will be considered.

II THE IMPLICATIONS OF THE LACK OF DOMESTIC PARTNERSHIP LEGISLATION

In the absence of domestic partnership legislation the current legal position in South African family law dictates that, as a general rule, none of the invariable consequences that attach to a marriage or civil partnership attach to a relationship between two or more persons who live together in non-formalised domestic partnerships. In short, such partnerships (whether hetero- or homosexual) receive no legal recognition save for the piecemeal judicial extensions of the consequences of marriage (referred to above) in respect of same-sex unions and save for where a certain piece of legislation specifically includes domestic partners within its ambit.[22] The lack of ex lege protection implies that the partners are required to rely on the ordinary rules of the common law (such as the law of contract, property and agency) and that they must regulate their respective rights and duties and the patrimonial aspects of their relationship themselves.[23] This can be done by means of contractual undertakings included in a cohabitation/domestic partnership contract (which agreement is, as an outflow of its contractual nature, binding only on the parties thereto), or, at the termination of their union, by proving that a universal partnership had either expressly or tacitly been created between them.[24] In the absence of either alternative, no community of property is

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marriages') are not currently regarded as valid marriages (within the context of Hindu marriages, see *Singh v Ramparsad* 2007 (3) SA 445 (D) at paras 30–34, 47 and 52. As far as Islamic marriages are concerned see *Ismail v Ismail* 2007 (4) SA 557 (E) at para 7). This lacuna falls beyond the scope of this contribution.

22 For example, the Medical Schemes Act 131 of 1998 defines a 'dependant' so as to include a 'spouse or partner' in respect of whom the member is liable to provide 'family care and support'.

23 The South African Law Reform Commission (hereafter 'SALRC') *Project 118: Report on domestic partnerships* 2006: 110, 111. This document can be accessed from: www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf.

24 As an outflow of its Roman-Dutch law heritage, South African law recognises two forms of universal partnership: The *societas universorum bonorum* is a partnership of all future assets acquired from whatever source (i e commercial or otherwise), while the partnership *universorum quae ex quaestu veniunt* is a partnership of all assets acquired by virtue of commercial undertakings – see *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 955. The former type of partnership (the universal partnership), which is effectively a claim that community of property exists between the parties, is usually encountered within the family law context in the case of a putative marriage, or in the case of a 'marriage' which is null and void for want of being concluded in accordance with applicable marriage legislation – see *Sepheri v Scanlan* 2008 (1) SA 332 (C) at 338 (C)–(D). South African law prescribes four requirements for a valid partnership, namely '[f]irst, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract' – per Stratford AJA in *Rhodesia Railways and Others v Commissioner of Taxes* 1925 AD 438 at 465.

established, and all private property is owned separately.[25] In addition, while authors such as Singh[26] have proposed on the basis of English law that the doctrine of proprietary estoppel may be of assistance to domestic partners, she unfortunately loses sight of the fact that in South African law estoppel operates only as a defence,[27] and, moreover, cannot be used to acquire ownership.[28] As for the further contention that the law of unjustified enrichment may be of some assistance to domestic partners, this theory is as yet untested and therefore speculative at best.[29]

Over and above the difficulties occasioned by the lack of statutory recognition of domestic partnerships, it is important to stress that the current legal position pertaining to domestic partners is problematic for two further major reasons. The first is that the piecemeal legislative and judicial recognition accorded to domestic partners in the wake of the advent of constitutional democracy has created a 'patchwork of laws that [do] not express a coherent set of family law rules'.[30] Secondly, the validation of same-sex marriage implies, strictu sensu, that the same argument which was previously used to justify the refusal to extend the consequences of marriage to heterosexual unmarried couples – namely that an election not to marry justifies the denial of the benefits attached to marriage to unmarried couples – now also applies to post-Civil Union Act same-sex couples who have neither married nor entered into a civil partnership. It can, however, be accepted that all legislation held to be unconstitutional for unfairly discriminating against same-sex couples by the pre-Civil Union Act judgments will continue to stand until those statutes are expressly amended,[31] with the result that same-sex couples who have neither married nor entered into a civil partnership currently enjoy better legal protection than their heterosexual counterparts;[32] a situation that is prima facie unconstitutional and will remain so unless the legislature intervenes. Consequently, it goes without saying that such intervention is required so as to recognise both hetero- and homosexual domestic partnerships, and, in so doing, to 'level the playing fields' based on sexual orientation.[33] In the sections that follow, the legislature's attempts to do so will be considered.

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25 T Schwellnus 'The legal position of cohabitees in the South African law' *Obiter* 1995: 139.

26 D Singh 'Cohabitation relationships revisited: Is it not time for acceptance?' (1996) 29 Comp & Int LJ S Afr 317 at 319.

27 *Pandor's Trustee v Beatley & Co* 1935 TPD 358 at 364.

28 *West v Pollak & Freemantle* 1937 TPD 64 at 68.

29 BS Smith *The development of South African matrimonial law with specific reference to the need for and application of a domestic partnership rubric*: Unpublished LLD thesis (University of the Free State, 2009) chapter 6 (para 2.2).

30 Per Sachs J in *Minister of Home Affairs v Fourie (Doctors for Life Intl, Amici Curiae); Lesbian & Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at para 125.

31 *Gory v Kolver NO* 2007 (4) SA 97 (CC) at paras 28–30.

32 See for example De Vos and Barnard (above n 18): 462.

33 MC Wood-Bodley 'Intestate succession rights and gay and lesbian couples' (2008) 125 SALJ 46, 59.

III PROSPECTIVE DOMESTIC PARTNERSHIPS LEGISLATION – THE DOMESTIC PARTNERSHIPS BILL, 2008

The first steps towards broadening the South African family law framework so as to include specific legislation to govern relationships outside of marriage were taken in 2003 when the South African Law Reform Commission (SALRC) presented its preliminary findings in the form of a *Discussion Paper* dealing with domestic partnerships.[34] Although this document included certain proposals pertaining to the recognition of same-sex relationships in the form of marriage or civil unions, for the purposes of this contribution the major relevance of the *Discussion Paper* was the Commission's proposal of a dual system to cater for relationships outside of marriage in terms of which both *registered* and *unregistered* domestic partnerships would be recognised by means of two separate Acts. This proposed dual system was in principle retained in the Commission's 2006 *Report on Domestic Partnerships*, with the only major deviation in structure being the Commission's proposal that a single piece of legislation (to be entitled the 'Domestic Partnerships Act') be enacted to govern both the registered and the unregistered options. A further departure from the 2003 document was that while the 2003 *Discussion Paper* left the question open as to whether a de facto or ex post facto model was to be preferred in respect of the unregistered partnership, the Commission expressly opted for the latter model in its 2006 *Report*. The upshot of this election would be that a certain civil status would not automatically be imposed on all unregistered partnerships that satisfied certain baseline criteria (such as a minimum period of duration), but that an unregistered domestic partner would after the termination of the union instead be permitted to 'opt-in' to the protection provided by the legislation by way of a court application, the quantum and merits of which would be adjudicated on the basis of the extent of the discretionary power granted to the court by the Act in question.[35] For this reason, the latter model is also referred to as the 'judicial discretion model'.[36]

The Commission's 2006 proposals were for the most part embodied in a draft Domestic Partnership Bill that saw the light of day in January 2008.[37] As an outflow of the developments set out above, the Bill envisions two types of (statutory)[38] domestic partnership: on the one hand, a couple may register a domestic partnership,[39] in which case their union will be regulated by chapter 3

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34 *Discussion Paper* 104 (Project 118).

35 SALRC (above n 23): 366–379.

36 See SALRC (above n 23): 367.

37 The Bill was published in Government Gazette No 30663 of 14 January of that year.

38 The gender-neutral domestic partnership as a creature of statute under the Bill must be distinguished from the independent legal entity (see above n 8) that was recognised in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 36.

39 The Bill defines a 'registered domestic partnership' as 'a partnership registered as a domestic partnership under Chapter 3 of this Act' (see clause 1).

of the Bill. In the alternative to the registered partnership option, chapter 4 of the Bill regulates the so-called 'unregistered domestic partnership'[40] in terms of which one or both partners to a domestic partnership which has not been registered in terms of the Bill could, at the termination of their relationship, 'opt-in' to the protection provided by that chapter by approaching a competent court for an order relating to property division, intestate succession or maintenance.[41]

(a) The registered domestic partnership

(i) Capacity to enter into a registered domestic partnership

Provided that at least one of them is a South Africa citizen, any two persons (whether of the same or opposite sex) who are at least 18 years of age may register a domestic partnership.[42] Monogamy is an absolute requirement, so that a person may only be a partner in one registered domestic partnership at any given time, and any person already married or involved in a civil partnership in terms of South African law may not register such a partnership.[43] As far as the prohibited degrees of relationship are concerned, the same restrictions that apply in the case of marriage in respect of blood relationship (consanguinity) and affinity apply to registered domestic partners.[44]

(ii) Registration

Registration officers are designated as such in writing by the Minister of Home Affairs or his or her authorised representative, and are appointed from within the ranks of officers or employees in the public, diplomatic or consular service of the Republic of South Africa.[45] The registration officer must obtain a written and signed declaration of willingness to register the partnership from each prospective partner, and must, in signing the prescribed documentation, certify that these declarations were made of the parties' own volition and in his or her presence.[46] After having done so, the officer must issue the partners with a registration certificate.[47] The Bill permits the partners to enter into a registered partnership agreement in order 'to regulate the financial matters pertaining to their partnership',[48] and if they have done so, the existence of

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40 This is simply defined in clause 1 of the Bill as 'a partnership that has not been registered as a domestic partnership under Chapter 3 of this Act'.

41 By providing for an 'opting-in' or 'judicial-discretion' model, chapter 4 of the Bill adopts an approach that differs from jurisdictions which apply a so-called 'ascription model' in terms of which domestic partnership legislation automatically applies to all relationships as soon as certain fundamental requirements (for example a minimum duration requirement) are complied with – see SALRC (above n 23): 366, 367 for examples.

42 Definition of 'domestic partnership' in clause 1 read with clause 4(6).

43 Clause 4(1) and (2).

44 Clause 4(5).

45 Clause 5(1).

46 Clause 6(3) and (4).

47 Clause 6(6).

48 Clause 1 definition of 'registered partnership agreement'.

such an agreement must be indicated on the certificate, and a certified copy thereof must be attached thereto.[49] The officer must keep a register of all registrations conducted by him or herself, and particulars of all registered partnerships must be included in the population register.[50]

(iii) Property regime

In direct contrast with the South African law of marriage in terms of which community of property is the default property regime, the Domestic Partnerships Bill stipulates that registered domestic partnerships are generally out of community of property save for where the Bill provides otherwise.[51] The partners may however deviate from this general rule by entering into a registered partnership agreement. In order to bind outsiders the existence of the agreement must be indicated in the registration officer's register and must also be indicated on or attached to the registration certificate, otherwise it binds only the parties thereto.[52]

A court is empowered to consider the terms of an agreement that complies with the prescribed formalities (and thus binds third parties) when the division of partnership property is at issue.[53] If the court is of the opinion that giving effect to the agreement or part thereof would 'cause serious injustice', the agreement or relevant part thereof may be set aside.[54]

(iv) Legal consequences

The Bill greatly improves on the existing legal position by providing for an ex lege duty of support,[55] a right to occupy the family home during the existence of the relationship and not to be evicted therefrom during that period,[56] and a limitation on the disposal of property belonging to both partners ('joint property') which a partner may not sell, donate, mortgage, let, lease or otherwise dispose of without obtaining the written consent of the other partner.[57] In addition, a surviving registered domestic partner will qualify as a 'spouse' for the purposes of the Intestate Succession Act 81 of 1987[58] and the

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49 Clause 6(5) and (6).

50 Clause 6(10).

51 Clause 7(1). The statutory registered domestic partnership will consequently deviate from the common law (universal) partnership in terms of which, when the partnership is terminated, the property is (i) divided in accordance with any express agreement to this effect, or (ii) if there is no agreement, the property is divided in accordance with the partners' respective contributions (unless these were equal), or (iii) where it is impossible to determine whether one partner contributed more than the other(s), the partnership assets are divided equally: See *Isaacs v Isaacs* 1949 (1) SA 952 (C) at 961; *Fink v Fink* 1945 WLD 226 at 241; *V (also known as L) v De Wet, NO* 1953 (1) SA 612 (O) at 615 (F); SALRC (above n 23): 112.

52 Clause 7(4) read with clause 6(8).

53 Clause 8(1).

54 Clause 8(2).

55 Clause 9.

56 Clause 11(1) and (2).

57 Clause 10.

58 Clause 20.

Maintenance of Surviving Spouses Act 27 of 1990.[59] As far as children are concerned, clause 17 of the Bill provides that, where a child is born into a registered domestic partnership between two persons of the opposite sex, the male partner is deemed to be the biological father of that child and that he has the same parental rights and responsibilities in respect of that child as a married biological father would have had.

The legal consequences provided for in chapter 3 of the Bill serve to iron out the prevailing inconsistent legal position between same- and opposite-sex domestic partners, at least as far as those couples who are prepared to register their partnership are concerned.[60]

(v) Termination

General

According to clause 12(1) of the Bill, a registered domestic partnership is terminated by the death of either partner, by agreement or by court order. Where the partnership is terminated by agreement (ie out of court), a registration officer must oversee the termination procedure, and must sign the prescribed documentation after the parties have individually and in writing declared that they are desirous of terminating their partnership.[61] A certificate to the effect of termination must be issued to the partners, and notification must be made thereon of the existence of a written termination agreement (if there is one),[62] which may regulate the financial consequences of the termination such as apportionment of joint property and maintenance.[63] The registration officer must keep a register of all terminated partnerships, and must transmit this register to the relevant officials for inclusion in the population register.[64]

Where minor children are involved, a court order is an absolute prerequisite for a registered domestic partnership to be terminated.[65] A court may not order the termination of the partnership unless it is satisfied that the arrangements made in respect of the welfare of all minor and dependent children are in their best interests.[66] In order to ascertain whether this is the case the court is empowered to request a family advocate to furnish a report and recommendations in this respect, and the court may order any person to appear before it or may appoint a legal practitioner to represent the child.[67] The court may make any order with

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59 Clause 19.

60 See the main text to nn 6–12, above. For a critique on the inconsistencies perpetuated by chapter 4 of the Bill within the context of the unregistered domestic partnership, see Smith (above n 29): chapter 7 (4 and 11).

61 Clause 13(1)–(4).

62 Clause 13(5).

63 Clause 14.

64 Clause 13(6)–(8).

65 Clause 15(1).

66 Clause 16(1).

67 Clause 16(2), (3), (4) and (7).

regard to maintenance, education, guardianship, care of or contact with children that the court deems to be in their best interests.[68] As far as children are concerned, the termination of a registered domestic partnership largely mirrors the procedure prescribed for the dissolution of a marriage or civil partnership by divorce.[69]

Maintenance after termination

Clause 18 of the Bill resembles s 7(2) of the Divorce Act 70 of 1979 and provides that where the partners have not reached an agreement regarding post-termination inter-partner maintenance, an application may be made to court for a maintenance order which the court deems to be just and equitable under the circumstances. Such an order may be made for any specified period, but may not endure beyond the death of the indebted ex-partner, or beyond the date upon which he or she enters into a civil or customary marriage, registers a civil union or enters into another registered partnership.[70] The Bill lists a number of factors which a court is enjoined to consider in deciding whether to make an order for maintenance and what the amount and nature thereof should be.[71] It is interesting to note that clause 18 of the Bill is more restrictive than its counterpart in the Divorce Act in that the latter only limits the duration of a maintenance order to the 'death or remarriage' of the indebted spouse while the former is more widely phrased. It is consequently suggested that, if and when the Domestic Partnerships Bill comes into operation, the Divorce Act should be updated so as to provide for the possibility of the indebted spouse entering into a civil union or a registered domestic partnership.

Property division

If the partners are unable to agree on the division of property after their partnership has terminated, clause 22 permits either or both of them to apply to court for an order dividing joint and/or separate property on the basis of what the court deems to be 'just and equitable' in the light of a number of factors.[72] As far as the re-apportionment of separate property is concerned, the

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68 Clause 16(5) read with s 1(2) of the Children's Act 38 of 2005.

69 See Smith (above n 29): chapter 7 (9.2.2.2).

70 Clause 18(1).

71 Clause 18(2). These factors are: '(a) the respective contributions of each partner to the registered domestic partnership; (b) the existing and prospective means of each of the registered domestic partners; (c) the respective earning capacities, future financial needs and obligations of each of the registered partners; (d) the age of the registered partners; (e) the duration of the registered domestic partnership; (f) the standard of living of the registered domestic partners prior to the termination of the registered domestic partnership; and (g) any other factor which in the opinion of the court should be taken into account.'

72 According to clause 22(4) these factors are: '(a) the existing means and obligations of the registered domestic partners; (b) any donation made by one registered domestic partner to the other during the subsistence of the registered domestic partnership; (c) the circumstances of the registered domestic partnership; (d) the vested rights of interested parties in the joint and separate property of the registered domestic partners; (e) the existence and terms of a registered domestic partnerships agreement, if any between the registered domestic partners; and (f) any other relevant factors.'

court must, in addition to being satisfied that the re-apportionment is 'just and equitable,' be satisfied that the 'partner in whose favour the order is granted, made direct or indirect contributions to the maintenance or increase of the separate property or part of the separate property of the other registered domestic partner during the existence of the registered domestic partnership'.[73]

Other consequences

As mentioned earlier, the surviving partner to a registered domestic partnership that is terminated by death qualifies as a 'spouse' for the purposes of the Maintenance of Surviving Spouses Act 27 of 1990 as well as for the Intestate Succession Act 81 of 1987. As a result, such a partner will be treated in an identical fashion as a surviving spouse of a marriage terminated by death.

Registered domestic partners are also deemed to be spouses in a valid marriage for the purposes of instituting a delictual claim for damages as well as for instituting a delictual claim against a wrongdoer who caused the wrongful death of one of the partners.[74] In addition, a partner qualifies as a dependant for the purposes of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.[75]

Time-limits

According to clause 23 of the Bill, once a registered domestic partnership has been terminated a time-limit of 2 years applies within which an applicant may institute a claim 'under [clause] 21' of the Bill. The reference to '[clause] 21' (which deals with delictual claims) appears to be incorrect as a perusal of the legislative history of the Bill indicates that the time-limit of 2 years is actually intended to apply to claims for post-termination maintenance and/or property division.[76] It can therefore be accepted that the cross-reference to '[clause] 21' is an oversight, and that clause 23 should be amended so as to prescribe a time-limit of 2 years within which maintenance and/or property division claims are to be instituted.

Notice of termination and protection of outsiders

Both partners to a registered domestic partnership are required to notify all interested parties[77] in writing that their partnership has been terminated.[78] If the partnership is dissolved by the death of either or both partners, the survivor or the executor of the deceased estate of either partner is enjoined to notify all

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[73] Clause 22(5).
[74] Clauses 21(1) and (2).
[75] Clause 21(3).
[76] See Smith (above n 29): chapter 7 (9.3.4).
[77] According to the Bill, an 'interested party' is 'any party with an interest in, or who could reasonably be expected to have an interest in– (a) The joint property of the domestic partners; (b) The separate property of either of the domestic partners; or (c) The partnership debt of the domestic partners . . .'.
[78] Clause 24(1).

interested parties.[79] Furthermore, a court considering an application under the Bill must consider the interests of any other person with an interest in the property concerned, and may, in general, make any order for the protection of the rights of any interested person.[80]

(b) The unregistered domestic partnership

(i) Introduction

Chapter 4 of the Bill intends to regulate the so-called 'unregistered domestic partnership,' with the gist of this chapter being that either or both partners to a non-formalised domestic partnership that is terminated by death or separation can apply to a court which, after considering 'all the circumstances of the relationship' as well as any other specific criteria posed by the Bill, can grant an order for maintenance, intestate succession or property division.[81]

(ii) Qualifications

An unregistered domestic partnership is a domestic partnership that has not been registered under chapter 3 of the Bill, involving at least one person who is a South African citizen or who permanently resides in South Africa.[82] According to clause 26(4) a court may not grant an order in respect of a relationship of any person who, while the relationship subsisted, was married to a third party in terms of the Marriage Act 25 of 1961 or the Civil Union Act 17 of 2006, or was a partner in a civil partnership with a third party, or was a partner in a registered domestic partnership with a third party. An immediate conclusion to be reached from this provision is that it does not exclude a partner who is involved in a relationship with a person who is a spouse in a subsisting *customary* or *purely religious*[83] marriage with a third party from bringing an application under chapter 4 of the Bill. In addition, the fact that no mention is made of multiple unregistered domestic partnerships invites the inference that the applicant under chapter 4 may also be the unregistered domestic partner of a person who is also a party to an unregistered domestic partnership with someone else. The significance of this conclusion will become evident in the discussion that follows. It is also interesting to note that, in contrast with chapter 3, chapter 4 of the Bill contains no restrictions based on affinity or consanguinity, with the result that unregistered domestic partnerships that offend these restrictions may – provided that they are otherwise valid in terms of chapter 4 – ostensibly qualify for the protection provided by the latter chapter. It has been suggested that this is an oversight which should be rectified by amending the Bill so as to allow only partners

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79 Clause 24(2).
80 Clause 25.
81 Clause 26.
82 Definition of 'unregistered domestic partnership' in clause 1 of the Bill, read with clause 26(5).
83 See above n 21.

involved in non-conjugal relationships which indeed offend the prohibited degrees to bring an application under chapter 4.[84]

(iii) Maintenance

No ex lege reciprocal duty of support applies during the currency of an unregistered domestic partnership.[85] However, once the partnership has been terminated, clause 28 provides that either or both partners may apply to court for a maintenance order that is 'just and equitable' for a specified period. As in the case of the registered domestic partnership, various factors are listed in the Bill in order to assist a court to determine what the terms of such an order may be. A problem however presents itself on closer examination of this list of guiding factors, in that clause 28(2)(h) permits a court to consider 'the relevant circumstances of *another unregistered domestic partnership or customary marriage* of one or both unregistered domestic partners, where applicable, insofar as they are connected to the existence and circumstances of the unregistered domestic partnership, and any other factor which, in the opinion of the court, should be taken into account'.[86] The problem with this provision is that it only provides for the existence of one form of polygynous marriage – the customary marriage – to be taken into account, and therefore disregards the fact that certain religious systems sanction polygyny and that the claimant may be involved in an unregistered domestic partnership with someone who is already a spouse in a purely religious marriage.[87] It is submitted that the Bill should be amended to cater for this possibility.[88] A slightly more acute form of this problem presents itself as far as a claim for maintenance after the *death* of an unregistered domestic partner is concerned (clauses 29 and 30). In this regard clauses 29(3) and 30(d) permit only competing claims for maintenance from the deceased estate of a surviving 'customary spouse' to be considered, and therefore fail to permit a court to consider competing claims instituted by either the surviving spouse to a purely religious marriage[89] or by another unregistered domestic partner. These lacunae ought to be remedied.[90]

(iv) Intestate succession

In terms of clause 31 a surviving unregistered domestic partner is permitted to apply to court to inherit the intestate estate, or, where the deceased partner is survived by one or more descendants, to inherit either a child's share of the intestate estate or an amount determined by the relevant Minister responsible for the administration of justice, whichever amount is the greater.[91] Should the surviving partner's claim compete with that of a surviving 'customary spouse',

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84 Smith (above n 29): chapter 7 (3.2).
85 Clause 27.
86 Emphasis added.
87 See above n 21 for a description of this concept.
88 Smith (above n 29): chapter 7 (11.3.2.2).
89 See above n 21 for a description of this concept.
90 Smith (above n 29): chapter 7 (11.3.3).
91 Clause 31(1) and (2).

the court may make an order that is 'just and equitable with reference to all the relevant circumstances of both relationships'.[92] The same problem mentioned in (iii) above immediately becomes apparent: in limiting the possibility of competing claims to those of a partner and a 'customary spouse', clause 31 does not cater for other forms of multiple relationships involving a partner competing with a spouse in terms of a purely religious marriage or with an additional unregistered domestic partnership. It is suggested that clause 31 should therefore be amended accordingly.[93]

(v) Property division

Clause 32 substantially recasts clause 22 of chapter 3 of the Bill, and therefore provides for either or both unregistered domestic partners to bring an application to court for the division of joint property and/or for the re-apportionment of separate property. The same criteria as mentioned regarding property division in Part III(a)(v) above apply in respect of such a claim. It is however interesting to note that clause 32 provides for the deferment of a claim for the re-apportionment of separate property while clause 22 contains no similar provision within the context of the registered domestic partnership. This is an oversight that should be corrected.

(vi) Time-limits

As is the case with clause 23, clause 33 also prescribes a time-limit of 2 years as from the date of termination of an unregistered domestic partnership within which an application may be made to court. Unfortunately clause 33 also contains an incorrect cross-reference in that it specifically states that the time-limit in question pertains to claims under '[clause] 31' of the Bill, which is the clause that governs intestate succession claims. For the same reason explained in respect of time-limits in Part III(a)(v) above, the legislative history behind the Bill indicates that this cross-reference is incorrect, and that the time-limit should in fact rather apply to claims for maintenance and property division. It is therefore submitted that the cross-reference should instead refer to claims under clauses 28 and/or 32 of the Bill.

IV A CONCLUDING OBSERVATION

The potential enactment of domestic partnership legislation in South Africa provides an interesting point of speculation as far as the unregistered domestic partnership is concerned. In this regard it will be recalled that the current legal position (that is to say the position pending enactment of the Domestic Partnerships Bill) has clothed same-sex non-formalised cohabitative relationships with more legal rights than their heterosexual counterparts.[94] For

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92 Clause 31(3).
93 Smith (above n 29): chapter 7 (11.4).
94 See the main text to nn 6–12 above.

example, while same-sex couples are currently entitled to inherit intestate by virtue of the judgment in *Gory v Kolver NO*,[95] this right has not yet been extended to opposite-sex couples. Moreover, it is important to note that a surviving same-sex partner need, on the basis of the *Gory* judgment, prove no more than that his or her relationship was (i) permanent, and (ii) that reciprocal duties of support existed between him- or herself and the deceased. However, if the Domestic Partnerships Bill were enacted this position would change, as the survivor to a non-formalised (that is to say unregistered) same-sex domestic partnership would henceforth have to obtain a court order under chapter 4 of the Bill in order to accomplish something for which no court process was previously required. Could this less favourable position amount to unfair discrimination? In this regard it is important to note Ackermann J's observation in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*[96] to the effect that:

> 'It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.'

The question therefore is: is the more arduous procedure prescribed by chapter 4 of the Bill a legislative amendment of an earlier court's remedy that is 'within constitutional limits'? On the one hand, it may be argued that a court procedure is costly and unaffordable, and in so doing 'largely benefit[s] economically resourced partners'.[97] On the other hand, it could be contended – as the South African Law Reform Commission points out – that the provision of legal aid could counter this problem.[98] In addition, the availability of the registered domestic partnership option, coupled with the fact that the ex post facto (judicial discretion) model ensures that a competent forum will adjudicate on matters which involve issues of legal certainty, autonomy and the interests of outsiders, may provide strong support for the model proposed by chapter 4 of the Bill. It is submitted that these arguments should thwart any allegations of unconstitutionality.

In the end result, it is clear that the legislative provision of a statutory domestic partnership as an alternative to marriage has become a dire necessity in South Africa. While the Domestic Partnerships Bill, 2008 is not flawless and requires a fair amount of fine-tuning,[99] it is submitted that the South African legislature has taken the first steps towards developing that country's family law in a salutary fashion.

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95 See above n 9.
96 2000 (2) SA 1 (CC) at para 76.
97 SALRC (above n 23): 373; 378.
98 SALRC (above n 23): 378.
99 See in general Smith (above n 29): chapter 7.

South Korea

KOREAN DIVORCE LAW: CAN A SPOUSE GUILTY OF MARITAL MISCONDUCT GET A DIVORCE WITHOUT THE CONSENT OF THE OTHER SPOUSE?

*Dong-Jin Park**

Résumé

De tous les domaines du droit de la famille, le divorce est sans doute celui qui reflète le mieux les structures sociales et l'esprit d'une société. Le taux de divorcialité a graduellement augmenté depuis les années 1990, ce qui coïncide avec la montée des problèmes sociaux qui y sont reliés. Le droit du divorce tient en 13 articles au total, dont deux dispositions qui trouvent application mutatis mutandis.

Toutefois, le Code civil coréen ne répond pas à la question de savoir si le tribunal peut prononcer un divorce à la demande d'un époux fautif. La majorité des auteurs estiment qu'une telle demande devrait être rejetée, à moins de circonstances exceptionnelles. Et la Cour suprême de Corée a érigé en principe le rejet d'une demande de divorce introduite par un époux fautif. Pourtant, certaines décisions judiciaires ont créé des exceptions au principe et celles-ci se sont récemment multipliées. La demande de divorce par un époux fautif peut être jugée recevable lorsque le conjoint défendeur peut être tenu pour le premier responsable de l'échec du mariage. Dans une telle situation, il fut jugé qu'il importe peu que le demandeur soit partiellement responsable de cet échec.

De plus, il semble que les tribunaux soient désormais plus centrés sur la vérification des possibilités de réconciliation des époux que sur la question de la faute conjugale. En décidant qu'en certaines circonstances, par exemple une séparation de longue durée, la faute des parties n'est plus vraiment pertinente, les tribunaux ont considérablement élargi le domaine du divorce sans faute. Il devient donc important de chercher à établir jusqu'à quel point le divorce sans faute devrait ou non être reconnu.

Cette tendance semble réelle mais elle reste à vérifier de façon plus pointue. Si l'on garde à l'esprit que l'effet principal du divorce est de dissoudre le mariage légal, le critère premier dans l'octroi du divorce devrait être celui de la vérification de la fin réelle de la communauté de vie et des possibilités de réconciliation des époux. Lorsque la faillite du mariage se vérifie dans les faits, le divorce ne devrait pas être refusé pour le simple motif que le demandeur a commis une faute conjugale.

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Pour ce qui est de la plupart des divorces, les deux époux ont d'ailleurs leur part de responsabilité dans la rupture irrémédiable du couple. De plus, chaque divorce a des causes multiples et il est très difficile de déterminer lequel des deux époux porte la plus grande part de responsabilité à cet égard. Par conséquent, le point le plus important est bien celui de la vérification d'une atteinte irrémédiable au lien du mariage.

Ce n'est que dans des circonstances bien particulières permettant de prédire que le divorce aura sur un époux ou sur les enfants des effets psychologiques, sociaux ou économiques désastreux, que le tribunal refusera exceptionnellement de prononcer le divorce. Plutôt que de laisser cette question à la discrétion du juge, la demande de divorce présentée par un époux fautif devrait donc généralement être reçue, à moins que des circonstances exceptionnelles militent en faveur de son rejet.

I INTRODUCTION

Since 1990, there have been many amendments to Korean family law due to the changes in perception of family relationships which were caused by the rapid changes in the Korean social environment. Some of these changes include the conspicuous trend toward nuclear families, the abolition of discrimination against females, and a rise in the economic status of females. Amongst all of the areas in family law, divorce law most especially reflects the societal structure and the spirit that governs society.

The divorce rate in Korea has climbed gradually since the 1990s (see table below),[1] which is also when relevant social problems began to surface. The increase in the divorce rate became a serious threat to society as it caused problems like elopement, juvenile crime, and statutory outrage.[2] Even though two-thirds of divorced couples have young children, no legal system exists to protect and ensure the welfare of the children of divorced parents. Some believe that the high divorce rate in Korea is a direct result of the simple legal procedures required for a divorce by agreement and that no legal advice is given to couples pursuing a divorce. For these reasons, the Korean divorce law was examined,[3] and several amendments to family law articles were enacted.

Table: number and percentage of each type of divorce (unit: thousand)

Year	Divorce by Agreement	Judicial Divorce	Total
1995	54.1 (79.2%)	13.0 (19.1%)	68.3 (100%)
1997	73.9 (81.0%)	16.8 (18.5%)	91.2 (100%)

1 *Vital Statistics Yearbook on Population* (Korea: Statistics Agency, 2006).

2 Bok-Yong Han 'A Study on the Introduction of No-fault Divorce Law to the Korean Family Law' (2005) 345 *Human Right and Justice* 36; Maekyung Kim 'The Reform of the Procedure of Consensual Divorce' (2006) 20(3) *Korean Journal of Family Law* 2.

3 Hereafter, the Korean divorce law refers to the articles stated in the Korean Civil Code.

1999	98.9 (83.8%)	18.9 (16.0%)	118.0 (100%)
2001	111.7 (82.7%)	22.6 (16.8%)	135.0 (100%)
2003	143.6 (85.9%)	22.3 (13.4%)	167.1 (100%)
2005	111.1 (86.5%)	16.5 (12.8%)	128.5 (100%)

Before the laws were revised in 2007, divorce had been granted only by registering the parties' agreement to divorce. In this system, there were many premature divorces that resulted because no legal system was in place to assist couples in reconsidering their divorce decision. Furthermore, it was possible to file for divorce without any agreement regarding the support of the children. To solve these problems, revisions to Korean divorce law were necessary.[4]

The Korean divorce law does not exist as a separate statute, but is included as part of the Korean Civil Code (hereafter 'KCC'), located in Part IV Relatives, Chapter III Marriage, Section 5 Divorce. There are 13 articles in total, including the provisions for mutatis mutandis. Since 2007, divorce law has undergone a large scale reform, in which five out of the 13 articles have been amended or created.[5]

Most of the articles, however, have not been revised. This is because a social consensus on the more desirable solutions to the certain issues at hand has not been reached, and some decisions of the Korean Supreme Court have not been settled as case-law.[6]

The provisions in the KCC do not mention, for example, whether or not the court can approve divorce applications that are filed by at-fault spouses. Although the court has changed its original position, which strictly denied guilty spouses the right to file divorce applications, it has been inconsistent with decisions regarding divorces, resulting in widespread criticism. After examining the characteristics of and the changes in Korean divorce law, the issue of whether a guilty spouse has the right to file for divorce based on the interpretation of the divorce provisions in the KCC will be discussed.

II OVERVIEW OF KOREAN DIVORCE LAW

Korean divorce law provides two methods for obtaining a divorce, divorce by agreement or judicial divorce. In Korean divorce law, a judicial divorce and a

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4 Sang-Yong Kim 'Geschichtliche Ueberblick ueber die Ehescheidung' (2007) 31(1) *Chung-Ang Journal of Legal Studies* 156.

5 For more details, see Whasook Lee 'Transformation of Korean Family Law' in B Atkin (ed) *International Survey of Family Law 2008 Edition* (Jordan Publishing Limited, 2008) pp 239–254.

6 Because of this, the articles regarding the revocation of property disposition, for example, have not yet been passed by Parliament. See Whasook Lee, above n 5 at pp 251–253.

divorce by agreement are differentiated because the spouses who are filing for divorce are subject to different procedures depending on which method they choose. A divorce by agreement involves the dissolution of marriage without obtaining the court's judgment and can be achieved as long as both spouses agree to the divorce. It is not an issue, whether the marital relationship is objectively broken, or whether the breakdown of marriage is caused by unilateral or bilateral misconduct. In such a case, the only critical issue is to determine both parties' intentions for divorce.

In contrast, a judicial divorce is a divorce in which the marriage is dissolved by the court's decision when the two parties are not in agreement with regard to the divorce.[7] In this situation, one spouse, on the basis of the divorce grounds in art 840 of the KCC, may file for a divorce. A court decision is essential for the divorce to be official and is why this method is called a 'judicial divorce'. In order to obtain a judicial divorce, courts require evidence showing the justification for a legal divorce. Article 840 of the KCC includes six legal justifications for judicial divorce.[8]

(a) The Amendments of the divorce law in 2007

(i) Features of the divorce law prior to the amendment

Before Korean family law was amended in 2007, the most important characteristic of divorce by agreement in Korea was that there was no active intervention of the court, as long as there was mutual consent by both spouses. The court was involved only to conventionally confirm whether the consents of both parties were earnest.[9] Thus, if the two parties received confirmation from the Family Court with regard to their mutual consent to divorce, and they reported their divorce in accordance with 'the Act on the Registration, etc. of Family Relationship',[10] then their marriage was legally dissolved.[11]

This practice results in an increased possibility of spouses prematurely filing for divorce based only on a temporary impulse. Furthermore, a divorce may be granted with only the mutual consent of the spouses, even though there may not have been any consideration regarding the custody of the children. The implementation of a divorce is not affected by whether or not an agreement exists regarding child support. Since these divorces were valid solely on the

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7 If the couple fails to agree on the division of their assets or one party has the advantage in filing for divorce, then a single spouse can file for a divorce.

8 Details will be discussed in the following relevant sections.

9 Such a confirmation process has no effect on the judgment.

10 The Korean Constitutional Court has declared that 'The head of the family system' was incompatible with the Constitution (The Korean Constitutional Court Decision on 3 February, case no 2001 Heonga 9 et al). After the decision of the Korean Constitutional Court, the Family Registration Act was replaced by the Act on the Registration, etc of Family Relationship. For more details about the head of the family system, see Whasook Lee 'The Head of family system, its patriarchal thought and discriminational factors' (2004) 10(2) *Yonsei Law Review* 17–40.

11 See KCC, art 836(1).

mutual consent of the spouses regardless of the emotional, social or economic hardships the divorce may instill on the children or the spouses themselves, the protection of the children of divorced parents and of financially disadvantaged spouses became a central issue.[12]

As a result, the need for systematic protection was the motivation for the amendment of the civil law in 2007. This amendment took into account Western divorce law procedures[13] and added requirements for the confirmation of the Family Court.[14]

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[12] Sang-Jin Oh 'A Study on the divorce for fault and no-fault principle, the study on the problem of Family Court's case' (2003) 101 *Trial Data* (Supreme Court Library of Korea) 154.

[13] The central issue in the divorce systems of the United Kingdom and the United States seems to be related to the problems that are connected to a divorce, most especially the welfare of children after a divorce, rather than the divorce itself. For this reason, courts are proactively involved in the divorce procedures by only allowing judicial divorces, which require deliberation periods or a separation period and counselling for the party who wishes to divorce. In detail see Whasook Lee 'A Suggestion Based on the Revocation of English Family Law Act 1996 and the Amendment French Divorce Law' (2005) 12(4) *The Journal of Comparative Private Law* 265. Germany has selected the no-fault divorce as the only grounds for divorce, as shown in art 1565(1) of the German Civil Code, which says 'one may divorce when a marriage is broken'. Meanwhile, art 1565(2) provides a legal definition of a 'broken marriage', which states 'a marriage is broken when the couple's marital life no longer exists, or when the couple can no longer hope to restore the marital life'. However, even if the marriage is broken, the couple may not get a divorce 'if the maintenance of the marriage, in the interest of minor children of the family, is, exceptionally, necessary' (art 1568(1) of the German Civil Code). In one German case, in which the parents of a 13-year-old mentally disabled boy wanted to get a divorce, the courts disallowed the divorce because there was a risk that the boy, who feared not having a father anymore, might commit suicide (OLG Hamburg FamRZ, 1986, s 469ff). Also, the revised French marriage laws, which embrace various values and perspectives on marriage and divorce, provide several different grounds for divorce. This is contrary to the tendency of other Western countries which seem to simplify the grounds for divorce as much as possible. Fault-based divorce has been sustained in current French marriage law. Furthermore, in contrast to the original legislative purpose, the diverse possibilities of divorce were negligently entrusted to the parties, who are not very knowledgeable in the area of law, and consequently resulted in the use of various divorce grounds, in combination with various procedures for divorce suits. This resulted in many extremely complicated states of affairs. In particular, art 296 of the French Civil Code prescribes a limited divorce/separation (living separate and apart) system. According to art 306 of the French Civil Code, if the state of separation due to a separation judgment is maintained for more than 2 years, then the judgment of separation may change into a judgment of divorce upon request. The principles of divorce law of the Commission on European Family Law (CEFL) overcame the previous conflict that existed between fault-based and no-fault divorces and the previous legislative paradigm which had classified divorce into many types by distinguishing the types into one of two categories. Divorce by agreement has only slight differences in the deliberation period depending on the existence of children under the age of 16 and the existence of an agreement on certain issues that are related to the effects of a divorce. The other category of divorce is divorce without agreement, which required a separation of at least a year. In detail see Choon-Soo An 'The European principles of divorce law of the Commission on European Family Law' (2006) 20(3) *Korean Journal Of Family Law* 231.

[14] See below for details.

(ii) Main features of the 2007 amendment of the divorce law

As mentioned above, the fundamental revision in the Korean divorce law aimed to address the requisites and the procedure for obtaining a divorce by agreement. First, couples who are filing for divorce by agreement are required to receive Family Court guidance on their divorce, and the court may also recommend that both parties receive professional counselling.[15] Another conspicuous revision of the law was the adoption of a deliberation period. The deliberation period is 3 months for those who have children to support, but is only one month for those who do not have children.[16]

However, the Family Court may shorten or waive the deliberation period requirement when domestic violence is involved or when the continuance of the marriage would result in unbearable suffering for one of the parties.[17] Lastly, when children are present, a written custody and childcare agreement and other necessary agreements must be submitted to the courts.[18] Thus, it is no longer possible to file for a divorce by agreement without both parties settling on the custody and care of their children.

(b) The two types of divorce: divorce by agreement and judicial divorce

(i) Divorce by agreement

The divorce by mutual consent commonly found in the legal systems of other countries[19] is similar to that in the Korean legal system in that they both allow for a divorce by agreement, where a mutual agreement must exist in order to obtain a divorce. However, there are some differences between the two. In

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[15] KCC, art 836-2 (Procedure of Divorce) (1). Any person who intends to get a divorce by agreement shall have guidance on their divorce provided by the Family Court and, if necessary, the Family Court may recommend counselling with a professional, experienced counsellor.

[16] KCC, art 836-2(2).

[17] KCC, art 836-2(3).

[18] KCC, art 836-2(4).

[19] The French Civil Code allows for divorce by mutual consent. According to art 276 of the French Civil Code, the mutual consent shall not be received until 2 years after the marriage. In detail see Whasook Lee, above n 13, 284. In Germany, art 1565 (1) of the German Civil Code declares that a marriage may be dissolved by divorce if it has broken down. And it is irrebuttably presumed that the marriage has broken down if the spouses have lived apart for one year and both spouses petition for divorce or the respondent consents to divorce (art 1566(1) of the German Civil Code). The Swiss revised their divorce law in 2000, and adopted two kinds of divorce. The first one is agreed divorce in marriage and consequences; the second one is agreed divorce in marriage only. In addition according to art 111 of the Swiss Civil Code when an agreed divorce in marriage and consequences, is desired, the partners should apply for divorce together, and submit their divorce to the court. After England revised its divorce laws, the most remarkable changes were that it had eliminated the fault issues that were regulated in the Matrimonial Causes Act, and had changed its position to that of the no-fault theory. Furthermore, they adopted a consideration period, mandated a consultation, and required an agreement on the results of divorce in order to protect and maintain the value of family and marriage. In detail see Sang-Yon Kim 'Die einverstaendliche Scheidung in rechtslvergleichender Sicht' (November 2004) 578 BUP JO 6–34; also Whasook Lee, above n 13, 268.

Korea, a couple can get a divorce without the court's decision. A husband and wife are authorised to divorce as long as they have a mutual agreement. The Family Court merely confirms the existence of mutual consent and is not a part of the judicial procedure. The court does not have to investigate or process the confirmation of mutual consent of both parties, stating that 'by the process of confirming their intent to divorce it is to be clarified whether both parties have genuine intent to divorce at the time of confirmation. The court does not examine how the mutual agreement was reached'.[20]

In other countries the courts make their final determination with regard to the mutual consent. For this reason, divorce by mutual consent in other countries could also be broadly classified as a type of judicial divorce from the viewpoint of the Korean divorce law, since divorce by mutual consent is determined by the court's final decision.

For instance, although divorce by mutual agreement is allowed in France, the United Kingdom and Sweden, whether or not a divorce is granted is determined by the courts, and that the courts have the discretion to reject a divorce application even if there is a mutual consent shows that these may also be considered judicial divorces.[21]

In other words, the distinction between a divorce by agreement and a judicial divorce in Korea is made by examining whether the final decision of the divorce is made by agreement of both parties or by the decision of the Family Court. In contrast, other countries focus on the application for the divorce itself when they use the term 'divorce by mutual consent'. A mutual consent is merely one of the grounds for judicial divorce such as adultery or desertion**.** Thus, the terminology is defined differently by certain countries and is used in two different kinds of situations.

The legal requirements to obtain a divorce by agreement in Korea are as follows: According to the amended Korean family law, which is in contrast to the law prior to the amendment, any parties who wish to divorce by agreement shall not only apply for the confirmation of their mutual intent to divorce, but they must also receive Family Court guidance on their divorce (KCC, art 836-2(1)). Furthermore, if necessary, the Family Court may recommend that the couple receive counselling with a professional and experienced counsellor. In order to prevent premature divorces and to take into account the interests of the children, the amended KCC provides an opportunity for the parties to reconsider their decision to divorce by requiring a deliberation period of 3 months for those who have children to support and one month for those who do not have (KCC, art 836-2(2), (3)). The parties who have children must submit their relevant agreements regarding the fostering and the custody of their children or seek adjudication from the Family Court on the matter. After

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[20] See Korean Supreme Court Decision 86Meu86, delivered on 20 January 1987.

[21] Whasook Lee, above n 13, 237.

all of these requirements are satisfied, and once the parties report their divorce in accordance with 'the Act on the Registration, etc. of Family Relationship', the divorce is valid.

(ii) Judicial divorce

Korean divorce law recognises another type of divorce, namely judicial divorce, which is regulated by art 840 of the KCC. A spouse can apply to the Family Court for divorce as long as they meet at least one of the six grounds for divorce of the KCC, art 840. A person can even get a divorce without the consent of their spouse. In other words, a spouse may be divorced against her or his will. That is the reason why judicial divorce is in Korea regarded as unilateral divorce.

When compared with divorce by agreement, judicial divorce in Korea is characterised by (i) lack of consensus (disagreement) to divorce, (ii) initiation of the judicial procedure, and (iii) evidentiary proof of at least one of the six grounds for divorce cited in KCC, art 840.

A spouse who is seeking a divorce has to choose whether to divorce by agreement or to have a judicial divorce, each of which has its own separate procedures. Thus, it is impossible to have a judicial divorce that is compatible with a divorce by agreement.

The grounds for judicial divorce are enumerated in KCC, art 840 as follows:

> 'Article 840 (Causes for Judicial Divorce) Either husband or wife may apply to the Family Court for a divorce in each case of the following subparagraphs:
>
> 1. If the other spouse has committed an act of unchastity;
> 2. If one spouse has been maliciously deserted by the other spouse;
> 3. If one spouse has been extremely maltreated by the other spouse or his or her lineal ascendants;
> 4. If a spouse's lineal ascendant has been extremely maltreated by the other spouse;
> 5. If the death or life of the other spouse has been unknown for three years; and
> 6. If there exist any other serious cause for making it difficult to continue the marriage.'

An act of unchastity is a broader concept than that of adultery,[22] including an objective violation of fidelity with a subjective act of free will to constitute an act of infidelity.[23] Malicious desertion is defined as an act of abandoning a spouse and discontinuing their marital life without an adequate reason[24] or of discontinuing the marital relationship against the other spouse's will. This means that there were relinquishments of the marital obligations to cohabit,

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[22] Korean Supreme Court Decision 62Da54, delivered on 14 March 1963.
[23] Korean Supreme Court Decision 76Meu10, delivered on 14 December 1976.
[24] Korean Supreme Court Decision 5291Minsang190, delivered on 29 September 1959.

support and co-operate with one another. Extreme maltreatment by a spouse or by their lineal ascendant (KCC, art 840(3)) or extreme maltreatment by a spouse to one's lineal ascendant (KCC, art 840(4)) are both defined as situations in which there was physical and/or mental abuse, and sustaining the marriage would cause severe pain to the suffering party.[25] When the life or death of a spouse cannot be determined or proven for at least the previous 3 years, this constitutes an unknown status of the spouse (KCC, art 840(5)). This 3-year period begins from the date that the remaining spouse is able to confirm the living status of the missing spouse. To apply for divorce, the remaining spouse must demonstrate that the 3 years have fully lapsed, and that the whereabouts of the missing spouse is still unknown.[26]

While the divorce grounds listed in KCC, art 840(1)–(5) are tangible, art 840(6), which states 'other serious causes making it difficult to continue the marriage', is the most abstract and most ambiguous reason for divorce. Any one of these six items is sufficient for divorce, as long as the court is in agreement.[27]

(c) Grounds for judicial divorce: fault-based divorce and no-fault divorce

(i) The concepts of fault-based divorce and no-fault divorce

In a fault-based divorce system, a divorce is granted only if a spouse is guilty of marital misconduct, such as cruelty, adultery or desertion. Any spouse who has engaged in marital misconduct will qualify as being 'at fault'.[28]

For the sake of preserving and strengthening the marriage, the spouse who wanted the divorce should not be at fault. Therefore, a guilty spouse may not file for divorce, while the innocent spouse may claim for damages against the guilty spouse. Having a fault-based divorce system generally creates an environment in which people abide by conjugal norms, since these types of divorces usually result in compensation for the spouse who abided by the conjugal duties being paid by the guilty spouse.[29] Thus, the significance of a fault-based divorce lies in penalising the guilty spouse and protecting the innocent spouse.

However there are concerns about fault-based divorce. First of all it excessively limits the possibility of divorce even when a marriage is already broken by no fault of either spouse, such as incompatibility or mental illness. The most

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[25] Korean Supreme Court Decision 2003Meu1890, delivered on 27 February 2004.

[26] Sang-Yong Kim and Ju-Su Kim *Family Law* (Bobmunsa (Seoul), 9th edn, 2008) p 186.

[27] Ibid, p 187.

[28] The no-fault divorce revolution started in 1968 in the state of California, USA, although the fault-based divorce system was used even before then. England enacted the Family Law Act in 1996, eliminating the existence of fault issues that were regulated in the Matrimonial Causes Act. They also changed their position to the no-fault theory. See Whasook Lee, above n 13, 268.

[29] LJ Weitzman *The Divorce Law Revolution and the Illusion of Equality: a View from the United States* in M Freeman (ed) *Essays in Family Law 1985* (Stevens, 1986) p 85.

important concern is when an innocent spouse refuses to agree to divorce.[30] Moreover, in order to claim damages under the fault-based divorce law, each party may expose each other's private lives in an attempt to demonstrate why the other spouse should be considered at fault, possibly leading to debasement of their character.[31] However, under KCC, art 840 fault-based divorce is viewed as a means to allow only the innocent spouse to apply for judicial divorce even without the consent of the guilty spouse. Therefore, a fault-based divorce is by itself a kind of remedy for the innocent spouse. The general idea of this kind of divorce implies a moral responsibility for failure.

The no-fault divorce, on the other hand, refers to the unilateral dissolution of an irretrievably broken marriage, without assigning blame or identifying the cause of the failed marriage. This type of legislative model has been adopted by the United Kingdom, France, Germany, and most of the states in the United States, including California,[32] as well as others.[33] The significance of a no-fault divorce lies in being able to end a marriage in which the circumstances were due to no-fault grounds such as incurable mental illness or voluntary separation. That is, by ending a failed marriage and solving any problems that may arise during and after the court proceedings (ie issues regarding children, custody and finances), a no-fault divorce prevents an emotional confrontation between the spouses and formally releases them from their conjugal relationship. Thus, in comparison to the fault-based divorce, the no-fault divorce allows for a 'mature divorce'.[34]

There is also criticism of no-fault divorce: First of all no-fault divorce may weaken conjugal obligations. And if the standards for judging the breakdown of marriage are indefinite, the court might further make arbitrary decisions when deciding if the marriage is irretrievably broken.

(ii) Korean divorce law: fault-based or no-fault divorce?

Preliminary

Korea has adopted a more advanced version of no-fault divorce than that used in other countries, because divorce by agreement is allowed without judicial examination and decision. What is more, if it is found that both parties have no intention of maintaining their marriage, the divorce is finalised without taking into account any other elements, such as irreconcilable differences, long-term separation or a serious cause that makes it difficult to continue on with the marriage (KCC, art 840(6)). The mutual agreement of both parties to divorce is

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30 Whasook Lee 'Old Aged Divorce, Divorce Ground and Separate Property System' (2000) 7(1) *Yonsei Law Journal* 4.

31 LJ Weitzman *Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (Free Press, New York, 1985) pp 20–26.

32 Chun Eui Hong 'Der Scheidungsantrag eines Verschuldensehegatten und der Schutz des anderen Ehegatten' 17 *The Legal Study* (Chonbuk National University law research institute, 1990) pp 200–201.

33 Eun-Young Lee *Civil Law II* (Bakyoungsa, 5th edn, 2005) p 593.

34 Whasook Lee, above n 30, 7.

sufficient grounds for divorce. For this reason, Korean divorce law as a whole can be seen as a system that follows the no-fault divorce law.

However, in focusing on judicial divorce in KCC, art 840, the question has been raised as to whether or not it is a fault-based divorce. Korean divorce law does not define it as such, and so it is open for interpretation, which will decide the character and identification of the grounds for judicial divorce. Fault is inherent in the terminologies of unchastity, desertion, extreme maltreatment by the other spouse or the lineal ascendants and extreme maltreatment to one spouse's lineal ascendant, which are enumerated in KCC, art 840(1)–(6).

However, the grounds of ambiguity of the death or life of the other spouse (KCC, art 840(5)) and a serious cause making it difficult to continue on with marriage (KCC, art 840(6)) are both divorce grounds which have no element of fault associated with them when the latter two divorce grounds are literally interpreted. In particular the divorce ground in art 840(6) is so inclusive and abstract that the interpretation of this item has received much attention. The following section will examine the correlations between the six grounds for judicial divorce.

Evaluation of the grounds for judicial divorce

There is a debate on whether each ground for divorce that is listed in KCC, art 840 adheres to a fault-based divorce, no-fault divorce, or both. The first opinion, which is supported by the Korean Supreme Court, understands all of them as fault-based grounds. The first five items are specifically described, because these were expected to be most important and most often alleged in divorce suits. All the fault grounds of divorce could not be listed so that a general clause which was supposed to subsume any other fault grounds was necessary. 'Any other serious cause' in the sixth item takes the role of such subsumption. That is the reason why even the sixth item should be interpreted as a fault ground.[35]

The second opinion regards them all as no-fault grounds. Some scholars[36] insist that KCC, art 840 is to be applied only to no-fault divorces, arguing that the first five divorce grounds are just enumerated typical examples of the sixth item, irreconcilable breakdown of marriage.[37] And such irreconcilable breakdown of marriage is generally described as any other serious cause in the sixth item, which subsumes not only the fault grounds, but no-fault grounds as well. According to the literal interpretation, the sixth item does not require fault in order to apply for divorce. Korean divorce law adopts eventually a no-fault divorce system due to art 840(6).

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35 In detail see Whasook Lee, above n 30, 14.

36 Sang-Yong Kim and Ju-Su Kim, above n 26, p 190; Kyung-Hee Lee *Family Law* (Bubwonsa (Seoul), new edn, 2008) p 112.

37 Sang-Yong Kim and Ju-Su Kim, above n 26, p 178.

According to this opinion any spouse regardless of his or her fault can basically apply for divorce. The existence of fault is not significant.

The third opinion understands KCC, art 840 as an article for both types of divorce. According to this opinion the first four items of KCC, art 840 are to be understood as specific, fault-based grounds. Meanwhile the fifth and the sixth items are regarded as no-fault grounds.[38] All the six divorce grounds in KCC, art 840 are independent of each other and parallel.

Such differences in opinion have practical consequences on whether the Family Court should grant a guilty spouse a judicial divorce.

III THE RIGHT OF A GUILTY SPOUSE TO FILE FOR JUDICIAL DIVORCE

Restricting a party from applying for judicial divorce has been debated, and the courts have been repeatedly changing their position on this matter. It is unclear simply from the text of the Korean Civil Code whether (a) judicial divorce is granted as long as there is a ground regardless of who is the guilty spouse; or (b) only those who did not contribute to the grounds for divorce are qualified to file for judicial divorce under this article.

The aforementioned first five items of KCC, art 840 are largely understood to be typical grounds for a fault-based divorce. In particular, by looking at the context of this code, it can be interpreted that only the innocent spouse may apply for a divorce.

However, the theories and the courts are split in their decision as to whether the guilty spouse may apply for a judicial divorce under KCC, art 840(6) which states the reason as 'any other serious cause for making it difficult to continue the marriage'. This stems from the difference in viewing the sixth item as grounds for a fault-based divorce or for a no-fault divorce. For those who view the sixth item as a justification for a fault-based divorce, it is impermissible to allow a guilty spouse to apply for a judicial divorce, while those who view the sixth item as a justification for a no-fault divorce feel that a divorce should be granted if the breakdown of marriage can be demonstrated.

(a) Theories and controversies

From the point of view that the grounds for judicial divorce in the current KCC are a combination of fault-based and no-fault divorce bases, the legal topic of whether to grant a divorce to a guilty spouse is ready for discussion.[39]

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[38] Kang-Won Lee 'The Study on the Amendment of Divorce Law' (2005) 10 *Research of Legal Practice* (Seoul Family Court) 579.

[39] Sang-Yong Kim and Ju-Su Kim, above n 26, pp 191–192.

(i) Positive proposition

The positive proposition position acknowledges the possibility of granting a divorce to a guilty spouse. This proposition argues that (1) forcing the sustenance of marriage is against the morality of marriage, which is fundamental to an individual's character; (2) insisting on the continuity of legal marriage will further promote bigamy and de facto marriages outside of the law;[40] and (3) protecting the innocent spouse in a broken marriage will not maintain the marriage.[41]

(ii) Negative proposition

As opposed to the positive proposition, this position denies the guilty spouse the ability to apply for a divorce. The rationales for this position are that: (1) it is against moral justice for the guilty spouse who caused the breakdown of marriage to request its dissolution; (2) one may unjustly face a compulsory divorce due to the will of the other spouse to end the marriage;[42] (3) women as innocent parties, who tend to be economically disadvantaged, must be protected; and (4) it is against 'Trust and Good Faith' and 'Prohibition of Abuse of Right', which are the general principles of civil law.[43]

(iii) Compromise proposition

Currently, the majority of academia shares the opinion that the application for divorce by a guilty spouse must in general be precluded, but that it should be allowed in exceptional cases.[44] The Korean courts seem to have also adopted this position. However, there are differences in opinion as to which circumstances are categorised as exceptional.

(b) Tendency of judgments (case-law)

Ever since the dismissal[45] of the divorce suit by a guilty spouse, the Korean Supreme Court has maintained it as a rule in case-law. Nonetheless, the court first accepted a divorce suit by a guilty spouse as an exception in 1987,[46] and the court has continued to accept these types of exceptions.[47] Considering that

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40 In a case in which the plaintiff, who had been forced by his parents to marry the defendant, had not lived with the defendant for a long time and was in a new marital relationship with another woman who had borne his children, the plaintiff's application for divorce was denied with the reasoning that the plaintiff was solely responsible for the breakdown of the marriage (Korean Supreme Court Decision 71Meu18, delivered on 8 June 1971).

41 Chun Eui Hong, above n 32, p 219.

42 Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.

43 Kwang-Hyun Jeong *The Study on Korean Family Law* (Seoul National University Press (Seoul), 1st edn, 1967) p 801.

44 Eun-Young Lee, above n 33, p 595; Kyung-Hee Lee, above n 38, 112; Byung-Ho Park *Family Law* (Korea National Open University (Seoul), 1st edn, 1999) p 121.

45 Korean Supreme Court Decision 65Meu37, delivered on 21 September 1965.

46 Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.

47 Korean Supreme Court Decision 2009Meu2130, delivered on 24 December 2009.

lower ranking courts tend to dismiss many of the divorce suits on the basis that they are being filed by a guilty spouse,[48] it is important to observe how the court determines which cases are exceptional cases.

(i) General principle – denial of the right of the guilty spouse to file for divorce

The Korean Supreme Court in principle forbids the guilty spouse from filing for divorce. For instance, the Supreme Court has held that in the case where the spouse had committed an act of infidelity, such as having a mistress or committing adultery, the cause of the failure of marriage is primarily attributed to the spouse even if the marriage was broken by the other spouse's infertility, the act of reporting the former's corruption, long-term separation or the act of suing the former for charges of adultery, thereby, in principle, ruling against divorces that were filed by guilty spouses. The rationale of the Supreme Court was that 'not only is it fundamentally against the morality of the institution of marriage to allow the right to divorce to the person who caused the failure of marriage, but granting such divorces will promote unjust consequences such as expulsive divorces'. This is illustrated by the following Supreme Court decisions:

(a) The first decision of the Korean Supreme Court on this matter rejected a husband's application for divorce because it found that he was liable for the breakdown of his marriage because he had a mistress. In this decision, the court dismissed the divorce suit since the husband, the petitioner in the case, disrespected the importance of domestic peace and fundamental gender equality, and because he caused the breakdown of his own marriage by having a mistress and was thereby identified as a guilty spouse.[49]

(b) Furthermore, a divorce was not granted in a case in which the petitioner's repeated sexual relationships and cohabitation with other women led to a poor marital relationship that had resulted in a separation. The court reasoned that 'to allow the right to file for divorce to those who intentionally committed the unlawful act of breaking the marital relationship would be unjust, and if the law tolerates this sort of phenomenon, the sanctity of marriage and fidelity of the spouse protected by the Constitution would not be achievable'.[50]

(c) The Korean Supreme Court rejected a petition for divorce by a husband, who unjustly demanded that his wife had to choose between the family and her religion, although the coexistence of religion and family was in

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[48] In 2000, approximately 60% of the grounds for dismissal of divorce suits by the lower courts of the Seoul Family Court were due to guilty spouses applying for divorce. In detail see Seong-Gon Kim 'About the Guilty Spouse's Claim for Divorce' (2001) 10 *Research of Legal Practice* (Seoul Family Court) 111.

[49] Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.

[50] Korean Supreme Court Decision 71Meu51, delivered on 23 March 1971.

fact possible. The wife inevitably chose her religion over the well-being of the family, and thereby broke the marital relationship. The facts of this case show that the plaintiff (husband) demanded that the defendant (wife), who was a Jehovah's Witness, had to choose between her religion and their family because he reasoned that the principles of the Jehovah's Witnesses such as the refusal of military service were frequently in the press. However, the defendant refused to give up her faith. The Korean Supreme Court held that the principles of the Jehovah's Witnesses themselves are not illicit and that the approximate 5 hours of worship that is required per week was not a severe deterrence to marital life.[51]

(d) In particular, a petition for divorce was dismissed in a case in which the defendant left home due to the plaintiff's extreme maltreatment, holding that the defendant was not guilty of elopement, and therefore only the plaintiff was at fault. It should be noted that the act of running away from home, which the defendant under special circumstances did in this case, was determined to not qualify as a fault-based ground for divorce.[52]

(e) The petition for a divorce by a plaintiff should be granted in the case in which the marriage was irretrievably broken due to both spouses, unless one was more at fault than the other.[53] In case (d), the elopement by the defendant was not at all recognised as a cause of the problems, and fault was found in only the plaintiff**.** This case, on the other hand, recognised fault in both parties and compared the degrees of fault in order to determine whether the petition for the divorce was valid.[54]

(ii) Exceptional circumstances in accepting the guilty spouse's right to file for a divorce

Existence of a serious cause making it difficult to continue on with the marriage

The ground for divorce that is prescribed in the sixth item of KCC, art 840 refers to when marital life, which should be based on love and trust, is irretrievably broken and forcing the continuation of marriage would inflict unbearable pain on one of the spouses. In order to determine whether this is the case, various factors, such as the intent of continuing forward with the marriage, which party may be at fault for the failure of the marriage, the length of marriage, whether there are children involved, the ages of both parties, their economic conditions after the divorce and so on, are all things that must be considered.

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51 Korean Supreme Court Decision 81Meu26, delivered on 14 July 1981.

52 Korean Supreme Court Decision 82Meu55, delivered on 28 June 1983.

53 Korean Supreme Court Decision 88Meu375, delivered on 27 March 1990.

54 The Korean Supreme Court Decision 90Meu408, delivered on 10 August 1990, rejected the plaintiff's application for divorce in a case where the husband (plaintiff) demanded that the wife give up her religious faith and abused her for following her faith. The marriage was ultimately broken by the wife.

In one case, a plaintiff, the wife in this situation, had over 18 years faced severe distress and emotional pain as she alone supported the family, due to the defendant's incompetence and lack of responsibility. The husband exacerbated her agony by gambling and being involved in speculative economic activities, amassing a large debt, earning the plaintiff a reputation as a 'credit delinquent'. As frustration and mistrust against the defendant accumulated, the couple frequently argued and there were instances in which the defendant committed acts of violence against the plaintiff, demonstrating a severe lack of love and trust. As a result, the marriage reached a point beyond restoration. Also, there had been no sexual relationship for almost 10 years prior to their separation, and their oldest daughter used the analogy of 'water and oil' to describe her parents' relationship and had testified that she was not opposed to their divorce. These were all serious reasons for why a continuation of the marriage would be difficult.[55]

Cases in which the degree of marital misconduct of the plaintiff is greater

Generally, the application for divorce is dismissed when there is fault on the part of the plaintiff. But what if the cause of the breakdown of a marriage is attributable to both parties? In such a case the degrees of marital misconduct of both parties are to be weighed and compared to one another. In the past, cases that have allowed a guilty spouse to petition for a divorce have been classified into three categories: (1) when the defendant has been found to be mainly accountable for the breakdown of the marriage after weighing the degrees of marital misconduct of both parties;[56] (2) when both parties have brought themselves to divorce and the degrees of marital misconduct cannot be compared to one another;[57] and (3) when the defendant has committed an act that qualifies for a judicial divorce after the marriage has already broken down.[58] In these instances, the guilty spouse's right to file for a divorce is recognised. In such cases, both parties are responsible for the breakdown of their marriage.[59] Realistically, it would not be easy to determine the degrees of fault in the breakdown of a marriage, which is essential for a divorce suit by a guilty spouse.

(1) Case granting a divorce by ruling that the defendant's contribution to the failure of their marriage was greater than that of the plaintiff's

The facts of this case were that the plaintiff, being unable to endure his debt, left his wife and family for 6 years without informing them of his exact whereabouts. The plaintiff occasionally sent letters to his family that stated 'do not try to find me'. The defendant, while trying to locate the plaintiff, made a

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55 Korean Supreme Court Decision 2007Meu1690, delivered on 14 December 2007.
56 Korean Supreme Court Decision 94Meu130, delivered on 27 May 1994.
57 Korean Supreme Court Decision 90Meu552, delivered on 11 January 1991; Korean Supreme Court Decision 85Meu85, delivered on 25 March 1986.
58 Korean Supreme Court Decision 2003Meu1890, delivered on 27 February 2004; Korean Supreme Court Decision 89Meu112, delivered on 25 September 1990.
59 Korean Supreme Court Decision 87Meu9, delivered on 25 April 1988.

living by doing day labour and had been committing adultery with another man for the previous 19 months. The court decided that the cause of the breakdown of the marriage was a result of the actions of the defendant.[60]

(2) Cases involving a divorce petition by a guilty spouse in which the degree of marital misconduct could not be determined

The defendant (wife) left her home around October 1966 due to being in debt and did not return in spite of her (plaintiff) husband's requests. As of 1967, a year after the defendant had left the plaintiff, the plaintiff had entered into a de facto marital relationship with another woman for approximately 20 years, while the defendant had been cohabitating with another man since 1972. The court could not determine the degree of fault since both the plaintiff and the defendant had not been in a traditional husband and wife relationship for more than 20 years.[61]

In another case, the plaintiff (husband) was conscripted to the Japanese military and was forced to serve in Japan 10 days after he was married to the defendant in early February of 1940. As of 1942, the defendant was in a de facto relationship with another man with whom she had a son, while the plaintiff also began a de facto marriage with another woman with whom he had two sons and two daughters. When the plaintiff briefly returned to Korea in 1962, both parties agreed to divorce but did not officially register the divorce. However, the defendant did not co-operate with the divorce procedures and was brought to court by the plaintiff. The Supreme Court granted the divorce on the grounds that the cause of the breakdown of the marriage was attributable to both parties.[62]

(3) Case in which the causation between the violating act of the plaintiff and the breakdown of marriage is denied

The court held that, in determining the fault of the plaintiff, the court was to look into the cause of the marital breakdown and that any violating act that was committed after the breakdown of the marriage was irrelevant.[63] In addition, the court was not to determine the faults of the parties by comparing the given situation prior to the breakdown of the marriage to the situation that resulted after the breakdown.

According to the fault-based divorce items of KCC, art 840 a pre-existing cause of the breakdown of a marriage does not need to be the fault of one of the individuals, but it could serve as a way to show the mutual consent to divorce between two parties. In another case, both parties had agreed to divorce 2 days after registering their marriage, and they had been separated for more than 10

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60 Korean Supreme Court Decision 82Meu63, delivered on 26 April 1983.
61 Korean Supreme Court Decision 90Meu552, delivered on 11 January 1991.
62 Korean Supreme Court Decision 85Meu85, delivered on 25 March 1986.
63 Korean Supreme Court Decision 2003Meu1890, delivered on 27 February 2004; see for the same purpose Korean Supreme Court Decision 87Meu9, delivered on 25 April 1988.

years without being in contact with one another. Two years after the agreement, the husband began living with another woman, with whom he later had children. The court granted the divorce on the grounds that, if the husband, who was the plaintiff, cohabitated with another woman after the agreement to divorce was made, he could not be held primarily responsible for the breakdown of the marriage. This case shows that the cause of the breakdown of marriage need not be the grounds for judicial divorce as stated in KCC, art 840 but could also serve as an illustration of mutual consent to divorce.[64]

Cases in which the intentions of the other spouse to divorce are objectively evident

When a guilty spouse has filed for a divorce due to the other spouse's refusing to file for a divorce by agreement, the divorce is granted if it is objectively evident that the other spouse intends to divorce even if the plaintiff is primarily responsible for the breakdown of the marriage**.** The rationale for denying the right to file for divorce by the guilty spouse is to uphold the wish of the other spouse who does not want a divorce despite the breakdown of their marriage. The purpose is not to force the continuation of the broken marriage. Thus, the court will accept the divorce petition by the guilty spouse when it is objectively evident that the other spouse has no intent to continue the marriage. The reasons why the court recognises objective evidence of the divorce intention of the other spouse are as follows.

(1) Cases of counteraction

When a spouse files for a counteraction against the guilty spouse's suit for a divorce, this act is considered incompatible with the continuation of their marriage. Thus, it is objectively evident that the spouse who has filed for a counteraction does intend to divorce, even if the plaintiff is completely responsible for the breakdown of the marriage. The divorce will be granted in these types of situations.[65]

Unless there are no special circumstances, the counter-application for a divorce will be granted, and the application for divorce by the guilty spouse will be dismissed. In one case, the cause of the breakdown of the marriage started when the husband and his parents began to mistreat his wife, who was not receiving any financial support from the husband. The husband would physically abuse his wife after their arguments. The wife's behaviour, such as leaving their home and harassing her husband at his workplace, also contributed to the breakdown of the marriage. The court found that, if the husband and wife filed for divorce separately, then it is objectively evident that neither party has any intention to continue the marriage. Thus, even though the

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[64] Korean Supreme Court Decision 86Meu90, delivered on 22 December 1987.
[65] Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.

wife was at fault for leaving their home, her counteraction of requesting for the dissolution of marriage will be granted.[66]

However, the act of filing for counteraction itself does not always result in the granting of the guilty spouse's divorce suit. In one particular case, the defendant continuously refused the plaintiff's request to divorce due to her children's opposition to a divorce and the possible financial hardship that she might face if a divorce was granted. However, the defendant could no longer refuse to divorce considering the fact that the plaintiff began to abuse their children after the plaintiff had expressed his wish to get a divorce. The defendant decided to file for a divorce as well because she could not bear to see the parent-child relationship falter. The court, taking all of the above into consideration, held that it was difficult to decide whether or not the defendant refused to divorce because of vengeance even though she had no intention to continue the marital relationship.[67]

(2) Case in which the other spouse commits acts that are incompatible with marriage

Even in cases when the fault of the breakdown of the marriage is entirely with the plaintiff, the divorce suit may be granted when it is evident that the other spouse has no intentions of maintaining the marital relationship.[68] There are yet some cases that do not acknowledge the spiteful or vengeful quality of the other spouse's refusal to divorce.

In one case, a plaintiff (husband) frequently assaulted and battered the defendant (wife), resulting in the wife filing for divorce against him, although she later chose to drop the case when the plaintiff begged for forgiveness. A few years later, the defendant and her parents demanded a divorce by agreement when the husband again began to abuse the defendant. The plaintiff agreed to a divorce as well, offering the defendant an apartment as alimony. Shortly after, without fulfilling his promise, he filed for judicial divorce. Meanwhile the defendant successfully filed charges against the plaintiff for assault and battery. Their two sons lived with the mother of the plaintiff, and the defendant had never stopped by to visit with her sons or with the plaintiff. Despite all of these facts, the defendant continuously expressed her intent to continue her marriage with the plaintiff throughout the proceedings. Also considering that the plaintiff did not carry out the conditions for divorce by agreement and turned his wealth over to someone else before filing for this divorce, the court found that the defendant's intent to continue the marriage existed.[69]

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66 Korean Supreme Court Decision 87Meu44, 45, delivered on 8 December 1987.
67 Korean Supreme Court Decision 98Meu15, 22, delivered on 23 June 1998.
68 Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.
69 Korean Supreme Court Decision 92Meu778, delivered on 12 February 1993.

(3) Cases with a charge of adultery and its judgment conviction[70]

When one spouse accuses the other of adultery and the guilty spouse is convicted of the charge, the court generally finds that it is objectively evident that the spouse's accusation can be considered as an intention to divorce. In one case, the wife accused her husband of adultery and he was convicted. As a consequence, the husband lost his medical doctor's licence. When the husband served his sentence, the wife did not welcome him back and chose to remain separated. The wife had filed for divorce when she sued the husband for adultery, but the case was dismissed due to an incorrect address. When the husband wanted to file for divorce, the wife then refused. Under these circumstances, the divorce suit by the husband was granted, since the wife's refusal to divorce was merely due to vengeance and her intent to divorce was objectively clear.[71]

In a similar case that dealt with a charge of adultery and divorce, the court allowed the guilty spouse's right to file for a divorce on the grounds that the guilty spouse was not solely to blame for the breakdown of the marriage.[72] In another case, a wife accused her husband of adultery, for which he was found guilty in the lower court. However, before the judgment of the appellate court was to be delivered, the wife decided to drop the divorce suit. The court found that her actions were merely a ploy to annoy and harass the husband and were not because of her desire to maintain the marriage.[73]

However, the Korean Supreme Court has been reluctant to conclude that charging the guilty spouse with adultery is a clear sign of the other spouse's intent to divorce.[74] Although there is an article that requires the innocent party to divorce or file for divorce in order to charge the spouse with adultery (Korean Criminal Procedure Code, art 229(1)), it is common for the innocent party to file these charges of adultery against the guilty spouse to punish them and to induce repentance. Therefore, it is difficult to assume that the accusation of adultery is a clear, objective sign of the other spouse's intent to divorce.

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[70] Under the Korean criminal law, a person who has committed adultery is sentenced to 2 years in jail along with the person with whom they committed the act (Korean Criminal Code, art 241(1)). The second paragraph notes that adultery is an offensive subject and that the nature of adultery is due to a disturbance in sexual faithfulness. Korean Criminal Procedure Code, art 229(1) states that in order to accuse one of adultery, the marriage should have ended or at least be in the process of a divorce suit. Furthermore, Korean Criminal Procedure Code, art 229(2) regulates that the accusation is cancelled when a divorce suit is withdrawn or if the plaintiff re-engages. Because of these reasons, accusing a spouse of adultery can have unique problems in that the existence of a divorce suit may affect the results of an adultery accusation. (Youn Hwan Seong 'A divorce suit and an effect of complaint of adultery' (2007) 9(1) *Chung-Ang Law Review* 2.

[71] Korean Supreme Court Decision 86Meu28, delivered on 14 April 1987.

[72] Korean Supreme Court Decision 87Meu60, delivered on 9 February 1988.

[73] Korean Supreme Court Decision 91Meu177, delivered on 26 November 1993.

[74] Korean Supreme Court Decision 97Meu155, delivered on 16 May 1997.

(4) Other cases with criminal charges

In one case, the defendant (wife) accused the plaintiff and his father of criminal charges. A petition was also submitted that requested strict punishment of the plaintiff when he faced criminal charges for driving without a licence. The plaintiff, on the other hand, was in a relationship with another woman and had previously abused the defendant. The court took all of the above into consideration and decided that the defendant had no intention to continue her marital relationship with the plaintiff but was refusing to divorce out of spite or vengeance.[75]

Long-term separation

In addition to the reasons that have already been discussed, a long-term separation of at least 10 years is another important ground on which a guilty spouse may apply for a divorce. However, long-term separation by itself does not give a guilty spouse the right to file for divorce. It is merely used to show that the other spouse does not intend to continue the marital relationship.

The court holds that:[76]

> ' . . . if the wife B who filed charges against her husband A for adultery and caused him to serve time, thereafter receiving alimony and child care and agreeing to divorce under her free will, neglected the fact that A cohabitated with another woman C with whom A had children, and did not contact A for ten years, B cannot be assumed to have an intent to continue her marriage with A. If B is unwilling to give consent to divorce, then it cannot be judged that the current breakdown of the marriage cannot be solely attributed to B even if he was initially guilty of adultery.'

That is, if the fault of both parties is recognised and both parties have been separated for at least 10 years, then the application for divorce by a guilty spouse will be granted. It is important to note that a long-term separation is not used as an independent cause of the breakdown of a marriage, but rather as a means to determine the intention of the other spouse.

However recently, a Korean Supreme Court decision seems to have recognised long-term separation as an independent justification for divorce. In this particular case, the plaintiff (wife) and the defendant (husband) were separated for 11 years due to the plaintiff's constant drinking and overnight absences. After the separation, the plaintiff lived with another man, gave birth to a disabled daughter, and needed an official divorce in order to apply for welfare to treat her daughter. Later, the defendant urged the plaintiff to come back, on the condition that the daughter was left with the other man. In this case, the

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[75] Korean Supreme Court Decision 2003Meu1890, delivered on 27 February 2004; Korean Supreme Court Decision 94Meu741, delivered on 25 June 1996.

[76] Korean Supreme Court Decision 87Meu60, delivered on 9 February 1988.

court found that the marriage had already been completely dissolved, that both parties were at fault, and that they were both responsible for the breakdown of their marriage.

In this case, the court reasoned that the long-term separation signified the extent of the dissolution of the marital life. Although the defendant's desire to stay married must be taken into account, it should be noted that the defendant's intent seemed to be rooted in a desire to maintain a superficial marriage. In addition, determining of the degrees of fault was meaningless and unnecessarily difficult, and the circumstances of maintaining the marriage created unbearable pain to the plaintiff, thus the plaintiff was granted a divorce.[77]

Although the court has allowed divorce when the degree of marital misconduct by the defendant was less than that of the plaintiff, in cases in which both parties are offenders the notion of fault is weakened. That is, in light of the plaintiff's circumstances, the legal evaluation of her fault differed on the assumption that either it was impossible or that the legal significance in weighing and balancing her degree of fault had lessened. This case illustrates that the position of the court is transitioning towards a no-fault divorce perspective.

IV CONCLUSIONS

When one party applies for a judicial divorce because the other spouse is in disagreement over the divorce, then one of the divorce grounds in KCC, art 840 must be proven. Never before has the divorce ground of KCC, art 840(6) which states that 'any other serious cause for making it difficult to continue the marriage', been more important. The sixth item can be used as an applicable provision by a guilty spouse to file for a judicial divorce.

The grounds for divorce are not to be confused with fault, as a justification for divorce refers only to the reason for the divorce. It is another question whether the justification for divorce was the fault of the spouse or not. The grounds for divorce include not only incompatibility and irreconcilable differences, but adultery and cruelty as well. Fault refers to the fact that a person in a marital relationship did wrong. In KCC, art 840 there are six grounds that are listed and applicable for a judicial divorce. The sixth item of the article provides one divorce ground, one which is not fault-based.

Korean precedents do not grant divorce to a guilty spouse, because they fundamentally regard a judicial divorce as a fault-based divorce. At the same time some decisions have been made that have allowed for some exceptions, which have recently been more widely accepted. The application for a divorce by a guilty spouse is accepted when the opposing spouse is held primarily

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[77] Korean Supreme Court Decision 2009Meu2130, delivered on 24 December 2009.

responsible for the breakdown of the marriage. Then it is of no consequence that the applicant was partly responsible for its breakdown. Moreover, it seemed that the court has been substantially more focused on the issue of irreconcilability than the issue of fault. By holding that under certain circumstances, such as long-term separation, the fault of the parties is not significant, the courts have been consistently widening the scope of no-fault divorce. Such exceptions have enabled even the guilty spouse to file for a judicial divorce.[78] Therefore it is important to realise the extent to which no-fault divorces should be granted.

This tendency does seem plausible, yet it requires further examination. In light of the fact that a divorce mainly affects the dissolution of a legal marriage, the most important standard in granting a divorce should depend on whether or not the conjugal community of the spouses no longer exists and it cannot be expected that the spouses restore it. If the breakdown of a marriage is recognised, then the divorce should not be rejected only because the plaintiff is found at fault.

Another factor to be taken into account is reparability. In most judicial divorce cases the irretrievable breakdown of a marriage is caused by both parties. There are many causes for the marital breakdown even in one divorce case. It is difficult to verify which spouse was primarily at fault. As a consequence, the most important issue for a judicial divorce is whether the marriage is irretrievably broken.

Only under specific circumstances when it is predicted that the after-effect of a divorce would cause a psychologically, socially and economically severe hardship to the other spouse or the minor children will the court exceptionally dismiss a suit of a guilty spouse. It is the court's discretion to determine which exceptional cases of divorce should be denied, but in general most of the divorce cases that are filed by a guilty spouse should generally be approved.

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[78] Korean Supreme Court Decision 2009Meu2130, delivered on 24 December 2009.

Spain

DAMAGES IN FAMILY MATTERS IN SPAIN: EXPLORING UNCHARTED NEW LAND OR BACKSLIDING?

Miquel Martín-Casals and Jordi Ribot[*]

Résumé

Dans la seule année 2009 plusieurs livres ainsi que de nombreux articles et chapitres de livres ont été consacrés tant à la question des recours en responsabilité civile entre conjoints visant la réparation d'un préjudice causé pendant le mariage ou provoqué par sa rupture, qu'à la question de la possibilité de recours en responsabilité civile des enfants contre leurs parents pour non-respect de devoirs parentaux. Un arrêt de la Cour suprême d'Espagne rendu le 30 juin 2009 a incité certains auteurs à s'intéresser à ces questions, alors que des tribunaux inférieurs se sont également penchés sur le sujet à l'occasion de demandes de dommages-intérêts réclamés par des hommes contre leur ex-conjointe après qu'ils eurent contesté avec succès leur lien de paternité. La présente contribution entend démontrer que les positions doctrinales qui encouragent ce genre de recours en responsabilité, sont fragiles tant en regard du droit de la famille que du droit de la responsabilité civile. En faisant abstraction de certains éléments fondamentaux du droit de la responsabilité, ces auteurs prônent des solutions incompatibles avec les principes sous-jacents à l'évolution récente du droit familial espagnol.

'. . . and once more it was borne in on him that marriage was not the safe anchorage he had been taught to think, but a voyage on uncharted seas.'

Edith Wharton *The Age of Innocence* (Grosset & Dunlap, 1920) 40

I A 'FASHIONABLE' TOPIC?

In a ruling issued on 30 June 2009[1] the Spanish Supreme Court upheld the claim for an award of damages filed by a man who had been granted custody of his 7-year-old son, but who could never see him again because his former spouse had taken him to the United States and had prevented any further

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1 Judgment of the Supreme Court (hereafter STS) 30.6.2009 (RJ 2009, 5490; commented on by G Bosques Hernández, *Cuadernos Civitas de Jurisprudencia Civil* [CCJC] (2010) 83 (forthcoming)).

contact with him. The Supreme Court granted the father an award of €60,000 as compensation for non-pecuniary loss (*daño moral*, ie moral damage) suffered and, thereby also took into account that the situation giving rise to damage was already irreversible, since when the decision was issued his son was already 25 years old.

A sector of Spanish legal scholarship considers that this decision recognises an important role of damages awards (either in tort, in contract or simply for the breach of a legal duty) in family law disputes and, according to some authors, the decision even confirms that this is a 'fashionable' topic.[2] In fact, in recent years interest in the Spanish doctrine on the feasibility and scope of these damages awards within the area of family relationships has grown enormously. Perhaps, influenced by the doctrine and case-law of other countries, especially from France, Italy and Argentina, there is an ever growing interest in the possible actions between spouses for damage caused during marriage or as a result of marital breakdown, as well as in possible claims of children against their parents for the damage resulting from infringement of parental duties. During 2009 alone, several monographs – two of them being the result of extensive dissertations[3] – and a significant number of articles and book chapters have been published on these topics[4] and these are simply new references that can be added to an already extensive body of recent legal literature.[5] Surprisingly enough, the Spanish legal doctrine had barely addressed these issues before.[6]

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[2] See JR de Verda y Beamonte 'Intromisión ilegítima en las relaciones entre padres e hijos por las administraciones y particulares' (2009) *SEPIN Familia* no 4387 ('Without doubt, the issue of civil liability in the area of family relationships is fashionable'). From the same author see also 'Responsabilidad civil y divorcio en el Derecho español: Resarcimiento del daño moral derivado del incumplimiento de los deberes conyugales' (21.3.2007) *La Ley* no 6676. See also AM Romero Coloma 'Indemnizaciones entre cónyuges y su problemática jurídica' (2009) 715 *Revista Crítica de Derecho Inmobiliario* 2441.

[3] MA Novales Alquézar *Las obligaciones personales del matrimonio en Derecho comparado* (2009); AM Rodríguez Guitián *Responsabilidad civil en el Derecho de familia: Especial referencia al ámbito de las relaciones paterno-filiales* (2009); AM Romero Coloma *Reclamaciones e indemnizaciones entre familiares en el marco de la responsabilidad civil* (2009); D Vargas Aravena *Daños civiles en el matrimonio* (2009).

[4] Romero Coloma (above n 2) 2441–2461 and V Moreno Velasco 'La indemnización de daños y perjuicios por daños patrimoniales y morales derivados del incumplimiento del régimen de visitas' (2009) *La Ley* no 7163. See also MP García Rubio 'La prestación compensatoria tras la separación y el divorcio. Algunas cuestiones controvertidas' in *Estudios Jurídicos en Memoria del Profesor José Manuel Lete del Río* (2009) 341–377.

[5] JR de Verda y Beamonte (ed) *Daños en el Derecho de Familia* (2006); MA Novales Alquézar 'Hacia una teoría general de la responsabilidad civil en el Derecho de Familia. El ámbito de las relaciones personales entre los cónyuges' (2006) 60 *Revista jurídica del notariado* 197–218. See also AM Romero Coloma, *La indemnización entre cónyuges, excónyuges y parejas de hecho* (2008) and 'Genera responsabilidad civil la violación de los artículos 67 y 68 del Código Civil' (2000) *Revista de Responsabilidad Civil, Circulación y Seguro* 544–549 and A Pérez Mayor 'Revolución en el derecho de familia: Indemnización por daño moral' (2008) 7666 *Actualidad Jurídica Aranzadi* and 'Crisis matrimoniales e indemnización por daño moral' (2004) *Revista Jurídica de Catalunya* 163–171.

[6] But see E Roca Trías 'La Responsabilidad civil en el Derecho de familia. Venturas y Desventuras de cónyuges, padres e hijos en el mundo de la responsabilidad civil' in JA Moreno Martínez (ed) *Perfiles de la Responsabilidad civil en el nuevo milenio* (2000) 533–563 and J

The usual starting point of the doctrinal analysis is the question of spousal or family immunity, which is defined as 'freedom . . . to harm, under the protection . . . of family relationships'.[7] It is contended that this model pertains to the historical model of the patriarchal family enshrined in the nineteenth-century civil codes and which is out-dated. It is held, however, that some forms of immunity could be promoted in practice by the existence of some institutional barriers, such as the time limitation of actions between family members.[8] In contrast to this model based on the concept of immunity, it is stressed that the contemporary family must serve individuals and establish the field where they exercise their fundamental rights and which ensures a harmonious development of their personality. The individual, therefore, cannot be deprived of basic protection granted, for instance, by the law of torts, for damage resulting from an act or omission of another family member.[9] Moreover, excluding tort compensation from among family members would be inconsistent with a general trend which allegedly 'aims at full compensation of all damage'.[10]

The second step in this analysis emphasises that the obligations relating to family relationships and, in particular, the mutual duties of spouses and the duties of parents as regards the person and property of their minor children, are legally binding obligations and, as such, enforceable. Although both sets of duties cannot be subject to coercive imposition by the state, 'this fact does not deprive such obligations or duties of their legal status'.[11] Consequently, a family member should 'not breach them without being subjected, at least as an initial possibility, to compensation for the damage caused', which will normally be compensation for non-pecuniary loss, but which can also result in compensation for pecuniary loss.[12]

It is obvious that in many cases the misconduct of a spouse or parent will be so serious that it will also involve a criminal breach and, therefore, a criminal sanction. This is the case of the conduct that the Penal Code typifies as criminal offences and, according to Spanish law, it is indisputable that if criminal offences also cause compensable damage, this is recoverable in tort.[13] What characterises the most recent Spanish legal doctrine, however, is that

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Ferrer Riba 'Relaciones familiares y límites del Derecho de daños' in *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo* (2003) vol II, 1837–1868.

7 See Vargas Aravena (above n 3) 19. Novales Alquézar (n 5) 206 contends that it would be a sort of bull provided by family law that would allow causing harm without punishment ('bula del Derecho de familia que permitiría dañar impunemente'). See also Romero Coloma (above n 2) 2460.

8 Rodríguez Guitián (above n 3) 65.

9 Vargas Aravena (above n 3) 118 and more references therein.

10 Vargas Aravena (above n 3) 212.

11 Rodríguez Guitián (above n 3) 84.

12 Rodríguez Guitián (above n 3) 84.

13 Pursuant to art 109(1) of the Spanish Penal Code (hereafter CP) 'the execution of an act described by the law as a crime or a minor offence entails the obligation to repair the harm thereby caused in the terms provided by the legislation' and according to CP, art 116(1) 'every person who is criminally responsible for a crime or a misdemeanour is also civilly liable in the act which gives rise to damage'.

beyond those kinds of conduct described as offences by criminal law it tries to mark off other sorts of conduct that deserve social reproach and criticism and which would also give rise to compensation for the damage caused to the spouse or to the child.

These kinds of conduct are related to the practice of the roles of spouse or parent and their boundaries are usually demarcated from different perspectives. On the one hand, it is considered that liability does not arise from any sort of non-compliance, but only from conduct which 'for its gravity or its recurrence, is able . . . to break the balance of the family relationship [and also] . . . to infringe fundamental rights of the family member'.[14] The limit of what is compensable could be thus found in an undetermined 'infringement of fundamental rights' in the spousal or parent-child relationship. This thesis is nevertheless considered insufficient by those who argue that the source of the obligation to compensate for the damage suffered is the serious or repeated violation of marital or parental duties, even if the defendant's conduct cannot qualify as an infringement to the fundamental rights of the claimant.[15]

Paradoxically, the major reforms on divorce that took place in 2005 and which have introduced the possibility of unilateral divorce without the need to establish any grounds,[16] have encouraged legal doctrine to explore the possibility of compensation for damage resulting from marital breakdown. Since the reform has removed the previously existing limited effects resulting from the infringement of spousal duties, which mentioned serious or repeated infringement as grounds for separation or divorce only, this section of the legal doctrine considers that it is now inescapable to invoke their infringement as grounds for a claim for damages when marriage breaks down. Otherwise these duties would be deprived of all their binding force or legal efficacy.[17] Moreover, and apart from any violation of those duties, it has also been argued that 'since marriage is a bilateral contract whose fulfillment cannot be left to the will of one of the contracting parties . . . it shall necessarily involve compensation for damage . . . resulting from liability for a non-consensual breakup'.[18] In this

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[14] Rodríguez Guitián (above n 3) 89.

[15] Verda y Beamonte (above n 2) generally. See also Vargas Aravena (above n 3) 223ff and more references therein.

[16] See Act 15/2005 of 8 July, *por la que se modifican el Código Civil y la Ley de Enjuiciamiento Civil en materia de separación y divorcio*. On this reform see M Martín-Casals and J Ribot 'The Postmodern Family and the Agenda for Radical Legal Change' in B Atkin (ed) *The International Survey of Family Law 2008 Edition* (Jordan Publishing Limited, 2008) pp 411–436.

[17] See among others Verda y Beamonte (above n 2) 4 and ML Atienza Navarro 'La incidencia de las reformas de 2005 en materia de efectos personales del matrimonio' in JR de Verda y Beamonte (ed) *Comentarios a las Reformas de Derecho de Familia de 2005* (2006) p 160. See also A Domínguez Luelmo 'La supresión de las causas de separación y divorcio en la Ley 15/2005 y sus repercusiones en el Derecho Civil' (2007) 13 *Revista Jurídica de Castilla y León* 53–112 at 65–66, and MT Marín García de Leonardo 'Separación y divorcio sin causa. Situación de los daños personales' (2006) 16 *Revista de Derecho Patrimonial* 145–162. Vargas Aravena (above n 3) even calls scholars opposed to accepting damages in this case to review their point of view after the entry into force of Act 15/2005 (see pp 38 and 225).

[18] Emphasis added. See Themis *Conclusiones del taller de trabajo del 17 de noviembre de 2004*

case, the compensable damage may consist either in the harm to the reliance established by the marriage,[19] or in the fact that the spouse filing the claim for damages 'has been forced to accept a marriage breakdown that he or she had not wanted, being thereby frustrated in his/her future family expectations'.[20]

II SYSTEMATISATION OF THE GROUPS OF CASES

Accordingly, relying on various liability grounds, the authors strive to explore uncharted lands which include cases that are very different from one another. However, under the general formula of compensation for damage caused to family (spousal or parental) relationships, they stress the necessity for liability rules to play a much more important role than that which has been traditionally recognised. The hardest part, however, is to find out where they propose to draw the dividing line between compensable and non-compensable damage and on which grounds.

When trying to justify resorting to damages rules the promoters of this trend often omit the difficult task of systematising the different constellations of cases involving family relationships where damages rules can play a role and distinguishing them from those other groups of cases where a damages rule is out of place. We are convinced that reviewing and systematising the cases that legal scholars have in mind can help to assess the appropriateness or inappropriateness of the proposed doctrine.

(a) Cases of compensable damage in the relations between spouses

In this setting legal scholars usually refer to different types of cases, which may be grouped as follows:

(i) Cases such as homicide or intentional personal injury to the other spouse, sexual assault and abuse against him or her,[21] which the Penal Code describes as offences or minor offences.[22] To these cases legal scholarship could also add others which involve risks to the health of one of the spouses as, for instance, the case of the spouse who suffers a sexual disease and does not inform the other, conduct which sometimes has been

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sobre el anteproyecto de ley de reforma del Código Civil en materia de separación y divorcio (Asociación de Mujeres Juristas) document available at: www.mujeresjuristasthemis.org/documentos/Familia/index.htm (accessed 1 April 2010).

19 Domínguez Luelmo (above n 17) 66.

20 But see the critical standpoint of Vargas Aravena (above n 3) 304. Such interest was recognised, however, by STS 16.11.1985 (RJ 1985, 5901).

21 Rodríguez Guitián (above n 3) 90.

22 Homicide or intentional personal injury to the other spouse: CP, art 147(1) in connection with art 148(4) and (5); sexual assault against the other spouse: CP, arts 178 and 179; abuse: CP, art 153(1). The physical or psychological violence conducted regularly against family members is punished by means of a specific offence under CP, art 173(2) (domestic violence).

equated to a crime of assault.[23] In all these cases, as is well known, tort liability will result from the existence of a crime or a minor offence if compensable damage has been caused (CP, art 116).

(ii) Cases that involve conduct which might infringe the rights of the personality of the other spouse and that may also be punishable, such as the checking of the other spouse's private e-mail without his or her permission or opening private letters that he or she has received,[24] behaviour that can give rise to the crimes of discovery and disclosure of confidential secrets established in CP, arts 197(1) and (2).[25] This group would also include cases of outrageous public or private conduct of a spouse against the other, which can also give rise to an unlawful infringement of his or her reputation and, in extreme cases, constitute a crime of libel (CP, art 208). Also, as an infringement to the personality rights this group could include the conduct of a spouse who limits or controls the life of the other by restricting his or her freedom of movement or contact with his or her relatives or close friends, or by monitoring his or her social activities; all these cases could lead to a crime of coercion (CP, art 171(1)), which is aggravated if the victim is the wife (CP, art 172(2)). At any rate, in this group of cases civil liability may arise even when criminal liability does not exist, since the spouse carrying out this conduct could be held liable in tort for the infringement to the rights of personality of the other.

(iii) According to the prevailing opinion, the duty to compensate for the damage suffered could also exist in cases related to the sexual life of the spouses, such as the case of sexual practices consented to by both spouses,[26] but where one of the spouses considers them revolting or inappropriate.[27] This group could also include claims seeking compensation for damage resulting from unfaithfulness[28] or from the lack of sexual desire by the other spouse, or from impotence, homosexuality[29] or transsexualism.[30]

(iv) Compensation for damage could also result in cases of lack of support towards the other spouse, such as moral abandonment of a spouse who is

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[23] See for instance Judgment of the Court of Appeal (hereafter SAP) Madrid 2.1.2004 (JUR 20040872).

[24] Rodríguez Guitián (above n 3) 91.

[25] See STS 14.5.2001 and 20.6.2003.

[26] Emphasis added.

[27] Rodríguez Guitián (above n 3) 91 (this author qualifies the practise of certain sexual habits as required by the spouse as an infringement the other spouse's sexual freedom, but if consent is lacking then the case must be placed somewhere else as spousal abuse).

[28] Rodríguez Guitián (above n 3) 90 (qualifying adultery as an infringement of the spouse's right 'to psychological integrity and honour'). See also Vargas (above n 3) 39 and 101ff and Novales Alquézar (above n 5) 211.

[29] See SAP Illes Balears 5.6.2006 (dealing with a case of marriage nullity on the grounds of hidden homosexuality of the spouse uncovered many years afterwards).

[30] Vargas Aravena (above n 3) 232–233 (quoting French cases involving divorce from homosexual spouses).

facing health problems, financial difficulties, conflicts at work or conflicts in his or her family relationships. Additionally, the harm resulting from breach of the duty to share the housework[31] would also be compensable,[32] as well as the damage ensuing from lack of communication, emotional coldness and indifference suffered by one spouse for the acts or omissions of the other.[33]

(v) Finally, the unilateral breakdown of marriage without any grounds could also result in compensation for the other spouse for 'damage consisting in the fact of being forced to undergo a breakdown which is not desired and which frustrates her expectations of a family relationship in the future'.[34]

Among other situations that may relate to marriage, legal scholars often point to the public breach and, without just cause, of the formal promise of marriage (betrothal)[35] or the unilateral breach of the promise of marriage which was made maliciously with the sole purpose of obtaining sexual access to the promisee,[36] or even the case where someone pretends to be a bachelor for the purpose of having sexual access to the other person or to start living together with him or her.[37] Finally, it is also discussed whether a unilateral breach of an ongoing stable cohabitation relationship may also give rise to damages awards or not.[38]

(b) Cases of compensable damage in the parent-child relationship

In the area of the parent-child relationships the groups of cases deal with very different issues and, accordingly, a grouping attempt is more difficult and risky here. However, a possible classification could be as follows:

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[31] Enshrined since 2005 in art 68 *in fine* CC, which states that spouses 'must share domestic responsibilities and the care and attention to ascendants and descendants and to other dependent persons in charge'.

[32] See P Cremades García 'El reparto de las tareas domésticas y su valoración en el ámbito familiar' (18.12.2008) *La Ley* no 7079. García Rubio (above n 4) 365 also favours the award of damages in this case, provided that the infringement of spousal duties would have entailed 'a definitive and overwhelming obstacle to the legal autonomy of the claimant'. She relies upon LL López de la Cruz 'La incidencia del principio de igualdad en la distribución de las responsabilidades domésticas y familiares (La nueva redacción del art. 68 del Código civil tras la reforma operada por la Ley 15/2005)' (2007) 2–3 *Revista de Derecho Privado* 4–45.

[33] Vargas Aravena (above n 3) 235–6.

[34] See Marín García de Leonardo (above n 17) 152 (provided that the claim is based upon unlawful damage ('*daño injusto*') and not only upon the infringement of spousal duties). More nuanced Dominguez Luelmo (above n 17) 66.

[35] Vargas Aravena (above n 3) 82.

[36] Rodríguez Guitián (above n 3) 159. See STS 26.11.1985 (RJ 1985, 5901)

[37] Rodríguez Guitián (above n 3) 165.See also Vargas Aravena (above n 3) 86, who contends that liability for such behaviour should be confined to 'groups that hold and promote certain moralistic opinions … which could be violated by the seduction (Catholic or Islamic fanatic groups, gypsies …)'.

[38] See STS 16.12.1996.

(i) Cases described as crimes or minor offences by the Penal Code such as homicide or intentional injuries perpetrated against the child (or which are not prevented by one parent when perpetrated by the other or by his or her partner),[39] death or injuries caused intentionally to the child before birth, or abandonment of a minor.[40]

(ii) Cases related to procreation, such as infection or hereditary transmission to the child of diseases the parents knew they were suffering from and did nothing to prevent transmission;[41] or damage caused by the neglect of the medical or health care required during pregnancy or resulting from carrying out activities that were risky for the foetus or not suitable for foetal health (smoking, taking drugs, having unsafe or risky sex, etc).[42]

(iii) Cases related to the exercise of parental duties, such as the defective exercise of the duty of care towards children which causes them to suffer accidents at home or during their daily activities,[43] or the negligence or incompetence of the parents in the exercise of their duty to educate, which leads to lack of education and training that seriously impairs the future prospects of the child as regards integration into society and appropriate interaction with others.[44] Other cases that could be placed in this area are the excessive exercise or abuse of the parental power of correction;[45] giving the child treatment which is humiliating or disrespectful as regards his or her dignity as a person; having a relationship which is cold and lacks dialogue and empathy with a child;[46] lack of relationship with the child after the separation of the parents, either through neglect of the duties of the non-custodial parent[47] or because the custodial parent prevents the other from having contact with the child.[48] Finally, in the financial area, the mismanagement by parents of the property of their minor children in their capacity as guardians can also be included here.[49]

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39 CP, art 147(1).

40 Abandonment of children is punished regardless whether it puts in danger the life, health, physical integrity or sexual freedom of the minor or not (see CP, art 229(1) in connection with CP, art 229(3)).

41 Rodríguez Guitián (above n 3) 308 (arguing that the HIV infected mother could be made liable towards the child in case of transmission of an AIDS infection, whereas parents could not be held liable for knowingly conceiving a child that may inherit congenital defects or diseases).

42 Rodríguez Guitián (above n 3) 296–298.

43 Rodríguez Guitián (above n 3) 236 ff.

44 Rodríguez Guitián (above n 3) 254–255.

45 Rodríguez Guitián (above n 3) 265. See CC, art 154 and CP, art 20(7).

46 See Rodríguez Guitián (above n 3) 265.

47 Rodríguez Guitián (above n 3) 271.

48 Rodríguez Guitián (above n 3) 278.

49 Rodríguez Guitián (above n 3) 126–127. According to CC, art 168(II), 'in case of parents' reckless disregard or intentional behaviour amounting to damage to the assets of the child or to the loss of them, the parents shall be held liable for the damage suffered by the child' ('*en caso de pérdida o deterioro de los bienes por dolo o culpa grave, responderán los padres de los daños y perjuicios sufridos*').

(iv) A fourth and final group of cases would refer to damage related to the vicissitudes of the parent-child relationship, either in its legal aspect, such as the lack of timely recognition of an illegitimate child[50] or making the child believe that his or her father is the husband of the mother, when the parent who leads the child into believing this knows that this is not the case;[51] or in its factual aspect, as when the parent does not treat a child born out of wedlock as his or her own child or treats him or her worse than his or her other children.[52]

III REVIEW OF CASE-LAW

Legal doctrine aimed at extending the application of the remedy of damages to family law has had no impact previously on the case-law of the Spanish Supreme Court. The ruling mentioned earlier and handed down on 30 June 2009 was the first of this court to rule affirmatively on a request of this kind. In this case, the mother deliberately prevented the father from exercising his parental responsibilities by retaining the child in the United States against the ruling in the decisions ordering custody. The Supreme Court quashed the decision of the Court of Appeal which had considered that the time limitation barred the action and held that the mother had violated the father's right of contact with his minor son, in addition to having disobeyed the court decisions on custody, which were perfectly known to her since she had appeared in all legal proceedings that had taken place in Spain on the case. For this reason the Supreme Court ordered the mother to pay €60,000 as compensation for non-pecuniary loss suffered by the father as a result of the deprivation of contact with his son and for the irreversible loss of his relationship with him.

According to the Supreme Court:

> 'There is damage in this case and it consists not only in the impossibility of exercising parental and custody rights, since in this case it could have been claimed only by the child being kept apart by the imposition of the parent who prevents his relationship with the other, but it consists in the impossibility of one parent having contact with his son due to the fact that this contact was prevented by the parent who is actually in charge of the child.'

Additionally, the decision acknowledges that 'the relationship between separated parents as regards facilitating contact with someone who does not live with the child when custody has been attributed to one of them gives rise to complex problems'. However, it stresses that in international debates the appropriateness of the 'principle of sanctioning the defaulting parent to protect

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[50] Rodríguez Guitián (above n 3) 180–184 ('as a result of having to endure the social stigma of lacking a father or a mother').

[51] Among many others see Rodríguez Guitián (above n 3) 172–173; Vargas Aravena (above n 3) 39 and Marín García de Leonardo (above n 17) 157–158.

[52] Rodríguez Guitián (above n 3) 156 (provided that such behaviour of the father 'had seriously impinged on the physical integrity of the child').

not only the child's interest, but also the interest of the parent who does not live with the child' has been defended and refers to Italian judgments on similar cases as well as to case-law of the European Court of Human Rights in cases of unreasonable suspension by public bodies of the right of contact of one of the parents with his or her children.

Until this ruling, the Supreme Court's case-law referred only to claims of former spouses for the breach of marital duties, and in particular, for the breach of the duty of faithfulness between spouses which had resulted in the conception of children who, for a time, had been considered as fathered by the husband when, in fact, this had not been the case. For this group of cases, case-law of the Supreme Court did not provide any support to doctrines keen to apply tort law rules to family relationships since it manifestly expressed the opposite view.

The first decision was issued on 22 July 1999[53] and involved a case where the husband sought compensation both for maintenance paid for a child whom during 15 years he believed to be his own son and for non-pecuniary loss suffered for the concealment of the truth regarding his paternity. Since the claim had been dismissed on appeal, the husband appealed to the Supreme Court alleging infringement by non-application of art 1902 of the Civil Code (CC), ie the general provision on tort liability, and claimed that he had been subjected to undergoing a procedure to contest his paternity in which the extramarital affairs of his wife had been vented and also their result: the birth of a child he considered his son when in fact he was not. He pretended that he had been inflicted 'undeniable non-pecuniary loss (ie *daño moral* or moral damage), since he had been humiliated and his honour and dignity had been infringed'. The Supreme Court confined itself to the facts established by the instant court and found that, although his wife could have suspected that the child was not his, she never had 'full knowledge and total certainty' of this and concluded that, since no deceit of the wife could be established, the court could not decide any of the claims in favour of the husband.

A few days later, on 30 July 1999,[54] in another judgment with the same reporter, the Supreme Court decided a very similar case in which a husband had brought a claim against his wife requesting compensation for maintenance provided to her children, in the wrong belief that they were his, and for moral damage or non-pecuniary loss. The lawsuit was dismissed entirely and the husband filed an appeal, in this case for the breach of CC, arts 67 and 68, which refer to the legal duties between spouses, in relation to CC, art 1101, which provides for liability for breach of obligations (either legal, contractual or stemming from other sources, except tort). The appeal was based on the grounds that the legal duty of faithfulness 'is a contractual obligation, which has its origin in the contract of marriage which she is obliged to honour'. Regarding non-pecuniary loss the husband claimed 'not only [that] he had been living in continuous deception,

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53 RJ 1999, 5721.

54 RJ 1999, 5726. Commented on by LF Ragel Sánchez (2000) 52 CCJC 153–163.

but also that the end result of this deception had been the loss of his children, since he regarded them as his own when they were not, as well as his mental or spiritual suffering from seeing all prospects for his future projects collapse'. By contrast to this approach, the Supreme Court endorsed the reasoning of the Court of Appeal and held that 'there is no doubt that the breach of duties between spouses as laid down in articles 67 and 68 of the Civil Code deserve an undeniable social and ethical reproach', but it also stressed that 'it is clear that the only legal consequence that our legislation includes is to consider breach as a cause of legal separation in article 82 . . . without linking the breach to any economic consequences against the violator'. The court also added that 'one cannot include their enforceability under the generic provision of art. 1101 CC, even if they are considered contractual duties due to the nature of marriage, since considering otherwise would lead to the conclusion that any disturbance of life in common would give rise to a damages award'. Finally, this judgment ends with the categorical assertion that 'non-pecuniary loss generated by the unfaithfulness of one spouse to the other is not subject to any financial compensation'.

Accordingly, the position of the Supreme Court in this second judgment is clear and precise when refusing to award the compensation sought in a case where the facts were practically identical to the first judgment. However, in the first judgment the ratio decidendi seems to be that the defendant wife had not intentionally concealed the truth from her husband, while in the second case the existing evidence seems to indicate that the wife knew of it and the Supreme Court considered that this fact was irrelevant, since the damage for which compensation was sought was closely linked to the breach of the duty of faithfulness for which the judgment expressly declares that there is no obligation to compensate for the resulting non-pecuniary damage caused to the other spouse.

Since these rulings were issued, there have also been several decisions issued by Courts of Appeal in cases of this type. In general terms, we see that the Courts of Appeal have abided by the Supreme Court's doctrine regarding the lack of compensability for non-pecuniary loss due to spousal unfaithfulness. It should be noted, however, that the reference in the first ruling to the wife's deceit when concealing the true paternity has been interpreted by some lower court decisions as a unique opportunity to impute liability to the unfaithful spouse if deceitful misconduct is proven.

This process begins with the decision of the Court of Appeal of Valencia, issued on 2 November 2004,[55] concerning a claim of a former husband filed against his former wife and against the true father of three of the four children born during their marriage. This ruling distinguishes, first, the issue of marital unfaithfulness, where compensation is rejected in accordance with doctrine of the two 1999 Supreme Court decisions, which this decision declares to follow.

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[55] AC 2004, 1994. Commented on by E Farnós Amorós 'El precio de ocultar la paternidad' *InDret* 2/2005 (www.indret.com).

However, regarding the concealment of the true paternity of the children born during marriage, it concludes that the defendants' engaged in 'negligence in their intimate relationships', since 'they knew that the contraceptive methods they used were not safe'. Furthermore, it attributes the defendants' deceitful conduct consisting in hiding the truth about the paternity of the children born during marriage from the husband and allowing them to be registered as children of the claimant and to become part of his family, a situation that continued for over 6 years. The judgment concluded by ordering the defendants to pay €100,000 for non-pecuniary loss since it considered, rather surprisingly, that in this case the 'suffering may be greater than if the children had died, given the fact that the claimant was unable to mourn as a reaction to his loss' and argued that the willingness of the defendants to allow the claimant to have contact with the children could hardly be implemented. Subsequent decisions of the Court of Appeal of Valencia[56] and other Courts of Appeal follow the same line of argument, sometimes finding against both the wife and the true father of the children allegedly born in the marriage.[57]

Thus, despite the clear words of the Supreme Court, especially in its ruling of 30 July 1999, it appears that some courts feel the need to provide a positive answer to claims filed by husbands in this sort of case. Moreover, some decisions even expressly assert the need to overcome the case-law issued in 1999 in order to 'provide legal content to marriage and to punish unlawful behaviour that takes place within it'.[58] Against this approach there are also judgments that warn about the dangers of this opinion, since what the claimant requires is that 'on the grounds of Article 1902, a door that is still shut be opened in a particularly sensitive matter: that of dealing with family conflicts where no explicit rule or case law allowing compensation for pure non-pecuniary loss exists'.[59] However, due to the approach of the already mentioned decisions of Courts of Appeal there is the risk that the 2009 decision quoted early on is interpreted, in our view erroneously, as a turning point in the Supreme Court's position. Actually, it is possible that both courts and legal scholarship construe this decision as a correction of previous case-law and that it becomes a tool for validating the doctrine that postulates the indiscriminate application of liability law to family conflicts while ignoring the specific circumstances of the case decided by the Supreme Court. For this reason, we think that is necessary to raise the question again and analyse whether the approach taken by the

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56 See SAP Valencia 5.9.2007 (JUR 2007, 340366).

57 See SAP León 2.1.2007 (JUR 2007, 59972) and Barcelona 16.1.2007 (commented on by E Farnós Amorós 'La indemnización del daño moral derivado de ocultar la paternidad' *InDret* 4/2007 (www.indret.com)). See more recently, SAP Murcia 18.11.2009 (AC 2010, 60). Other rulings end by freeing the defendant from liability on the basis of lack of proof of the wife's deceitful behaviour. See SAP Barcelona 22.7.2005 (JUR 2006, 163268), which takes special care to say that 'one cannot and shall not mingle the proof of the unfaithfulness with the proof of the defendant's knowledge that the daughter born during marriage was not her husband's'. In the same line see SAP Barcelona 31.10.2008 (AC 2009, 93).

58 SAP Cádiz 3.4.2008 (JUR 2008, 234675). In the same line, Pérez Mayor (above n 5) 2.

59 SAP Barcelona 28.11.2008 (*La Llei*, 4.6.2009, no 750).

doctrine and some Courts of Appeal is acceptable or whether the traditional case-law of the Supreme Court reflects defensible reasons and should be maintained.

IV RETHINKING THE ISSUE: A CRITICAL COMMENTARY

(a) Introduction

In our view, the doctrinal proposals that encourage opening the doors to damages awards in family disputes are based on very weak legal foundations, both as regards family law and damages issues. In other words, by disregarding essential elements of civil liability, they arrive at results that are inconsistent with the principles that have guided the recent evolution of Spanish family law.

We are also concerned about the fact that few voices speak out clearly and forcefully enough against this 'fashionable' legal doctrine that is currently being established in Spanish family law.[60] The apparently 'progressive' character of the proposal may have given rise to such an unusual unanimity. In fact, certain feminist sectors have, paradoxically, ended up joining ranks in a common cause with the theses promoted by the most conservative academics. Therefore, and without being able to go into depth in this chapter, we would like to contribute to debunking some of the basic assumptions of these doctrinal proposals and set out some basic ideas which are going exactly in the opposite direction to what is being advocated by the most recent Spanish legal literature.

(b) The spousal and parental immunity issue

It is a commonplace, perhaps influenced by Anglo-American doctrine, to set the terms of the debate in the 'spousal or parental immunity' arena. However, the first thing that should be done here is to try to clarify what it is meant by 'immunity' in this context and, especially, what consequences can be drawn from denying the existence of such an immunity under Spanish law.

If immunity is seen as 'freedom . . . to harm, under the protection . . . of family relationships',[61] there is no doubt that, in private law related to family relationships, immunity no longer exists since there are no situations left where

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[60] But see P Salvador Coderch and JA Ruiz García 'Comentari a l'article 1' in J Egea Fernàndez and J Ferrer Riba *Comentaris al Codi de família, a la Llei d'unions estables de parella i a la Llei de situacions convivencials d'ajuda mútua* (2000) 63 and Ferrer Riba (above n 6) 1854–1856. See also E Llamas Pombo 'Divorcio y responsabilidad civil' (2005) 25 *Práctica Derecho de Daños* 3–6 and J Ribot 'Nota crítica a J.R. de Verda y Beamonte (ed), Daños en el Derecho de Familia' (2006) *Anuario de Derecho Civil* 1883–1894 at 1891.

[61] See above n 7.

the mere fact that the person causing harm and the victim being spouses or relatives exonerate the former from compensating for the damage caused to the latter.[62]

It is obvious that the protection afforded by liability rules to persons suffering damage caused by others should not be denied when the person suffering damage and the person causing it are linked by family ties. This fits in perfectly with the reflection, also common in the recent literature on the subject, on overcoming a concept of family as a community or group and adopting another concept in which the family has the role of ensuring the harmonious development of the personality of all its members and to enable them to exercise their fundamental rights and defend their personal interests against any alleged superior interest of the family as a group. Moreover, as the criminal law response to the phenomenon of domestic and gender violence shows, since family relationships are the area where persons expose their most basic and personal interests, Spanish law has opted for a gradual hardening of the criminal sanctions when the criminal conduct is committed against persons who are relatives and, especially, when it consists of acts of physical or psychological violence against women and the most other vulnerable persons living under the same roof.[63]Additionally, it must be stressed that those cases which give rise to criminal liability for the infringement of family duties or obligations, and which can lead to civil liability in tort if damage occurs do in fact punish with criminal sanctions conduct which family law rules also discourage.[64]

Accordingly, since it seems that we all agree about what 'immunity' means, and that in Spain it cannot be said currently that family relationships make persons immune for conduct that gives rise to criminal sanctions or to civil liability for damage when perpetrated between people not linked to each other through family ties, where does the disagreement then lie?

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62 By contrast to criminal law, where kinship can be the grounds for attenuation, aggravation or exclusion of criminal liability, according to the circumstances and the type of crime or misdemeanour (see CP, arts 23, 180(4) and 268(1)).

63 Spanish Criminal Law even recognises a special type of crime of domestic violence, which requires the abuse to be 'habitual' and committed upon a member of the same family or household (see CP, art 153). In addition, in recent years several reforms have provided for stronger sanctions against males who commit acts of violence against their spouses or women living with them as well as against other vulnerable persons of the same household (see for instance CP, arts 147(8) nos 4 and 5, 153(1) and 171(4)). The Constitutional Court ended the controversy about the legitimacy of this special regime in decisions 59/2008, of 14 May and 45/2009, of 19 February.

64 That is the case regarding criminal liability for bigamy (CP, art 218(1)), abandonment of children and other members of the family who are in need (CP, art 226(1)) or non-compliance with spousal or child support ordered by a Court (CP, arts 227(1) and 618(2)). In the same vein, in the case decided by the Supreme Court on 30 June 2009 the conduct of the defendant mother may qualify as a crime of unlawful abduction of children (punished specifically by art 225 bis CP) or of contempt of court or of infringement against family obligations. See Moreno Velasco (above n 4) 2–3.

The disagreement lies in the fact that the doctrine that we are questioning aims at making family relationship the grounds for liability in cases where liability would not exist between persons not linked through family ties and that it uses liability rules to supplement family law rules whenever the corresponding scholar considers that there is a gap in the protection of the family member concerned. Some supporters of the extension of liability to family disputes even argue that its true foundation is 'contractual', meaning thereby that its source lies in the obligations previously imposed by law on the spouses or parents under the spousal or parent-child relationship.[65] However, the interests involved in family relationships are organised and protected as defined by family law rules in force at a particular historical moment, and they provide norms as to how the roles of spouse and parent are to be exercised.

For all these reasons, we believe that it is coherent with this ordering to judge the infringement of the standards set by family law according to family law rules and not to proceed from the idea that the family law regulations are incomplete. Where family law rules do not provide for a specific regulation there is no gap that must be filled in with liability rules. What the doctrines that we are criticising do is indiscriminately order compensation for non-pecuniary damage (and also pecuniary damage) for the mere disappointment or discomfort of husbands, wives, and children and against wives, husbands or parents who allegedly are would-be tortfeasors or would-be contract breachers but who, in fact, have done nothing else than to exercise the self-determination that the currently applicable family law rules allow them. We believe that it is more reasonable to consider that the silence of the law regarding any sort of pecuniary compensation in this type of conflict is due to a legal policy decision consistent with the principles upon which the current family law rests and that the resort to damages rules outside the area of family law would contradict this decision. This option also accords with the idea set out in art VI-1:103(c) of the Common Frame of Reference (DCFR) which provides that tort law rules 'do not apply in so far as their application would contradict the purpose of other private law rules', an idea which, despite concentrating predominantly on the relationships between the law of contract and the law of tort, 'plays a similar role in relation to the law on benevolent intervention in another's affairs, the law of property and even family law'.[66]

(c) Civil liability and the protection of fundamental rights within the family

As we have seen in the previous section, it is clear that there is no general immunity from civil liability for the fact that victims and perpetrators of the damage are spouses or parents and children. However, this does not mean that

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[65] See Vargas Aravena (above n 3) 235 (quoting JL Lacruz Berdejo 'Comentario al artículo 68' in 662 *Matrimonio y divorcio. Comentarios al Título IV del Código Civil* (1994, 2nd edn) 662ff).

[66] Emphasis added. See C von Bar and E Clive 'Principles, Definitions and Modern Rules of European Private Law. Draft Common Frame of Reference (DCFR)' Full Edition, (2009) vol 4, p 3117.

all cases raised by the doctrine we criticise here, and whose only common denominator is that the injured person and the alleged perpetrator are relatives, give rise to civil liability and require compensation for the ensuing damage. Hence the importance of distinguishing between different groups of cases as we have tried to do in our previous systematisation.[67]

Therefore, the starting point could be that spouses and parents should be responsible for any harmful conduct that, if carried out by a third person non-member of the family, would give rise to liability and would entitle the victim to bring a claim for damages. Whether there is fault or intention, everybody is civilly liable to his or her spouse or children in cases where a third party would also undoubtedly be so. The most obvious example of this is where, as a result of the negligent act or omission of a spouse or parent, the other spouse or the child suffers personal injury.[68]

Often, not coincidentally, the gravity of the consequences resulting from the conduct of the actor may even lead to the attribution of criminal responsibility.[69] In this case, the family relationship may play a role and it is generally considered an aggravating circumstance.[70] By contrast, in cases involving death or personal injury, the attribution of civil liability is independent of the existence of any prior family relationship between the persons involved.[71]

This is also the case as regards responsibility of one spouse for failing to warn the other that he or she is suffering from a sexually transmitted disease probably contracted as the result of extramarital affairs. Although the risk of transmission of such diseases increases between spouses due to regular sexual activity,[72] liability for failing to warn about the need to take protective measures applies not only to spouses but also to cohabitants and even to strangers. In

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67 See above Part II(a) and (b).

68 In fact, as regards children, only in a limited number of cases are civil actions brought by children against their parents. These cases are related to work or traffic accidents and there is some type of compulsory or voluntary liability insurance which provides for coverage of personal injuries. See M Martín-Casals, J Ribot and J Solé 'Children as Victims under Spanish Law' in M Martín-Casals and J Solé *Children in Tort Law* (2007) vol II, pp 225–250, and more references therein. As regards road-traffic compulsory liability insurance coverage, current European rules stress that '*members of the family* of the policyholder, driver or any other person who is liable under civil law in the event of an accident . . . shall not be excluded from insurance in respect of their personal injuries *by virtue of that relationship*' (Art 12(2) of Directive 2009/103/EC of 16 September 2009 (OJ L 263, 7.10.2009)). This rule was already laid down by the Second Council Directive on the approximation of the laws of the Member States relating to insurance against civil liability, in respect of the use of motor vehicles (Art 3 of Directive 84/5/EEC of 30 December 1983 (OJ L 8, 11.1.1984)).

69 See above Parts II(a)(i) and II(b)(i).

70 See above n 63.

71 Note, however, that in cases in which one of the spouses (or partners) knows of and consents to the assault or abuse of his or her children by the other spouse or partner, case-law has proceeded unambiguously on the basis that parents have a special position which morally and legally requires them to take positive steps to protect their children from harm caused by third parties. See Martin-Casals, Ribot and Solé (above n 68) pp 230–231.

72 Apparently, that is the idea underlying the considerations on the duty of care of the defendant

general terms, it cannot be contended that victims must assume the risk of contracting a sexually transmitted disease and, accordingly, their sexual partners are exempted from liability if they do not disclose a disease that they know they are suffering from and against which they should have given their sexual partners the opportunity to adopt protective measures.

The general character of civil and criminal protection also applies to cases where the protected interest is sexual freedom, understood as a guarantee that sexual conduct will always take place in conditions of individual freedom (art 17(1) of the Spanish Constitution [hereafter CE]). It should be noted, however, that the doctrine we criticise includes within this group of cases the unilateral breach of the promise of marriage which was made maliciously with the sole purpose of obtaining sexual access to the promisee, or the case where someone pretends to be a bachelor for the purpose of having sexual access to the other person or to start living together with him or her.[73] However, these cases have already been decriminalised in recent reforms of the Penal Code precisely because the criminal protection focuses on the sexual freedom of the individual and moves away from the state's punitive intervention with the intention of enforcing certain moral beliefs and attitudes which would be inappropriate under the rule of law of a pluralistic democratic society. In other words, when the doctrine we criticise aims at applying liability for damages in these types of cases, it forgets that this conduct between adults has been decriminalised[74] and that decriminalisation responds to a change of approach as regards which interests deserve criminal protection.

Today the protected interest is sexual freedom, understood in the negative sense of banning the practice of sexuality which lacks freedom (negative sexual freedom). Therefore, the decriminalisation reflects a change of approach of the legal system, in which the protected interest is not the honesty of the persons who consent to sexual intercourse, measured according to whether they have exercised their sexuality within an appropriate or socially accepted framework. What now is decisive is whether they have been free enough to decide to have sex. Accordingly, there is no room for the infringement of an alleged interest protected by tort law rules, whose foundation might lie in an outdated conception of sexuality and in an understanding of the usual conduct of adults which has more to do with the moral prejudice of one sector of the society than with the commonly shared values.[75] For the same reasons, it is unacceptable to

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spouse in the case dealt with by SAP Illes Balears 14.9.2001 (commented on by I Barral Viñals 'Pertenencia a un grupo de riesgo y responsabilidad por contagio de SIDA al cónyuge' (2004) 15 *Práctica de Derecho de Daños* 6ff).

73 See above Part II(a)(v).

74 Pursuant to CP, art 183(1), deception is only punishable regarding consented sexual intercourse with minors aged between 13 and 16 years old.

75 As is stressed by criminal law scholars, 'conceiving deception as an element that could put [sexual freedom] at risk would be possible only from a commercialised and instrumental conception of it, which is against the modern conception of sexuality as a means in itself […] A person capable of deciding over his or her sexuality . . . must be supposed to have capacity to be aware of how short-lived the promises made in the heat of desire can be' (F Morales Prats and R García Albero 'Comentario del artículo 184' in G Quintero Olivares *Comentario a*

invoke the German example of BGB, s 825 whose recent amendment shows that the interest being protected here by tort law rules is not linked to a hypothetical marital or pseudo-matrimonial status, but to the negative sexual freedom against anyone who deprives the victim of it through direct or indirect specially qualified means, such as coercion, abuse of power or deception.[76]

Finally, as regards other conduct infringing the rights of the personality of the other spouse, in some cases they also give rise to criminal responsibility and thus also to the tort liability resulting from the harm suffered. As a general rule, however, the infringements to the rights of honour, privacy and one's own image have been decriminalised and the imputation of civil liability depends on a prior balancing of the conflicting rights. As regards the right of privacy it seems possible to establish protection against interferences by the spouse or by the parents while exercising their parental duties, in which the key element would be to what extent the person whose right is infringed had, expressly or implicitly, kept aside an area of his or her personal life and, in the case of minors, whether the interference of the parents is justified or not by their carrying out of the duty to look after their children.[77]

By contrast, as regards the right to honour, demarcation problems arise in some cases, such as those dealing with the disclosure of matters related to the sexual life of the couple and those where a spouse considers that the conduct of the other spouse is detrimental because it lowers him or her in the consideration of the others.[78] At this point it is necessary to draw attention to the fact that it is one thing for the self-esteem of a person to be severely affected by the conduct of another, as when it is known that a wife was unfaithful to her husband or when the fiancé is exposed to ridicule by the late withdrawal of the woman he was engaged to, but the infringement of the right to honour as protected by tort law rules with a claim for damages is another. Only from a moralistic conception of the protection of fundamental rights can it be seriously defended that the lack of fulfillment of the promise of marriage,[79] the disclosure of spousal unfaithfulness, and the spousal conflicts related to the

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la parte especial del Derecho penal (2007, 6th edn) p 318). See also A Carrasco Perera *Derecho de familia. Casos, reglas, argumentos* (2006) pp 521–522 (commenting critically STS 26.11.1985 (see text accompanying n 36)).

[76] In addition, s 825 does not apply when the agent merely pretends to be in love with the victim or promises to divorce and marry the victim. See G Wagner 'Commentary to s 825' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2009, 5th edn) vol 5, p 2156.

[77] A prior immunity from criminal liability for parental disclosure of children's confidential information does not exist anymore. Moreover, art 4(3) of the Organic Act 1/1996, of 15 January, qualifies the use of their image in mass media, as unlawful interference with children's rights 'provided that it would entail harm to their honour or reputation or otherwise be against their interests, irrespective that consent is given by the minor child *or by his or her legal representatives*'. See JR de Verda y Beamonte 'Resarcimiento del daño moral por intromisiones consentidas en el derecho a la propia imagen de menores (en relación al caso Marta del Castillo)' (11.5.2009) *La Ley* no 7171.

[78] See above Part III the grounds of the claimant's appeal to the Supreme Court in the judgment of 22 July 1999.

[79] Vargas Aravena (above n 3) 82 (describing the case of a groom who was publicly stood up at the door of the church by the bride).

discovery of impotence, homosexuality and transsexuality of a spouse may result in an infringement to the honour of the aggrieved spouse or fiancé, entitling him or her to claim damages.

In any event, recourse to civil liability is never an automatic consequence resulting from the identification, as a fundamental right, of some interest to the victim (e g physical or mental integrity, sexual freedom, honour, etc). It is always the result of a prior balancing of fundamental rights in conflict, which ultimately involves the limitation of one of them. An example which may seem far-fetched but which may be illustrative of this type of analysis and should be applied in all cases proposed by the doctrine we criticise is the case of injury to the foetus as a result of the mother's negligent conduct.[80] This case is decriminalised in Spanish law,[81] but it is unclear whether it is possible to bring a claim for damages before civil courts.[82] Decriminalisation is the result of a complex legal dilemma which must balance the rights of the mother against the legal protection of the unborn child. For this reason, the lack of punishment for this negligent conduct could respond to the idea that after balancing the rights it is considered that the mother's rights to privacy and to the exercise of her autonomy and freedom during pregnancy should prevail. This conclusion would not only be applicable to criminal liability but should be also extended to civil liability as regards any possible claims for damages brought by the child's legal representative or by the child himself on reaching the age of majority.

(d) Psychological impact and emotional distress flowing from marriage disruption as recoverable damage

The doctrine we criticise in this chapter claims that psychological or emotional impact in situations of family conflict and, especially within marriage, are compensable damage.[83]

One of the main difficulties in the analysis of this issue according to Spanish tort law rules is the difficulty of defining what is compensable moral damage or non-pecuniary loss. In Spanish tort law, based on a general tort liability clause (CC, art 1902), similar to the French one (Code Civil, art 1382), there are no typical characteristics of the compensable damage[84] and the law does not explicitly define what types of interests deserve the protection of tort law either. It is for case-law to carry out the delimitation of these interests, by individualising them through the analysis of protective statutes, the use of

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80 See above Part II(b)(ii).

81 See CP, arts 146 III and 158 III.

82 See Martin-Casals, Ribot and Solé (above n 68) pp 249–250.

83 See above Part II(a)(iii) and (iv), including cases related to the sexual life of the spouses or the impact upon one spouse of the lack of support or communication of the other. See also above Part II(b)(iii), in cases where the relationship between parents and children is cold and lacks dialogue and empathy.

84 LF Reglero Campos 'Conceptos generales y elementos de delimitación' in LF Reglero Campos (ed) *Tratado de responsabilidad civil* (2008, 5th edn) p 59.

constitutional principles[85] and, ultimately, by resorting to social consciousness.[86] In practice, however, it is a widespread idea that moral damage or non-pecuniary loss is the psychological effect described using the terms anxiety, distress, pain, etc.[87] In other words: the impact of the tortfeasor's conduct on the feelings or moral sphere of the victim is the decisive element for tort law protection, both as regards the grounds for establishing liability as well as for the scope of the obligation to compensate the non-pecuniary loss suffered. For this reason, the boundaries of recoverable non-pecuniary loss are rather blurred in Spanish law.[88]

Social life produces many situations of mishap, inconvenience, frustration and anger and although it can be conceded that one cannot always bring a claim against those who cause them,[89] the prevailing understanding of non-pecuniary loss makes it impossible to know when a victim of these situations will be prevented from bringing a claim for the psychological or emotional impact of the defendant's conduct. For these reasons, and contrary to what the doctrine advocating the extension of liability as a general rule to family relationships suggests, with such a wide notion of non-pecuniary loss it is practically impossible to establish the limits to the 'trifles, mere or simple discomfort' inherent to family life and which the potential claimant is expected to bear.[90]

Moreover, the problem of this approach is that, in order to reach the conclusion that someone deserves protection, it focuses exclusively on the damage allegedly suffered by the victim. This approach is incomplete since, before deciding in favour of attributing liability to the defendant, the conflicting interests involved in the particular situation must be considered. As Koziol points out, when it is expected that the infringement of some interest will generate a duty to compensate the damage caused, recognising a protected area for the victim also involves a restriction on the freedom of the actor who

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85 See M Martín-Casals and J Solé Feliu 'Comentario del art. 1902' in A Domínguez Luelmo (ed) *Comentario del Código Civil* (2010) vol II, forthcoming (quoting case-law on tort protection against excessive noise, wrongful conception and wrongful birth claims, etc).

86 MM Naveira Zarra *El resarcimiento del daño en la responsabilidad civil extracontractual* (2006) p 50.

87 STS 16.5.1998 (RJ 1998878). For non-pecuniary damage to be established the 'impact or psychological or spiritual suffering, feeling of anxiety, grief, fear or uncertainty' or 'anxiety, emotional impact and uncertainty resulting thereof' are sufficient (STS 3.5.2006 (RJ 2006070)).

88 See among others E Vicente Domingo 'El daño' in LF Reglero Campos (ed) *Tratado de responsabilidad civil* (2008, 5th edn) vol I, p 346. See a very critical account on the recoverability of non-pecuniary damage in certain cases dealt with by recent case-law in L Díez-Picazo *El escándalo del daño moral* (2008).

89 See STS 31.5.2000 (RJ 2000089) (while noting that not just any discomfort, boredom, anger or disappointment is sufficient, and hence requiring that the distress or disturbance be of certain importance, this decision does not specify exactly what level of severity of distress must be attained to be considered compensable harm and how it compares with distress which is not).

90 Vargas Aravena (above n 3) 255. According to Romero Coloma (above n 2, p 2451) it is not feasible to compensate all 'non-pecuniary damage flowing from harm to feelings or emotions', and she therefore requires 'intense, real and deep pain to be experienced'; she adds that 'superficial' cases should be rejected.

could potentially be held liable.[91] The establishment of the scope of that protection requires, therefore, the weighing up of the conflicting interests: on the one hand, the interest of the victim in enjoying the broadest protection and, on the other, the interest of all the others in enjoying the greatest possible freedom. So art 2:102(6) of the Principles of European Tort Law (PETL) states that 'in determining the scope of protection, the interests of the actor, especially in liberty of action and in exercising his rights, as well as public interests also have to be taken into consideration'.[92]

For these reasons, before concluding that the infringement of the rights granted to one party by virtue of a family law relationship gives rise to tort liability which inexorably leads the other party to having to compensate for the resulting damage, the existing conflicting interests must be weighed up. In this group of cases, the damage consists mainly of harm resulting from the emotional or psychological impact of the conduct of the actors, which must be balanced with their right to make decisions about their own life with autonomy and freedom. It is not unreasonable to suggest that the balancing of each of these interests against one another has already been done by the family law rules in force in the light of constitutional principles. Hence, the family law solutions addressed to alleviate the economic consequences of marriage breakdown and to ensure the maintenance of an economic balance between the spouses, even if temporary only, are the most appropriate because they weigh up, in a balanced manner, the interests of both parties in the relationship. By contrast, it would not be justified to restrict individual autonomy within the family through the use of liability rules, since those who exercise rights recognised by the law and the Constitution, such as the right to the free development of their personality, especially in intimate matters such as their sexuality, lifestyles or their own life choices, perform no wrong from which damages compensation may arise. Obviously this does not mean that persons must endure life in common if they do not like the decisions taken by their spouses. If they so wish, they may obtain divorce and rebuild their lives, but they may not have recourse to liability for damages by, for instance, qualifying the discovery of their husband's transsexuality as giving rise to 'such a state of egotism that led [the husband] to forget about his family life'[93] or by holding that his impotence, which makes sexual access impossible, gave rise to 'a violation of the human person, understood in its wholeness, in her freedom-dignity and self-determination in marriage, in her expectations of a harmonious sexual life, in motherhood projects, in her hope of a married life based upon the community, solidarity and on the full development of her own capacities in the field of this peculiar social grouping which is the family'.[94]

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[91] H Koziol 'Comments to art. 2:102' in European Group on Tort Law *Principles of European Tort Law: Text and Commentary* (2005) pp 32–33.

[92] European Group on Tort Law, *Principles of European Tort Law: Text and Commentary* (2005).

[93] See Vargas Aravena (above n 3) 232 (quoting some decisions of French Courts of Appeal).

[94] Judgment of the Italian *Corte di Cassazione* 10.5.2005, no 9801 (*Responsabilità civile e previdenza* 2005, 676).

For some, the role of marital duties is to establish a model of conduct for the spouse, the infringement of which is ethically reprehensible. They argue that, unless the possibility for damage compensation is provided, pursuant to the regulation now in force the conduct of the offender has no legal consequences.[95] However, the approach to the issue made from the perspective of the spouse suffering the detriment, and thereby ignoring the weight that the interests of the other spouse may have, attempts to disguise what is actually a legal punishment for morally reprehensible conduct, about which the law in fact says nothing and has nothing to say. The problem with this approach arises most dramatically in areas dealing with very personal issues, such as sexual life or honesty in intimate relationships where it is extremely complex to carry out a moral judgment. It is not uncommon for the wrongs suffered by a party to have their counterpart in the wrongs suffered by the other. Furthermore, a morality judgment is much more difficult in an open, pluralistic society that cannot impose models of correctness on conduct as it would involve suppressing the free development of the personality or discriminatory attitudes prohibited by the law.

The proposals of legal scholarship that we criticise lead, under the cover of compensation for allegedly suffered damage, to the imposition of civil penalties against conduct branded as immoral on the basis of a questionable judgment of morality which more often than not revives views and attitudes of the so-called National-Catholicism which were common in Spain's pre-democratic days. A clear proof of this backsliding is the use of typologies and fact patterns which were in fact designed for the criminal law applied in those earlier times, where what was legally protected was not, as is currently, a fundamental human right, but the public morality and 'good morals' against conduct which was described as immoral, unnatural or abnormal. It is baffling to note that, while claiming, correctly, civil protection against the interception of private communications of the spouse,[96] the validity of the proof of marital unfaithfulness obtained through the use of detectives is not even discussed and it is simply admitted that its cost would be an additional head of damages when assessing pecuniary loss in a hypothetical post-divorce settlement for damages.[97] The climax of this crescendo in the reasoning is the treatment accorded to the damages liability of the third party who 'cooperates decisively' in the consummation of marital unfaithfulness. Here the authors, without dissent on the question of principle, ie that the adulterous spouse's lover may be held civilly liable to the deceived spouse, differ as to whether liability requires a 'decisive contribution' or whether mere 'passive attitude' suffices. One opinion holds that the lover may escape liability if he affirms 'that it was the defendant spouse who seduced him into that short romance'[98] whereas another, most uncompromisingly, holds that the third party who co-operated

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[95] See authors mentioned in n 17, and accompanying text.
[96] Rodríguez Guitián (above n 3) 90.
[97] Rodríguez Guitián (above n 3) 91.
[98] Vargas Aravena (above n 3) 283.

with the breach of faithfulness is liable even 'when not taking any action to ascertain whether it was true that the wife's marriage was in crisis or not'.[99]

In our view, civil liability rules should not be used by the courts to carry out morality judgments of the conduct of the family members, thereby trying to compensate 'moral victims' with damages awards. In our current society promoting state interference in order to take a position on issues of sexual morality is questionable, even if the inherited tradition of codified law still contains rules such as reciprocal marital duties, about whose basically symbolic value there should be no doubt.

(e) The alleged 'gaps' in family law

The worst aspect of the doctrine we criticise here is, however, that it subverts current family law when it positions liability rules providing for compensation for damage to serve aims totally opposed to those that underpin family law rules in force.

Family law differs from the other branches of civil law in that it demarcates a sector of human reality which is aimed at interpersonal relationships that fall on more personal and private interests of the individual, assigning rights and obligations which, in general, are inconceivable with regard to the legal regulation of the non-family related private sphere of the individual. Sector-specific regulation of family relationships provides for legal devices aimed at achieving the proposed results in terms of legal policy. The state's interest in marriage, for instance, has historically justified the regulation of the conditions of its conclusion and effects, as well as whether the dissolution of marriage by divorce was possible and, if so, with what consequences. Gradually, this interest has evolved from a position of extreme intervention in family life and marriage, both as regards life in common and the grounds required for marital breakdown, towards a more neutral position in which the state tends not to interfere in marital or family life and does not establish unjustified barriers to marital breakdown. Historically, the regulation of the family reflects, to an extent which would be inconceivable today, what has been the prevailing morality of each time and how the relationships between spouses and between parents and children have been understood.[100]

In recent decades, however, the idea that the state should respect the opinion of each of the spouses regarding the tolerability of the situation they experience in their marriage has been gaining ground. Spain has even accepted the petition for divorce without proof of any grounds that justify it in the eyes of the law and society. This regulation reflects with all its consequences the idea that the

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[99] See Vargas Aravena (above n 3) 284 and more references therein.

[100] The wife, for example, must plead and provide very serious reasons for leaving her husband because otherwise he could bring her back by physical force. Only in the mid-1960s of the last century, was the exemption from criminal responsibility for killing the woman and her lover found in the act of adultery repealed.

reasons for the marriage breakdown are a matter which concerns the spouses only and that unwanted life in common cannot be imposed regardless of whether breakdown is against the wishes of one of the spouses or detrimental to his or her interests.

With regard to minor children, the situation of the parents is not exactly the same, although it is clear that the interests of the children as individuals have gained more autonomy within the family while the powers and authority of parents have correspondingly decreased. The legal consequence of this situation has been the legitimation of greater public scrutiny regarding the exercise of parental duties. At the same time, however, democratisation of society and pluralism have led to courts attaching more importance to the free development of forms of education and upbringing of minor children outside the values prevailing in a given society.

Expanding the role of civil liability within the family brings the autonomy of family law into question. Just when family law decreases both the density and intensity of its rules in order to respect the privacy and personal freedom within marriage and the parent-child relationships and minimises the interference of public authorities in this area, the legal doctrines we criticise here place emphasis on the alleged shortcomings of the legal regulation of family life. They use civil liability and, more commonly, the law of torts, especially with regard to the consequences of the inappropriate conduct of family members. In this way, they want to give the impression that something is wrong with family law without considering whether the alleged shortcoming or failure is consistent or not with an institutional design which, whether they like it or not, has been chosen by the legislature. In this sense, it is a serious contradiction to bring the rules of civil liability into an area where in recent decades family law has been deliberately withdrawing its specific remedies. But this is exactly what is achieved when, for instance, legal duties between spouses are given a significance that goes beyond the scope attributed to them by the family law rules that establish them; and also when it is affirmed that it is possible to settle scores after marriage breakdown according to civil liability rules, not only for breach of the duties of the spouses during marital cohabitation but also for the very fact of the marriage breakdown and the negative consequences it may entail for the more vulnerable spouse.

(i) Legal significance of marital legal duties

Statutory marital duties are personal obligations for which no specific performance can be claimed. Obviously, this condition dramatically limits the scope of any rule of law in which they can be encapsulated. The remedies provided by family law, based on the possibility of separation and even of divorce if the other spouse does not act consistently with what is expected of him or her, do not become for this reason arbitrary or irrational. On the contrary, they respond realistically to the question of which legal devices can be applied to family relationships and which cannot. In spite of that, part of the legal doctrine intends to supplement or correct the system provided by the

family law rules. The basic idea is that these rules provide very limited protection because they only cover certain types of adverse situations, which occur under certain circumstances only and with very specific requirements.[101]

Paradigmatic examples of this are maintenance as provided by CC, art 97, which can be claimed by the legally separated or divorced spouse, as well as the compensation provided by CC, art 98 in favour of the spouse in good faith when a marriage is void. In both cases, compensation for psychological, moral or non-pecuniary damage resulting from marriage breakdown is not included. For this reason, the doctrine we criticise considers that compensation for this sort of damage could be claimed on the grounds of the general tort liability rule of CC, art 1902.[102] It contends that at the end of the day 'family law remedies and civil liability actions respond to different purposes and follow different procedures, with different evidentiary burdens: in one case what is at stake is the end of married life, whereas in the other the matter is the repair of damage arising as a result of the breach of a marital duty'.[103]

However, the assumption that the intentional or grossly negligent breach of marital duties gives rise to compensation for the damage caused to the other spouse would mean, in practice, that what cannot be achieved directly (for instance, that the spouse becomes faithful) can be ensured with the threat of civil liability in the case of breach. This is unworkable for a legal system that has chosen to limit state interference in family affairs to a minimum and which organises tort law consistently with the principle of proportionality with the interests that it protects. To this end, the symbolic function of marital duties, and especially the duties of faithfulness and mutual respect and aid, would not endorse an injunction against conduct which has been performed in the exercise of personal and sexual freedom. From this point of view, there is no room either for indirect protection, ie for orders providing for damages awards as compensation for the psychological or emotional damage resulting from conduct such as moral neglect of or lack of interest in the other spouse, or decisions about one's own sex life, or any other in which one spouse neglects marriage as a project of life in common.

(ii) Damages awards resulting from marriage breakdown

The new legal framework of marriage established in Spain by the Act 15/2005 of 8 July[104] has been the culmination of a several decades long process consistent with the social development of the marriage model and the conduct of spouses as a couple. As explained in the Explanatory Memorandum of the Act, the raison d'être of the amendments introduced on the law of marriage was 'the obvious change in the way our society understands couple relationships', which renders the standards set in the Civil Code regarding the

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[101] Rodríguez Guitián (above n 3) 114.

[102] Verda y Beamonte (above n 2) 5. See also Rodríguez Guitián (above n 3) 121.

[103] Rodríguez Guitián (above n 3) 122. See also Verda y Beamonte (above n 2) 5 and Vargas Aravena (above n 3) 169.

[104] See above n 16.

conditions for access to divorce meaningless. It goes on by saying that courts, 'responsive to these changes', were already applying these rules in accordance to this new reality to avoid 'the inconvenience of perpetuating the conflict between spouses' and 'the futility of sacrificing the willingness of individuals by delaying the dissolution of the legal relationship for reasons that were incomprehensible to the persons linked by them'. The key element in the new model is, thus, the 'right not to stay married' that the legislature itself has bound to the right to free development of personality as enshrined by art 10(1) of the Spanish Constitution.

> 'The aim – according to the Explanatory Memorandum – is strengthening the principle of freedom of spouses in marriage, since both the continuation of life in common and its existence depend on the constant will of both'.[105]

In spite of these clear statements of the legislature, both with regard to strengthening the principle of freedom in marriage, and the most significant recognition of the individual will of the person who no longer wishes to remain linked to his or her spouse, the doctrine we criticise suggests that a settling of accounts at the time of breakdown may be claimed if it is proven that during life in common one of the spouses infringed marital duties, and liability for pecuniary and non-pecuniary loss attached to this infringement may be claimed.

It is obvious that this possibility is entirely inconsistent with the disappearance, since 1981, of the divorce-sanction model, the last residue of which disappeared in 2005 with the removal of grounds for separation and divorce.[106] It is inconsistent to argue that the law does not take into account conduct that gives rise to marriage breakdown when establishing the compensatory measures provided by family law and simultaneously, or subsequently, to open the door to the attribution of liability for damage resulting from this conduct. This assessment of damages entails, in addition, reintroducing into matrimonial proceedings the need to analyse and to prove intimate details of married life which, fortunately, in recent decades the legal system and judicial practice had left aside. This position brings us to a ridiculous and grotesque situation when it leads to the proposal to apply an objective yardstick to measure the liability of spouses in these cases even pointing to the possibility of establishing a '*baremo*' (a schedule or tariffication scheme) for the assessment of damages awards to compensate for damage suffered during marriage.[107]

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[105] A harsh critic of the terms used by the legislature in the Explanatory Memorandum, from the point of view of the doctrine we are criticising, is Marín García de Leonardo (above n 17) 147.

[106] See Vargas Aravena (above n 3) 168–169 (correctly explaining the legislative milestones in the process of deconstruction of the fault-based divorce regime in force until 1981, and connecting them with the recent amendments laid down in 2005).

[107] See Novales Alquézar (above n 3) 2014–2015.

(f) Is the approach necessarily different in the case of parent-child relationships?

Family law operates with standards such as the best interests of the child which must underpin the relationships of children with their parents and their families. This functional perspective may be inconsistent, and often is, with measures such as actions for damages, or even with sanctions imposed by the criminal law rules. This has actually happened in cases as, for example, one which was decided in Andalusia and in which a mother was convicted for personal injuries caused to her child when reproving him for his bad behaviour.[108] In this case, the measures taken against the mother were detrimental to the child.[109] The case is thus illustrative of the precautions to be taken before imposing measures such as restraining orders or awards of damages in the case of families without permanent problems and where to suspend parental responsibility might be inappropriate.

Actually the same concern lurks behind some proposals that aim at preventing hypothetical settling of the scores from taking place in cases such as educational mismanagement by the parents[110] or 'irresponsible procreation'.[111] Probably it is realised that it is not at all certain that, in general, it is convenient for children's parents to be held civilly liable on such grounds in situations where the legal system refrains from applying family law remedies such as suspension or deprivation of parental responsibility.

On the other hand, in cases relating to the development of the parent-child relationship the recognition of damages claims for non-pecuniary damage runs the risk of perpetuating social stereotypes corresponding to historical contexts which have already been overcome. This is the case in the hypothetical instance of a child born out of wedlock who files a claim against his father for not recognising paternity in time or even for not treating him as a family member.[112] Compensating in tort for such a situation means accepting that this situation is a 'wrong' that must be redressed and, since this is not possible without the collaboration of father and of other family members, an order to repair it, to the extent that money can do, is issued.[113] Legal solutions like this

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[108] SAP Jaén 22.1.2009 (La Ley, 2009, 18.2.2009).

[109] Rodríguez Guitián (above n 3, 268, note 517) expressly mentions that the judge eventually proposed that the mother was granted a pardon for the prohibition decreed by the ruling to approach the child for 2 years. According to the court such a penalty could produce adverse consequences for the child himself and for his siblings since their father spent most of his time working away from the place where they lived.

[110] See Rodríguez Guitián (above n 3) 254–255 (who contends, somewhat unrealistically, that 'the judge can fulfil a mission of collaboration and assistance to the education of the children and can take appropriate action to correct defects in the exercise of parental duty to educate').

[111] Rodríguez Guitián (above n 3) 308–309.

[112] See above Part II(b)(iv).

[113] See Rodríguez Guitián (above n 3) 184, who supports awarding damages for 'having endured the stigma of not having a parent'. However, the author suggests that lack of recognition due to the lack of co-operation of the mother does not amount to liability unless her right to privacy has been improperly exercised (187–188).

one perpetuate the stigma of birth out of wedlock, a consideration which had already been overcome in Spanish family law and which is no longer suited to the current Spanish social context.

As regards the group of cases that have kept Spanish courts busy until now and which refer to the attribution to the mother of the damage suffered by her husband for letting him believe that the child conceived during marriage was his,[114] we think that the test that is beginning to be generally accepted is artificial. In fact, the distinction between the harm associated with unfaithfulness, which would not be compensable, and the harm resulting from the fraudulent concealment of the non-marital condition of the child, which would be compensable, is based on a clear internal inconsistency. Whereas being unfaithful would not give rise to compensable harm, the concealment of unfaithfulness as such, whenever a child may have been born as a result of it, would.[115] In fact, the only basis for such a claim is the infringement of the marital duty of faithfulness, which is incongruous, as the Spanish Supreme Court considered recently, with the consequences of marital duties under Spanish law.[116] Additionally, a hypothetical claim by the child, who believed that the husband of his mother was his father,[117] inevitably raises several conflicts between the self-determination of the mother as regards the concealment of the true paternity and the interests of the child. In fact, the child may be interested or not in contesting marital paternity and in bringing a claim for non-marital paternity. Therefore it remains an open question when the mother acts in the interest of the child: when she does not reveal the false paternity or when she does and triggers thereby the contestation of marital paternity. Moreover, if filing this claim gives rise to compensable damage to the child, the logical outcome would be not to postulate that compensation can be claimed on these grounds but to propose de lege ferenda that contestation brought by the mother should not succeed because it is contrary to the interest of the child.[118] In this regard it should be noted that Spanish law, as amended in 1981, has long been heading towards an almost absolute prevalence of the principle of biological truth. As is well known, with the strong support of the Constitution (CE, art 39(3)), first the legislature and then the Constitutional Court have cast aside the traditional limitations imposed for the sake of alleged 'family peace' based on outdated social conventions.[119] But if that is so, it is a contradiction to entitle the mother to bring the action as the legal representative of the child or even acting on her own behalf, and even to entitle a third party who claims to be the actual father and, at the same time, to

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[114] See above in Part III the review of case-law.

[115] See Carrasco Perera (above n 75) 525–526 (who nevertheless apparently favours the award for damages on the basis of the spouse's unfaithfulness).

[116] See above in Part III the review of case-law.

[117] See above Part II(b)(iii).

[118] A limitation of this type is laid down by BGB, s 1600a(4), concerning affiliation challenged by the legal representative on behalf of the child.

[119] See a comprehensive account of the case-law of the Constitutional Court regarding affiliation matters and the principles upon which future legislation may be established in JR García Vicente 'La previsible reforma del Derecho de las acciones de filiación. Algunas propuestas' (2006) 20 *Derecho privado y Constitución* 203–254.

recognise a claim for compensation to the child against them for the 'loss' of the person whom the child had considered his father until then.

Sri Lanka

REFORMING THE MARRIAGE LAWS OF SRI LANKA: A PLEA FOR THE INCORPORATION OF INTERNATIONAL STANDARDS

*Sharya Scharenguivel**

Résumé

Le droit sri-lankais de la famille comprend un ensemble complexe de législations avec une loi générale et des lois particulières. L'application de ces dernières est tributaire de l'appartenance ethnique des parties, de leur religion et, dans certains cas, du statut personnel du mari. Des concepts contradictoires sous-tendent ces différentes législations et mettent souvent en péril le principe d'égalité consacré par la Constitution. Le présent texte s'interroge sur l'opportunité d'adopter une législation uniforme qui porterait à tout le moins sur certains aspects du droit familial au Sri Lanka. Nous analyserons cette question pour ce qui est de l'âge de nubilité, de l'enregistrement des mariages, de l'unicité du domicile et du statut personnel, de l'autorité parentale et du droit de garde, de l'obligation alimentaire, du droit successoral ainsi que du divorce. Le présent texte démontre que l'activité législative et jurisprudentielle a déjà permis d'instaurer une certaine uniformité dans quelques secteurs. On en trouve deux exemples clairs en matière de soutien alimentaire et de droit de garde. Les réclamations alimentaires qui sont introduites dans le cadre de la loi générale ainsi que dans le cadre de deux lois particulières, sont désormais régies par une loi unique qui répond largement aux standards internationaux. Par ailleurs, la jurisprudence a imposé le principe de protection de l'enfant dans tout le contentieux relatif à la garde, quel qu'en soit le cadre législatif. De plus, l'enregistrement des mariages est aujourd'hui une pratique largement répandue. Le présent texte insiste cependant sur la nécessité d'uniformiser les autres secteurs du droit familial chaque fois qu'une loi locale entre en conflit avec les standards internationaux.

I INTRODUCTION

A striking feature of the law today is that whilst at the international level there is a commitment to equality the ground situation in many countries represents economic, social and political inequality. The law too is often the repository of inequality although there may be entrenched constitutional safeguards. In the

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Sri Lankan marriage laws two main reasons can be identified for this inequality. The first is the existence of a large body of received colonial law both statutory and non-statutory which contains strands of inequality because it has origins either in Roman Dutch law (which in relation to women at least was not an enlightened system) or in English law. Insofar as English law was concerned the laws that were introduced may, in fact, have been progressive at the time they were introduced. When measured by current international standards however, they fall short. The second reason for inequality is the existence of customary or special laws which apply to certain sections of the community. Some aspects of these laws too have strands of inequality. Both the received laws as well as the existing customary laws are protected by art 16 of the Constitution.

In Sri Lanka, the law relating to marriage consists of a complex body of law comprising of the general law and the special laws. Whether the general law or a special law applies to a woman depends on her ethnic grouping, religion, status and in some instances the personal law of the husband. Thus a Sinhalese woman who marries a man governed by Thesawalamai will be governed by the Thesawalamai (one of the main customary laws in Sri Lanka) during the subsistence of the marriage because the codified Thesawalamai incorporates the concept of unity of domicile and personal law.[1] By contrast, a non-Kandyan woman who marries a Kandyan man is not governed by the Kandyan law although the children of the marriage would be deemed to be Kandyans.[2]

This complex body of law is characterised by widely divergent concepts. Thus, the general law of marriage and divorce is based upon the ideas of a monogamous marriage which can be dissolved only if there is proof of the commission of a serious fault or impotency. Also, the Kandyan law only recognises monogamous marriages, but its attitudes to dissolution of such marriages are totally different. Matrimonial fault is only one of the possible grounds for divorce. The concept of irretrievable breakdown is well entrenched in Kandyan law and a Kandyan woman has alternatives which are not available to her counterparts in the general law. Muslim law encompasses extensive fault-based grounds (*fasah*), unilateral divorce (*talaq*) and divorce by mutual consent (*mubarath*). Thus, a woman governed by Muslim law, like a Kandyan woman, has a number of optional grounds available to her which a woman married under the general law does not have.

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1 Jaffna Matrimonial Rights and Inheritances Ordinance No 1 of 1911, (as amended) s 3.

2 *Bandaranayake v Bandaranayake* (1922) 24 NLR 245. See also *Manikkan v Peter* (1899) 4 NLR 243. See further Savitri Goonesekere *Legal Status of the Female in the Sri Lankan Law on Family Relations* (Gunesena, 1980) pp 20–21 and HW Tambiah *Sinhala Law and Customs* (Lake House Investments, 1968) pp 82–84. See further Kandyan Succession ordinance No 23 of 1917, s 2. For a different view, See Savitri Goonesekere 'The Roman Dutch Law in a Plural Legal System' (1995) 9 *Colombo Law Review* 14–15, where she takes the view that, where a Kandyan man marries a non-Kandyan woman, the marriage will be governed by the General Law.

This chapter will dwell on these differences and pose the question whether, in some areas at least, we should be moving towards a uniform law. Uniform laws one must remember are a legacy of our colonial heritage. The Wills Ordinance,[3] the Adoption of Childrens Ordinance[4] and the Age of Majority Ordinance,[5] (subject to the exceptions contained therein), all represent laws which are of general application. Moreover, the post-colonial period demonstrates continued recourse to these laws. Sometimes however, recourse to the generally applicable laws has created anomalous situations. In *Ghouse*[6] the question that arose for decision was whether a child, adopted under the general law by a Muslim couple, was entitled to succeed to the estate of his adoptive parents. The majority of the Supreme Court held that Muslim law postulates consanguinity to qualify for intestate succession. Thus, the adopted child was precluded in terms of the Muslim Intestate Succession Ordinance[7] from succeeding to his adoptive parents. The decision of the court rested on a principle of statutory construction namely, that a subsequent general law should not be construed as repealing a Special Act (*generalia specialibus non derogant*) by implication. Whatever the legal merits of the decision, one cannot help but wonder whether the essence of adoption was lost in the process. As clearly stated in the Adoption of Children's Ordinance 'an adoption once effected results in the adopted child for all purposes being deemed to be a child born in lawful wedlock'.[8] The effect of the Supreme Court judgment was that of placing the adopted child in a different position to that of a natural child.

Clearly, the British legacy of statutes of general applicability did not have as its objective that of bringing the special laws in line with international standards. The objective was more that of making available to all communities, a body of law that the British felt were in keeping with their notions of justice. Yet, at this juncture Sri Lanka should be acutely conscious of the obligations that it has voluntarily undertaken in the form of international norms and obligations. It is these obligations and the constitutional provisions which should form the impetus for law reform and the movement towards a uniform law in some areas of the laws relating to marriage.

II CONTRACTING A MARRIAGE

Article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages states that State Parties to the Convention shall take legislative action to specify a minimum age of marriage. The article goes on to say that no marriage shall be legally entered into by any person under this age except where a competent authority has granted a dispensation as to age, for serious reasons. The Convention on the Elimination

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3 No 21 of 1884.
4 No 24 of 1941.
5 No 7 of 1865.
6 [1988] 1 Sn LR 25.
7 No 10 of 1931.
8 Adoption of Children's Ordinance No 24 of 1941, s 6(3).

of all Forms of Discrimination Against Women (CEDAW) in similar vein, states that 'the betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage'.[9]

The Convention of the Rights of the Child (CRC), whilst it does not specifically deal with marriage, defines a child as one below 18 years.[10] Pivotal to the Convention is Art 3 which states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Underage marriages are clearly detrimental to the child's interests and come within traditional practices prejudicial to the health of children.[11] Such marriages may also impinge on other rights, for example, the child's right to education, the child's right to leisure, play and recreational activities appropriate to the age of the child[12] and the child's right to be protected from sexual exploitation.[13]

The Sri Lankan provisions relating to the age of marriage have undergone some changes. Prior to 1995, the law reflected low prohibited ages of marriage. Thus, the general law provided that the male party should be above 16 years and the female party should be above 12 years except where the female was of European or Burgher parentage in which case the lawful age of marriage was 14 years.[14] In 1995, the general law was amended.[15] Section 15 was amended and now stipulated that the prohibited age of a marriage was to be 18 years for both parties to the marriage. Yet the law was not altogether clear. Section 22 of the Ordinance dealing with parental consent to marriage of minors was retained in the statute book, thereby, giving rise to rather convoluted interpretations. One view as regards the retention of s 22 was that parental consent was still a requirement for those who had reached age of 18 but were under the age of 21. Another view, and possibly the more logical one, was that the retention of s 22 was an inadvertent one. The section should, in fact, have been repealed. The requirement of parental consent can have no place in a system that recognises 18, as the minimum age of marriage. The age of 18, since 1989, coincided with the age of majority.[16]

The Kandyan law too went through the same process. Like in the general law the Kandyan law prior to 1995 incorporated a low minimum age of marriage. The principal Act provided that a male party to a Kandyan marriage had to be over 16 years whilst a female party had to be over 12 years.[17] In 1995, as in the general law, a uniform minimum age of marriage was introduced. Both the

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9 CEDAW, Art 16(2).
10 CRC, Art 1.
11 CRC, Art 24(3).
12 CRC, Art 31.
13 CRC, Art 34.
14 Marriage Registration Ordinance No 19 of 1907, s 15.
15 Marriage Registration (Amending) Act No 18 of 1995.
16 See Age of Majority (Amendment) Act No 17 of 1989, s 3.
17 Kandyan Marriage and Divorce Act No 44 of 1952, s 4 read with s 66.

male and the female parties to a Kandyan marriage are now required to be a minimum of 18 years.[18] Thus, as in the general law there was a lack of clarity in the law. Section 8 of the principal Act which provides for the consent of a competent authority in the event of the parties or one of the parties being a minor was retained. A minor is defined in s 66 as a male person under the age of 18 years and a female under the age of 16 years. Thus, as in the case of the general law, there was more than one possible interpretation of this section. The first, and this runs contrary to the concept of a prohibited age, is that parental consent or the consent of other stipulated persons could be used to circumvent provisions relating to prohibited age. The second and more plausible view is that the section was retained inadvertently.

Other provisions which were retained in the Kandyan law despite the amendments and which run counter to the minimum age of marriage are the provisions that validate marriages contracted between persons below the minimum age of marriage. The statutory provisions cover two situations. The first situation is where one of the parties to the marriage is below the lawful age of marriage.[19] The second situation envisages a marriage between parties, both of whom are below the lawful age of marriage.[20] In both situations cohabitation, for a period of one year after the party or parties attain majority or the birth of a child, renders the marriage valid.

The year 1997 brought further confusion into the general law. Section 22 of the principal ordinance was further amended. Parental consent, it would seem, could now be obtained for the marriage of a person under the age of 18.[21] The legislation, on the face of it, appeared to negate the effect of bringing in an enhanced minimum age.

The legislation of 1997 brought about mixed reactions. Academic opinion was firmly of the view that the amending law did not permit parents to consent to underage marriages. Reports from Registrars of Marriages displayed contradictory approaches. Some Registrars permitted non-age marriages with parental consent and others did not permit the contraction of such marriages. In the light of these contradictory approaches, the Court of Appeal judgment in *Gunaratnam v Registrar General*[22] was a welcome judgment. The Registrar General in this case had refused to register the marriage of a girl who was 14 years old. It is not entirely clear what the age of the male party to the marriage was. The issue before the court was whether, in spite of the consent, there was a prohibition in law preventing the parties from marrying. Thilakawardene J, dealing with the amendment to the Marriage Registration Ordinance brought in 1995, held that the amended s 15 operates as an absolute bar against those below the age of 18 marrying. Dealing with the apparent contradiction between the amendment to s 22 and s 15 of the Marriage Registration

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18 Kandyan Marriage and Divorce (Amendment) Act No 19 of 1995, s 4.
19 Kandyan Marriage and Divorce Act, s 4(2).
20 Kandyan Marriage and Divorce Act, s 4(3).
21 Marriage Registration (Amendment) Act No 12 of 1997.
22 2002 (2) Sri LR 302.

Ordinance, the judge stated that since the prohibited age of marriage operates as an absolute bar to marriage the parental authority to give consent to the marriage of a party is necessarily overridden. The overall intention of the legislature, in the judge's view, was that no person can enter into a marriage until they are 18 years of age. There is no doubt that Justice Shirani Thilakawardana's judgment reflects a sound approach to the whole issue of a prohibited age of marriage. The purpose of stipulating a minimum age of marriage is to protect children from early marriages which are detrimental to their physical and mental development and which forces them into adulthood. Parental consent, it is submitted, cannot be used to circumvent the protection conferred on a child. The only exception that can be visualised is consent given by a competent authority, for serious reasons, in the interests of the intending spouses.[23]

The Muslim law stands apart. The source of the law relating to marriage and divorce in Sri Lanka is the law of the sect to which the parties belong.[24] The majority of Muslims in Sri Lanka belong to the Shafi sect. Neither the Shafi sect nor any other sect appears to recognise a minimum age of marriage. It is difficult to conclude as to what extent child marriage is practised in Sri Lanka. A recent study suggests that it may be more prevalent than one may think,[25] despite information being more readily available on the dangers of early child bearing and the greater acceptance of the necessity for completion of secondary education at least. It has also been pointed out that amongst the wealthier segments of Muslim society early marriages were the rule.[26] Early empirical studies suggest that child marriage was common in the eastern districts of Sri Lanka.[27] The age of marriage could also depend on family tradition. Thus, amongst the Odeyar clan of Moorish physicians, the father of a young boy would call on the mother of a young girl child soon after her birth and propose a marriage. Consent to the marriage would be given on the girl child's naming day ceremony and the girl child would be presented with an *anayala podava*[28] and *adalayam*.[29] On the seventh birthday of the girl child she would be given in marriage and conveyed to her new home. A second wedding takes place when the child attains puberty after which consummation takes place.[30]

In 1999, research carried out under the auspices of the Muslim Women's Research and Action Forum found that the age of marriage amongst Muslim Women was fairly low when compared with the national average but had risen

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23 Minimum Age Convention 1962, Art 2.

24 Muslim Marriage and Divorce Act No 13 of 1951, s 98(2).

25 See Asiff Hussein *Sarandib, An Ethnological Study of the Muslims of Sri Lanka* (Pehiwala, Asiff Hussein, 2007) p 99.

26 Bawa (1888) in 'Ceylon' in Athal Joyce and NW Thomas (eds) *Women of all Nations* (Cassell & Company, London, 1908).

27 EB Deutrom *Ceylon at the Census of 1911* cited by Asiff Hussain, above n 25, at 99.

28 A piece of cloth which would be used as a nappy.

29 Consists of a silver bangle, silver necklace and silver earrings.

30 Asiff Hussain, above n 25, citing Vinodini de Silva in *Cultural Rhapsody* (Viator Publications, Colombo, 2000).

considerably when compared to 20 years ago. The study found that in Amparai the age of marriage was between 17 and 21, in Beruwela between 15 and 25 and in Kandy between 19 and 25. The study also found in all the areas that there were older women who had married between the ages of 12 and 16 and that only one case was found where the woman had married below the age of puberty, although consummation had taken place after the age of puberty.[31]

The case-law on the whole upholds the validity of child marriages. One early case held that the marriage of a 4-year-old Muslim girl was not legal.[32] Subsequent cases however recognised the validity of child marriages.[33] There is nothing to indicate, however, that the Muslim community, as a whole, endorses child marriages. In 1937, in *Muheidenbawa v Seyalethumma* the Board of Quazi's remarked that it was in the interest of the Muslim community that this 'social evil be eradicated by the creation of public opinion'.[34]

Legislative attempts to deal with the low age of marriage in the Muslim community have not really addressed the problem. Section 23 of this Muslim Marriage and Divorce Act states that the registration of a marriage of a Muslim girl who is below 12 years requires the consent of the Quasi. The Quasi is empowered to hold any such inquiry as he may deem necessary but there is no indication as to what the focus of the inquiry ought to be.

Whilst the decision of *Gunaratnam v Registrar General*[35] brought certainty into the general law, that same certainty is not prevalent in relation to the Kandyan law. It is possible that a future court may hold, as Thilakawardene J did, that the provisions relating to prohibited age in Kandyan law operate as an absolute bar against the marriage of persons below 18 years and that parental consent cannot validate a marriage of persons below the prohibited age.

The express retention of s 4(3)(a) and (b) in the Kandyan Marriage and Divorce Act which validate marriages of those below the lawful age of marriage in certain circumstances also poses a distinct problem. Would a court now regard these provisions as pro-non scripto?

As far as Muslim law is concerned, the provisions are undoubtedly clear. There is no ambiguity, but the law falls short of international standards. International standards, as we have seen, require a minimum age of marriage to be clearly stipulated. They demand, moreover, that marriages in contravention of such a stipulated age be invalidated with the exception of those which have been endorsed by a competent authority for serious reasons, in the interests of the intending spouses.[36] The Convention on the Rights of the Child demands that

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31 'Muslim Women as Actors – Symbolic Boundaries and Socio Cultural Realities' in *Between Two Worlds* (Muslem Women's Research and Action Forum, 1999) p 57.
32 DC Bathcoloa 18614, (1877) R 20.
33 (1937) 2 MMDR 53.
34 At p 55.
35 Above n 22.
36 Minimum Age Convention 1962, Art 2.

childhood be protected and the best interest of the child be the governing criterion in all matters relating to the child.[37] An underage marriage thrusts the child into an adult world with the responsibilities of an adult. Clearly this is not in the best interests of the child. It would furthermore deprive the child of rights expressly recognised by the Convention, for example, the right to education,[38] the right to engage in play and recreational activities appropriate to the age of the child[39] and possibly the right to be protected from work that is hazardous.[40] It could even be a violation of the right to life, survival and development recognised in the Convention.[41]

In 1835, some Bengali women ventilated their grievances on child marriage in the newspapers as follows:[42]

> 'Oh! father and brothers: why should you deprive us of the scope of education?
>
> Why don't you allow us to live and move freely as women of other countries do?
>
> Why are we transferred like cattle at the tender age of 4, 5, 10 and 12 to unknown men . . .'?

This statement goes to the roots of the problem, loss of education, loss of freedom, lack of choice and deprivation of childhood.

Child marriage today is clearly on the wane. The issue that the Sri Lankan legislature must address is whether it should be totally prohibited for all children irrespective of religion, ethnic or social origin, birth or status.[43] The general attitude of successive Sri Lankan legislatures has been to exclude the Muslim community from reforms which are perceived as offensive to the community. This perception appears, moreover, not to be backed by any systematic inquiry or study. Thus, when the amendments relating to the age of marriage were brought before Parliament in relation to the general law and the Kandyan law in 1995, the then Justice Minister justified this exclusion on the ground that 'the Muslim community is entitled to be governed by their own laws, usages and customs and that it would not be productive to aim at a level of uniformity which does not recognize adequately the different cultural traditions and aspirations of the Muslim community'.[44] He went on to state:[45]

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37 CRC, Art 3.
38 CRC, Art 28.
39 CRC, Art 31.
40 CRC, Art 32.
41 CRC, Art 6.
42 Samachar Darpan (21 March 1835) cited by Monmayee Basu in *Hindu Women and Marriage Law* (Oxford University Press, 2001) p 39.
43 CRC, Art 2.
44 *Hansard*, vol 101, pp 219–210 (1995).
45 Ibid, cited by Kishali Pinto Jayawardena and Chulani Kodikara in *Women and Governance in Sri Lanka* (ICES, New Delhi, 2003) pp 66–67.

> '[I]t is through respect for diversity of cultures . . . which enrich our land that the government is making that exception . . . [It is not] a sign of weakness or prevarication but embodies the essence of democratic traditions to recognize the different cultural values and to seek to incorporate them all in a comprehensive body of jurisprudence that we give effect to in our country.'

Pinto Jayawardene and Kodikara commenting on the exclusion of the Muslim community from the reforms relating to the age of marriage and the 1995 amendments to the Penal Code (which raised the age of statutory rape from 12 to 16 and made an exception in relation to married Muslim girls) said that '(t)he state's discourse on cultural rights of minorities and sensitivity to their values was an all too transparent mask for the political exigencies behind the exclusion of Muslim women from a universally applicable minimum age of marriage'. They point out pertinently that 'the then ruling government's slim majority in Parliament depended on a number of small parties including the Sri Lanka Muslim Congress, the self appointed spokesman within Parliament for the Muslim community'.[46]

This approach which in effect looks at law reform from the perspective of political survival does not take into account either Sri Lanka's international obligations arising from the ratification of Conventions or the aspirations of those governed by their personal laws to retain these laws and modernise them in line with the underlying spirit of their personal law. One must not lose sight of the fact that attempts were made by both the Dutch and the British colonial rulers to codify the personal laws and what remains now are personal laws with infiltrations of Roman Dutch law, English law and perhaps even more invidiously a colonial interpretation of the essence of the personal laws. In the light of this reality, one wonders whether such a timorous approach towards the personal laws is justified.

III PRESUMPTION OF MARRIAGE BY HABIT AND REPUTE, CUSTOMARY MARRIAGES AND REGISTRATION AS A REQUIREMENT OF A VALID MARRIAGE

Where parties have cohabited and been accepted by society as husband and wife, most legal systems presume that they have lived together as husband and wife rather than as cohabitees. Some legal systems, additionally, recognise customary marriages. Other legal systems strictly stipulate registration as a requirement of marriage and do not recognise customary marriages or the evidential rule relating to the presumption of marriage by habit and repute.

International standards favour registration. The rationale is that registration which takes place before an officer appointed by the state ensures compliance

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[46] Ibid, pp 67–68.

with other requirements relating to prohibited age, prohibited degrees of relationship, prohibitions based on the existence of a previous marriage, etc.

The Sri Lankan law on the presumption of marriage by habit and repute, customary marriages and registration is by no means consistent. The general law recognises customary marriages provided certain conditions are satisfied. The concept of the minimum ritual emerges from the judicial decisions. In effect if a customary marriage is to be recognised some acceptable ritual should have taken place.[47] The general law also permits a presumption of marriage to be drawn where there is evidence of cohabitation and repute.

Goonesekere identifies two distinct lines of authority in relation to the presumption of marriage by habit and repute.[48] The earlier view is that the presumption of marriage by habit and repute can be drawn even in the absence of evidence of the performance of customary rites.[49] The rationale is that the law presumes unless the contrary is proved that a man and a woman who have lived together as husband and wife are living together as a consequence of a valid marriage and not in a state of concubinage. The other line of cases deny legal recognition of unions where cohabitation is not preceded by some evidence of essential ceremonies where one or both parties to the union is alive. In these circumstances there is a reluctance to attach any significance to cohabitation as husband and wife and acceptance of the parties, as such, by their friends and relatives unless the parties can provide evidence that a proper customary marriage took place.[50] The law seems to be saying that if one or both parties are alive it is reasonable to expect them to recollect and adduce some evidence of solemnisation of the marriage. This latter approach to the presumption of marriage by habit and repute is clearly a restrictive one where the emphasis is on customary rites rather than cohabitation per se. Long cohabitation, except perhaps where both parties to the union are dead, does not, on this approach, form the basis for drawing a presumption of marriage rather than cohabitation.

Whilst this is the situation in the general law, the Kandyan law takes a wholly different approach to customary marriages and the presumption of marriage by habit and repute. The Kandyan law only recognises as valid, marriages which have complied with the statutory requirements relating to notice, solemnisation and registration.[51] This approach to solemnisation and

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47 *Rathnammah v Rasiah* (1947) 48 NLR 275, *Sinnaval v Nagappu* (1916) 1 Bal N of C 26, *Selvaratnam v Anandavelu* (1941) 42 NLR 487, and *Soosaipillai v Parapathipillai* 1985 (2) Sri LR 55.

48 'Some Reflections on Solemnization of Marriage in the General Law of Sri Lanka' (2002) *Moot Society Review* 24.

49 *Sastry Valaider Aronegary v Sembecutty Vaigalie* (1881) 2 NLR 322 (PC).

50 *Gunaratna v Punchihamy* (1912) 15 NLR 501, *Kandiah v Thangamany* (1953) 55 NLR 568 *Fernando v Dabrera* (1961) 65 NLR 282, and *Punchinona v Charlis Appuhamy* (1931) 33 NLR 227.

51 The current position is reflected in ss 3(1)(a) and (b), 16, 22(2) and 23(1) of the Kandyan Marriage and Divorce Act No 44 of 1952.

registration was a feature of British colonial legislation[52] despite the very apparent ill effects it caused in rendering children who would, in terms of the customary law, have been considered as marital children.[53] Indeed many writers of the British era make reference to the fact that Kandyan marriage, except amongst those of a high rank was contracted in a very informal manner without rituals. Thus, Davy having described a marriage ceremony and a marriage feast goes on to say that 'amongst people of the lower rank little attention is paid to the marriage ceremony'.[54] To impose compulsory registration on such a community was harsh and the consequences far reaching.

Berwick's statement summarises the consequences aptly when he says 'the effect of the new law was to bastardise and disinherit multitudes of the generation then being born, who would otherwise have had under the old law, the status of legitimacy'.[55]

In post-independent Sri Lanka, no attempt has been made to mitigate the harshness of the Kandyan law.[56] Whilst, as pointed out earlier, international standards favour registration they do not prescribe that a presumption in favour of marriage should not be drawn where there is evidence of cohabitation and repute. In a legal system that requires registration the presumption, when drawn, would also assume that the marriage had been duly registered.

The validity or invalidity of the Muslim marriage depends on whether it conforms with the law of the sect to which the parties belong.[57] Registration is clearly favoured and the law imposes penalties on those on whom it imposes the duty of registration.[58] It is significant, however, that non-registration does not make an otherwise valid Muslim marriage invalid.

Registration, it must be remembered, is completely alien to what people perceive as the essence of marriage. Nevertheless, registration of marriages is commonly imposed by the state and serves many purposes. The state, for example, has an interest in ensuring compliance with the requirements relating to prohibited degrees of relationship and the prohibited age of marriage. Registration of marriages is more likely to ensure that such provisions are complied with. Furthermore, undoubtedly issues relating to intestate succession of a deceased person would be simpler if marriage can be positively established. The intervention of a state official could, moreover, better ensure that marriage is consensual and that one or both the parties are not contracting

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52 See Ordinance No 13 of 1859 and Ordinance No 3 of 1870.

53 See Amerasinghe J in *Jayasinghe v Kiribindu* 1997 (2) Sn LR 1 at 21.

54 Davy 'An Account of the Interview of Ceylon, and of its Inhabitants' 286 in Knox *A Historical Relation of Ceylon* (Tissaso Prakashakayo, Dehiwala, Sri Lanka, 2nd edn, 1981) p 175.

55 Cited in *Jayasinghe v Kiribindu* 1997 (2) Sn LR 1 at 21.

56 See *Podinona v Herathhamy* 1985 (2) Sn LR 237 where a customary Kandyan marriage was not recognised.

57 Muslim Marriage and Divorce Act No 13 of 1954, s 16.

58 Ibid, s 17 read with s 81.

a marriage due to parental or other pressures. Lastly, registration may serve the state's interest in having accurate statistics on marriage.

All these reasons cumulatively provide sufficient justification for making registration of marriages compulsory. Furthermore, unlike in the initial stages of British rule where attempts to introduce compulsory registration failed for lack of awareness or appreciation of the requirement of registration, there is now a much greater awareness of registration. Thus, its imposition today would not, it is felt, result in a number of irregular unions. In any event even if the state imposes the requirements of registration the presumption of marriage by habit and repute could still be drawn and it would be presumed that the parties had in fact registered the marriage but that proof of registration was not available. This would be especially significant where both parties to the marriage are dead and evidence of registration is not available.

IV CONSEQUENCE OF MARRIAGE

Unity of domicile and unity of personal laws

Marriage under the general law results in a unity of domicile and a unity of personal laws. Thus, when a woman governed by one of the personal laws marries a man governed by the general law she ceases to be governed by her personal law and comes within the purview of the general law.[59] The basic tenet underlying unity of domicile and unity of personal laws is reflected in other areas of the law relating to marriage, namely that the husband is the predominant partner in the marriage. Thus, it is the husband who is the natural guardian of the children born of the marriage and it is he who determines by virtue of a concept known as the marital power where the parties should live. These aspects of marriage have been challenged and rejected by international standard setting mechanisms.[60] They are also not in keeping with local standards.[61]

A similar concept is found in the Thesawalamai. The Thesawalamai Code promulgated in 1707 by the Dutch Government had no provision dealing with the situation of intermarriage and the applicable law. The only provision dealing with intermarriage entitled 'How where a Pagan Marries a Christian Woman' deals with entitlement to acquired property. The reasons are not far to seek. Intermarriage would have been rare and possibly frowned upon. An analogy can be found in the Kandyan provinces. The Muslims were forced during the Portuguese and Dutch periods to seek refuge in the Kandyan

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[59] Married Women's Property Act No 18 of 1923, s 3(1).
[60] See CEDAW, Arts 16(d) and 15(4).
[61] See Women's Charter (Sri Lanka), art 7(1)(d) and (g).

provinces. They were received by the Kandyan kings and absorbed into the Rajakariya system.[62] Yet there is little evidence of intermarriage on a significant scale.[63]

The current position in relation to unity of personal laws in the Thesawalamai is found in s 3 of the Jaffna Matrimonial Rights and Inheritances Ordinance. The Act clearly states that, whenever a woman to whom the Thesawalamai applies marries a man to whom the Thesawalamai does not apply, she shall not during the subsistence of the marriage be subject to the Thesawalamai.[64] Conversely, where a woman to whom the Thesawalamai applies marries a man to whom the Thesawalamai does not apply, she shall during the subsistence of the marriage be subject to the Thesawalamai.[65]

The codified Kandyan law does not reflect the concepts of unity of domicile and unity of personal laws. The customary Kandyan law, moreover, did not reflect the premise that the husband was invariably the predominant partner in the marriage. In the *diga* marriage which was characterised by the departure of the wife from her '*mulgedera*' to that of the husband's, it is the husband (as one may expect) who is the predominant partner in the marriage. By contrast, in the *binna* marriage where the husband came to the wife's '*mulgedera*', it is the wife who is the predominant partner in the marriage. In modern times it has been suggested that the test of a *'binna'* or *'diga'* marriage is not invariably that of settlement on the husband's property or the wife's property but of economic sustenance of the marriage.[66] In a system which recognises two different forms of marriage and distinct variances as to who is the predominant partner in a marriage, the concept of domicile and unity of personal law in the sense of the wife taking on the husband's domicile and personal law has no place. It could only operate subject to a variance, that a spouse takes on the predominant spouse's domicile and personal law. There is no indication that such a concept has evolved.

Furthermore, the codified Kandyan law only contemplates a Kandyan marriage between parties both of whom are governed by the Kandyan law and who choose to register their marriage under the Kandyan Marriage and Divorce Act.[67] It would seem that the concept of unity of personal law would have no significance in the context of this legal framework.

The Muslim Marriage and Divorce Act also does not have any provision relating to unity of personal laws. Like the Kandyan Marriage and Divorce Act, the Muslim Marriage and Divorce Act only applies to marriage and

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62 See generally, Lorna Devaraja *The Muslims in the Kandyan Kingdom (1600–1815) A Study in Ethnic Harmony* (Golden Jubilee Souvenir Moors Islamic Cultural Home, Colombo, 1994).

63 Ibid.

64 Jaffna Matrimonial Rights and Inheritances Ordinance, No 1 of 1911, s 3(1).

65 Ibid, s 3(2).

66 See *Jayasinghe v Kiribindu* 1997 (2) Sri LR 1 for a comprehensive discussion on *binna* and *diga* marriages.

67 No 44 of 1952, s 3(1)(a) and (b).

divorces and other connected matters of Muslims.[68] Thus, the concept of unity of personal laws will have no application since only two Muslims could contract a Muslim marriage. Furthermore, Muslim law, being a religious law, cannot be imposed on a non-Muslim. Thus, the codified law does not incorporate the concept of unity of personal law. Yet where a marriage takes place between two Muslims a wife who refuses to live with her husband in the place where he chooses to set up the matrimonial home will be in breach of her matrimonial obligations and not entitled to maintenance.[69] The courts, however, tend to uphold the principle that the place and accommodation must be reasonable.[70]

Unity of domicile and unity of personal law reflected in the general law and Thesawalamai are in contravention of the international standards. International standards require State Parties to accord to men and women the freedom to choose their residence and domicile.[71] The stance taken by these standards is that domicile, like nationality, should be capable of change by an adult woman regardless of her marital status.[72] Concepts like unity of domicile and unity of personal law stem from the common law and in Sri Lanka, have been incorporated statutorily. Once incorporated they are protected and cannot be challenged even on the basis that they violate constitutional provisions.[73] Thus, legislation repealing statutory provisions and common law principles is imperative if Sri Lankan law is to come in line with international standards. The Kandyan law can perhaps be the model on which the Thesawalamai reforms ought to be based. The codified Kandyan law clearly provides that only two Kandyans can marry under the Kandyan law and that also only if they choose to register their marriage under the Kandyan law. It is only in those circumstances that the marriage will be governed by the Kandyan law. The thinking behind the Kandyan law is commendable. It ensures that the parties who are subjected to this law not only share the same personal law but have also opted to be governed by this law. The choice of whether they want their marriage to be governed by the Kandyan law or the general law is a matter that they must determine.

The Muslim Marriage and Divorce Law as we have discussed earlier only applies if both parties to the marriage are Muslims. It does not give the parties a choice of registering their marriage under the general law and having the marriage governed by the general law.[74] The law is not discriminatory

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68 Act No 13 of 1951, s 2.

69 *Ahmed v Sithy*, Sapoora (1939) 2 MMDLR 101, *Haniffa v Jamula Nachia* (1941) 2 MMDLR 127.

70 *Mohamed v Nazeema* 1990 6 MMDLR 90.

71 CEDAW, Art 15(4).

72 CEDAW General Recommendation No 21.

73 Constitution, Sri Lanka, art 16.

74 See Marriage Registration Ordinance No 19 of 1907, s 64 which defines a marriage for the purposes of the Ordinance as being a marriage 'save and except a marriage contracted under and by virtue of the Kandyan Marriage Ordinance 1870 (Repealed by Act No 44 of 1952) or the Kandyan Marriage and Divorce Act and except marriages contracted *between persons professing Islam*' (emphasis added).

nevertheless. It stipulates that all marriages between Muslims must be governed by a religious law irrespective of whether the parties wish their marriage to be governed by their religious law or not. The choice of a secular marriage is not available to Muslims.

V GUARDIANSHIP AND CUSTODY

Both the general law and the Muslim law are premised on the idea that the father is the natural guardian of the children of the marriage. This is very evident when one examines the provisions relating to administration of the property of minors, acceptance of gifts and the parental role in the marriage of minors. Statutory changes in the general law have resulted in a change in regard to parental consent relating to the marriage of a minor since the lawful age of marriage has been enhanced to 18.[75] Thus, the issue of parental consent no longer arises in the context of the general law. Its relevance continues in the realms of the Muslim law which does not enshrine a minimum age of marriage and insists on the presence of a *wali* or guardian in the event of the parties to the marriage being minors and also in the case of a major Shafei woman who is a virgin.[76] The preferred guardian is clearly the father or the paternal grandfather demonstrating the superior position of the father and the paternal relatives over the mother.

The procedural laws also reflected the premise that the father was the natural guardian of the children. Thus, the Civil Procedure Code precluded a married woman from defending an action brought against the minor child.[77] This legislative procedure is no longer part of Sri Lankan law.[78] Yet it was part and parcel of the law for well over 100 years and clearly founded on the premise that the father was the natural guardian of the child.

The concept that the court is the upper guardian of all minors is well entrenched in Sri Lankan law.[79] It has been used by the courts where the principles of Muslim law relating to custody appear to conflict with the now well entrenched best interests standard.[80] It has also been used to interfere with

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75 Marriage Registration (Amendment)Act No 18 of 1995, s 15.

76 Muslim Marriage and Divorce Act No 13 of 1951, s 25(1). For the applicability of the law of the relevant sect see ss 16 and 98 of the same Act.

77 Civil Procedure Code, s 479, read with s 495.

78 See Civil Procedure Amendment Act No 20 of 2002, s 2.

79 The Court's Ordinance No 19 of 1889 vested in the District Court of 'a special jurisdiction' over the persons and estate of minors. See s 69. For a brief time this jurisdiction was removed from the District Court and vested in a specially constituted Family Court. Now see Judicature Amendment (Act) No 71 of 1981, s 3.

80 *Fernando v Fernando* (1932) 2 MMDR 1, *Subair v Isthika* (1974) 77 NLR 397.

the preferential right of the father to custody[81] and the natural right of a parent to custody.[82] Both these principles originated from the Roman Dutch law and are now a part of the general law.

The Kandyan law of guardianship and the Thesawalamai law of guardianship have not survived with the exception of a provision found in the Thesawalamai Code[83] which deals with guardianship where a surviving father remarries. The Code states that on remarriage, a father was required to hand over the guardianship of his children to the maternal relatives together with his deceased wife's property. The wording used in the Code and in particular the use of the words that the 'mother-in-law or nearest relation generally takes the child' suggests that this was not a rule but an arrangement that was usually made.[84] Two distinct lines of authority are seen in the case-law. *Kanapathipillai v Sivakolonthu*[85] suggests that the maternal relations have a right to the custody of the child on the remarriage of the father unless there were sufficient reasons to depart from this principle. *Ambalavanar v Ponnammah*[86] suggests otherwise. De Kretser J, with whom Hearne J agreed, held that maternal relatives generally have the children, but this did not imply that they had rights to the children. The relevant paragraph in the Code in De Kretser J's views was an arrangement and nothing more. It was intrinsically linked with the possession of property and maintenance of the child. De Kretser J argued somewhat convincingly that the Jaffna Matrimonial Rights and Inheritances Ordinance[87] abolished forfeiture with regard to property on remarriage.[88] Thus, De Kretser J argues that the provisions of the Code discussed above were repealed and with the repeal the passing remark relating to custody was also repealed.

Whatever the merits of the arguments put forward in these cases the international standards on guardianship and custody are clear. Both parents are seen as the guardians of their children and international standards do not endorse superior rights to the father.[89] Moreover, the best interests standard incorporated in the CRC[90] is now almost universally acknowledged as the criterion to be used in custody applications. Thus, any vestige of a preferential right to the father, maternal preferential rights or even a recognition that parents have a natural right to the custody of their children must be viewed as undermining the best interests standard. What Sri Lanka needs at this point is a clear legislative articulation of the best interests standard in all custody matters.

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81 *Weragoda v Weragoda* (1961) 59 CLW 59, *Fernando v Fernando* (1968) 70 NLR 534.
82 *Premawathie v Pudalugoda Arachie* (1969) 75 NLR 398, *Frugtneit v Fernando* (1969) 74 NLR 448.
83 Thesawalamai Code Part 1, para 11.
84 Ibid.
85 (1911) 14 NLR 484.
86 42 NLR 219.
87 No 1 of 1911 (as amended).
88 Ibid, ss 37 and 38.
89 CRC, Art 18(1), CEDAW, Art 16(1)(d).
90 Article 3.

VI MAINTENANCE

The general law relating to maintenance was reformed considerably by the Maintenance Act of 1999. Despite the express retention of the alternative civil action, the primary remedy for non-support is that which is envisaged in the Act. The concept of joint parental liability for support of children, whether marital or non-marital, is enshrined in the legislation.[91] Also enshrined is the important concept of the reciprocal duty of support between husband and wife.[92] Provision has also been made for the disabled child[93] and the needy major.[94] By and large the new law is in keeping with international standards. The state's obligation of support envisaged in the Convention on the Rights of the Child does not find a place in the Maintenance Act.[95] Yet it is entrenched in the state's policy of free education, health and income support schemes which have operated at various times in post-independent Sri Lanka.[96] A recent publication cites Sri Lanka as an example of a 'support led' strategy for improving basic capabilities and points out that 4% of the gross domestic product has been redistributed to households in the form of free education, health services, and food subsidies and food stamps.[97] The 2003/04 Consumers' Finances and Socio Economic Survey which covered a sample of 11,722 households across the country with the exception of three districts in the Northern Province found that, in general, socio economic conditions had improved in Sri Lanka since the last survey done in 1996/97. It also found that there were significant differences between the Western Province and the other provinces on many indicators. Thus, although there was evidence that living standards and quality of life had improved in the country since the last survey, the improvements were uneven across sectors, provinces and income groups. There was, therefore, continued concerns about living conditions amongst the more vulnerable groups in the population.[98] Thus, continued state support for the poorest sectors remains vital in the context of the findings.

In relation to the Kandyan law and the Thesawalamai the principles relating to support have for the greater part fallen into disuse. A few isolated provisions in the codified law remains. As far as the Kandyan law was concerned the early British judges proceeded on the premise that distinct principles relating to support were not discernible in the Kandyan law and that obligations of support had to be enforced initially through the Vagrants Ordinance[99] and later through its successor, the Maintenance Ordinance.[100]

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91 Maintenance Act No 37 of 1999, s 2(2).
92 Ibid, s 2(1).
93 Ibid, s 2(4).
94 Ibid, s 2(3).
95 CRC, Art 27(3).
96 One may cite as examples, the food subsidy programme 1948–1977, the 1978 food stamp scheme, the Janasaviya Programme and the Samurdhi programme.
97 *Millennium Development Goals* (Sri Lanka, 2005) p 25.
98 *The Consumers, Finances and Socio Economic Survey Report* (Central Bank of Ceylon, 2003/2004) p 6.
99 No 4 of 1841.
100 No 19 of 1889.

The Vagrants Ordinance and the Maintenance Ordinance imposed an obligation on a husband to support his wife and his marital and non-marital children. Thus, it was no longer possible to distinguish between the *binna* married husband and the *diga* married husband and to enforce the principles of the customary law that imposed the obligation of support only on a *diga* married husband. Principles of the customary Kandyan law relating to support which have found expression in the codified law are those which relate to the obligation of a widow to support the children of the marriage out of her life estate in the acquired property of her husband, where the children are minors and in need of maintenance and where the deceased has left no *paraveni* (inheritable property) or if the *paraveni* is insufficient for this purpose.[101] Another customary principle which finds statutory expression is found in a provision which states that a widow's right to a life estate in the acquired property of her husband is limited to a half share of such property where the deceased husband shall have left a child or descendant by a former marriage. Once again the child or descendant should be a minor and in need of maintenance and the deceased's *paraveni* property should be insufficient for the maintenance of such a child, children or descendant(s).[102]

Some principles of the customary Thesawalamai too have found their way into statute law. Thus, when the estate of a deceased parent devolves on a minor child the surviving parent may continue to possess the estate and enjoy the income thereof until the child or children marry or attain majority.[103] The obligation of supporting the child or children until marriage or the attainment of majority is a concomitant obligation where a surviving parent possesses and enjoys the income from the property of a deceased spouse.[104]

Some principles introduced into statute law, however, do not have a foundation in the customary laws but are rather embodiments of English law principles, which have found their way both into the general law and the customary laws. One may cite, as an example, the provision which casts an obligation on a married woman who has separate property to maintain her children in the same way as a widow is obliged to do.[105] This obligation was also cast on a married woman who married under the general law[106] and had its origins in English law. These sections although still a part of statute law have very little significance now in view of the joint obligation of support imposed by the Maintenance Act.[107] The current obligation cast on a married woman is much wider than that which was imposed by these Acts. The obligation is no longer confined to one that comes into play only when a married woman has 'separate property'

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101 Kandyan Law Declaration and Amendment Ordinance No 39 of 1938, s 11(1)(9).
102 Ibid.
103 Matrimonial Rights and Inheritances Ordinance (Jaffna) No 1 of 1911, s 37.
104 Ibid, s 38.
105 Ibid, s 13.
106 Matrimonial Rights and Inheritances Ordinances No 15 of 1875, s 18 and Married Women's Property Act No 18 of 1923, s 27.
107 Maintenance Act No 37 of 1999.

but one which is imposed when she has the 'means' to support her children.[108] 'Means' have been interpreted by the Sri Lankan courts in a wide sense to include earnings and earning capacity.[109] The current law is much more in accord with the provisions in CEDAW which aims at equality between the spouses in every aspect of the marriage relationship.[110] Equal rights entail equal obligations and the obligation of support envisaged in our law is qualitatively the same for both spouses.

In contrast to Kandyan law and the Thesawalamai, the Muslim law principles relating to support have remained intact. The Muslim Marriage and Divorce Act[111] expressly provides that the Act shall apply to 'marriages, divorces and other matters connected therewith in relation to those inhabitants who are Muslims'.[112] Section 98(2) of the Act, declares that all matters relating to any Muslim marriage or divorce shall be determined according to the Muslim law governing the sect to which the parties belong. Thus, it is the law of the sect that assumes significance in the area of support as in other areas.

Some general principles relating to support which can be identified in Muslim law are first, that the obligation of support falls primarily on the husband and the father. Secondly, that whilst the husband's support obligation vis à vis his wife and his unmarried daughter is extensive, that as regards the male child only extends until puberty save in exceptional circumstances.

Recent cases have extended the father's obligation of support to children who are engaged in education on the premise that the Quranic principles were formulated in a different age and could be stretched to suit modern needs.[113] Yet despite this development, Muslim law falls short of international standards in relation to reciprocity of support obligations between husband and wife and joint parental obligations. It may also fall short of international standards in relation to the obligations owed to extra-marital children although there is support for the proposition that a Muslim man is obliged to maintain his extra-marital child in Sri Lanka owing to the statutory obligation imposed.[114] The content of the law relating to support of extra-marital children is not clear. The Muslim Marriage and Divorce Act clearly vests in the Quazi the power to inquire into and adjudicate any claim for maintenance by or on behalf of an illegitimate child where the mother of such child and the person from whom maintenance is claimed are Muslims.[115] The same Act stipulates that, in all matters relating to any Muslim marriage or divorce, the status and the mutual rights and obligations of the parties shall be determined according to the

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[108] Ibid, s 2.
[109] See *Weeraratne v Perera* (1977) 79 NLR 445, *Sivapakiam v Sivapakiam* (1934) 36 NLR 295, and *Rasamany v Subramaniam* (1948) 50 NLR 84.
[110] Article 16.
[111] No 13 of 1951.
[112] Ibid, s 2.
[113] *Ummul Marzoona v Samad* (1977) 79 NLR 209, and *Buhari v Ismail* 1978 (2) SLR 218.
[114] *Palliathamby v Savariathumma* (1969) 73 NLR 572.
[115] Muslim Marriage and Divorce Act, s 47(1)(cc).

Muslim law governing the sect to which the parties belong.[116] The Act visualises, at least in relation to marriage and divorce, that the law of the sect should be the source of the law. Yet in relation to the extra-marital child resorting to the law of the sect would be of little consequence since Islamic law does not impose an obligation of support on the father of an extra-marital child. There is furthermore, doubt as to whether the mother of an extra-marital child is under an obligation to support her child. Thus, the content of the obligation has been determined in accordance with general law principles.[117] Some courts have used the principles relating to corroboration which were part of the Maintenance Ordinance in respect of claims made by a woman on behalf of her extra-marital children.[118] This further buttresses the view that the substantive law that is applied is the general law. It must be noted that the Maintenance Act[119] does not enshrine the principle of corroboration of a woman's statement where she makes a claim for maintenance on behalf of her extra-marital child. Sweeping changes took place in 1999 and in relation to maintenance claims for the extra-marital child parentage must be established by cogent evidence.[120] With the exception of that requirement the content of the obligation in relation to the non-marital child is identical to the content of the obligation that is owed to the marital child.[121] The 'core' principle of non-discrimination that runs through the Convention on the Rights of the Child is therefore satisfied.

Given the significance of the obligation owed by parents to their children in international law[122] and given the importance of equality in the marriage relationship and the recognition of the same rights and obligations between spouses in international law,[123] it would seem that it is appropriate for Sri Lanka to reassess its diverse laws on support obligations to create common obligations between husband and wife and parent and child.

VII PROPERTY RIGHTS AND SUCCESSION RIGHTS

International standards require the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property.[124] The general law, the Kandyan law and the Muslim law are essentially separate property regimes vesting in each spouse rights to acquire, administer and dispose of his or her property. The issue that arises is whether this is mere formal equality or whether there is substantial equality. It has been said that women in Sri Lanka like elsewhere are 'either stuck at the bottom or

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116 Ibid, s 98(2).
117 See *Palliathamby v Savariathumma,* above n 115. See also Savitri Goonesekere *Muslim Personal Law in Sri Lanka* (MWRAF, 2000) pp 50–52 where she makes this argument.
118 *Cassim v Muthu Naeema* (1977) 6 MMDR 75.
119 No 37 of 1999.
120 Section 2(2) and (3).
121 Ibid.
122 CRC, Art 27.
123 CEDAW, Art 16.
124 CEDAW, Art 16(h).

seldom reach the top'.[125] If so, are there real opportunities available to women to amass property?[126] Given that reality, a community property based regime may in fact accord greater equality in property rights. Thesawalamai is the one system in Sri Lanka that recognises such an approach but it lacks proper equality since the administration of the community property is vested in the husband.[127] A reformed community or at least optional property regimes should be considered. The South African legal system is an example of a legal system that affords such a choice of systems. Thus, parties to a marriage determine the system that suits them best. In the South African model parties may determine whether their marriage ought to be governed by a universal community regime or a separate property regime, a deferred community acquests regime or a separate property regime. Such a model merits consideration.

Intestate succession rights differ depending on whether parties are governed by the general law or the special laws. In terms of the general law a surviving spouse inherits half of the property of the deceased spouse. No distinction is made between property that was brought into the marriage and property that was acquired during the marriage. In Kandyan law, the rules of succession to property are now embodied in the Kandyan law Declaration and Amendment Ordinance.[128] Both the *binna* married widow and the *diga* married widow are entitled to a life interest in the acquired property of their husband.[129] The section also provides for a situation where there is no acquired property or where the acquired property is insufficient. The widow in those circumstances is entitled to be maintained from the *paraveni* property of her deceased husband.[130] The widow's rights survive remarriage establishing the concept of entitlement. As far as the widower is concerned, his rights are more limited. A *diga* married widower is entitled to his wife's acquired property only if she dies issueless. Furthermore, he is entitled only to property acquired by his wife subsequent to the marriage.[131] The *binna* married widower's entitlement is not dealt with in the statute with the exception of a common provision[132] relating to movable property.[133] This gives rise to two possible interpretations. First, that there is no provision for the *binna* married widower and secondly, that the customary law principles would apply. If the customary law principles are applicable it must be stated that there is no uniformity amongst text writers as to the content of the customary law. Sawers suggests that a husband acquires

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125 ARB Amerasinghe *Gender and the Law* (Vishva Lekha Publishers, Ratmalana, Sri Lanka, 2003) p 35.

126 See generally *Labour Legislation and Female Employment in Sri Lanka's Manufacturing Sector* (IPS, Colombo, 1999).

127 See, eg, *Manikkavasagar v Kandasamy* (1996) 2 Sri LR 8 at p 25 where Sharvananda CJ argued that fundamental alterations in the customary law cannot be made except by 'unequivocal express legislation'.

128 No 39 of 1938.

129 Section 11(1).

130 Ibid.

131 Ibid, s 19.

132 Ibid, s 22.

133 Kandyan Law Declaration and Amendment Ordinance, s 24.

an interest in the wife's landed property which on his demise will go to the heirs.[134] Yet Sawers himself points out that this is the view of Doleswela Dessave, and the Chiefs of the Udaratta were of the view that the husband is not an heir to the wife's *paraveni* or acquired property.[135] Yet despite the above statement by Sawers, there is a great deal of uncertainty as to the rights of a widower, for Sawers himself in another passage talking of movable property states that on the death of the wife her movable property goes to her children and not to her husband.[136] One cannot reconcile this position with that stated earlier. It seems difficult to comprehend why a widower should have rights in relation to his wife's landed property but not her movable property. It is possible that in the first passage Sawers is referring to a *diga* married husband and in the second to a *binna* married husband.

Most writers veer to the view that whilst the *diga* married widower had a life interest in the property acquired by his wife during the subsistence of the marriage the *binna* married husband did not have such an interest.[137] This further illustrates the vulnerability of the *binna* married husband. The *binna* marriage is essentially one where the husband settles on the wife's land. He severs connections with his household and becomes a part of his wife's household. To leave him without any interest in his wife's property in these circumstances appears harsh. The statutory intervention to give him a right to a share of his wife's movable property is in these circumstances a welcome one.[138]

Viewed from the perspective of gender equality, the widower in Kandyan law is clearly treated differently from the widow. The widow (including the *binna* married widow) is treated as one who invariably requires support, whilst the widower is not so treated. This is perhaps illustrative of the fact that Kandyan law is essentially a patriarchal system irrespective of its recognition of the *binna* form of marriage. The *binna* marriage then must be viewed as being more a means of saving a family from extinction rather than one which has the woman as a focal point.

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134 Memoranda of the Laws of Inheritance to Landed Property, s 31 in Sawers *Digest of the Kandyan Law* (Tellippalai, Ceylon, 1921).

135 Ibid.

136 Sawers, above n 134, Memoranda of the Laws which Regulate Succession to Movable Property, s 6.

137 FA Hayley *A Treatise on the Laws and Customs of The Sinhalese* (Colombo, 1923) refers to, the d*iga* married husband at pp 460 and 461 and says that although the extent of his interest in the wife's property is not certain property acquired during coverture goes to the husband. With reference to the *binna* married husband at p 459, he states that on the wife's death, he ceased to have an interest in her property. Frank Modder and Earle Modder in *The Principles of Kandyan Law* (London, 1914) s 197 similarly states that a *binna* married husband who survived his wife had no interest in her property whether ancestral or acquired. At s 196, they state that a *diga* husband who survived his wife was entitled to a life interest over the landed property acquired by her. See also, TB Dissanayake and Colin Soysa *Kandyan Law and Buddhist Ecclesiastical Law* (Dharmasamaya Press,1963) p 138 where the authors citing *Naida Appu v Pulingu Rala* 1879 2 SCC 176 state that a *binna* married husband had no interest in either the ancestral or acquired property of the wife.

138 Kandyan Law Declaration and Amendment Ordinance, above n 134, s 22.

By contrast, the Thesawalamai, from a gender perspective, encompass rules relating to intestate succession which are gender neutral. Property except acquired property (*thediathettam*) reverts to the source from which it came. Acquired property, which includes the fruits from the separate property, constitutes community property in which both parties have a stake. Legislative interventions have reduced the community element in *thediathettam*. The legislation introduces the concept of separate *thediathettam* of the spouses.[139] The community element comes only at the point of termination of the marriage.[140] The legislation appears to have been conceived of as a piece of transitional legislation prior to giving the married woman complete control over the separate property. Parallels can be drawn with the Matrimonial Rights and Inheritances Ordinance in the general law which gave the married woman complete control over her movable property. By contrast her rights over her immovable property were restricted.[141] Weaknesses that are apparent in the law are that the law does not make provision for joint administration of the community property or even provide mechanisms for preventing mal-administration of the community. Judicial decisions uphold the sale of the *thediathettam* by the husband.[142] Donations in excess of the husband's half share have been set aside by the courts.[143] The husband has been likened to a trustee of the *thediathettam*.[144] Yet even cumulatively these aspects do not amount to much. What is required is joint administration of the *thediathettam*. This would make the entitlement on the termination of the marriage a more meaningful one.

VIII DIVORCE

Broadly the two alternative regimes governing the dissolution of marriage are the fault system and the breakdown system.

Matrimonial fault as the basis for divorce is widely discredited. It is thought to perpetuate acrimony between the parties and act as a disincentive for post-divorce co-operation between the parties as parents. The breakdown theory by contrast has gained widespread acceptance. The general law of the country retains the fault principle. Divorce can only be obtained for adultery, desertion, or incurable impotency.[145] Impotency is also a ground of nullity and more appropriately so, since it does not fit in well with the fault principle.

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139 Jaffna Matrimonial Rights and Inheritances Ordinance, ss 6 and 7.

140 Ibid, s 20.

141 Ibid, s 8.

142 *Sangarapillai v Devaraja Mudaliyar* (1936) 38 NLR 1, *Vijayaratnam v Rajadurai* (1966) 69 NLR 147.

143 *Parasathy Ammah v Setupillai* (1872) 3 NLR 271. See also *Seelachchi v Visuvanathan Chetty* (1922) 23 NLR 97. For an indepth discussion see Kamala Nagendra *Matrimonial Property and Gender Inequality. A Study of Thesawalamai* (Cambridge University Press, Stamford Lake, 2008) ch 4.

144 See *Seelachchi v Visuvanathan Chetty,* ibid. See also *Seenivasagam v Vythilingam* (1944) 45 NLR 409.

145 Marriage Registration Ordinance No 19 of 1907, s 19.

Various efforts at law reform have not resulted in a change in the basic structure of the law. In 1977 the legislature sought to introduce a 7-year separation ground through the Civil Procedure Code.[146] It was widely thought that this was with a view to introducing the breakdown principle. Yet the majority of the Supreme Court outwardly declared that the fault principle was too well entrenched in the jurisprudence of the country to be jettisoned by a 'side wind'.[147] Any interpretation which would allow a party who defies the 'moral laws' to obtain a divorce on the grounds of his own matrimonial offence was in the court's view inconceivable.[148] Thus, the fault principle remains firmly entrenched in the general law. By contrast the Kandyan law and the Muslim law contain both fault and non-fault grounds.

Yet whilst the divorce laws in these systems are less rigid they are nevertheless discriminatory since they stipulate different grounds of divorce for men and women. Thus, the codified Kandyan law permits a man to divorce his wife on proof of adultery.[149] In the case of the wife, however, she is required to prove adultery on the part of the husband coupled with incest or gross cruelty.[150] Admittedly there are gender neutral grounds but the adultery based grounds require amendment if they are to comply with international standards.

It is doubtful whether the provisions that attempt to incorporate the customary law which was based on breakdown reflect a proper understanding of the customary law or provide necessary safeguards to ensure that a marriage that is to be dissolved is, in fact, one that has broken down. The net result is a statutory provision that needs considerable amendments to bring it in line with the underlying premises of the customary law and the current safeguards operating in legal systems that have incorporated breakdown as the sole ground of divorce.

The source of the Muslim Law of Divorce is the Muslim law governing the sect to which the parties belong.[151] The Muslim Law of Divorce although considerably more liberal than the general law in that it recognises both fault based and non-fault based grounds of divorce is inherently discriminatory since it differentiates between the grounds of divorce available to the wife and the grounds of divorce available to the husband. Nevertheless, it recognises a form of divorce based on mutual consent (*mubarath*) which in essence reflects the breakdown concept. The *khuta* divorce in essence is also based on the breakdown concept. A woman who is unhappy with her marriage but who cannot attribute any fault to her husband can obtain a divorce having compensated the husband.

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146 Civil Procedure Code, No 2 of 1889 as amended by law No 20 of 1977.
147 *Tennekoon v Somawathie Perera* 1986 (1) Sri LR 90.
148 Ibid, at p 100.
149 Kandyan Marriage and Divorce Act No 44 of 1952, s 320.
150 Ibid, s 32(b).
151 Muslim Marriage and Divorce Act No 13 of 1951, s 98(2). Read with s 16.

Retention of divorce laws that stipulate different grounds for the male spouse and the female spouse are clearly not in keeping with international standards. The concept of equality visualised in the relevant instruments envisage equality of the spouses both during the marriage and at its dissolution.[152] Thus, in this area as well as in the other areas what is proposed here is a re-examination of the grounds of divorce in the light of international standards.

Furthermore, in Sri Lankan law as it currently holds, divorce under the general law is founded on the principle of fault and in the other systems on both fault and non-fault based grounds. Thus, in some cases divorce will be a relatively simple process based on consent or a broader concept of fault. In other cases, divorce will only be possible for adultery or malicious desertion.

The process of divorce also varies and in terms of the Kandyan law divorce will be available through a relatively painless administrative process. In the Muslim law a divorce application is made to a Quazi who determines the matter through an informal process. Those married under the general law however cannot terminate their marriages except through a formal court process. Quite apart from the substantive law, procedures in relation to some divorces are relatively simple and private. In others they are formal, and public.

Just as the conceptual basis of divorce should be re-examined, the procedural framework also requires consideration. Here the issue is whether the current procedures facilitate an amicable resolution of all the issues that arise at the point of divorce, ie the custodial support and property matters. Do the procedures encourage conciliation or mediation and informal interventions?

This chapter has, it is hoped, demonstrated the vital need for re-examination of some aspects of the marriage laws in Sri Lanka. It is the author's view that ratification of international conventions requires Sri Lanka to bring its domestic law in line with the standards embodied on those conventions. Whilst the international standards provide the impetus for law reform, the old colonial legacy of bringing about enactments which could be accessed by any person irrespective of whether such a person was governed by a special system of law might provide a means by which the process can take place.

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[152] International Covenant on Civil and Political Rights, Art 23(4), CEDAW, Art 16(5)(c).

Sweden

EQUAL TREATMENT OF SAME-SEX COUPLES IN SWEDEN

*Anna Singer**

Résumé

En modifiant son *Code du Mariage*, la Suède a franchi en 2009 une nouvelle étape dans la reconnaissance des couples de même sexe. Ces changements sont entrés en vigueur le 15 mai 2009. À l'issue de longs débats au sein de la société et du Parlement, l'article 1 du Chapitre 1 du Code fut amendé. L'ancienne disposition se lisait ainsi: «Le mariage est l'union d'une femme et d'un homme. Les deux personnes qui se marient deviennent époux». Le nouveau texte prévoit maintenant: «Ce Code contient les dispositions concernant la vie commune en mariage. Deux personnes qui se marient deviennent époux». Sur le plan législatif, il ne s'agit que d'un changement technique. En effet, la *Loi de 1993 sur le Partenariat Enregistré*, qui encadre les unions de même sexe, avait déjà reconnu le principe de l'égalité juridique entre le partenariat enregistré et et le mariage. Le nouvel amendement au *Code du Mariage* peut néanmoins être vu comme un pas majeur, voire ultime, dans la reconnaissance des couples de même sexe qui se trouvent désormais dans une position juridique totalement identique à celle des couples hétérosexuels. Le présent texte fait un survol de l'évolution législative en Suède concernant la reconnaissance des couples de même sexe, incluant le droit de l'adoption et de la procréation assistée.

I INTRODUCTION

In recent decades, one of the great challenges to the traditional view of what comprises a family has been posed by same-sex couples and their claim to be recognised as any other family. In 2009, yet another step towards the equal treatment of same-sex couples was taken in Sweden through changes to the Marriage Code which came into effect on 15 May 2009. After a lengthy debate in both society and Parliament, the wording of chapter 1, section 1 of the Code, which had previously provided that '[m]arriage is concluded between a woman and a man. The two who have married one another become spouses', was amended. The new wording provides that '[t]his Code contains provisions regarding life together in marriage. Two persons who enter into marriage with one another become spouses'.[1]

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1 All translation from Swedish is done by the author.

From a language point of view, this minor change caused a lively debate in Sweden over the years. From a legal point of view, the change was basically only technical. The Registered Partnership Act of 1993, which regulated same-sex unions, had already in principle given partners the same legal position as the Marriage Code gives to spouses. Still, this amendment to the Marriage Code could be described as a major, and in a sense final, step towards the equal recognition of same-sex couples who are now put in the same legal position as different-sex couples. It could, therefore, be of interest to give a short summary of the development of the legislation concerning the legal recognition of same-sex couples in Sweden.

II BACKGROUND – LEGALLY RECOGNISING SAME-SEX COUPLES

The agony preceding the introduction of the above-mentioned change to the Swedish Marriage Code is noteworthy, considering that the question of legal recognition of same-sex unions has been on the political and legislative agenda for more than 30 years. In 1973, the Swedish Parliament had already discussed a proposal to abolish marriage in favour of registered cohabitation for all couples.[2] This, at the time radical, suggestion was rejected but Parliament at the same time emphasised that cohabitation between two persons of the same sex is a perfectly acceptable form of family life from society's point of view.[3] A few years later, in 1978, a committee was appointed to investigate, from a legal perspective, the conditions of life of homosexual individuals and the occurrence of discrimination in different sections of society.[4] The result of this investigation was the introduction of the Homosexual Cohabitees Act in 1987. Through this legislation, Sweden became one of the first countries in the world to introduce family law legislation for same-sex relationships. The Homosexual Cohabitees Act did not comprise any material provisions. It contained only one section stating that when two persons live together in a homosexual relationship they should be treated the same way as heterosexual cohabitees when applying the rules of certain laws referred to in the section. The main practical significance of this law was that the division of the couple's joint home on separation was accomplished in the same way as for heterosexual cohabitees.[5]

After introducing the Homosexual Cohabitees Act, the Swedish legislator proceeded rather cautiously with the legislative work concerning same-sex couples. In 1991, a committee was established to evaluate the 1987 legislation and to consider the need for a law on registered partnership. The result was the

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2 Motion to Parliament 1973:1793.

3 Report of the Parliamentary Legislative Committee [Lagutskottets betänkande] LU 1973:20 p 116.

4 Government Committee Report SOU 1984:63 Homosexuals and Society [Homosexuella och samhället].

5 The Law on Homosexual Cohabitees [lag (1987:813) om homosexuella sambor].

enactment of the Swedish Registered Partnership Act in 1994.[6] The Registered Partnership Act made it possible for two persons of the same sex to register their partnership through a ceremony similar to the one practised for civil marriages. The law comprised rules stating that legal provisions concerning spouses, with some exceptions (eg parenthood), were applicable to registered partners.

Gradually, the differences between the legal effects of registered partnerships and marriage have been abolished and, prior to the change of the Marriage Code in 2009, there were hardly any differences at all. Essentially, it was only the registration ceremony that differed from the marriage ceremony.

III PARENTHOOD FOR SAME-SEX COUPLES

Legally recognising same-sex couples as equal to heterosexual married couples inevitably raises the question of joint legal parenthood. Joint parenthood is often seen as one of the genuine signs of a family. If same-sex couples are being recognised as equal to married couples of different sexes, they have a justified claim to be permitted to become, jointly, parents to a child.

(a) Adoption

The committee investigating the situation for homosexuals in society pointed out in their 1984 report that homosexual guardians, single as well as those living in a homosexual relationship, have the same qualifications as other guardians to give children growing up care, consideration and love.[7] However, allowing non-married couples to adopt would necessitate general changes in the law, also allowing for non-married heterosexual couples to adopt, something that was not considered desirable. There were also concerns that allowing same-sex couples to adopt could be contrary to the best interest of children, as society attitudes towards homosexuals were still negative. Since most adoptions concerned children from other countries, there was a perceived risk that the child, already different due to his or her origin, would be exposed to another form of alienation as a result of the untraditional family form. However, the question of allowing same-sex couples to become adoptive parents had been raised and it was not going to disappear.

A subsequent parliamentary committee appointed in 1999 was given the task to investigate and analyse the conditions for children in homosexual families. The committee was also to consider whether the legal differences between the possibilities for hetero- and homosexual couples to, among other things, adopt

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[6] Government Committee Report SOU 1993:98 Partnership [Partnerskap]; [lag (1994:1117) om registrerat partnerskap].

[7] Government Committee Report SOU 1984:63 Homosexuals and Society [Homosexuella och samhället] p 79.

children were objectively justified. The best interest of the child was to be the guiding principle for the committee's work.

The committee found that the legal difference between hetero- and homosexual couples' possibilities to adopt was not objectively justified. Since only married couples had the right to adopt jointly, the suggestion was that adoption also be made available for same-sex couples who had registered their partnership.[8] Two forms of adoption were discussed: stepchild adoption and intercountry adoption.

Few objections were made against making stepchild adoption available for same-sex couples. This kind of adoption was seen as a way to strengthen the legal position of children living in families with two adults of the same sex. An adoption can give a child economical, social and legal security. A change in the law could also underline that these families are as acceptable as other families. The law was subsequently amended, coming into effect on 1 February 2003 and registered partners were put in the same position as married couples regarding the right to apply for adoption, both stepchild adoption and intercountry adoption.[9]

The question of intercountry adoption had been more controversial than stepchild adoption. There was an apprehension that to be adopted into a family different from the dominant family form could add to the difficulties these children already encountered due to their background and origin. However, it was deemed that same-sex couples would not be less equipped than other couples to successfully deal with these problems and registered partners were therefore allowed to apply for intercountry adoption.

It was foreseen that the change to the law would have very little impact on the possibilities for registered partners to receive children through intercountry adoption. The purpose behind the change to the adoption regulation was to treat registered partners and spouses equally if this was considered to be in the child's best interest and to set a positive example for other States. As it was stated in the government bill: 'A Swedish openness in this matter can in time lead to a change of the attitudes toward homosexuals and adoption by registered partners in a positive direction, also in foreign countries'.[10]

As expected, the law has had little impact concerning intercountry adoptions. So far, no children have been adopted through the recognised adoption agencies. Stepchild adoptions have been more frequent, but there are no statistics available on how many children have been adopted by a partner of the parent, only on stepchild adoptions in general.[11]

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8 Government Committee Report SOU 2001:10 Children in Homosexual Families [Barn i homosexuella familjer].

9 Government Bill 2001/02 Partnership and Adoption [Partnerskap och adoption] pp 29, 47.

10 Government Bill 2001/02 Partnership and Adoption [Partnerskap och adoption] p 29.

11 There has been no significant change in the number of stepchild adoptions following the introduction of the law in 2003.

(b) Assisted reproduction for lesbian couples

Allowing same-sex couples to adopt prompts the question of whether lesbian couples should be given access to assisted reproduction techniques. When giving same-sex couples the possibility to apply for adoption it was stated that same-sex couples were suitable as parents and that adoption by same-sex couples was not contrary to the best interest of the child. Against this background, no reason was found not to allow same-sex couples of the female sex access to assisted procreation methods.[12] In 2005, rules were enacted giving female couples access to donor insemination and IVF treatment with donor sperm.[13]

Women in registered partnerships (today marriage), and women cohabiting, have access to treatment. Parenthood for the woman not giving birth but consenting to the treatment of her wife or cohabitee – designated as a parent under the law as opposed to a mother or father – is in both cases established through confirmation of parenthood.[14] A further requirement for the establishment of legal parenthood is that the child is conceived through treatment in a Swedish hospital where only non anonymous donors are used. In this way, the child's interest in having two legal parents and access to information about genetic origins can be satisfied, since the child has a right to access the information kept at the hospital concerning the donor, including his identity. If the insemination has been carried out abroad or through a private arrangement, a consenting woman cannot confirm parenthood since the child's right to knowledge about his or her origin is not protected. Instead, in these cases, paternity should be established. If paternity cannot be established, which usually is the case when anonymous donors have been used, the only way to establish joint parenthood for the women is through adoption, an alternative available to married couples only.

IV THE MARRIAGE CODE AFTER 2009 AMENDMENTS

Having put same-sex couples in almost the same legal position vis-à-vis parenthood as different-sex couples, the question of gender neutral marriage gained new momentum. In 2005, a special commissioner was appointed to analyse the question of whether persons of the same sex should be allowed to marry. His work was very thorough and included several hearings with representatives from the different religious communities. The subsequent

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[12] Government Committee Report SOU 2001:10 Children in Homosexual Families [Barn i homosexuella familjer]; Government Bill 2001/02:123 Partnership and Adoption [Partnerskap och adoption] p 34.

[13] Memorandum of the Ministry of Justice, Ds 2004:19 Parenthood after assisted reproduction for homosexuals [Föräldraskap vid assisterad befruktning för homosexuella]; Law on Genetic Integrity [lag (2006:351) om genetisk integritet] ch 6 and 7.

[14] The Parental Code [föräldrabalken] ch 1, s 9.

recommendation was to allow couples of the same sex to enter into marriage.[15] Due to the political constellation of the government, there was no government proposal following this suggestion. It was instead a parliamentary bill that eventually was accepted with the result that the Partnership Act was revoked in the spring of 2009 and the Marriage Code, as of 15 May 2009, is applicable to all couples, regardless of their sex.[16] Couples who have previously registered their partnership may have their partnership converted into marriage through notification to the Swedish Tax Agency or through marrying again. There is also a possibility for registered partners to remain partners.

Considering that same-sex couples during the past decades have been put in the same legal position as different-sex couples in most respects, it is a little surprising that the question of gender neutral marriage was, and possibly still is, a source of such diverse opinion.[17] Perhaps the core of the difficulty in introducing gender neutral marriage lies in the fact that the right to solemnise legally binding marriages has been given to most religious communities in Sweden. Those who wish to marry can thus choose between a civil and a religious ceremony. Most religious communities have been opposed to the idea of gender neutral marriage, maintaining that marriage is exclusively a union between a man and a woman. Where it concerns gender neutral marriage, the question has been whether religious communities should be forced to marry persons of the same sex. The right to solemnise marriages constitutes the exercise of public authority that must be exercised without discrimination. The alternative has been to withdraw the right to solemnise marriages from religious communities. Since most couples, also of the same sex, still prefer to have a religious ceremony, the withdrawal of the religious communities' authority to perform marriages would not be in accordance with public opinion. It could also place unnecessary blame on same-sex couples. In the end, the right for religious communities to perform binding marriages has been retained and it is left to the communities themselves to decide whether they want to marry a couple or not. A couple who cannot find a religious community willing to solemnise their marriage always has the option of a civil ceremony.

The only remaining legal difference between same- and different-sex spouses is that an equivalent to the pater-est rule for establishing legal paternity – a mater-est rule – has not been introduced. Legal parental status for a woman married to another woman must still be achieved through a confirmation of

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[15] Government Committee Report SOU 2007:17 Marriage for couples of the same sex [Äktenskap för par med samma kön].

[16] Government Committee Report SOU 2007:17 Marriage for couples of the same sex [Äktenskap för par med samma kön]; Government Bill 2008/09:80 Questions of marriage [Äktenskapsfrågor]; Report of the Parliamentary Committee on Civil Affairs [Civilutskottets betänkande] 2008/09:CU19.

[17] The changing significance of marriage in Sweden over the centuries is the topic for a forthcoming PhD dissertation by Caroline Sörgjerd, Uppsala University, *The Reconstruction of Marriage – Legal Challenges of Changing Family Patterns*.

parenthood. There has been a suggestion that legal parenthood should be established in the same way for both kinds of spouses but so far this has not resulted in legislation.[18]

[18] Government Committee Report SOU 2007:3 Parenthood after assisted reproduction [Föräldraskap efter assisterad befruktning].

The United States

SAME-SEX COUPLES SEEK FEDERAL BENEFITS AND INTERSTATE RECOGNITION OF THEIR RELATIONSHIPS

Barbara J Cox[*]

Résumé

Depuis plusieurs années, certains articles relatifs à cette vue générale sur les États-Unis ont discuté de la manière dont des États fédérés ont doté les couples de même sexe d'un statut légal et des positions divergentes prises par les États en abordant cette question.

Ce qui a reçu le moins d'attention, et qui fait l'objet de ce thème, sont les orientations fédérales sur le mariage et le partenariat aux États-Unis. De nombreuses évolutions méritant attention se sont produites les dernières années relatives au contentieux provoqué par la défense de la législation sur le mariage, aux décisions administratives attribuant l'aide sociale aux enfants de parents de même sexe et autorisant un changement de nom sur le passeport, ainsi qu'à une extension fédérale limitée des droits professionnels des couples parentaux de même sexe.

Les positions portant sur la reconnaissance légale entre États des couples de même sexe adoptées par la Californie et l'État de New York sont également visées. Au regard de l'octroi croissant d'un statut légal aux couples de même sexe, la question de la reconnaissance au niveau fédéral, de même que dans les relations inter-étatiques de ces mariages et de ces partenariats suscite l'intérêt grandissant des juges, des parties, des universitaires, des législateurs et du grand public.

I INTRODUCTION

In the past few years, some of the articles in this Survey about the United States have focused on various issues concerning marriage or partnership for same-sex couples. These articles have primarily discussed how individual states created a legal relationship status for same-sex couples and the divergent paths that states have taken when addressing this issue. What has received less

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attention and what will be the focus of this chapter are the federal aspects of marriage and partnership in the United States. Many developments have occurred in the last few years that deserve attention. Two additional developments in 2009 concerning interstate recognition of same-sex couples' legal relationships are also discussed. As more same-sex couples enter legally recognised relationships, we are sure to see questions of federal and interstate recognition of their marriages and partnerships increasingly demand the attention of judges, litigators, academics, legislators and the general public.

Currently five US States permit same-sex couples to marry: Connecticut (2008), Iowa (2009), Massachusetts (2004), New Hampshire (2010) and Vermont (2009). California also recognises the marriages of same-sex couples who were married whilst marriage was legal in the state and also recognises marriages from other jurisdictions in certain situations. Additionally, six states provide either domestic partnerships or civil unions for same-sex couples that provide all of the state rights, but not the name, that married couples enjoy: California (domestic partnership, 1999, expanded 2005), the District of Columbia (domestic partnership, 2002), Nevada (domestic partnerships, 2009), New Jersey (civil unions, 2007), Oregon (domestic partnerships, 2008) and Washington (domestic partnerships, 2007, expanded 2009). Four additional states provide some state-wide spousal rights to same-sex couples: Colorado (designated beneficiaries, 2009), Hawaii (reciprocal beneficiaries, 1997), Maine (2004) and Wisconsin (domestic partnerships, 2009). Two states and the District of Columbia recognise marriages by same-sex couples that were legally entered into in another jurisdiction: California (2009), New York (2008, 2009) and the District of Columbia (2009). As a result of the November 2009 elections, Maine voters reversed the marriage equality legislation signed into law on 6 May 2009. Finally, the District of Columbia adopted legislation indicating that it would recognise marriages of same-sex couples from different jurisdictions and extending equal marriage rights to its citizens, subject to further action by Congress.[1]

Part II of this chapter discusses two cases from Massachusetts that were filed in 2009 and challenge the denial of federal rights to couples who are legally married in that state. One case was brought by eight same-sex married couples

[1] This information comes from the Human Rights Campaign's map on 'Marriage Equality & Other Relationship Recognition Laws', which is found at www.hrc.org/state_laws and from the Taskforce's map on 'Relationship Recognition for Same-Sex Couples in the US', which is found at www.thetaskforce.org/reports_and_research/issue_maps. California adopted legislation to recognise marriages from other jurisdictions as marriages if they were celebrated before 5 November 2008; any marriages celebrated in other jurisdictions after 5 November 2008 are recognised as domestic partnerships. See below Part IV(a). Maryland and Rhode Island also provide limited rights to statutorily defined domestic partners but do not have a domestic partner registry. Whether the District of Columbia marriage equality legislation will take effect as anticipated on 2 March 2010 will depend on whether Congress gets involved. The 'District of Columbia Referendum on Marriage Act of 2010' was introduced in the House and the Senate on 13 January 2010, and would prevent marriage licences from being issued to same-sex couples unless a referendum on the issue is held first. Search for Bill number HR 4430 at http://thomas.loc.gov (accessed June 2010). See also, 'Summary of State Developments in 2009' (2010) at www.hrc.org/documents/HRC_States_Report_09.pdf.

and three surviving spouses and the other case was brought by the Commonwealth of Massachusetts. Although they raise different causes of action, both cases challenge the constitutionality of the Defense of Marriage Act (DOMA)[2] as it applies to married couples in Massachusetts.

Part III considers related aspects of federal recognition of same-sex couples' legal relationships. This section discusses a recent ruling by the Social Security Administration that a non-biological mother's child could receive benefits despite DOMA; a ruling by the State Department that same-sex couples who change their names after marriage or entering other legal relationships may be issued passports in their new names; and a memorandum from President Barack Obama ordering various federal benefits for same-sex couples in those limited situations where DOMA does not control federal law.

Part IV looks at two important developments in interstate recognition of same-sex couples' legal relationships from other jurisdictions. The first development concerns New York, where Governor David A Patterson issued an Executive Order on 14 May 2008 directing all state agencies to revise their rules and regulations in order to provide equal rights, benefits and responsibilities to same-sex couples who marry in other jurisdictions and a 2009 ruling by the New York Court of Appeals denying challenges to decisions by Westchester County and the Civil Service Commission that recognise same-sex couples who were married in other jurisdictions for employment benefits purposes. The second development concerns California where legislation was adopted in 2009 that recognises marriages of same-sex couples from other jurisdictions that were entered into before 5 November 2008 when the voters of California amended its Constitution to prevent same-sex couples from marrying. The California Supreme Court ruled earlier in 2009 that couples who were married between its May 2008 ruling and the 4 November election would be considered as married in California. This new legislation provides similar recognition to couples who married outside of California at any time prior to the 5 November election.

Analysing these developments permits family law experts to better predict how same-sex couples' legal rights and responsibilities will be treated from a US federal perspective and anticipate issues that will continue to arise concerning interstate recognition of these relationships. It establishes that complex issues of federalism and conflicts of law will continue to arise as long as same-sex couples' marital or partnership status varies between and among the federal and state governments.

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[2] Pub L No 104–199, 110 Stat 2419 (1996).

II DOMA CHALLENGE BY GLAD AND COMMONWEALTH OF MASSACHUSETTS

Gay and Lesbian Advocates and Defenders (GLAD), the legal rights organisation from New England that won the Vermont civil unions case,[3] the Massachusetts marriage case[4] and the Connecticut marriage case[5] has now set its sights on s 3 of DOMA. That section states:[6]

> 'In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.'

Most of the early law review literature concerning DOMA focused on s 2 through which Congress used its 'express grant of authority', under the US Constitution's Full Faith and Credit clause 'to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States' with the intention of preserving the right of each state to decide whether to recognise the marriages of same-sex couples entered into in other states.[7] The academic discussion of whether s 2 of DOMA was constitutional and, if so, whether it had any effect given the already existing power of states to choose whether to recognise each other's marriages, was intense and divided.[8]

Section 3 of DOMA received less attention, primarily because it was adopted in 1996 but same-sex couples could not marry in the United States until Massachusetts began permitting marriage on 17 May 2004. Section 3 prevents same-sex couples who are married in states that permit those marriages from obtaining federal rights that are based on marital status. At least 1,138 laws tie federal benefits, protections and responsibilities to marital status, including

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3 *Baker v State*, 744 A.2d 864 (Vt 1999).

4 *Goodridge v Department of Public Health*, 798 N.E.2d 941 (Mass 2003).

5 *Kerrigan v Commissioner of Public Health*, 957 A.2d 407 (Conn 2008).

6 DOMA, s 3 codified at 1 USC (United States Code), s 7.

7 DOMA, s 2 states, in part, '[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State … respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State' (28 USC, s 1738C).

8 See, eg, 'Symposium on Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis' (1996) 16 Quinnipiac L Rev 1; 'Symposium on Interjurisdictional Marriage Recognition' (1998) 32 Creighton L Rev 1; 'Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriage and the Validity of DOMA' (2005) 38 Creighton L Rev 233; 'Symposium on Interjurisdictional Recognition of Civil Unions, Domestic Partnerships and Benefits' (2005) 3 Ave Maria L Rev 393; and 'Symposium: Current Debates in the Conflicts of Laws: Recognition and Enforcement of Same-Sex Marriage' (2005) 153 U Pa L Rev 2143. See also, Wardle, Strasser, Duncan and Coolidge (eds) *Marriage and Same-Sex Unions: A Debate* (Praeger Publishers, 2003) pp 313–347.

taxation, employment benefits, social security benefits, retirement benefits, medical leave and immigration, to name a few.[9]

Of these rights, GLAD's clients (eight married couples and three surviving spouses) are specifically challenging DOMA's denial of federal income tax, social security and employment benefits to them.[10] The lawsuit is limited to these specific programmes and does not seek to invalidate s 3 of DOMA in its entirety, even though many other benefits may cause even more hardship for married same-sex couples.[11] The lawsuit argues that s 3 of DOMA is unconstitutional under the Equal Protection Clause of the Fifth Amendment because it differentiates between the marriages of opposite-sex couples and same-sex couples and cannot be justified by any legitimate or rational governmental interest.[12]

The Defendants' Memorandum of Law supporting their Motion to Dismiss states that 'this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal'.[13] Despite this, the Department of Justice (DOJ) followed its common practice of defending federal statutes, as long as the DOJ finds reasonable arguments exist in favor of its constitutionality.[14]

The plaintiffs assert and the defendants deny that the fundamental right to marry is impacted by DOMA and that DOMA's classifications, which are based on sexual orientation, should be treated as suspect. If the courts interpret DOMA as raising either of these issues, then DOMA would receive heightened scrutiny. Under heightened scrutiny, '[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation'.[15] If DOMA's classifications do not impact fundamental rights or suspect classes, then it will be subjected to rational review, will be 'accorded a strong presumption of validity', and must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'.[16] But the

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9 See Report of the US General Accounting Office, Office of General Counsel, 23 January 2004 (GAO-04-353R), available at www.gao.gov/new.items/d04353r.pdf.

10 *Nancy Gill and Marcelle Letourneau v Office of Personnel Management*, No 1:09-cv-10309 (D Mass filed 3 March 2009) (original complaint). Most of the lawsuit's documents, including the plaintiffs' original complaint, first Amended Complaint and Motion for Summary Judgment, are available on GLAD's website at www.glad.org/doma (accessed 22 February 2010). The DOJ documents are also available there.

11 See 'What this Case Does and Does Not Do' at www.glad.org/doma/lawsuit (accessed 22 February 2010). For example, the lawsuit does not challenge the federal government's denial of family medical leave to care for a spouse who is ill or disabled or its denial of the right of a US citizen to sponsor a non-citizen spouse for a spousal visa.

12 Plaintiffs' Motion for Summary Judgment, above n 10, at 1.

13 Memorandum of Law in Support of Defendants' Motion to Dismiss at 1, Case No 1:09-cv-10309 (D Mass filed 18 September 2009). The Memorandum is available at www.tinyurl.com/gill-doj-mtd (accessed 22 February 2010).

14 Ibid.

15 Plaintiffs' Motion for Summary Judgment, above n 10, at 26, citing *United States v Virginia*, 518 US 515, 533 (1996) (emphasis in original).

16 Defendants' Motion to Dismiss, above n 13, at 16, citing *Heller v Doe*, 509 US 312, 319 (1993).

interests claimed must be legitimate and must be 'relevant to interests' the classifying body 'has the authority to implement'.[17] The plaintiffs believe DOMA fails this requirement because they question the federal government's authority to legislate concerning the definition of marriage, an area traditionally reserved to the states.[18]

Interestingly, the DOJ disclaimed the governmental interests arising from DOMA's legislative history, specifically those based on 'responsible procreation' or 'child-rearing'. It noted that numerous studies have established that 'children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents', and that even Justice Scalia's dissent in *Lawrence v Texas* indicated that 'encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples . . . because "the sterile and the elderly are allowed to marry"'.[19] According to the plaintiffs, since the DOJ has disclaimed the rationales arising from DOMA's legislative history, if heightened scrutiny is required, the plaintiffs must win because the DOJ has used only 'hypothesised' or 'post hoc' explanations for the governmental interests in preserving DOMA.[20]

Instead, the DOJ has asserted governmental interests of maintaining the status quo, adjusting national policy incrementally, and avoiding having federal rights vary dramatically between states.[21] Each of these rationales is questionable. Maintaining the status quo could be understood as either providing federal rights to opposite-sex married couples and not to same-sex married couples or providing federal benefits to all couples who married according to the state law of their domicile. Plaintiffs and defendants obviously disagree.

But before DOMA and since the country's founding, the federal government always relied on state law to define who was married, and countless statutes and regulations, as well as common law, use state law to determine who is married under various federal programs.[22] The Supreme Court has frequently stated that 'there is no federal law of domestic relations, which is a primarily a

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17 Plaintiffs' Motion for Summary Judgment, above n 10, at 27, citing *Bd of Tr of the Univ of Ala V Garrett,* 457 US 356, 366 (2001).

18 Ibid at 27.

19 Ibid at 19, citing *Lawrence v Texas,* 539 US 558, 605 (2003) (Scalia J dissenting).

20 Ibid at 26.

21 Ibid at 29.

22 Ibid at 15–16, citing, eg, *Dunn v Commissioner of Internal Revenue,* 70 TC 361, 366 (1978) (referring to numerous decisions 'recognizing that whether an individual is "married" is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile'); 5 CFR (Code of Federal Regulations), s 843.102 (defining 'spouse' for federal employee benefits by referring to state law); and 20 CFR, s 404.435 (defining spouse for social security benefits as '[i]f you and the insured were validly married under State law at the time you apply for . . . benefits, the relationship requirement will be met'). According to the plaintiffs, only one federal statute beside DOMA excludes legally married couples from the definition of 'marriage' or 'spouse', and that prevents both individuals in same-sex couples from being married buried in veterans' cemeteries. See 38 USC, s 101(31).

matter of state concern'.[23] During the legislative debates, opponents of DOMA emphasised that '[t]he Federal government has no history in determining the legal status of relationships, and to begin to do so now is a derogation of states' traditional rights to so determine'.[24]

Despite controversial differences between the states concerning the validity of marriages of interracial couples and first cousins, common-law marriages, remarriage after divorce and marriages of individuals under the age of 16 or 18, the federal government had consistently deferred to each state's laws to determine whether any specific couple was eligible for federal governmental benefits based on their marital status. It remained neutral concerning each of these prior controversies and left each state to resolve the controversy concerning which of its citizens could marry. Then the federal government simply adopted that state's determination for which of its citizens would be recognised as married for federal purposes. But s 3 of DOMA changed that, and prevents same-sex couples from receiving federal benefits even though their home state permits them to marry.

The parties also disagree about DOJ's assertion that DOMA allows federal policy to be developed incrementally and keeps there from being dramatic differences between states as to which same-sex couples are recognised as married. The DOJ believes that recognising only opposite-sex couples for federal benefits is better than recognising all married couples regardless of whether they are opposite-sex or same-sex couples. In some ways, this is sensible because federal programs and administrators would not have to delve into potentially complex questions of whether a same-sex couple who claims to be married is actually married under the law of its domiciliary state. While this question would be clear in states that affirmatively permit marriage, such as Massachusetts, Connecticut, Iowa, New Hampshire and Vermont, it would be more complicated under many states' laws, including California, New York and the District of Columbia, which recognise other jurisdictions' marriages while not permitting their own citizens to marry within the state.

But the plaintiffs question the DOJ's argument that avoiding dramatic differences between states can justify DOMA's constitutionality. Without DOMA, state law would determine marital status for federal benefits in all 50 states. All couples who are considered to be married according to their domicile would receive federal benefits; all couples who are not considered to be married would not. It would then be left to each state to determine for itself whether a same-sex couple is married under that state's law.

Allowing state law to control the definition of marital status under federal programmes may also encourage states to reconsider their laws if they prohibit

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[23] Plaintiffs' Motion for Summary Judgment, above n 10, at 15–16, citing *DeSylva v Ballentine,* 351 US 570, 580 (1956) and federal tax, employee benefits, and social security statutes and regulations.

[24] Barbara J Cox 'But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal' (2000) 25 Vermont L Rev 113, 145.

same-sex couples from marrying, but permit them to enter into civil unions or domestic partnerships. If federal benefits are available only to couples who are married, this may increase the pressure for states to grant their citizens full marriage rights, rather than limit them to alternative institutions that are not likely to be recognised by the federal government. This may have been what happened in Sweden following the case of *D and Kingdom of Sweden v Council,* where the European Court of Justice held that D was not entitled to have the Swedish registered partnership with his same-sex partner treated as a marriage for purposes of obtaining the household allowance provided to EU officials.[25] The Court rejected the argument that the registered partnership had to be treated the same as a marriage for those purposes, noting that under Swedish law, registered partnerships were not given all of the rights of marriages. As long as Sweden treated the relationships differently, then the EU could do so as well.[26] In 2009, Sweden changed its law to permit same-sex couples to marry, and treatment of its registered partnerships as having lesser importance outside the country may have played a role in leading to this change.[27]

In addition to GLAD's lawsuit, the Commonwealth of Massachusetts also filed suit against the United States Departments of Health and Human Services and Veterans Affairs, challenging s 3 of DOMA as being unconstitutional because it requires Massachusetts to differentiate between its own citizens depending on whether they are married opposite-sex couples or married same-sex couples. According to its complaint, although Massachusetts uses a unitary definition of civil marriage as 'the voluntary union of two persons as spouses, to the exclusion of all others',[28] the federal government requires it to differentiate between its citizens based on what the Commonwealth perceives to be animus toward gay and lesbian people.[29] Massachusetts challenged s 3 of DOMA as exceeding congressional authority and interfering with 'the Commonwealth's sovereign authority to define marriage, in violation of the Tenth Amendment to the United States Constitution, Congress's Article I powers, and the Constitution's principles of federalism'.[30]

Massachusetts argued that 'Congress's decision to enact a federal definition of marriage rejected the long-standing practice of deferring to each state's definition of marriage and contravened the constitutional designation of exclusive authority to the states'.[31] The Commonwealth asserted that DOMA interferes with 'its exclusive authority to determine and regulate the marital

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25 Case C-122/99P and C-125/99P, *D and Kingdom of Sweden v Council*, 2001 ECR 1-4319 (2001).

26 Ibid at 33–38.

27 'Same-sex Marriage Around the World' (2009) at www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html. On 1 April 2009, Sweden's Parliament voted 226 to 22 to recognise same-sex marriage, effective 1 May 2009. Couples may wed in either a civil or religious ceremony, although churches may refuse to permit the marriages.

28 *Goodridge*, 798 N.E.2d 941 (Mass 2003).

29 See *Commonwealth of Massachusetts v US Department of Health and Human Services*, *et al*, Case No 1:09-11156 (D Mass filed 8 July 2009) at 2009 WL 1995808 (paras 45 and 90).

30 Ibid at 3.

31 Ibid at 2.

status of its citizens', imposes conditions on its participation in federally-funded programmes that require it to treat some of its married citizens as if they were not married, and exceeds Congressional power in violation of the US Constitution.[32] The complaint cites those portions of DOMA's legislative history where representatives argued against passage of the bill because it would trample states' rights, would unnecessarily intrude in state-controlled family law, and may violate the Tenth Amendment by legislating in an area of law where states have had exclusive authority.[33]

The DOJ's response again disclaimed support for DOMA and indicated the Obama administration's support for its repeal.[34] The DOJ repeated its assertion from the *Gill* litigation that Congress 'codified, for purposes of federal law, a definition of marriage that all fifty States had adopted (ie, the union of a man and a woman) and continued to accord financial and other benefits on the basis of that understanding'.[35] But it also denied that Congress was regulating marriage and argued that DOMA does not interfere with Massachusetts' decision to allow same-sex couples to marry. Instead, Congress limited the use of federal funds to the definition used in all 50 states.[36] Additionally, the DOJ questioned the Commonwealth's Spending Clause challenge, arguing that DOMA simply regulated how federal funds were used by defining marital status under federal programmes; it did not prevent Massachusetts from using its funds in any way it chose.[37]

Both of these cases continue to move forward through litigation. In *Gill*, the plaintiffs have filed a Motion for Summary Judgment and the defendants have filed a Motion to Stay Proceedings on the Motion for Summary Judgment until after their Motion to Dismiss is decided.[38] The Commonwealth of Massachusetts has also filed a Motion for Summary Judgment and supporting documents in that case. These two cases have the potential to dramatically influence marriage for same-sex couples in the United States. If s 3 of DOMA is held to be unconstitutional (even concerning the limited benefits that these lawsuits target), thousands of couples will become eligible for a vast array of federal rights and benefits. The federal government will no longer be able to refuse to recognise the marital status of couples whose states permit them to marry. Given the breadth of rights that may ultimately become available and the pressure to make those rights available to same-sex couples in

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32 Ibid at 2–3.

33 Ibid at para 27, citing 142 Cong Rec H7446, H7449 (daily edn 11 July 1996) and 142 Cong Rec S10120 (daily edn 10 September 1996).

34 See *Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss,* No 1:09-11156 (D Mass filed 30 October 2009) at 2009 WL 3794375.

35 Ibid at 2.

36 Ibid at 3.

37 Ibid.

38 See, eg, *Plaintiffs' Reply Memorandum of Law in Support of Their Motion for Summary Judgment* (16 February 2010); *Reply in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment* (29 January 2010); and *Defendants' Motion to Stay Proceedings on Plaintiffs' Motion for Summary Judgment* (4 December 2009). All the case documents are available in pdf format at www.glad.org/doma.

legally-recognised relationships, marriage rights may expand in the United States, at least in states that currently provide civil unions or domestic partnerships. It may also lead other states to extend marriage rights as the status of married same-sex couples become comparable to those of opposite-sex couples in the important area of federal rights.

III ADDITIONAL FEDERAL DEVELOPMENTS

Although same-sex couples have been able to marry in Massachusetts since May 2004, virtually all federal rights based on marital status have been unavailable due to DOMA. But minor steps toward achieving federal rights for same-sex couples have occurred in the past few years. Analysing these limited but important changes in the federal rights available to same-sex couples provides a more thorough understanding of the restrictions caused by DOMA in setting federal policy.

(a) Social Security Administration ruling

Due to DOMA's breadth in denying federal rights to same-sex married couples, many family law experts believed that the federal government would refuse to recognise legal relationships between same-sex couples as giving rise to any federal benefits. However, the 16 October 2007 Memorandum Opinion by the Acting General Counsel of the Social Security Administration (SSA) concluded that 'nothing in DOMA would prevent the non-biological child of a partner in a Vermont civil union from receiving [child insurance benefits (CIB)] under the Social Security Act'.[39] This ruling is an important limitation on DOMA's expansive reach in the area of parenting and family law.

In this case, Karen and Monique entered into a Vermont civil union in 2002, and Monique gave birth to their son, Elijah, in 2003. Karen did not adopt Elijah but she was listed as the second parent on his birth certificates and on other documents as his 'civil union parent'.[40] Karen became eligible for federal disability benefits and she sought CIB benefits for Elijah. The SSA determined that Elijah qualified as Karen's child under 42 USC, s 416(e)(1), and that DOMA did not affect Elijah's status under the Social Security Act.

Under the Act, Elijah would qualify for CIB benefits as long as he is 'the dependent "child" of an individual entitled to disability benefits'.[41] The regulations provide that 'child' is defined based on 'the law of inheritance rights

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[39] See Steven A Engel 'Whether the Defense of Marriage Act Precludes the Non-biological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act' (16 October 2007) at www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf (accessed 22 February 2010).

[40] Ibid at 2.

[41] See 42 USC, s 402(d) (2000).

that the State courts would use to decide whether [the individual] could inherit a child's share of the insured's personal property if the insured were to die without leaving a will'.[42]

Vermont's civil union law provides that civil union partners have the same rights as spouses concerning intestate succession and inheritance by the children born during the term of the civil union.[43] The Vermont Supreme Court has also held that a child born to one partner during a civil union is the child of the other partner as well for custody purposes following dissolution.[44] Thus, the SSA concluded that Vermont law would consider Elijah to be Karen's child for intestacy purposes and hence for receiving CIB.

The only remaining question was whether DOMA would prevent this result. The SSA determined that DOMA did not apply because Elijah's eligibility was not based on an interpretation of the words 'marriage' or 'spouse', which are restricted under DOMA, but rather was based on his status as Karen's 'child'. The Memorandum concluded that: 'The fact that Elijah's right of inheritance ultimately derives from Vermont's recognition of a same-sex civil union is simply immaterial under DOMA'.[45] This ruling is important because its reasoning would extend to all legally-recognised same-sex couples, whether they are married, in civil unions or in domestic partnerships. It also was the first time that any branch of the federal government limited the reach of DOMA in a case concerning a same-sex couple's legal relationship. It provides an expansive means of analysis that may prove helpful to other parents who are seeking federal benefits for their children born into legally-recognised same-sex relationships.

(b) Department of State passport ruling

In direct response to the *Gill* litigation, the US Department of State has changed the relevant provision of its Foreign Affairs Manual (FAM) to permit passports to be issued in the new name that individuals in same-sex couples may adopt after entering into marriages, civil unions or domestic partnerships. The change was effective from 15 June 2009.[46] Although the State Department began permitting name changes on passports in February 2008 if the change

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42 20 CFR, s 404.355(b)(1) (2007).

43 Vt Stat Ann 15 s 1204(e)(1) and (f).

44 *Miller-Jenkins v Miller-Jenkins,* 912 A.2d 951, 969–970 (Vt 2006). The court also noted that other factors supported its conclusion including that the parties intended for the non-biological parent to be the child's parent, that the non-biological parent was involved in the artificial insemination decision, and that no other individual claimed to be the child's parent (at 970). These factors also support Elijah as being considered to be Karen's child.

45 See Memorandum Opinion, above n 34, at 5.

46 See letter of 15 June 2009 from W Scott Simpson, Senior Trial Counsel, US Department of Justice, citing the change that has been posted on the State Department website at 7 FAM 1359 Appendix C, www.glad.org/uploads/docs/publications/passport_manual.pdf. This change is consistent with 22 CFR, s 51.25(c)(4).

occurred by operation of state law, it had not permitted same-sex couples to do so when they legally changed their names after getting married or entering into civil unions or domestic partnerships.[47]

In its letter, the State Department invited one of the *Gill* plaintiffs, Keith Toney, to submit a new application for a passport in his married name. The DOJ then asked GLAD to agree that the claims of Keith and Albert Toney were rendered moot and to omit them from any amended complaints. GLAD's First Amended Complaint drops the Toneys' claims.[48]

Although same-sex couples are still not permitted to enter the United States as 'married' couples, this change permits individuals in same-sex relationships who change their names as part of their partnered or marital status to obtain passports in their new names and not be forced to continue using the names on their birth certificates.

(c) President Obama's Memorandum

On 17 June 2009, President Obama issued a 'Memorandum for the Heads of Executive Departments and Agencies'.[49] He noted that his administration is prevented from extending benefits to same-sex couples because of DOMA. But some areas were identified in which the spousal benefits provided to federal employees in opposite-sex relationships could be extended to employees in same-sex relationships. Because extending benefits allows the federal government to compete more effectively with the private sector where thousands of companies provide these benefits, President Obama ordered that they be extended to the extent permissible under law. These benefits include allowing same-sex domestic partners to be added to long-term-care insurance policies and to use sick leave to care for partners.[50]

Therefore, the State Department and the Office of Personnel Management (OPM) will extend some benefits to qualified same-sex domestic partners of foreign service employees and federal employees, respectively, so long as doing so is consistent with federal law. All other department and agency heads were ordered to report to the OPM whether additional benefits can be authorised

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47 See Plaintiff's Original Complaint, above n 10, at 59–63 (stating the facts concerning the State Department's rejection of the request by Keith Toney to obtain a new passport in his married name).

48 Plaintiffs' First Amended and Supplemental Complaint, above n 10, filed 31 July 2009 (see www.glad.org/uploads/docs/cases/gill-amended-complaint-7-31-09.pdf).

49 See 'Memorandum for the Heads of Executive Departments and Agencies' (17 June 2009) 74 Fed Reg 29,393, see also, 'Benefits for a Diverse Workforce' (7 December 2009) 74 Fed Reg 63,345-01 describing final regulations to be issued by the OPM that would include same-sex and opposite-sex domestic partners of federal employees in the definitions of family members for whom sick leave, funeral leave, voluntary leave transfer and leave bank and emergency leave transfer would be available.

50 See Ashely Surdin 'Benefits for Same-Sex Partners are Expanding' *The Washington Post* (27 November 2009).

within 90 days.[51] The OPM then issued Proposed Regulations to modify the definitions of family member/immediate relative for use of sick leave, funeral leave, voluntary leave and emergency leave on 14 September 2009 and is preparing final regulations for these benefits.[52] Congress is also considering whether to extend domestic partner benefits, such as health insurance, retirement and disability benefits, workers compensation and life insurance, to federal employees in same-sex relationships.[53] As these developments establish, same-sex couples have achieved limited federal benefits in areas where DOMA does not require treating them differently than opposite-sex couples. Although nothing can replace the benefits that DOMA eliminates, same-sex couples are starting to overcome what had been perceived as DOMA's all-encompassing breadth.

IV INTERSTATE RECOGNITION OF THE MARRIAGES OF SAME-SEX COUPLES

Although this chapter has focused on US federal rights so far, it is important to note two important developments in 2009 in the area of interstate recognition of same-sex couples' relationships. Both New York and California took steps to clarify the status of their citizens who are prevented from marrying within their home state but who marry in other jurisdictions. While both states now recognise these out-of-state marriages if valid where celebrated, denial of in-state marriage rights continues to create a perplexing legal landscape for their citizens.

(a) California legislation

California's battle over whether to permit marriage for same-sex couples made news around the world in 2008. On 15 May 2008, in *In re Marriage Cases,*[54] the California Supreme Court held that Family Code, ss 300 and 308.5 (banning same-sex couples from marrying in California and refusing to recognise their out-of-state marriages) violated the fundamental right to marry and the guarantee of Equal Protection enshrined in the California Constitution. The decision became effective one month later, and more than 18,000 same-sex couples were married between 17 June and 4 November 2008.

On 4 November 2008, 52% of California voters adopted Proposition 8, thereby amending the State Constitution and rejecting the California Supreme Court's conclusion that all couples should enjoy the fundamental right to marry.

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51 Ibid.

52 See 'Absence and Leave; Sick Leave' 74 Fed Reg 46934-01, 2009 WL 2912889 (proposed 14 September 2009) (to be codified at 5 CFR, s 630) and Statement of Regulatory Priorities, 74 Fed Reg 64345-01, 2009 WL 5357928 (7 December 2009).

53 Joe Davidson 'Same-Sex Benefits Advance, Quietly' *The Washington Post* (17 December 2009) at A31.

54 183 P.3d 384 (Cal 2008).

Proposition 8 stated that 'only marriage between a man and a woman is valid and recognized in California'.[55] On 5 November, numerous challenges to Proposition 8 were filed and the California Supreme Court granted review on 19 November. The court held that Proposition 8 was a valid amendment to the State Constitution but that the 18,000 couples who married during the interim must be considered married for all purposes in California.[56]

When the court issued the *In re Marriage Cases* decision, it held that Proposition 22, adopted by the voters in March 2000 and creating Family Code, s 308.5, was also unconstitutional.[57] Marriage recognition is controlled by conflict of law and comity principles, and most courts and legal experts agree that a state may refuse to recognise out-of-state marriages that violate its stated public policy. Although Family Code, s 308 declares that California recognises all marriages that are valid where celebrated and case-law had recognised numerous types of controversial marriages entered into in other states, Proposition 22 added Family Code, s 308.5, limiting marriage recognition to those marriages consisting of 'one man and one woman'.

Although the 18,000 married couples in California had their marriages validated by the Supreme Court's second decision, the validity of marriages from other jurisdictions remained unclear. For example, my spouse and I were married in Canada on 18 July 2003. Because we were already married, we were prevented from marrying again in California during the 4 months when marriage by same-sex couples was legal and our Canadian marriage was considered to be valid in California. Thus, we believed that our marital status was controlled by Proposition 8, that we had been 'divorced' by the voters of California after 19 years of being together, and that our marital status within our home state had been lost.

But the California legislature adopted and the Governor signed a bill on 11 October 2009, that amended Family Code, s 308.[58] It added two new subsections concerning marriages by same-sex couples to the original section that provided for universal recognition of out-of-state marriages. Subsection 2 states that 'a marriage between two persons of the same sex contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state if the marriage was contracted prior to November 5, 2008'.[59] Subsection 3 states that marriages by same-sex couples from jurisdictions outside California that were contracted on or after 5 November 2008 would have the 'same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties . . . as are granted to and imposed upon spouses with the sole exception of the designation of "marriage"'.[60]

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55 See www.whatisprop8.com (accessed 22 February 2010).
56 *Strauss v Horton*, 207 P.3d 48, 64 (Cal 2009).
57 183 P.3d at 453.
58 Cal Family Code, s 308, 2009 Cal Stat ch 625 (SB 54).
59 Family Code, s 308(b) (2009).
60 Family Code, s 308(c) (2009).

Thus, because we were validly married in Canada in 2003, our marriage must be recognised in California despite Proposition 8. This legislation may become particularly important for numerous California couples if the lawsuits challenging DOMA eventually allow married same-sex couples to be eligible for federal rights. Although our state rights are the same as opposite-sex couples' rights, DOMA prevents us from obtaining significant federal rights and benefits.

(b) New York judicial and legislative decisions

New York's law on marriage and marriage recognition for same-sex couples is a strange mix.

In November 2009, the New York Court of Appeals issued its decision in *Godfrey v Spano*, rejecting facial challenges to decisions by state and county government officials to recognise marriages by same-sex couples from other jurisdictions for purposes of receiving spousal employment benefits. Both the County of Westchester and the New York State Department of Civil Service issued orders directing that employees with marriages from other jurisdictions must be treated as married for employment purposes.

Previously, in March 2004, the Solicitor General of New York had issued an 'Informal Opinion Letter' concluding that, in relation to marriages of same-sex couples from other jurisdictions, 'New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law'.[61] The opinion relied on New York's common law marriage recognition rule. The Office of the State Comptroller issued a similar opinion letter in October 2004 indicating that the New York State retirement system would also recognise Canadian marriages 'in the same manner as an opposite-sex New York marriage, under the principle of comity'.[62]

In 2008, the intermediate New York Appellate Division decided *Martinez v County of Monroe, et al,*[63] requiring the Monroe Community College to recognise an employee's Canadian marriage as entitling her female spouse to receive health care benefits. The court followed what it characterised as century-old legal precedent in the state recognising out-of-state marriages that were valid where celebrated, including an uncle/niece marriage, common-law marriages from other states, a Canadian marriage by spouses under the age of 18 and a proxy marriage, as long as the marriage was not prohibited by statute or natural law.

In *Godfrey,* residents and taxpayers brought separate lawsuits against the Westchester County Executive Officer and the New York Civil Service

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61 *Godfrey v Spano,*13 N.Y.3d 358, 368 n.3 (2009), citing AG Informal Opn No 2004-1 at 16 (3 March 2004).

62 Ibid.

63 50 A.D.3d 189, 191-192 (NY App Div 2008).

Commission and its Commissioner, arguing that the officials' decisions to recognise out-of-state marriages violated New York statutory and constitutional law. The lower courts dismissed the cases and the intermediate courts upheld the appeals. The Court of Appeals affirmed.

Unfortunately, the Court of Appeals avoided directly answering the question of whether New York law affirmatively requires the recognition of marriages by same-sex couples from other jurisdictions and instead used technical grounds to reject both lawsuits. The court held that the case against Westchester County was properly dismissed because the plaintiff taxpayers had not alleged an unlawful expenditure of taxpayer funds, and thus failed to state a valid claim.[64] The court reached a similar conclusion in the suit against the Civil Service Commissioner, noting that the Commission had provided spousal benefits to same-sex domestic partners since the mid-1990s and thus the plaintiffs had failed to show a specific threat of an imminent expenditure sufficient to support their legal challenge.[65] While the court said it was not reaching the broader issue of interstate recognition because it could resolve both cases on narrower grounds, it asked the Legislature to address the controversy.[66]

Three judges concurred in the result, but wrote separately to emphasise their opinion that the court should have addressed the issue squarely raised by the appeals and affirm the judgments because marriages by same-sex couples from other jurisdictions were entitled to recognition as long as they were valid where celebrated.[67] The concurrence noted '[i]ndeed, through our marriage recognition rule, we have recognized out-of-state marriages, valid where contracted, despite the parties' intent in entering the marital contract elsewhere was to evade New York laws proscribing their marriage from being performed here'.[68] Indicating that, historically, out-of-state marriages were denied recognition only if the Legislature had declared the marriages from other jurisdictions to be void or when the out-of-state marriage was 'abhorrent to New York public policy', the concurrence noted that New York legislation and decisional law 'protect[s] committed same-sex couples in a myriad of ways'.[69] Since the challenges fell squarely within the usual marriage recognition rule and neither exception applied, the concurring judges would have affirmed the lower courts' decisions but definitively held that same-sex couples from New York may marry in other jurisdictions and have their marriages recognised in their home state.

The New York Senate's recent vote shows that relying on the legislature to resolve the uncertainty concerning marriage in New York is unlikely to happen soon. It also underscored the perplexing system that exists for same-sex couples in New York. Despite the New York Court of Appeals decision in *Hernandez v*

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64 *Godfrey,* 13 N.Y.3d at 373–374.
65 Ibid at 375–376.
66 Ibid at 377.
67 *Godfrey,* 13 N.Y.3d 358, 377 (J Ciparick concurring).
68 Ibid at 378, citing six cases where other marriages were recognised.
69 Ibid at 380–381.

Robles,[70] holding that limiting marriage to opposite-sex couples is constitutional, the same court in *Godfrey* indicated that challenges to same-sex couples' marriages from other jurisdiction are likely to be unsuccessful. Thus, it appears that marriages from other jurisdictions will be valid in New York even though same-sex couples cannot marry in New York.

On 2 December 2009, the New York Senate continued this confusion by rejecting a bill that would have extended marriage rights to same-sex couples by a vote of 38 to 24. The bill had been adopted by the State Assembly and Governor Patterson promised to sign it. Only one speaker on the Senate floor spoke against the bill; numerous others spoke in favour with moving, sometimes personal stories, explaining their support. Despite this, the vote was not close.[71]

The result of these legislative and judicial decisions is that same-sex couples from New York must leave their home state, go to another jurisdiction (easily done because Canada, Vermont, New Hampshire, Connecticut and Massachusetts are nearby), get married there, return to New York, and seek recognition within the state for their out-of-state marriages. Knowing that couples could go to neighbouring states, bring their marriages home, and have them recognised for numerous purposes makes it even more perplexing why the State Senate refused to pass the marriage bill. It seems strange that a governing body would refuse rights to their own citizens knowing that they will obtain some of them simply by leaving home. Now each same-sex couple may have to seek recognition right-by-right and institution-by-institution, and will find that some marriage rights are difficult to obtain through marriage recognition.

V CONCLUSION

The year 2009 proved to be an important one in the emerging development of federal rights for partnered same-sex couples. Although litigation filed in 2009 may not ultimately be resolved for several years, these lawsuits may potentially provide vital federal benefits to those same-sex couples whose domiciliary states consider them to be married. Other developments in the federal arena show the federal government to be moderating its position against recognising same-sex couples' relationships, at least to the extent that DOMA does not prevent it from doing so. Important developments in California and New York, two of the most populous and influential states in the United States, show increasing acceptance of interstate recognition of marriages by same-sex couples from those jurisdictions that permit them to marry. When these

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[70] 7 N.Y.3d 338 (2006). For a discussion of why the dissenting opinion in that case had the better argument, see Barbara J Cox '"A Painful Process of Waiting": The New York, Washington, New Jersey and Maryland Dissenting Justice Understand That "Same-Sex Marriage" is Not What Same-Sex Couples are Seeking' (2008) 45 Cal WL Rev 139.

[71] Michael M Grynbaum 'From the Floor and the Heart, Senators Make an Issue Personal' *New York Times* (3 December 2009) at www.nytimes.com/2009/12/03/nyregion/03personal.html?ref=nyregion.

developments are considered together, 2009 is likely to be seen as an important year in expanding rights for same-sex couples in legal relationships.

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